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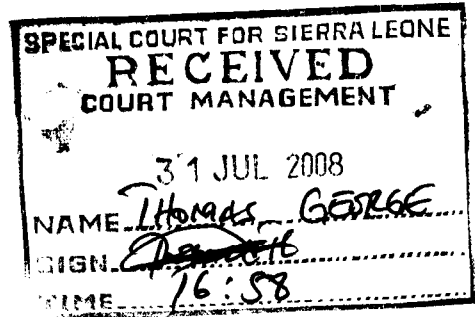
SPECIAL COURT FOR SIERRA LEONE
TRIAL CHAMBER I

29580

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

Registrar: Mr. Herman von Hebel

Date filed: 31 July 2008



THE PROSECUTOR

against

ISSA HASSAN SESAY
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-2004-15-T

PUBLIC

GBAO - FINAL TRIAL BRIEF

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Table of Contents

Page

Introduction

I. The Prosecution's Case Against Gbao.....	9
II. Summary of the Charges in the Indictment.....	11

General Background

II. Augustine Gbao: His Personal History, Role and Personality	
A. Gbao Arrested by RUF in Liberia on Suspicion of Spying for Sierra Leone Government.....	13
B. Gbao's Positions During the War.....	14
C. Gbao's Rank in the RUF.....	14
D. Respect for Gbao in the RUF.....	14
E. Gbao's Personality.....	19
III. The Revolutionary United Front	
A. Organisational Structure.....	23
B. RUF Leadership.....	31
IV. The Internal Defence Unit	
A. The IDU's Role and Responsibilities During the War.....	33
B. The Role and Location of IDU Agents.....	34
C. Structure of the IDU	35
D. Reporting in the IDU—Sending IDU Reports to Area/Local Commanders.....	35
E. IDU Reports Received by Augustine Gbao.....	40
F. Inherent Weaknesses with the IDU in Accomplishing its Tasks.....	43
G. Relationship Between IDU and Other Security Units.....	44
V. Gbao's Role as Overall Security Commander	
A. The Role and Responsibilities of the Overall Security Commander.....	46
VI. The Joint Security Board of Investigations	51
A. Creation of Joint Security Boards.....	52
B. Composition and Location of the Joint Security Boards of Investigation.....	52
C. Procedures and Practices of Joint Security Boards.....	53
D. Important Additional Notes on Joint Security Boards.....	55
E. Gbao's Role in the Joint Security Boards.....	56

F. Exhibited Joint Security Board Cases Demonstrate Gbao's Limited Role.....56

G. The People's Court Handled the Most Serious of Alleged Crimes.....58

V. Punishment in the RUF.....59

Assessment of Witnesses and Other Evidence

I. Introduction.....61

II. Assessment of Witness Evidence.....62

III. Overall Credibility of Prosecution Witnesses.....70

IV. Entirely Discredited Witness Testimony

 A. TF1-108.....72

 B. TF1-117.....86

 C. TF1-054.....102

 D. TF1-314.....107

 E. TF1-113.....115

Applicable Law

I. Crimes Against Humanity.....128

II. Article III Common to the Geneva Conventions and of Additional Protocol II.....132

III. Other Serious Violations of International Humanitarian Law.....136

Modes of Liability

I. Article 6(1) of the Special Court Statute.....138

II. Joint Criminal Enterprise.....142

III. Submissions on Joint Criminal Enterprise.....151

IV. Article 6(3) of the Special Court Statute.....162

V. General Submissions on Article 6(3) Liability and Augustine Gbao.....172

 A. Element 1: The Alleged Superior-Subordinate Relationship Between Gbao and Offenders
of a Criminal Act is Not Satisfied.....172

 Testimony of Former President Kabbah.....172

 B. RUF Hierarchy Demonstrates that Gbao's Administrative Positions did not Provide
Him with Effective Control.....177

 C. Gbao's Responsibilities do Not Meet the Threshold Needed to Demonstrate He
Had Effective Control Over Those Committing Crimes.....178

 D. Gbao's Knowledge or Reason to Know that a Criminal Act was About to

or had Been Committed.....	181
E. Whether Gbao Failed to Take Necessary and Reasonable Steps to Prevent Criminal Act or Punish Offender Thereof.....	182
VI. Prosecution Witnesses do Not Demonstrate Gbao's Superior Responsibility.....	185
A. TF1-371.....	185
 <i>Counts 3-5</i>	
<i>Killing of Suspected Kamajors in Kailahun Town</i>	
I. Introduction.....	196
II. Prosecution testimony.....	196
III. Defence Witnesses.....	201
IV. Credibility of Prosecution Witnesses.....	206
V. Preliminary Remarks.....	223
VI. Legal Submissions Regarding Count 3-5 of the Indictment.....	224
VII. Submissions Regarding Counts 3-5 of the Indictment.....	225
<i>Other Charges under Counts 3-5.....</i>	229
 <i>Counts 6-9 (Excluding Forced Marriage)</i>	
I. Introduction.....	230
II. Testimony Relating to Counts 6-9.....	231
III. Credibility of Prosecution Testimony.....	233
IV. Legal Submissions on Count 6-9 on Behalf of the Third Accused.....	233
 <i>Count 8 (Forced Marriage)</i>	
I. Introduction.....	248
II. Testimony Relating to Count 8.....	248
III. Credibility of Prosecution Witnesses	249
IV. Legal Submissions Regarding Count 8 on Behalf of the Third Accused.....	252
V. Submissions on Count 8 on Behalf of the Third Accused	253
 <i>Counts 10-11: Physical Violence</i>	
Submissions.....	256

29584

Count 12: Use of Child Soldiers

I. Defence Evidence.....258
II. Credibility of Prosecution Witnesses.....262
III. Legal Submissions Regarding Count 12 of the Indictment.....267
IV. Submissions on Count 12 on Behalf of the Third Accused.....268

Count 13

I. Introduction.....277
II. Prosecution Evidence.....277
III. Defence Evidence.....277
IV. Assessment of Prosecution Evidence.....284
V. Legal Submissions Regarding Count 13 of the Indictment.....295
VI. Submissions on Count 13 on Behalf of the Third Accused296

Count 14303

Counts 15-18.....305

I. Prosecution Evidence.....307
II. Defence Evidence.....321
III. Assessment of Prosecution Testimony.....327
IV. Preliminary Remarks on Defence Submissions Regarding Counts 15-18.....342

I. Introduction

1. “Augustine Gbao was not the type of person to have been indicted by the Special Court, because he did not commit atrocities the [Prosecutors of the] Special Court alleged he committed, because I never heard of him and never found him looting; I never found him killing; I never found him using forced labour; I never found him harassing people. You see, he was somebody who was very mild in doing his job; he was somebody who was not involved in molesting even the soldiers; he was somebody who was not materialistic; he was not somebody who was too—he was not too mannish. He was only having one wife, that's Hawa, and he was always with his family. So when I heard that he was indicted, it was a surprise to me, that he was not the right somebody to have indicted, because all those charges against him he did not commit”.¹

2. “The way Gbao acted, if everybody in the RUF, as far as we [the people of Kailahun] are concerned...if everybody would have acted the way Gbao acted, there would have been no court today”.²

A. The Prosecution's Case Against Augustine Gbao

3. The above sentiments, expressed by Augustine Gbao's Defence witnesses, came at the end of a four year trial. They stand in bold contrast with the Prosecution's opening statement made in July 2004, wherein Gbao was alleged to be “responsible for every single murder, every single amputation, every single rape, every single beating, every single burnt house...the suffering of every woman [forced to marry]...and every person forced from their home and made to carry goods or mine diamonds”.³

4. With that sobering opening assertion in 2004, one could be forgiven for anticipating that the Prosecution had brought this Indictment on information in both law and fact that justified their decision to prosecute Gbao. Given the sanctimonious confidence with which the Prosecution opened its case, and the nature of the charges, one may have expected to hear a litany of convincing and cogent evidence against the Third Accused as one who “bears the greatest responsibility” for the war in Sierra Leone. At the very least, one might have expected the case to reflect the multitude of serious allegations raised against him in the pre-trial brief and supplemental pre-trial brief. But that is not what the Prosecution offered. Instead, the case against him seemed to falter from the start, with two years passing before the presentation of any substantial testimony. Evidence that did

¹ DAG-080, Transcript 6 June 2008, pp.36-37.

² DAG-110, Transcript 2 June 2008, p.67.

³ Opening Statement, Prosecution, Transcript 5 July 2004, p.50.

arise was frequently the result of late additions to Prosecution 'proofing notes'; in other instances the testimony was so tainted through inconsistency or blatant lies told with dark motives as to have no value at all. Elsewhere the testimony amounted to no more than feeble trivia, or to the Prosecution's frustration, promised evidence simply never appeared. One irony of this expensive four year trial was that if Gbao had been tried alone the proceedings would have been concluded within a matter of weeks. Such was the Prosecution's predicament; such was the state of the evidence against one who supposedly 'bears the greatest responsibility'.

5. In July 2004, however, Gbao's plight looked equally discouraging. Mr Crane, the Chief Prosecutor at that time assured the Chamber in his Opening Statement that "[y]ou most certainly will, **beyond reasonable doubt**, believe the unbelievable international crimes committed by...Gbao".⁴ Now that the case has concluded, the Third Accused comfortably submits that the Prosecution's hubristic and somewhat bellicose promise has not been fulfilled.

6. Within these submissions we will show that during this trial the Prosecution presented no evidence that Gbao murdered a single civilian, Civil Defence Force ("CDF") soldier, Sierra Leonean Army soldier ("SLA"), or ECOMOG soldier; nor that Gbao ordered a single killing; or that Gbao was responsible (nor even aware of) amputations that took place across the country. Furthermore, we will show that the Prosecution failed to present credible evidence that Gbao committed any sexual offences or acceded to their commission by others. Moreover, the Defence will demonstrate that there is no credible evidence on the record that Gbao beat anyone, looted or burnt anything, or otherwise contributed to the widespread damage that engulfed this country for ten years.

7. As importantly, there is no credible evidence that, in his position as overall commander of the Internal Defence Unit or Overall Security Commander, Gbao had the power to prevent or punish the commission of certain crimes by the RUF.

8. Throughout the course of the trial, the Court has heard details of crimes, perpetrated by many during the 1990's. But Augustine Gbao does not deserve the epithet of one of those who 'bears the greatest responsibility' for what happened in Sierra Leone. The allegations against him are a product of political expediency, recklessness, and lies told by corrupt informants seeking self preservation. Contrary to the Prosecution's allegations, Gbao was never subordinate only to Foday

⁴ *Id.* at p.33 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Sankoh and Johnny Paul Koroma in the RUF hierarchy, as alleged in the Indictment.⁵ With the benefit of hindsight we submit that such an allegation was fanciful. To the frustration of the Prosecution, their own witnesses repeatedly reported that Gbao was a “far off”, low-ranking commander, incapable of shifting policy or changing the course of the war in Sierra Leone.

9. At the outset of the trial, the Prosecution also promised to prove that Gbao was responsible for the UNAMSIL incident that took place in Bombali District in early May 2000. They failed to do so, and this remains another clear example of how the evidential actuality told a totally different story from the fiction of the Prosecution's pre-trial brief. The best that could be adduced was that Gbao was angry with UNAMSIL on 1 May 2000 because he had been told that they forcefully disarmed some RUF. In contrast, analysis of documents adduced through Rule 68 showed that the Prosecution had clearly been “picking and choosing” the material most likely to lead to a conviction on counts 15-18, while simultaneously failing to disclose witness statements that could have led to a rule 98 dismissal of all UNAMSIL-related charges.

B. Summary of the Charges in the Indictment Against Augustine Gbao

10. It may be instructive to review the formal allegations against Augustine Gbao prior to a comprehensive review of the testimony.

11. Notwithstanding the evidence adduced we submit the Prosecution has ultimately failed to address the majority of the counts in the Indictment against the Third Accused. A cursory review demonstrates that, credible or not, Prosecution evidence against Gbao covered only a small percentage of the Indictment.

12. The Prosecution failed to allege crimes of Gbao's individual responsibility, control or involvement in any of the following provinces:

1. Bo District
2. Freetown and Western Area
3. Kono District
4. Koinadugu District
5. Port Loko District; and
6. Bombali District (during 1998).

⁵ *Prosecutor v Sesay, Kallon and Gbao*, SCSL-04-16-T-619, Corrected Consolidated Amended Indictment, 2 August 2006. ('Indictment').

13. This does not include Kenema, Bombali or Kailahun Districts, where dubious evidence was presented that Gbao acted in ways deemed criminally culpable.

14. Thus it would appear that the Prosecution adduced no evidence in support of the allegations made in paragraphs 46, 47, 48, 50, 51, 52, 53, 55, 56, 57, 59, 60, 62, 63, 64, 65, 66, 67, 70, 71, 72, 73, 75, 76, 78, 79, 80, 81, 82, 83 of the RUF Indictment. These paragraphs generally correspond to the locations listed above, and include most of the Indictment charges against Augustine Gbao (early paragraphs in the Indictment relate more to introductory information about the roles of Sesay, Kallon and Gbao). Furthermore, with regard to counts 15-18, there was no evidence of Gbao's involvement relating to the UNAMSIL conflict in Kono District, Port Loko District, Kambia District, or Kailahun Districts-the only such evidence presented concerned Bombali District.

15. Additionally, we submit that there was no credible evidence adduced during the trial that Gbao:

1. Fought on behalf of the RUF;
2. Killed anyone;
3. Had power over any military activities of the RUF;
4. Left Kailahun District between 1991-1999, when he left for Makeni;
5. Went to Freetown before 2000;
6. Was implicated in any crimes committed by subordinates;
7. Was involved in diamond mining;
8. Was involved in the trading of diamonds;
9. Had anything to do with amputations or other physical mutilations;
10. Was involved, in any capacity, in looting or the burning of houses in any area throughout Sierra Leone, or in attacks on civilians;
11. Attended or participated in any RUF/AFRC leadership meetings;
12. Together with the IDU was involved in any crimes that took place in Sierra Leone; and
13. Was ever a high-ranking officer.

16. Prior to submissions on the evidence against Gbao, we propose to address certain issues relevant to its eventual assessment. Firstly we will examine Augustine Gbao's rank, role and personality, illustrating his lower-level status as an RUF investigator. Secondly, we review the various military and administrative units in the RUF, emphasising Gbao's role and responsibilities

within the RUF as an organisation as a whole. Finally, we consider Gbao's role in leading the Internal Defence Unit ('IDU') and his role as Overall Security Commander.

17. We submit that the following material represents a realistic context which will assist in assessing the allegations against the Third Accused. Following the topical observations listed above we will provide a specific, count-by-count defence to offences alleged in Kailahun and Bombali District. We will turn to other districts at the end of these submissions.

II. Augustine Gbao: His History, Role and Personality

A. Gbao Arrested by RUF in Liberia on Suspicion of Spying for the Sierra Leone Government

18. Before Augustine Gbao joined the RUF,⁶ he had been employed as a detective in the Sierra Leonean Police.⁷ In 1991, he was sent on an undercover mission to observe the activities of Foday Sankoh. He was arrested in February 1991⁸ on suspicion of spying and was sent to Camp Naama⁹, where the RUF were training.¹⁰

19. Gbao had met Sankoh before the war during a police investigation in Freetown, but it is not suggested they knew each other well.¹¹ In Camp Naama Gbao was imprisoned in a small closet. One evening, Rashid Mansaray decided to execute him, suspecting that, as an ex-police officer, Gbao "came on a mission to locate RUF training base[s] and then [he would] get back to Sierra Leone and disclose it".¹² Mansaray then took Gbao to the riverside to dig his own grave before being executed. Mansaray claimed Gbao "didn't deserve to be in our midst".¹³

20. Prosecution witness TF1-168 was present for this event. He stated that the commander of the Women's Auxiliary Corps (WACs),¹⁴ Memunatu Sesay rushed to alert Foday Sankoh, who was unaware of what was happening. Sankoh "ran to the site and retrieved Augustine from Rashid".¹⁵ Shortly after that, Gbao joined the RUF.

⁶ TF1-168, Transcript 3 April 2006, p.76.

⁷ *Id.* at p.78.

⁸ *Id.* at pp.77-78.

⁹ *Id.*

¹⁰ TF1-168, Transcript 31 March 2006, p.44.

¹¹ *Id.* 3 April 2006, p.77.

¹² *Id.* at p.79.

¹³ *Id.*

¹⁴ A discussion of the roles and responsibilities of the WACs is covered in paras. 96-99 below.

¹⁵ *Id.* at p.80.

B. Augustine Gbao's Positions During the War

21. Gbao held various positions over the 10 years of the war in Sierra Leone; however, there is no credible evidence he was ever a combatant. In 1991, he served as assistant secretary to Foday Sankoh.¹⁶ In 1994, he served as the Border Patrol Commander, based in Koindu,¹⁷ where he worked to ensure that no enemy infiltrated the country.¹⁸ In late 1995, Gbao was based at Bayama teaching ideology.¹⁹ After that he lived in Giema, and subsequently moved to Kailahun Town where he remained until late 1998. In early 1996 he was called to a meeting of RUF authorities in Camp Zogoda.²⁰ There, Augustine Gbao was promoted to overall IDU commander and Overall Security Commander.²¹ In February 1999 he was sent to Makeni.²² Positions held by Augustine Gbao during the Indictment period are detailed below.

C. Augustine Gbao's Rank in the RUF

22. Gbao's rank was important in terms of his general prestige and respect within the RUF. Ultimately, we submit this is highly relevant to the assessment of his true overall capacity for command and control within the organisation. This, we suggest, should assist the Court in deciding on Gbao's Article 6(3) liability as well as the question of his alleged membership and participation in a joint criminal enterprise.

23. With regard to the Indictment period, Gbao was promoted to captain in 1996.²³ Around May 1998, Gbao was promoted from captain to major.²⁴ All other unit commanders were promoted at the same time.²⁵ Issa Sesay testified that Gbao was promoted to Lieutenant Colonel by Sam Bockarie in October 1998.²⁶ At some point thereafter, in late 1999 or early 2000, Gbao was promoted to Colonel.

D. Respect for Gbao in the RUF

24. Augustine Gbao was presented in the Indictment as second-in-command of the RUF, junior only to Foday Sankoh and Johnny Paul Koroma. If this were the case, one would expect Gbao to be

¹⁶ DAG-101, Transcript 9 June 2008, p.86.

¹⁷ DAG-080, Transcript 6 June 2008, p.13.

¹⁸ DAG-080, Transcript 9 June 2008, p.22-23.

¹⁹ DAG-048, Transcript 3 June 2008, p.28; *also see* DAG-101, Transcript 9 June 2008, pp.86-87; DIS-188, Transcript 1 November 2007, p.26.

²⁰ DIS-188, Transcript 1 November 2007, p.26.

²¹ *Id.* at p.27.

²² DAG-048, Transcript 3 June 2008, p.44.

²³ *Id.*, p.29.

²⁴ Issa Sesay, Transcript 31 May 2007, p.31.

²⁵ DIS-188, Transcript 1 November 2007, p.29.

²⁶ Issa Sesay, Transcript 31 May 2007, p.32.

treated with the deepest respect by fellow senior commanders. At the very least, one would assume that the RUF rank and file would have shown him the conventional hierarchical deference.

25. Instead, the opposite was true. Gbao was regularly harassed by members of the RUF leadership- especially Sam Bockarie, who had a profound dislike for Gbao. He was treated similarly and on a regular basis by many others, including Kailondo and Superman. Junior-ranked RUF commanders, such as Rambo, DDR and Forty-Barrel were named among those who regularly harassed Gbao²⁷ as a laughing stock; Gbao was likewise ostracised by the combatants overall for staying behind the front lines.²⁸

1. *Harassment by the RUF Leadership*

26. DIS-281 characterised the relationship between Gbao and Bockarie succinctly, stating Bockarie “didn't have any respect for him [Gbao]”.²⁹ Bockarie was unhappy with Gbao because of the role Gbao played in pursuing an allegation of misconduct made against Matthew Kennedy.³⁰ Bockarie was also angry with Gbao for assisting DIS-157 in the release of 45 Kamajors, who were being detained as suspects on Bockarie's command,³¹ and for the fact that Gbao's wife Hawa provided food to TF1-168 when he was imprisoned in Kailahun Town.³²

27. DIS-069 agreed that the relationship between Gbao and Bockarie was not good. He agreed that Bockarie was furious with Gbao for providing food to TF1-168.³³ The witness also opined that Bockarie may have resented the fact that Gbao and Sankoh had known each other for many years.³⁴

28. In an organisation rife with petty rumour and jealousy these issues may shed some light as to why Gbao was so routinely harassed by the all-powerful Bockarie. One of the most memorable anecdotes came from the [REDACTED] DAG-110's account that sometime after February 1998 Gbao sent a him a written request for cigarettes. Later, whilst DAG-110 reported the day's business to Mosquito's men (as was his custom), he produced the letter, in which Gbao had signed his name '*Lieutenant Colonel*' Augustine Gbao. Mosquito was furious and ordered Gbao's arrest for impersonating a higher rank. As a result, Gbao was summoned to a meeting with

²⁷ DAG-080, Transcript 6 June 2008, p.15.

²⁸ *Id.* at pp.14-15.

²⁹ DIS-281, Transcript 12 November 2007, p.45.

³⁰ DIS-188, Transcript 1 November 2007, p.101.

³¹ This matter is detailed in paragraphs below.

³² DIS-188, Transcript, 2 November 2007, pp.8-9.

³³ DIS-069, Transcript 23 October 2007, p.69.

³⁴ *Id.* at p.71, 73-74.

Bockarie. Upon seeing Gbao from a distance of about 50 yards Bockarie ordered Gbao to stop still, and demanding “Are you Gbao? You are to drop and roll and come very close to me because you call yourself a lieutenant colonel and you are not”. When Gbao rolled to a stop at Mosquito’s feet he was flogged.³⁵

29. On another occasion, according to DAG-048, when Foday Sankoh had ordered the construction of an airstrip in Buedu, Gbao was ordered by Bockarie to inform the G5 that they were to provide 500 civilians as manpower. Gbao passed this information to the G5 and the civilian commanders. No civilians went to the airstrip. Gbao reported this to Bockarie, who aggressively told Gbao that if he could not accomplish the mission he should go to the site himself and stay there until the work was completed. Bockarie shouted at Gbao, he molested him, and sent him to the airstrip for an unspecified time.³⁶ Again, one would hardly expect such treatment if Gbao truly was subordinate only to Foday Sankoh and Johnny Paul Koroma.

30. Another example of harassment recounted by DAG-048 occurred when “Mosquito came from Peyama...[o]n the way coming [to Buedu], [a] report reaches Augustine Gbao that the bodyguards of Mosquito have raped a girl. Mr Gbao, in his effort as security commander, tried to investigate these bodyguards. He went to Mosquito and gave him the information. At first, Mosquito gave the okay, but did not hand over the bodyguard[.]. The next time Mr Gbao went to Mosquito to release his bodyguards for investigation, Mosquito became very aggressive with Augustine Gbao, telling him that he's after his bodyguards. He [then said that Gbao] should forget about them and even ordered Augustine Gbao to lie down on the ground to be flogged and he was flogged”.³⁷

31. On another occasion, DAG-080 recalled that following an allegation that a crime had been committed against a civilian Gbao commenced an investigation for the High Command. According to the witness “he was given to investigation, that soldier to be investigated, and Augustine Gbao, being a very slow investigator...[h]e doesn't hasten up with investigation as the High Command would like because the RUF—the High Command believe in jungle justice...Augustine Gbao was

³⁵ DAG-110, Transcript 2 June 2008, pp.86-87.

³⁶ DAG-048, Transcript 3 June 2008, p.49.

³⁷ *Id.* at p.48.

against [jungle justice].³⁸ He takes his own time to investigate”.³⁹

32. Because Gbao was taking his time to investigate, he was summoned to the MP office in Giema and was “molested by Sam Bockarie. He knock[ed] his head. He knock his head with his hand...[t]his is a foolish man['], something like that. [‘Y]ou are a foolish man’. You don't go by my command. You are very slow...[t]hat was what exactly they did with him, in my presence and the presence of many soldiers”.⁴⁰

33. DAG-080's testimony provided further evidence of the low esteem with which Gbao was held within the RUF: “I heard that...he was again asked by the same Sam Bockarie to brush Bayama road. He was given machete to brush”.⁴¹ This occurred in 1995.

34. DIS-157 described another incident where Gbao was forced to brush a different road in 1998. He stated that Gbao, as Overall Security Commander, was banished to brush the Kono-Bunumbu highway in 1998.⁴² In his testimony, Issa Sesay agreed that Gbao was recalled by Bockarie to Buedu on disciplinary grounds and required to “brush the road from the Moa River to Sandiaru” in late 1998.⁴³

35. Superman, who appeared to have had little relationship with Gbao at all during the war, did come to Gbao's house in Kailahun Town at least once. During this visit, he came and shot 3 or 4 of Gbao's chickens simply because he was hungry.⁴⁴ This was allegedly done in front of others, including Gbao's family. In his testimony, Issa Sesay characterised this as a “molestation”⁴⁵ underscoring the low value and respect Gbao had earned from Superman and the leadership.

36. DAG-080 also spoke in general about Gbao being harassed by Superman. “Sometimes [the RUF] feel like molesting him, you know, so he has to run away from the site and sometimes he was hidden by civilians. There was a time, I can remember, when he was in greater—bitter argument

38 Jungle justice “means they carry you today. They say this man has committed a crime—rape, let's say Commando A has committed a rape crime. They carry you before the investigation board. They want you to investigate today. They want you to say “yes this person”—well, is wrong, is found guilty. They want you to implement the punishment today. Always in their own favour. So that was what we call jungle justice. ”. DAG-080, Transcript 6 June 2008, p.30.

39 DAG-080, Transcript 6 June 2008, p.30.

40 *Id.* at p.32.

41 DAG-080, Transcript 6 June 2008, p.33.

42 DIS-157, Transcript 25 January 2008, p.100.

43 Issa Sesay, Transcript 1 June 2007, p.14.

44 *Id.*, Transcript 31 May 2007, pp.70-71.

45 *Id.*

with Superman and Superman sent his bodyguards to him. Somebody rushed and told him that Superman has sent his bodyguards to him, to arrest him, so he had to run away and he was kept by the nearby civilian, who was his neighbour".⁴⁶

2. *Harassment by Rank-and-File RUF Fighters*

37. According to several Gbao Defence witnesses, there was a general sentiment among junior RUF fighters that the war was not meant for "book people". DAG-110 concisely noted that, according to some, "[t]he war was not meant for book people. So people who were literate were always molested...Gbao was more literate than the others".⁴⁷

38. DAG-048 also described the rank and file resentment of "book" people. He testified that "[t]hey were very much overlooked...Securities were regarded as not fighters, but people with books and pens, and so they were very much overlooked...[t]hey were not popular".⁴⁸

39. DAG-080 explained what this meant. He stated that "[t]hose people who were educated really the rank and file some of them were not on good terms with [the educated people]".⁴⁹ Continuing, he stated "[t]he [rank and file RUF] grew jealous of [the educated in the RUF] because they feel they were doing the fighting while the educated ones were—well they believe in the book and pen and they felt at the end of the day if they shall have won victory, the RUF, these [educated men] will be in higher positions [in an eventual RUF government]".⁵⁰

40. In addition, the combatants resented the IDU. DAG-048 stated that the IDU were not well-liked by the rank-and-file combatants "because of [their] reports. They said that the IDUs sent reports to the commanders against them and so they were not—they were not lik[ed] at all".⁵¹

3. *Other Harassment*

41. DAG-101 was also aware that Gbao was harassed by various colleagues because he was not a fighter. She testified that "Gbao's relationship with his colleague Vanguard, well, openly sometimes they were...sort of mockery, they were saying that Gbao is not a fighter, Gbao never go

⁴⁶ DAG-080, Transcript 3 June 2008, pp.34-35.

⁴⁷ DAG-110, Transcript 2 June 2008, p. 88.

⁴⁸ DAG-048, Transcript 3 June 2008, p.47.

⁴⁹ DAG-080, Transcript 6 June 2008, p.17.

⁵⁰ *Id.*

⁵¹ DAG-048, Transcript 3 June 2008, p.47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29595

to the frontlines”.⁵²

42. According to DAG-110, “some civilians were even more popular than Gbao because if you are a civilian then you are a civilian but when you are a commander, but you don't visit the frontline, you are not popular among the combatants; they don't even have regard for you”.⁵³ DAG-080 also stated that “[s]ometimes he was chased...[b]y his friends and colleagues”.⁵⁴

43. The Sesay witnesses DIS-281 and DIS-069 concurred that Gbao faced harassment in his day-to-day life. They agreed that Gbao was provoked, molested and otherwise harassed by many people in the RUF because he was not a soldier and because he would run from the frontline.⁵⁵

4. *Harassment of Other RUF Unit Officers*

44. The general attitude towards non-combatant RUF was further evidenced in the way that other administrative officers were also molested, including the MP's third in command and the IO Overall unit commander.⁵⁶

E. Gbao's Personality

1. *Gbao's Belief in the Principles Espoused by the RUF*

45. Gbao strove to implement the RUF ideology.⁵⁷ He would tell soldiers not to act in contravention of the ideology and the Geneva Conventions. He repeated this “so many times”.⁵⁸

46. Certain commanders, as well as some rank-and-file RUF combatants, however, did not listen to or respect Gbao's opinions. DAG-080 said that this isolated Gbao from the others. He stated that:

“Augustine Gbao being alone actually means the knowledge he had with him, he had wanted to use that knowledge, but there were nobody within his colleagues that really can come closer to him so that they can share that knowledge; they can accept his knowledge because he was somebody I know very intelligent, educated, and he has wanted to his use knowledge and education with his colleagues. But all the time he was—he was—he was not accepted, you see; he was overlooked. He was looked upon low, so he felt very lonesome sometimes and, in fact, that sometimes made him emotional. He become sometimes emotional when he think that, well, his ideas he has cannot be used. He is not allowed to use his ideas the way he should use them”.⁵⁹

⁵² DAG-101, Transcript 9 June 2008, p.120.

⁵³ DAG-110, Transcript 2 June 2008, p.88.

⁵⁴ DAG-080, Transcript 6 June 2008, p.34.

⁵⁵ DIS-281, Transcript 12 November 2007, p.44; *also see* DIS-069, Transcript 23 October 2007, p. 71.

⁵⁶ DAG-048, Transcript 3 June 2008, p.47; DAG-080, Transcript 6 June 2008, p.18.

⁵⁷ DIS-188, Transcript 1 November 2007, p. 89.

⁵⁸ DAG-080, Transcript 6 June 2008, p.26.

⁵⁹ DAG-080, Transcript 6 June 2008, pp. 37-38.

47. DAG-101 also made clear what he thought of Gbao and the principles he tried to implement:

“I want him to be free from this case...Gbao stood out rightly to defend the civilians from the soldiers. He never involved in any wrongdoing like doing bad to civilians, neither soldiers and he was, in fact, sometimes molested by his colleagues and even the combatants because of these civilians defending the rights of humans. So because of that I want Gbao actually to be free from this case. I don't want—he is not to be free because he is my commander. That one is over. But because of the role he played in the war [for] humanity, defending the rights of human—humans. That's why I want him to be free. He never did any wrong that should be—he should be in Court today”.⁶⁰

48. DAG-048 touchingly concluded: “[i]t is unfortunate for somebody who has struggled so long to redeem his own people and country, then at the end of the day to see himself behind bars, it's very, very unfortunate”.⁶¹

2. *Gbao Did not Carry a Weapon nor Wear Military Uniform*

49. Not only was Augustine Gbao not a fighter for the RUF, he rarely carried a weapon. He was normally with the civilians and largely acted as one of their number.

50. DAG-048 never saw Gbao carrying a weapon.⁶² DAG-101 stated that “Augustine Gbao never carried gun because he was not a combatant”.⁶³ The Sesay witnesses DIS-188 and DIS-069 stated that he was seldom, if ever, carrying a weapon.⁶⁴ DAG-018, a civilian in Makeni never saw Gbao carrying a weapon.⁶⁵ DAG-047 stated that “[m]ost of the time I saw him he was alone and never went with any weapon”.⁶⁶

51. DAG-018 and DAG-047, both witnesses from Makeni, stated that Gbao never wore a combat uniform of any type.⁶⁷ Indeed, DAG-047 stated that his only clothing were a “short pair of trousers and a T-shirt”.⁶⁸

3. *Gbao was Never a Frontline Combatant or Even Working as IDU on the Frontlines*

52. Gbao “didn't like any area where violence was.”⁶⁹ He was a “scary man” who was “always

⁶⁰ DAG-101, Transcript 10 June 2008, p.37.

⁶¹ DAG-048, Transcript 5 June 2008, p.26.

⁶² DAG-048, Transcript 3 June 2008, p.99.

⁶³ DAG-101, Transcript 9 June 2008, pp.117-18.

⁶⁴ DIS-188, Transcript 1 November 2007, p.91; *also see* DIS-069, Transcript 23 October 2007, p.67.

⁶⁵ DAG-018, Transcript 16 June 2008, p.27.

⁶⁶ DAG-047, Transcript 17 June 2008, p.10.

⁶⁷ DAG-018, Transcript 16 June 2008, p.27; DAG-047, Transcript 17 June 2008, p.10.

⁶⁸ DAG-047, Transcript 17 June 2008, p.10.

⁶⁹ DIS-188, Transcript 1 November 2007, p.88.

29597

at the rear” and did not “want to see blood”.⁷⁰

53. It is fair to say that at the start of this trial the fact that Gbao was not a combatant was unknown to the Prosecution just as to everybody else. As the case progressed, Gbao's status as a non-combatant became obvious.⁷¹ DAG-048 stated that between 1991 and 2001 “I never saw Augustine Gbao at the front line, neither did I ever heard that Augustine Gbao was sent to the frontline or gone to the front line”.⁷² Similarly, Issa Sesay stated that “Gbao was not a fighter at the battle front. And he has never been a commander who led fighters into battle. I did not see that from 1991 to 1999”.⁷³ DAG-101 also testified that Gbao was never a frontline combatant and that he never worked on the frontline.⁷⁴

54. Again referring to the case for Sesay, DIS-188 recalled that Gbao was seen as lazy because he would not go to the frontline. He was amused at the question of whether Gbao was a fighter:

“A. He can't fight. He can't go on the front line.

Q. And you're laughing about that?

A. I'm sorry. I'm sorry.

Q. That's quite all right. It's your evidence.

A. He is not a fighter.

Q. Okay.

A. So that's why we say he is lazy.

Q. Forgive me, but when you said that, he's not a fighter, he's not on the front line, you smiled. What is it that you find --

A. My memory recalled me of how we speak of him because when he hears of fighting, let me say enemies are advancing, he will be the first person to reach to the rear to make sure that the civilians there are getting their normal locations, everything is in order”.⁷⁵

55. DIS-069 spoke of how he and other men at the frontlines would criticise Gbao for, among other matters, never visiting the frontlines. He stated that Gbao was criticised because “he would not move to even visit us at the front line to know the security situation. He never did that. So that was what we were discussing”.⁷⁶

56. The Prosecution witness TF1-036 also stated that he has never seen Gbao at the frontline.⁷⁷ DAG-110 testified that Gbao ran like a “wild cat” from the daily jet raids from ECOMOG forces in

⁷⁰ DIS-188, Transcript 2 November 2007, p.12.

⁷¹ DAG-048, Transcript 3 June 2008, pp.28, 47; DAG-080, Transcript 6 June 2008, pp.14,22.

⁷² DAG-048, Transcript 3 June 2008, p.28; p.124 (lines 25-26).

⁷³ Issa Sesay, RUF Transcript 30 May 2007, p.46.

⁷⁴ DAG-101, Transcript 9 June 2008, p.118.

⁷⁵ DIS-188, Transcript 1 November 2007, p.90.

⁷⁶ DIS-069, Transcript 23 October 2007, p.71.

⁷⁷ TF1-036, Transcript 3 August 2005, p.81.

57. Gossip at the frontlines about Gbao's "wild cat" behaviour led RUF fighters to harass him. Another witness—DIS-281—similarly testified that Gbao was provoked, molested and otherwise harassed by many people in the RUF because he was not a soldier and because he would run from the frontline.⁷⁹ Even Foday Sankoh himself looked upon Gbao as an AWOL soldier—one who was always at the rear. DIS-281 stated that "Corporal Saybana Sankoh...was provoking him as [an] AWOL soldier. He said he was a soldier that is always at the rear".⁸⁰ Others simply found that he was a "coward."⁸¹

4. *Augustine Gbao Would Rarely use Bodyguards*

58. Gbao would use bodyguards only occasionally: their use no doubt unnecessary largely because Gbao never went near the frontlines. According to DAG-048, he would use various IDU agents as bodyguards "any time he wants to make a move".⁸² These bodyguards were all aged 20 or older.⁸³ DAG-080 stated that Gbao used bodyguards only at the early stage of the war.⁸⁴ DAG-101 stated that Gbao had four bodyguards assigned to him, all over 21, but that he normally walked alone.⁸⁵ DAG-110 testified that Gbao sometimes used bodyguards (a minority of the time), all of whom were over the age of 21.⁸⁶

59. DIS-188 agreed that Gbao was usually without securities. DIS-188 stated that "he goes around at times, he alone, or at times with one security with him, always saying that: I always guarantee my [own] security. I'm not doing anybody bad. So I don't think anybody will have any bad feeling against me."⁸⁷

5. *Augustine Gbao Did not Care About Material Possessions*

60. Prosecution witnesses, Sesay Defence witnesses and Gbao witnesses agreed that Gbao was not materialistic. He never had money during the war, and never yearned for it. The preponderance of such evidence surely suggests Gbao genuinely had such a reputation; we submit that such

78 DAG-110, Transcript 2 June 2008, p.81.

79 DIS-281, Transcript 12 November 2007, p.44; *also see* DIS-069, Transcript 23 October 2007, p. 71.

80 DIS-281, Transcript 12 November 2007, p.44.

81 DAG-080, Transcript 6 June 2008, p.14-15.

82 DAG-048, Transcript 3 June 2008, p.99.

83 DAG-048, Transcript 3 June 2008, p.99.

84 DAG-080, Transcript 6 June 2008, pp.90-91.

85 DAG-101, Transcript 9 June 2008, p.118.

86 DAG-110, Transcript 2 June 2008, p.88, 89.

87 DIS-188, Transcript 1 November 2007, p.88-89.

testimony could hardly have been falsified by so many unrelated witnesses. As stated by DAG-080:

“[h]e was somebody who wear clothes for sometimes a week before even changing it. He doesn't care. He was having only one pair of shoe—brown shoe, I can still remember. You should not only see him wearing those expensive materials. It was just having some old jeans most times, faded jeans, and when you ask him say: [W]hy don't you dress like your colleagues? He say: Well, I'm not here for that. the time for me to dress will come when we shall again have power. That will be the time I will dress but for now I'm not ready for that. That was what he used to tell us, that he has not come for materials. He was not materialistic”.⁸⁸

61. DAG-110 echoed DAG-080, stating also that Gbao would wear the same clothes for several weeks.⁸⁹ He was less concerned about committing war crimes than he was about obtaining cigarettes.⁹⁰ Gbao did not obtain these cigarettes through crime; instead, according to DAG-110 he took “his little Oxford dictionary he used to carry under his arm...” and used “big words” to impress people and persuade them to part with cigarettes.⁹¹ This amusing if trivial anecdote had been previously given by DIS-078, who stated that “if you had a cigarette, he would cajole you for you to give that cigarette to him. I did not actually see him that he used to lead fighting, but I used to see him around...if he wants to drink palm wine and if you are drinking palm wine he would go and sit there and cajole you and using big jargons for you to give him”.⁹²

62. Significantly, such testimonials did not only come from Defence witnesses. TF1-168, who knew Gbao well, concurred: “From the inception of the war, I didn't observe him accumulating property or wealth or money”.⁹³ TF1-371 also agreed that Gbao did not have a flamboyant standard of living.⁹⁴

63. Gbao did own one vehicle in Makeni. It was not a particularly glamorous vehicle: it was a Toyota Tercel:⁹⁵ a “very small old car, with a damaged windscreen. He was having plastic in front of the car as a windscreen; white plastic”.⁹⁶ Before a priest at a Catholic church in Magburaka gave the car to Gbao it had been off the road. As stated by DAG-111: “[t]he car was parked in one Catholic compound in Magburaka. There was a time when a Father went there and handed the vehicle to him

⁸⁸ DAG-080, Transcript 3 June 2008, p.35.

⁸⁹ DAG-110, Transcript 2 June 2008, p.74

⁹⁰ *Id.* at p.74.

⁹¹ *Id.* at p.75.

⁹² DIS-078, 11 October 2007, pp.90-91.

⁹³ TF1-168, Transcript 4 April 2006, p.168.

⁹⁴ TF1-371, Transcript 2 August 2006, p.9.

⁹⁵ DAG-111, Transcript 17 June 2008, p.55.

⁹⁶ DAG-080, Transcript 6 June 2008, p.36.

but the vehicle was not in good order".⁹⁷

29600

II. The Revolutionary United Front

A. Organisational Structure

64. The RUF's organisational structure and Augustine Gbao's place within it can be best understood by breaking the structure of the RUF into its constituent parts. Hopefully, this will assist this Court in understanding the Accused's particular role within the organisation. Based on testimony given during the trial, the RUF can be best understood by being broken down into geographic location and function. The military structure of the RUF is largely irrelevant as it pertains to Gbao, as we submit that he had no role a fighter. However, a brief discussion of the military structure follows.

65. TF1-071 assisted the Prosecution in explaining the command structure in 1999. An enormous diagram was presented to the Court detailing the hierarchy and leadership of the entire RUF.⁹⁸ **On both documents, Gbao's name was completely absent.**

1. Geographic Location

66. The location of the major RUF areas before 1996 were Kailahun and Kono. After, there were four brigades in Kailahun, Tongo, Kono and Makeni.

2. Function: Military Structure of the RUF

67. The military apparatus of the RUF was organised by brigade, battalion and company. "In each brigade, there were four battalions and, in each of these four battalions, there were four companies".⁹⁹ There was higher command above all of these units.

68. According to DAG-080, there were two brigades before 1996—one in Kailahun and one in Kono.¹⁰⁰ After 1996 or 1997, there were four operational brigades—in Kailahun, Tongo, Kono and Makeni.¹⁰¹ In his testimony, Issa Sesay offered a slightly different version of the military structure, asserting that, in 1996 and 1997, there were brigades (led by respective commanders) in Pujehun, Peyama, Western Jungle, Kangari Hills and Kailahun Districts.¹⁰²

⁹⁷ DAG-111, Transcript 17 June 2008, p.56.

⁹⁸ Exhibits 20 and 21.

⁹⁹ DAG-080, Transcript 6 June 2008, p.42.

¹⁰⁰ DAG-080, Transcript 6 June 2008, p.42.

¹⁰¹ DAG-080, Transcript 6 June 2008, p.42.

¹⁰² Issa Sesay, Transcript, 31 May 2007, p.7.

29601

69. Each brigade had its respective brigade commander. The same applied for each battalion and company.

70. As stated by Issa Sesay, the military leadership held more power than the overall commanders of the various RUF units.¹⁰³ According to Sesay, this was because “they had a lot of men, more than the unit, and they controlled the fighting force”.¹⁰⁴ The First Accused went even further in his testimony, asserting that **overall unit commanders had less power over the RUF than even battalion commanders**. He stated that “[t]hey did not have control more than the battalion commanders. Unit commanders, more of them [] contained unarmed men and the battalion commanders, he controlled fighting forces”.¹⁰⁵ The command and control of various RUF constituents, and further distinction between RUF fighters and unit officers, is discussed below.

71. The RUF traditionally held muster parades every morning in which the highest ranking leader of a unit (whether brigade, battalion, or company level) received “information or instructions from the area commander of that particular area...[t]he area commander receives these instructions from the High Command and passed that information to the [unit] commander. If it was a battalion, this battalion [level] commander receives instruction and pass[es] it on to the units”.¹⁰⁶

3. *Function—Units of the RUF*

72. There were several auxiliary units in the RUF. They are discussed below.

a. G1—Recruitment

73. G1 was in charge of RUF recruitment. It was, in particular, responsible for the various RUF training bases and reported directly to the Leader.¹⁰⁷ In addition, the unit was represented on the RUF War Council.¹⁰⁸

b. G2/IDU—Investigations

74. The G2 later became known as the Internal Defence Unit.¹⁰⁹ The IDU was responsible for

103 Issa Sesay, Transcript 31 May 2007, p.9.

104 *Id.*

105 Issa Sesay, Transcript, 31 May 2007, p.12.

106 DAG-048, Transcript 3 June 2008, p.24.

107DIS-069, RUF Transcripts 22 October 2007, p.109.

108DIS-069, RUF Transcripts 22 October 2007, p.109.

109 Issa Sesay, Transcript 3 May 2007, p.75; *also see* DIS-188, Transcript 25 October 2007, p.87.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

the investigation of alleged crimes committed by RUF soldiers against civilians.¹¹⁰ This was regarded as the primary, if sole, function of the IDU.¹¹¹

75. Augustine Gbao was the overall head of the IDU throughout the entire Indictment period.¹¹² Further discussion of its role and responsibilities, its structure and reporting practices together with other necessary considerations, can be found below.

c. G4—Arms and Ammunition

76. G4, otherwise known as the “armoury”, was responsible for all arms and ammunition in the battalion.¹¹³ The head of the armoury was Pa Molba, who lived in Buedu.¹¹⁴

d. G5

77. The G5 was “[r]esponsible for the administration of the civilians; they were working with the civilians”.¹¹⁵ It generally served as an intermediary between the soldiers and civilians.¹¹⁶ Its staff included both combatants and civilians.¹¹⁷

78. The role and responsibility of the G5 comprised the “full coordination of the affairs between the movement soldiers and the civilian population in a particular battalion”.¹¹⁸ In particular, it was charged with the issue of passes to civilians (unlike the MP, who issued passes to soldiers). If a civilian needed to go to Kenema in search of food, he would report to the G5 for permission.¹¹⁹

79. Other responsibilities included the settling of disputes between civilians and distributing food supplies to them.¹²⁰

80. The Overall G5 commander in 1996-1999 was Prince Taylor, who likewise lived in Buedu at

110DIS-149, Transcript 6 November 2007, p.7.

111 DIS-069, Transcript 23 October 2007, p.44.

112 DAG-080, Transcript 9 June 2008, p.22; DAG-101, Transcript 9 June 2008, p.87; Issa Sesay, Transcript 30 May 2007, pp.48-49.

113 Issa Sesay, Transcript 3 May 2007, p.75; *also see* DAG-048, Transcript 3 June 2008, p.103.

114 DAG-048, Transcript 3 June 2008, p.103-04.

115 DAG-048, Transcript 3 June 2008, p.91 (lines 8-10).

116 DIS-302, Transcript 26 July 2007, p.108; *also see* DIS-074, Transcript, 4 October 2007, p.26; DIS-069, Transcripts, 22 October 2007, p.68.

117 Issa Sesay, Transcripts, 4 May 2007, p.29.

118 Exhibit 273.

119 DIS-302, Transcript, 26 June 2007, p.108; *also see* DAG-048, Transcript 3 June 2008, p.91; DIS-124, Transcript 17 January 2008, p.17.

120 DIS-074, Transcript 4 October 2007, pp.87-88, 99.

that time.¹²¹

29603

e. MP—Military Police

81. The Military Police, or MP, was responsible for many security related tasks in the RUF. In general, its primary function was to “implement, arrest and detain[], and also to implement the rule of law of the revolution”¹²². More specifically, MP responsibilities included the following:

1. Upon order, implementing disciplinary actions and otherwise maintaining law and order amongst the soldiers;¹²³
2. Investigating crimes;¹²⁴
3. Issuing travel passes to soldiers (not civilians);¹²⁵
4. Serving on the Joint Security Board of Investigations;¹²⁶
5. Manning checkpoints in strategic areas to dissuade soldiers from retreating from the frontlines and to keep out enemy spies doing reconnaissance;¹²⁷
6. Investigating (at the checkpoint and later if cause is found) whether civilians moving from or between areas were actually the enemy in disguise;¹²⁸
7. Enforcing the law against RUF soldiers regarding the mistreatment of civilians.¹²⁹

82. According to DAG-048 [REDACTED]¹³⁰, the Leader, battlefield commanders, battlegroup commanders, and area commanders all had power to issue instructions to the MP.¹³¹ Augustine Gbao did not.¹³²

83. During the war, the RUF employed the following overall MP Commanders:

1. 1994: Acting: Patrick PS Baina¹³³
2. 1995: Mohammed Y Jalloh;¹³⁴

121 DAG-048, Transcript 3 June 2008, p.104.

122 DAG-048, Transcript 3 June 2008, p.36; also see DIS-074, Transcript 4 October 2007, p.26.

123 Exhibit 273.

124 Issa Sesay, Transcript, 3 May 2007, p.76; also see DIS-302, Transcript 26 June 2007, page 108.

125 DIS-188, Transcript 26 October 2007, p.22; also see DAG-048, Transcript 3 June 2008, p.91; DIS-124, Transcript 17 January 2008, p.17.

126 DAG-048, Transcript 3 June 2008, p.54.

127 DIS-188, Transcript 26 October 2007, p.22.

128 DIS-188, Transcript 26 October 2007, p.22.

129 DIS-302, Transcript 26 June 2007, p.108.

130 DAG-048, Transcript 3 June 2008, p.20.

131 DAG-048, Transcript 3 June 2008, pp.25-26.

132 DAG-048, Transcript 3 June 2008, p.35.

133 DIS-188, 26 October 2007, p.17

134 DIS-188, 25 October 2007, p.67.

29604

3. 1998: Mohammed Kaisamba (Kaisuku);¹³⁵

4. 2000: Mohammed Y Jalloh;¹³⁶

84. The Overall MP Commander was the leader of the MP unit. Next in line was the deputy MP Commander, followed by the senior clerk (or MP Adjutant). After that came operational commanders, including (in order of hierarchy), the brigade MP commander, battalion MP commander, and company MP commander.¹³⁷ There were approximately 62 MPs in a battalion.¹³⁸

85. The overall MP Commander reported directly to Sam Bockarie during the Indictment period.¹³⁹

f. The Intelligence Office

86. The identity of intelligence officers ('IOs') was secret.¹⁴⁰ According to DAG-080, this was necessary because "they were directly answerable to the High Command and the High Command [needed to] believe in their...report".¹⁴¹ Their responsibilities, in general, were to ensure that RUF laws "are maintained, and whosoever goes against those laws, they just have to write your name, then [the IO Officers] come and they report to me".¹⁴² These officers were responsible for monitoring the effectiveness of all operations within a particular battalion, after which the IO was required to send intelligence reports to the battalion headquarters.¹⁴³

87. In pursuit of this duty, IO officers would gather intelligence against renegade soldiers on the frontline.¹⁴⁴ Unlike the IDU, IO officers also received situation reports concerning the progress of military activity. These included reports on "the capturing of weapons, arms and ammunition. Sometimes they contained reports of killing in action, if a soldier happens to die during battle".¹⁴⁵ Such reports also concerned the conduct of fighters at the frontline.¹⁴⁶

88. Field reports were sent to the Overall IO Commander on a weekly basis. According to DAG-080, "[t]he agent sent—they make their report weekly, they sent it to me, weekly report, and

135 DIS-188, 25 October 2007, p.71; *also see* DAG-048, Transcript 3 June 2008, pp.107, 108.

136 DIS-188, Transcript, 25 October 2007, p.71.

137 DAG-048, Transcript 3 June 2008, pp.22-23.

138 *Id.* at p.23.

139 DAG-048, Transcript 3 June 2008, p.108.

140 DAG-080, Transcript 6 June 2008, pp. 31,39.

141 *Id.* at p.39.

142 *Id.*

143 Exhibit 273.

144 DAG-080, Transcript 6 June 2008, pp.18, 38.

145 DAG-080, Transcript 6 June 2008, p.43.

146 *Id.*

if there is a situation wherein urgent—the situation that is very much urgent to be addressed by the leader, or the High Command, they can send that report to me directly, without wasting time”.¹⁴⁷ “They do copy the [military] battalion commander if they are within the battalion, or the area [brigade] commander if they are within the area [brigade]”.¹⁴⁸

89. Each RUF company had an IO officer. As explained above, each battalion had four companies, meaning there were at least four IO officers in each battalion (although DAG-080 states that there were 16 after making the same calculation).¹⁴⁹

90. Ben Kenneh was the Overall IO Commander for the entire Indictment period.¹⁵⁰

g. S4 Unit

91. The S4 dealt with food affairs and carried out necessary distribution pursuant to battalion orders.¹⁵¹ It was generally responsible for logistics of a non-military nature.¹⁵²

92. The overall S4 commander in 1998-1999 was Jabati, who lived in Buedu.¹⁵³

h. Agriculture Unit

93. The Agriculture Unit ('AU') accumulated excess crops and delivered them to the RUF. DIS-078 testified that the RUF would take the harvest and sell it elsewhere so that other necessities for civilians could be obtained.¹⁵⁴

94. According to DIS-078, [REDACTED]¹⁵⁵ the agricultural subcommittee's responsibilities included “planting cocoa, harvesting it and placing them in stores. At the time of the war nobody cared for them [the farms]. And we gathered all, and Mr Sankoh said we should hand it over to him. He went to Kailahun and sold it and bought salt, Maggi, tobacco and placed them in those stores. They were there. Whoever came with, for

¹⁴⁷ *Id.* at p.40.

¹⁴⁸ *Id.* at p.41.

¹⁴⁹ *Id.* at p.42.

¹⁵⁰ DAG-080, Transcript 6 June 2008, p.19.

¹⁵¹ Exhibit 273; also see Issa Sesay, RUF Transcripts, 3 May 2007, p.75; 4 May 2007, p. 33; 31 May 2007, p.13.

¹⁵² DAG-048, Transcript 3 June 2008, p.105.

¹⁵³ *Id.*

¹⁵⁴ DIS-078, Transcripts 16 October 2007, p.27, 40.

¹⁵⁵ DIS-078, Transcript 11 October 2007, p.57. During the 1990's, he was located in the following areas: Mundu Tawahun, Baima, Pendembu, Gborbu, Giema, Kailahun, Golahun, and Sembehun. *See id.* at pp. 62-67.

instance, if anybody came, for instance, with cocoa, and he sold it, he would give you that tobacco".¹⁵⁶

i. The Black Guards

95. The Black Guards were bodyguards to the High Command.¹⁵⁷ They were also known to monitor the activities of certain commanders when Foday Sankoh was out of the country.¹⁵⁸

j. WACs

96. The Women's Auxiliary Corps¹⁵⁹ (a.k.a. "Women in Armed Conflict"¹⁶⁰ or "Women's Army Congregation") was unique in that it was reserved for females participating in the war on behalf of the RUF.

97. Its role was not clearly defined. Some WACs had just one identifiable role—to be a WAC. Some, however, were inducted into the IDU. According to DAG-101, [REDACTED], "[s]ome of the WACs were IDUs. Some were combatants...although some were mostly assisting the brothers taking care of them in the combat camps by preparing food for them and other aids they can keep".¹⁶¹

98. WACs were "deployed in the companies, battalions and even the liberated zones, where we called the rear, where the civilians were staying. They were deployed all over".¹⁶²

99. There was an overall WACs commander, as well as an overall WACs IDU commander. Only the IDU had a WACs unit.¹⁶³ The immediate boss of the WACs IDU commander was not Augustine Gbao, but Francis Musa,¹⁶⁴ who was the district IDU Commander in Kailahun District.¹⁶⁵

k. Motor Pool (Logistics) Unit

100. This bore responsibility for all machines and the maintenance of all vehicles and logistics in

¹⁵⁶ DIS-078, Transcript 16 October 2007, p.27.

¹⁵⁷ DAG-110, Transcript 2 June 2008, p.84; *also see* DIS-069, Transcript 22 October 2007, p.110.

¹⁵⁸ DIS-069, Transcripts 22 October 2007, p.111.

¹⁵⁹ Exhibit 273.

¹⁶⁰ DAG-101, Transcript 9 June 2008, p.83.

¹⁶¹ *Id.*

¹⁶² *Id.* at p.89.

¹⁶³ *Id.* at p.84.

¹⁶⁴ *Id.* at p.86.

¹⁶⁵ Issa Sesay, Transcript 1 June 2007, pp.5-6.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

the battalion.¹⁶⁶

29607

l. Signal (SSB) Unit

101. SSB was responsible for all communication. This included sending and receiving necessary messages to all operational areas.¹⁶⁷

m. Combat Medic Unit

102. There was no clear definition of the Combat Medic Unit, but they almost certainly dealt with medical matters in the RUF.

B. RUF Leadership

103. Foday Sankoh was the founder and original leader of the RUF. He held this position from 1991-1996,¹⁶⁸ after which Sam Bockarie took over in Sierra Leone. After Bockarie's resignation at the end of 1999, Issa Sesay became interim leader of the RUF.

1. Battlefield Commander

104. The Battlefield Commander was second-in-command in the RUF. "The role of the battle-field commander is to inspect the frontline and seek the welfare of the soldiers within the frontline, to make plans of advancement, to advance or to make plans or make certain defences within the movement".¹⁶⁹

105. The original RUF battlefield commander was Mohammed Tarawallie.¹⁷⁰

2. Battlegroup Commander

106. Next in the chain of command was the battlegroup commander, responsible for the welfare of all men within the RUF. According to DIS-188, it is "just like when we say the interior minister; all internal affairs of the RUF was within his responsibility, the battle group commander".¹⁷¹

107. The original RUF battlegroup commander was Rashid Mansaray.¹⁷² From early until late

166 Exhibit 273.

167 Exhibit 273.

168 Issa Sesay, Transcript 31 May 2007, p.3; *also see* DAG-080, Transcript 6 June 2008, p.11.

169 DIS-188, Transcript, 26 October 2007, p.19. Please note that the question was asked in reference specifically to 1994, but it is submitted that this was likely to be the general role of the battlefield commander throughout the war.

170 Issa Sesay, Transcript 31 May 2007, p.3; *also see* DAG-080, Transcript, 6 June 2008, p.11.

171 DIS-188, Transcript, 26 October 2007, p.20.

172 DAG-080, Transcript 6 June 2008, p.11.

1996 the position was vacant, after which Sam Bockarie was reappointed to that position.¹⁷³ Other RUF fighters later assumed this position.

3. *Battlefield Inspector*

108. It is not clear when the assignment of battlefield inspector first appeared; however, it was a position “responsible for the welfare of the frontline. It helped to ensure that fighters were comfortable and that they concentrate on battle, and that the fighters stick in their various assignment areas. If there are any lapses in the frontline or any area, he ensures that he beefed it up. If there is a lack of manpower he will send a reinforcement”. In short, the role entailed maintenance of the front lines.¹⁷⁴

109. It is similarly unclear where this position fitted into the chain of command. Indeed, DAG-080 was not aware of the title “battlefield inspector.”¹⁷⁵

4. *Advisors*

110. Foday Sankoh's closest advisor was Mike Lamin.¹⁷⁶ Others, such as David J. Kallon and Pa AG Kallon¹⁷⁷ were also named, though they were not as significant within the hierarchy as Lamin.

III. **The Internal Defence Unit (“IDU”)**

111. As stated, Augustine Gbao was overall IDU commander from 1996 until the end of the war. By virtue of this position, Gbao arguably maintained a certain leadership role within the RUF. However, as will be shown, it can not possibly be argued that he held the requisite “superior” status to be found culpable under Article 6(3) of the Statute. Nor did Gbao have “effective control” over those committing crimes against civilians in Sierra Leone during the war. Additionally, we submit that Gbao never had the power to make a significant contribution to the alleged criminal plan launched by the RUF in their attempted takeover of Sierra Leone.

112. In support of this position, we next review the role of the IDU during this period. In particular, we examine the tasks of IDU agents, its structure throughout the country, the unit's reporting practices, Gbao's decision-making power (and that of subordinate IDU agents), punishments administered by the RUF, and the inherent weaknesses of the IDU's day to day

¹⁷³ Issa Sesay, Transcript 31 May 2007, p.3.

¹⁷⁴ DIS-069, Transcript 22 October 2007, pp.101-02.

¹⁷⁵ DAG-080, Transcript 9 June 2008, p.31.

¹⁷⁶ DAG-080, Transcript 6 June 2008, p.12.

¹⁷⁷ Issa Sesay, Transcript 30 May 2007, p.45.

administration.

113. This section does not discuss the Joint Security Board of Investigations, which will be considered in the next section.

A. The IDU's Role and Responsibility in the War

114. As stated, the IDU was tasked with investigating alleged crimes committed by RUF soldiers against civilians.¹⁷⁸ This was regarded as its primary function.¹⁷⁹ DAG-080 described the IDU's role as one that "make[s] sure that soldiers do not harass the civilians. At the same time they [] investigate".¹⁸⁰ They were "responsible for defending the civilians from the soldiers".¹⁸¹ Issa Sesay characterised IDU agents as "informants", citing their duty to report violations of RUF policy by front line combatants to the High Command.¹⁸² DIS-302 presented the work of the IDU/G2 as similar to the work of a village or town chief.¹⁸³

115. Besides investigations, the IDU also staffed the liberated zones, with particular focus on searching for spies. "They were looking out for any or whether anybody was there who was playing a double role or for any -- if any enemy passes through the back and entered there, they were a sort of CIDs".¹⁸⁴ According to DAG-101, "[w]hen the civilians were captured from the front lines, they were brought directly to [the IDU] for investigation. We have to screen them. We crosscheck them, if there was no bad person amongst them and they will be turned over to G5 for settling".¹⁸⁵

116. As stated, there was also a WACs IDU commander. While a distinct unit themselves (the WACs included only women), the responsibilities of a WACs IDU were similar to that of a regular IDU agent. As stated by DAG-101, "[t]he WACs commander was responsible for defending the civilians from the combatants and he was—the WACs commander was also responsible for receiving all reports from different...areas where WACs were assigned...[a]nd when she received these reports, she will compile the reports and pass it on to her immediate commander for onwards

178 DAG-048, Transcript 3 June 2008, p.36; *also see* DAG-101, Transcript 9 June 2008, p.80; DIS-149, Transcript 6 November 2007, p.7.

179 DIS-069, Transcript 23 October 2007, p.44.

180 DAG-080, Transcript 6 June 2008, p.23.

181 DAG-101, Transcript 9 June 2008, pp.80, 89-90.

182 Issa Sesay, Transcript 3 May 2007, p.75.

183 DIS-302, Transcript 26 June 2007, p.100.

184 DIS-069, Transcript 22 October 2007, p.69.

185 DAG-101, Transcript 9 June 2008, p.124.

transmission”.¹⁸⁶ Only female IDU agents reported to the WACs IDU commander.¹⁸⁷

1. *The IDU Was Not the Only Investigative Unit in the RUF*

117. While investigating alleged crimes by RUF combatants was the IDU’s primary function, the IDU were not the only investigative body in the RUF. The three other security units (MP, G5, and IO), for example, had simultaneous “mandate[s]” to investigate alleged crimes between soldiers and civilians.¹⁸⁸ For example, Kailahun residents (including town chiefs) in receipt of a complaint from a local civilian stated that it was the G5 who was responsible for subsequent investigations.¹⁸⁹

2. *Power of IDU and other Security Units*

118. The security units and other administrative officers in the RUF did not have power and prestige comparable to actual RUF combatants. As we suggest later in these submissions, unit commanders could not issue orders to an area commander.¹⁹⁰ By contrast, “[t]he area commander ha[s] control over the entire people within his area”.¹⁹¹ An area commander was free to interfere with the day-to-day functioning inside a unit.¹⁹² For example, DAG-048 explained that “[s]ometimes the MP—let’s say the MP arrest[s] a soldier for let’s say harass—from harassing a civilian...[i]f that matter is brought before the area commander he can immediately order the MP to release that soldier without investigating him. He can say okay just forget about that man, release him and he will be released”.¹⁹³ This was not a power held by the IDU or other units.

B. Role and Location of IDU Agents

119. In implementing IDU responsibilities, IDU agents staffed every location where RUF fighters were deployed.¹⁹⁴ According to DIS-078, “[t]hey had a lot of agents. They used to go into the Joe Bushes[zobush]. As I understood, they were [also] at the targets”.¹⁹⁵

120. DAG-048 described investigations by IDU agents as generally focused in three main areas—harassment of civilians, intimidation of civilians, and innocent killings.¹⁹⁶ DIS-078 stated that

¹⁸⁶ DAG-101, Transcript 9 June 2008, p.94.

¹⁸⁷ DAG-101, Transcript 9 June 2008, pp.94-95.

¹⁸⁸ DAG-080, Transcript 6 June 2008, p.69.

¹⁸⁹ DIS-128, Transcript 26 November 2007, pp.109-10.

¹⁹⁰ DAG-080, Transcript 6 June 2008, p.51.

¹⁹¹ *Id.*

¹⁹² *Id.* at pp.51-52.

¹⁹³ DAG-080, Transcript 6 June 2008, pp.51-52.

¹⁹⁴ DAG-048, Transcript 3 June 2008, p.30.

¹⁹⁵ DIS-078, Transcript 16 October 2007, p.98.

¹⁹⁶ DAG-048, Transcript, 3 June 2008, p.33.

“[w]hosoever was doing bad to a civilian, if they saw it, they would write letter about you”.¹⁹⁷

121. DAG-101 stated “[t]he major crimes are committed in different areas...[s]o if a particular major crime is committed in a particular area the—the IDU there will investigate the matter”.¹⁹⁸ The IDU there [in that area] will do the investigation, and when they do the investigation, they will compile their report.¹⁹⁹

122. Unlike IO officers,²⁰⁰ the identity of IDU agents was generally known; however, “they report secretly”.²⁰¹

C. Structure of the IDU

123. The IDU’s administration was run on similar lines to the RUF’s military command. Company IDU commanders, for example, were typically in charge of the four IDU agents within that company.²⁰² Company IDU commanders and combatant company commanders were separate individuals.²⁰³ An IDU company commander’s role was far more limited than that of his combatant counterpart, who would typically command 248 people.²⁰⁴

124. There were four company IDU commanders within one battalion²⁰⁵ and there were 16 IDU agents within each battalion. There were approximately 1,000 combatants.

D. Reporting within the IDU—Sending IDU Reports to Area/Local Commanders

125. As stated, IDU agents would investigate and write secret reports concerning fighters who allegedly acted against RUF rules and regulations. IDU agents sent reports to their superiors recommending certain action. These were not always sent to Gbao, even though he was overall IDU commander. Instead, reports were often sent to area commanders (or the highest ranking combatant commander in the area) local to the IDU agent’s investigation. The area commander would then instruct on the matter. In such cases, Gbao would eventually receive reports by way of retrospective updates of disciplinary action taken in the field based upon the area commander’s instructions.²⁰⁶

¹⁹⁷ DIS-078, Transcript 16 October 2007, p.98.

¹⁹⁸ DAG-101, Transcript 9 June 2008, p.98.

¹⁹⁹ DAG-101, Transcript 9 June 2008, p.99.

²⁰⁰ *Supra* para 86

²⁰¹ DAG-080, Transcript 6 June 2008, p.31.

²⁰² DAG-080, Transcript 6 June 2008, p.46.

²⁰³ DAG-080, Transcript 6 June 2008, pp.45-46.

²⁰⁴ DAG-080, Transcript 6 June 2008, pp.46-47.

²⁰⁵ DAG-080, Transcript 6 June 2008, p.46.

²⁰⁶ DIS-069, for example, testified that a man named John Gavawo, who was an IDU commander in Pendembu, *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

125. Augustine Gbao also received reports from IDU agents under other circumstances. We discuss this issue in the following section.

1. Reasons for Sending IDU Investigation Reports to Local/Area Commander

126. Technological deficiencies within the RUF, the geographical distance between Gbao (who for the most part was living in Kailahun Town) and his agents, transport difficulties (few owned a vehicle), traditional RUF practice and the vagaries of wartime conditions, often prevented Gbao from receiving reports at all. By the same token he was often unable to advise on issues arising at the frontlines or elsewhere outside Kailahun Town. For the sake of expediency it was frequently necessary to direct IDU reports to the local area commander for recommendation.

a. Communication Difficulties

127. Communicating outside one's area was difficult and unpredictable. There were no mobile phones. Communication with one's superior was often impossible. The only long-distance option was by radio set, which was available to each combatant company, battalion and brigade.²⁰⁷

128. The IDU and other security units did not have their own radio,²⁰⁸ however. No doubt, had radios been available within security units they would have been used,²⁰⁹ but the fact remains that no radio log books recording reports of IDU investigations have been exhibited.²¹⁰ Moreover DAG-080 stated that ranking IO agents were not allowed to use the radio; only the IO's overall commander was allowed access, provided it was for contact with the High Command only.²¹¹ The same may have applied in the IDU; however, the Prosecution has not attempted to clarify these details.

129. It is also important to note that while IDU agents were unable to use radio sets, the same may well have applied to Gbao. DIS-069, for example, never saw Gbao using the radio.²¹² While there was a radio in Kailahun Town,²¹³ Gbao had no radio for his personal use.²¹⁴

reported directly to the area commander at the time-Issa Sesay. Transcript, 23 October 2007, pp.5-6; also see DIS-069 discussing reports made directly to Issa Sesay as area commander by the Overall MP Commander Jalloh. DIS-069, Transcript 22 October 2007, pp.103, 107; *also see* DIS-174, Transcript 21 January 2008, pp.68-69, where he states that IDU agents had a role to play at the frontlines, namely to "inform the commander on the ground".

207 DAG-048, Transcript 3 June 2008, pp.37-38.

208 DAG-048, Transcript 3 June 2008, p.38.

209 DAG-080, Transcript 6 June 2008, p.41.

210 *See* radio logbooks at Exhibits 32, 33, 34 and 43.

211 DAG-080, Transcript 9 June 2008, pp.45-46.

212 DIS-069, Transcript 23 October 2007, p.62.

213 Issa Sesay, Transcript 1 June 2007, p.40.

214 DAG-048, Transcript 3 June 2008, p.38.

130. TF1-361 alleged that all area commanders had radio sets. However, securities would not have had their own because the RUF command would generally not allow two or more radios to be operated in the same area at the same time.²¹⁵ TF1-361 never monitored a single radio message between 1997 until 1999 from Augustine Gbao—a period spanning almost the entire indictment.²¹⁶ The witness never heard that Gbao sent messages when he was living in Kailahun Town.²¹⁷

131. Since radio communication was at best inconsistent, units had little choice but to report to their overall commanders in writing. This again militated against Gbao's ability to receive reports regularly since messengers would have been required to physically carry such documents from the outlying areas (possibly across combat zones) to Kailahun Town, where Gbao was stationed for the greater part of the war.²¹⁸

b. Physical Distance and Unreliable Transport Provoked Local Action

132. Physical or geographical distance and associated problems also deterred IDU agents from supplying written reports to overall commanders. Issa Sesay offered the following comprehensive explanation: “in '96, the IDU commander in the Western Jungle would not be able to report to Gbao because – because if he wanted to send a monthly report, he would not be able...to prepare four, seven pages notes to send it through a radio...[d]uring that time there were difficulties. One unit was living in the Western Jungle and the unit commander would be in Giema...[the IDU agents] would not be able to leave the Western Jungle to go to Kailahun. *It was not possible*. And it was the same in the Northern Jungle. So, it was not possible for them to send a report and the radio messages would come from the area commander to the central command. *It was not so that units could send report to the commanders while the area commander was there in that area. So the unit commander would report to that commander and the commander himself would be able to take immediate action, because he was the commander on the ground*”.²¹⁹

c. Historical Practice Promoted Local Action

133. Issa Sesay stated that “[i]n principle, the IDU *should* report to his commander, the IDU”.²²⁰ However, “this system started working in '94 when the RUF had been in the jungle. When the IDU

²¹⁵ TF1-361, Transcript, 18 July 2005, p.114.

²¹⁶ *Id.* at Transcript, 19 July 2005, p.79.

²¹⁷ *Id.*

²¹⁸ DIS-149, Transcript 5 November 2007, p.76.

²¹⁹ Issa Sesay, Transcript, 31 May 2007 p.39-41 (emphasis added).

²²⁰ Issa Sesay, Transcript, 31 May 2007, p.39.

29614

commander [was] in this place, in this area [he or she] was working under the commander in the area, **that IDU should report to that commander [in the area]**...that was how things had been working [even up through 1998 or 1999]”.²²¹

d. Certain Area Commanders Did Not Permit Reporting to Gbao

134. TF1-361 stated that during Superman’s period of control Gbao had no access to the IDU or the MPs (or any security agents) in Koinadugu District.²²²

135. This was confirmed by TF1-041, who testified that when Gbao came to Makeni in February 1999, he was unhappy at the revelation that members of the G5 and IDU had been under the control of Superman.²²³

2. *Procedure Followed When Sending Reports to Local Military Commander*

136. DAG-101, an IDU agent, stated: “After the investigation, [the IDU agent] would compile the reports and then they would make their recommendation and they will submit the report to the area commander of that particular area. If it's company, they will submit [it] to the company commander”.²²⁴

137. There were several examples in this trial of IDU agents, and more broadly, security units reporting to their local area commanders rather than to Augustine Gbao. DIS-069 explained that if an IDU agent in Pendembu had completed a crime investigation, he would approach the brigade/area commander, rather than anyone else in order to promptly effect an arrest.²²⁵ This would clearly have occurred without Gbao’s knowledge or input.²²⁶ One notes that Pendembu is just 17 miles (33 km) from Kailahun Town, where Gbao was mainly stationed from 1996-98.

138. This was affirmed by Issa Sesay himself, who stated that he would take action (if it needed to be taken) against RUF fighters himself, based on any report given to him by John Gavawo, the local IDU agent in Pendembu at the time.²²⁷

221 Issa Sesay, Transcript, 31 May 2007, p.39.

222 TF1-361, Transcript 19 July 2005, p.67.

223 TF1-041, Transcript, 18 July 2006, p.3.

224 DAG-101, Transcript 9 June 2008, p.96.

225 DIS-069, Transcript 23 October 2007, p.6.

226 DIS-069, Transcript 23 October 2007, pp.60-61.

227 Issa Sesay, Transcript 31 May 2007, p.43.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

139. TF1-041, [REDACTED] made a similar statement: “[b]ut between me and Prince Taylor... [the overall G5 commander based in Kailahun]²²⁸ because the distance was too far, you see, I had no radio station. I would just send it to the commander [on the ground]”.²²⁹

140. DAG-080 stated more generally that “[a]fter their investigation of molestation, maybe a soldier molest a civilian, the IDU will investigate and, when they investigate, they pass on the result to the command on the ground”.²³⁰ “There were matters that...were not supposed to be sent to the High Command, he [the area commander] can solve it, he can solve the problem, settle the problem”.²³¹ We submit there is evidence aplenty that having taken investigative issues into his own hands an area commander would frequently instruct the MP to arrest an individual and punish him.²³²

141. DAG-080 affirmed this, stating that the area commander would intervene “when a crime is done at the frontline and he doesn't want to—to remove that person from the frontline he can ask the MPs to punish that person”.²³³ DAG-048 also stated that IDU agents “were to send in reports. They observe situations they were, and compile reports about the happenings of that area”.²³⁴ “They write [reports] in secret and send it to the area commanders”.²³⁵ “You send these reports to the area commanders on the happenings on the field, the attitudes of combatants”.²³⁶

142. DIS-069 stated that “if the [overall unit commander] were not present in [a] particular area”, the IDU agent would report to their area commander. Action would then be taken within that particular area.”²³⁷

143. TF1-036 supported the position that military commanders had power to investigate, enforce and punish combatants. In discussing the G5, he testified:

“A. Well, the G5, they will make their own reports and they'll present it. All units do make their reports.

Q. And the commanders were expected to enforce these instructions as part of the

²²⁸ TF1-041, Transcript, 11 July 2006, p.16.

²²⁹ *Id.* at p.18.

²³⁰ DAG-080, Transcript 6 June 2008, p.23.

²³¹ DAG-080, Transcript 6 June 2008, p.66.

²³² DAG-080, Transcript 6 June 2008, pp.66-67.

²³³ DAG-080, Transcript 6 June 2008, p.69.

²³⁴ DAG-048, Transcript 3 June 2008, p.31.

²³⁵ DAG-048, Transcript 3 June 2008, p.31.

²³⁶ DAG-048, Transcript 3 June 2008, p.32.

²³⁷ DIS-069, Transcript 23 October 2007, p.47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

ideology of the RUF?

A. Yes.

Q. The commanders were supposed to report to G5 if those instructions were not followed?

A. Well, the G5 personnel would be on the mission, and the commander himself would be on the mission. So you, the G5, if you find out the soldiers are not working by that, it was your duty to inform the commander on the mission saying so and so and so was trying to mistreat the civilians. So the commander would be made aware.

Q. And the commander would be expected to report those facts to the high command?

A. Yes, those whom he feel that are above him, he will report to the high command. But if he knew that he could put it under control then he would".²³⁸

E. IDU Reports Received by Augustine Gbao

144. As overall IDU Commander Gbao would traditionally receive two types of IDU reports from his agents: those on action already taken by the local area commander, and those requiring his review prior to being passed to the High Command for recommendation.

1. Reports of Actions Already Taken

145. DAG-101 stated that "[s]o after addressing the issue, the IDU, whether WACs or the agent, the men, will write the report and send it to the head office, CO Gbao's office, for recordkeeping because that one, the minor crimes will be dealt with at the area level wherever the crime is committed, so the report will only be sent to the office for record purposes or referencing".²³⁹

146. IDU agents "write about what they see or observe; they report to the area commanders. But they will send a copy of that report to the unit overall commanders after the area commander has already taken action on these reports. They only send in copies of these reports to the headquarters for the information or understanding of their own commanders".²⁴⁰

147. Abu Bakr Mustapha testified openly on behalf of Issa Sesay and agreed that Gbao was receiving reports on actions taken already by local area commanders, rather than reports requiring that Gbao himself take action.²⁴¹

148. According to DAG-048, an MP, Gbao would receive reports on a "weekly or monthly basis".²⁴² These reports concerned investigations and, once again, actions already taken by other

²³⁸ TF1-036, Transcript 3 August 2005, pp.73-74.

²³⁹ DAG-101, Transcript 9 June 2008, p.97.

²⁴⁰ DAG-048, Transcript 3 June 2008, p.32.

²⁴¹ Abu Bakr Mustapha, Transcript, 14 January 2008, p.75.

²⁴² DAG-048, Transcript 3 June 2008, p.40.

commanders prior to Gbao's knowledge of the issue. DAG-048 stated that "[l]et's say for instance at the front line there was a report against a combatant, or a fighter, for negative behaviour—negative behaviour in the sense like looting or harassment of fellow soldiers, et cetera—that report would be sent to the area commander by his agent. Then the area commander would in turn call upon—would inform the MPs to effect the arrest or invite that person. Then they will investigate that and, if that person is found guilty, action will be taken against him by the area commander, and a copy of that report will be sent to Gbao at the headquarters".²⁴³

149. DAG-080 stated that weekly reports would frequently refer to action taken against soldiers by the area commander.²⁴⁴ He also stated that the IDU agent would pass the report on the ground to the area commander, because "he was above the security, the IDU. He was responsible for the District, the entire District, so everybody was under his command within that district".²⁴⁵ "The area commander will read the report and pass it on to the MP for action".²⁴⁶

2. IDU Reports Requiring Contribution from Gbao

150. It must be noted at the outset that reports requiring Gbao's contribution in his position as overall IDU commander were in the minority. DIS-157, [REDACTED] [REDACTED]²⁴⁷ agreed with the suggestion that Gbao received relatively few reports from IDU subordinates.²⁴⁸

151. The procedure concerning this type of report was as follows: an IDU agent sent a report to the IDU company commander. The IDU company commander "[s]ent this report to the IDU battalion commander...then the IDU battalion commander sent his report to the IDU district commander".²⁴⁹ "Then the IDU district commander sent his report to the overall IDU commander who was Augustine Gbao".²⁵⁰ These reports were then copied to the combatant battalion or brigade commander.²⁵¹

²⁴³ DAG-048, Transcript 3 June 2008, pp.41-42.

²⁴⁴ DAG-080, Transcript 6 June 2008, pp.70-71.

²⁴⁵ DAG-080, Transcript 6 June 2008, p.24.

²⁴⁶ DAG-080, Transcript 6 June 2008, p. 24.

²⁴⁷ Around 1996, DIS-157 became deputy area commander for Kailahun. He became the area commander and brigade frontline commander in 1998 and was based in Pendemba. DIS-157, Transcript 24 January 2008, p.11.

²⁴⁸ DIS-157, Transcript, 25 January 2008, pp.46-47.

²⁴⁹ DAG-080, Transcript 6 June 2008, p.47.

²⁵⁰ DAG-080, Transcript 6 June 2008, p.48.

²⁵¹ DAG-080, Transcript 6 June 2008, p.48.

152. DAG-101 characterised the investigative process in ten steps:²⁵²

1. Step 1: The criminal would be invited by the MP and placed into custody.
2. Step 2: The IDU will carry out the investigation.
3. Step 3: “When the investigation is being carried out, be it the female IDU or the male, when the investigation is carried out, the report has to be compiled”.
4. Step 4: “[w]ith recommendations from these people. From there, they will inform the area commander, that's the combatant commander”.²⁵³
5. Step 5: “After that, they will have to send the report to the—if it's a man, they will send the report directly to the district commander”.²⁵⁴
6. Step 6: “[H]e will view the report and make sure that the investigation was properly done and he in turn will send the report to the overall IDU commander...Augustine Gbao”.²⁵⁵
7. Step 7: Gbao “will again view the report and make sure that the different branches did their functions correctly. And after that, Gbao hasn't got anything. **He had no right to alter anything on that document**”.²⁵⁶
8. Step 8: Gbao would then send the report to the high command.²⁵⁷
9. Step 9: The High Command “will take his decision and send instructions if the punishment that is to be left—if that criminal was found guilty, if he was alleged to punishment then he will give the green light. He will give the order”.²⁵⁸
10. Step 10: The high command “will order to the commander Gbao for the MPs to carry out the punishment”.²⁵⁹

153. It is also significant to note that reports which left the local IDU agent's operational area may not necessarily have even reached Gbao. In Kailahun District, most IDU reports went no further than District level. These investigations were concluded without need for intervention by the Overall IDU Commander Gbao.²⁶⁰ In most cases where a local IDU agent required assistance from a more senior IDU officer he would be expected to contact the battalion or district-level IDU agent.²⁶¹

154. DAG-080 agreed with this construction. He stated “[w]hen the IDU agent within the

²⁵² DAG-101, Transcript 9 June 2008, pp.102-105.

²⁵³ DAG-101, Transcript 9 June 2008, p.103.

²⁵⁴ *Id.*

²⁵⁵ DAG-101, Transcript 9 June 2008, p.103.

²⁵⁶ DAG-101, Transcript 9 June 2008, pp.103-04 (emphasis added).

²⁵⁷ DAG-101, Transcript 9 June 2008, p.104.

²⁵⁸ DAG-101, Transcript 9 June 2008, pp.104-05.

²⁵⁹ DAG-101, Transcript 9 June 2008, p.105.

²⁶⁰ DIS-157, Transcript, 25 January 2008, p.35.

²⁶¹ DIS-157, Transcript, 25 January 2008, p.46.

company—the IDU agent within the company sent his report to the IDU commander within the company, the IDU company commander...[h]e copy the [combatant] company commander...of that battalion”.²⁶² “Then he sent his report against to the battalion IDU commander. That same battalion IDU commander copy the battalion commander. Then that—then the battalion IDU commander sent his report to the district IDU commander. That district IDU commander in turns copy the local—or how we call it the area commander. Then the district IDU commander now sends his final report to the overall IDU commander”.²⁶³

155. The Prosecution witness TF1-036 stated that Gbao was the IDU commander until May 2000. He reported to the battle group, who would report to the battlefield, who then would report to the leader.²⁶⁴

156. Even TF1-366, who attempted to offer highly incriminating testimony against the Third Accused (in a way, as described throughout this submission, that was less credible than almost any other witness in the case), agreed that IDU agents had no independent power to take action without consent from the High Command.²⁶⁵ We strongly aver that every statement made by TF1-366 is suspect; nevertheless, even he would not implicate Gbao as having the final word on IDU investigations.

157. DAG-101 described the power of Augustine Gbao to punish with crystal clarity. She stated “I don't feel Gbao was just giving punishments from his own consent. They were laid down punishments for major crimes and minor crimes. So the punishments were recommended according to the rules and regulations of the movement, not self instruction or self-punishment levied on people, no. People don't give punishments by themselves...[t]hat's why he submit the report to the high in command. He has to pass the order that such-and-such punishment should be given to such-and-such person for such-and-such crime”.²⁶⁶

F. Inherent IDU Weaknesses in Accomplishing its Tasks

158. IDU agents could not always adequately implement their duties. As discussed above, they faced harassment by many junior level fighters, had no power to punish at any level, could only advise and warn, held no command and control over fighters, were unarmed, and were inherently

²⁶² DAG-080, Transcript 6 June 2008, pp.47-48.

²⁶³ DAG-080, Transcript 6 June 2008, pp.48-49.

²⁶⁴ TF1-036 Transcript 28 July 2005, p.27.

²⁶⁵ TF1-366, Transcript, 17 November 2005, p.34.

²⁶⁶ DAG-101, Transcript 10 June 2008, pp.6-7.

29620

weakened insofar as they were a mere administrative unit.

1. IDU Agents Faced Harassment by Junior Fighters and Some Leadership

159. IDU Agents were routinely harassed by the combatants and some members of leadership. Agents on the frontline, for example, would sometimes have to hide (as well as submit secret reports) out of fear that their identity would be discovered.²⁶⁷ As stated by DAG-048, if they were to have sent the reports in the open, they “were going to be hunted for [] by the fighters”.²⁶⁸

160. DIS-149 stated that such fears made it similarly difficult for IDUs to investigate frontline activities.²⁶⁹ RUF combatants would often obstruct the progress of an investigation;²⁷⁰ they did not want the IDU to “pry into their business”.²⁷¹ Gbao was aware of the problem and would advise battalion commanders to allow IDU agents to investigate unobstructed.²⁷²

161. Even when the agents were at the frontline, their work may yet be hindered: combatants immediately realised when IDU operatives were preparing reports on their alleged criminal activities. This proved a major deterrent to such work being done efficiently or at all.²⁷³

162. This led to deeper problems: whilst each newly-captured village should immediately have received both IDU and MP representatives to ensure the welfare of civilians it was not always possible to achieve this.²⁷⁴

163. DAG-048 also described the rank and file resentment of “book” people. He testified that “[t]hey were very much overlooked...Securities were regarded as not fighters, but people with books and pens, and so they were very much overlooked...[t]hey were not popular”.²⁷⁵

164. DAG-048, in his testimony, stated that the IDU were not well-liked by the rank and file combatants “because of [their] reports. They said that the IDUs sent reports to the commanders against them and so they were not—they were not lik[ed] at all”.²⁷⁶

²⁶⁷ DIS-149, Transcript 5 November 2007, p.76.

²⁶⁸ DAG-048, Transcript 3 June 2008, p.31.

²⁶⁹ DIS-149, Transcript 6 November 2007, pp.16-17.

²⁷⁰ DIS-149, Transcript 6 November 2007, p.17.

²⁷¹ DIS-149, Transcript 6 November 2007, pp.18-19.

²⁷² DIS-149, Transcript, 6 November 2007, pp.39-40.

²⁷³ DIS-149, Transcript, 6 November 2007, pp.39-40.

²⁷⁴ DIS-124, Transcript 22 November 2007, pp.72-73.

²⁷⁵ DAG-048, Transcript 3 June 2008, p.47.

²⁷⁶ DAG-048, Transcript 3 June 2008, p.47.

2. *IDU Agents had No Power to Arrest*

165. Unlike the MPs, IDUs had no power to arrest.²⁷⁷ They could merely “write, advise and warn”.²⁷⁸ This applied equally to low level fighters as it did to higher-ranked commanders.²⁷⁹

3. *IDU Agents had No Command and Control Over the Fighters*

166. DIS-069 testified that IDU powers were limited by an absence of command or control over battalion commanders (and, by extension, brigade commanders as well as the High Command).²⁸⁰

167. As a result, it was clear that IDU agents also had no direct power whatsoever over military activities.²⁸¹

168. Conversely however, the military leadership did have command and control over the IDU agents. Effectively, this could effectively interfere with the IDU’s traditional chain of command. DIS-188 stated: “[a]ny senior officer can instruct the IDU officer to conduct the investigation into cases or crimes that have been reported”.²⁸²

4. *IDU Agents were not Armed*

169. An IDU’s personal authority was further diminished by the fact that unlike the MP he or she was not armed.²⁸³

G. Relationship Between IDU and Other Security Units

170. While various RUF units generally co-operated with each other, there was a general lack of cohesion during investigations unless they were conducted under the auspices of the Joint Security Board,²⁸⁴ which will be discussed in the next section.

171. The Overall IDU commander was naturally able to issue orders to his subordinate IDU agents;²⁸⁵ the same structure applied within the MP, G5 and IO units.²⁸⁶ It is important to stress that

²⁷⁷ DIS-149, Transcript, 5 November 2007, p.77; Transcript, 6 November 2007, p.7.

²⁷⁸ DIS-157, Transcript 25 January 2008, p.44.

²⁷⁹ DIS-157, Transcript 25 January 2008, p.44.

²⁸⁰ DIS-069, Transcript 23 October 2007, pp.43-44.

²⁸¹ DIS-069, Transcript 23 October 2007, p.50.

²⁸² DIS-188, Transcript 25 October 2007, pp.108-09.

²⁸³ DIS-069, Transcript, 22 October 2007, p.68.

²⁸⁴ DIS-149, Transcript 5 November 2007, p. 94.

²⁸⁵ DAG-048, Transcript 3 June 2008, p.36.

²⁸⁶ DAG-048, Transcript 3 June 2008, p.36.

on no account was the Overall IDU in charge of other security personnel within the RUF.²⁸⁷

172. It is equally important to stress that as Overall IDU commander, Gbao could not issue orders outside the IDU.²⁸⁸ Gbao had no direct power or control over DAG-048, [REDACTED] [REDACTED]²⁸⁹ Gbao's position gave him no more than the power to REQUEST certain actions be taken; however, it is likely that others in the RUF held the same informal right.²⁹⁰ Accordingly, Gbao had to approach the MP commander for permission to utilise one of his men.²⁹¹

III. Augustine Gbao as Overall Security Commander

173. Gbao was promoted to overall security commander ("OSC") by Foday Sankoh at Zogoda in 1996, contrary to the indictment's allegation that Gbao did not take the position until 1998.²⁹²

174. The Prosecution's theory that the title of overall security commander imbued Gbao with some great power at a level subordinate only to Foday Sankoh and Johnny Paul Koroma throughout the entire RUF and AFRC²⁹³ is similarly erroneous. The evidence in this case has, we submit, borne this out quite clearly.

175. We submit that even a superficial review of credible testimony in this case demonstrates that the Overall Security Commander position within the RUF held less power than an area commander.²⁹⁴ Evidence was given that the OSC could not, in fact, issue orders on any matter to a brigade or area commander.²⁹⁵ We submit that the Overall IDU commanders' power to advise²⁹⁶ was no different to the actual power held by the OSC.

176. It is unclear just how well known the OSC's title was. Significantly, neither DAG-111 nor DAG-110 actually knew that Gbao held that position.²⁹⁷ Whilst this may be merely anecdotal, the fact that two individuals reasonably close to Augustine Gbao in both Kailahun Town and in Makeni did not know his position lends immediate doubt to the Prosecution's naïve 2004 claim that Gbao

²⁸⁷ DAG-048, Transcript 3 June 2008, p.37.

²⁸⁸ DAG-080, Transcript 6 June 2008, p.21

²⁸⁹ DAG-048, Transcript 3 June 2008, p.33.

²⁹⁰ DAG-048, Transcript 3 June 2008, p.33.

²⁹¹ DAG-048, Transcript 3 June 2008, p.35.

²⁹² Indictment, para.32.

²⁹³ Indictment, para.32.

²⁹⁴ See, for eg, DIS-069 who stated that the area commander had more "responsibilities" than the overall security commander. Transcript 23 October 2007, p.49-50.

²⁹⁵ DIS-069, Transcript, 23 October 2007, p.50-51.

²⁹⁶ DIS-069, Transcript, 23 October 2007, p.51.

²⁹⁷ DAG-111, Transcript 19 June 2008, p.18; *also see* DAG-110, Transcript, 2 June 2008, p.140.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

was the third most powerful individual in the RUF at the time.

177. The following section reviews Gbao's responsibility as OSC and purports to demonstrate the significant limitations on his powers.

A. The Role and Responsibilities of the Overall Security Commander

178. Gbao's role as OSC was largely "ceremonial" in nature. DIS-069 volunteered as much under cross examination by Gbao's counsel when he said, *inter alia*:

"Q...In his role as overall security commander, did Augustine Gbao at any stage, to the best of your knowledge, have any power over the distribution of arms?

A. That, the name, of the security commander, **I believe it was just the ceremonial name [Gbao] had**, he carried, because I did not see him perform in that capacity, actually.

Q. What did you say, it was just a name?

A. Yeah, that was just a name, the ceremonial name he had. **Because he was in one place, he would stay the whole day in Kailahun. That was where he did everything.** So I did not really know his role as the security commander".²⁹⁸

179. The witness claimed the title invited scorn amongst the combatants:

"A. I mean, it's just a title; a name they gave to him.

Q. Did anybody else hold that view, who you spoke to? Did anybody else make that kind of comment to you or draw that same conclusion?

A. Yes. Like when -- when we were in the front line, we used to -- we had a place where we would sit and if we had a leisure time, if we had our wine to drink, we would discuss those things.

Q. Okay. I -- have you finished?

A. No. We would discuss on most of the characters of our commanders, our senior commanders.

Q. Okay. And what --

A. So most of the time we placed him in that category because he would not move to even visit us at the front line to know the security situation. He never did that. So that was what we were discussing".²⁹⁹

180. Similarly, DIS-188 also agreed with Gbao's counsel when it was suggested that OSC was a largely ceremonial title conferred on Gbao by Foday Sankoh.³⁰⁰ We submit that the powers inherent in the position "Overall Security Commander" should never be construed to mean that the overall RUF —G5, IDU, MP, IO and IDU—were required to submit reports to Gbao for action.³⁰¹

²⁹⁸ DIS-069, Transcript 23 October 2007, p.70 (emphasis added).

²⁹⁹ *Id.* at p.71.

³⁰⁰ DIS-188, Transcript 1 November 2007, pp. 99-101.

³⁰¹ DIS-188, Transcript 1 November 2007, p.99.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29624

181. This view was shared by DAG-080 who said that Gbao could not issue anyone with orders in his capacity as OSC.³⁰² DAG-101 testified the same.³⁰³ Moreover, DAG-080 stated that “[h]e hadn’t any additional responsibility. It was just a title given to him by the CIC [Commander-in-Chief], Foday Sankoh”.³⁰⁴

182. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

183. Augustine Gbao accepts the role of OSC entailed some responsibilities, but denies that this position exceeded the level of command and control that he held as overall IDU. Furthermore, the Prosecution adduced no evidence contrary to Gbao’s position that the extent of the OSC’s power was merely to advise the various security units to promote their efficiency. Further still, and critically, the Prosecution adduced no credible evidence that Gbao had ever issued any orders to these units during the war in that capacity.

1. Gbao's General Role as Overall Security Commander

184. Whilst Gbao would no doubt have enjoyed the approval and personal prestige bestowed by the title of OSC, it is difficult to see what impact he may have had on the day to day working lives of the security units (IDU, MP, G5 and IO) in that guise.

185. DAG-080 stated that the remit of the “[o]verall security commander...was just to oversee the work done by the various securities to make sure that they are doing their work properly”.³⁰⁵ This related to their duties “[t]o carry on security. To maintain—to make sure that security is being maintain within the movement”.³⁰⁶ DAG-101 opined that, much like his position as overall IDU commander “[Gbao] was responsible for defending the civilians” in his position as overall security commander.³⁰⁷ DAG-048 stated “[t]he title of Mr Gbao as overall security commander means he oversees the administrative setup of the RUF...he sees that the administration is going on perfectly, offices are functioning accordingly”. In context this included the IDU, MP, IO and G5 units, but,

³⁰² DAG-080, Transcript 6 June 2008, p.21.

³⁰³ DAG-101, Transcript 9 June 2008, p.110.

³⁰⁴ DAG-080, Transcript 9 June 2008, p.27.

³⁰⁵ DAG-080, Transcript 6 June 2008, p.84.

³⁰⁶ DAG-080, Transcript 6 June 2008, p.84.

³⁰⁷ DAG-101, Transcript 9 June 2008, p.111.

pursuant to the evidence of the several defence witnesses who claimed knowledge of the issue cannot possibly be taken to indicate that Gbao exercised any command and control over any other units than the IDU.

186. Likewise, there was no duty amongst combatant commanders to report to Gbao in his role as overall joint security commander. Reports would traditionally be made to the High Command.³⁰⁸ As DAG-080 succinctly put it “we don't report to the joint security commander because *we are all of the same assignment rank*. He was overall, Kaisuku [overall MP commander]³⁰⁹ was overall, Prince Taylor was overall [G5 Commander],³¹⁰ so we don't report to him”.³¹¹

187. In the same vein, DAG-048 unequivocally stated “Each [security unit] have their overall commanders, and these overall commanders were not reporting to Augustine Gbao directly”.³¹²

188. What the Gbao defence *does* accept is that whilst the overall unit commanders were not required to report to Gbao, he would often be *copied* on the reports traditionally sent to the High Command. DAG-048 recalled that Gbao “received reports from these units [G5, IO, and MP] as overall security commander; reports of such nature were sent to the leader. Only the *copies* of these reports were sent to Augustine Gbao as overall security commander”.³¹³

189. We acknowledge that during Prosecution cross examination DAG-048 *appeared* to concede that other unit commanders were, in fact, subordinate to Gbao. However, to avoid an erroneous impression of what DAG-048 meant, one must read what he said in its correct context. Close inspection of what DAG-048 actually said on 3rd June reveals unequivocal evidence that, as OSC, Gbao could not issue orders to other overall unit commanders, each of whom have their own powers. Given that assertion, DAG-048's concession that the overall unit commanders were subordinate to Gbao should be interpreted narrowly in the sense that, while subordinate in terms of title, the overall unit commands were anything but subordinate when it came to taking orders. What is clear from the following extract is that the other unit commanders retained their autonomy whatever Gbao's status as OSC: all Gbao could actually do was render administrative advice:

“Q. And would I therefore be correct to say that when Gbao made requests to overall

308 DAG-080, Transcript 6 June 2008, pp.50-51; 81.

309 *Supra*, para. 83.

310 *Supra*, para. 139.

311 DAG-080, Transcript 6 June 2008, p.81 (emphasis added).

312 DAG-048, Transcript 5 June 2008, p.9.

313 DAG-048, Transcript 3 June 2008, p.133.

unit commanders these would be honoured, as far as you know?

A. As long as it is in the interests of the revolution, if such request is meant to deal with violators who has violated the rule of law of the revolution, yes.

Q. But what I would suggest to you is that **these were Gbao's orders, they were not just requests**; what do you have to say about that?

A. **I would not agree with you**, My Lord.

Q. But would you agree with me that in the RUF hierarchy the overall unit commanders would have been subordinate to Augustine Gbao in his capacity as overall security commander?

A. **The overall unit commanders have their own powers.** Augustine Gbao, as overall security commander, was just to oversee their operations and see that they are functioning well.

Q. So what I'm suggesting to you, Mr Witness, is that when he is performing those duties as overall security commander, to oversee their operations, **they are subordinate to him**; what do you say about that?

A. The unit commanders, you mean?

Q. Yes, please.

A. **Yes, I will agree to that.**³¹⁴

190. Mr Justice Boutet sought further clarification on this answer: DAG-048 stated that the overall security commander oversaw the other security units in the RUF.³¹⁵

191. As we submit above, it is clear that what DAG-048 meant here was that, in any event, Gbao was unable to order other unit commanders to do anything. Whatever interpretation is given to DAG-048's use of the word "oversee" in its context above, we submit the Prosecution are left with the inescapable fact that so far as DAG-048 saw things, Gbao was, in practice, unable to issue other units with orders.

192. Personal prestige and respect-yet without enhanced power cannot, we submit, equate to proof that Gbao was, in practical effect, the overall commander of the entire RUF security network. We submit that Sankoh bestowed the title of OSC upon Gbao in much the same spirit as he named Gbao as chairman of the Joint Security Board of Investigation (see below): namely, according to DAG-080, that Gbao was the only overall unit commander who was a Vanguard.³¹⁶ Moreover, the contempt that Gbao attracted from top to bottom of the RUF by virtue of his assignment hardly lends itself to a suggestion of command and control vested in him.

2. Augustine Gbao's Role as Overall Security Commander in Times of Peace

193. We submit that Gbao's role developed when he arrived in Makeni in February 1999.

³¹⁴ DAG-048, Transcript 3 June 2008, pp.128-29.

³¹⁵ *Id.* at p.129.

³¹⁶ DAG-080, Transcript 6 June 2008, p.80.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

DAG-080 explained that by that time the RUF had revised its aspirations. He stated that “[b]y the end of, by the early days of '99, the RUF thought that they will not win the war because from '91 until that time, if we were going to win the war we would have won it before that time, so we thought it fit it was enough for us...we were transforming the RUF into [a] political party...to gain power...[t]hrough the ballot.”³¹⁷

194. Gbao went to Makeni because “during that time, 1999, in Makeni in particular, soldiers were behaving disorderly. Soldiers of Superman, Kailondo, they were behaving disorderly, so the High Command was by then Mosquito, Sam Bockarie, thought it fit to send Augustine Gbao there as a matured man, and as a security, to really go and tell the people now to make sure that—to tell the people that we are now going to move from—from gun, to ballot, to election. So he was sent there for that, so his position as Joint Security, in fact, got widened a little bit because he was now involved in politics, in preaching politics, talking about how people should forget the arm and they concentrate on politics...talking to civilians so that we can gain population from the civilians, talking, doing things how—doing things so that we can also gain support from the UN...and the like. That was what Sam Bockarie sent him there for, and when he went there, really, there was peace in the town. People were now going about doing their business up and down”.³¹⁸

195. DAG-047 stated that he believed “Augustine's role as a security commander [in Makeni] was a sort of liaison officer between him and the civilians, and he was more or less a sort of supervisor to see that most of the units functioned and received reports, and then later to transfer them somewhere to somebody superior to him”³¹⁹ The witness did not believe Gbao to have sufficient power “as to take decision”.³²⁰ Nor did he believe that Gbao had the power to issue orders to either G5, IO, or MP.³²¹

196. We assume that the Prosecution introduced to Exhibit 378 to show that Gbao was receiving MP reports. We wish to emphasise that while the Prosecution sought to impeach Defence evidence that Gbao never received documentary reports from other security units, the exhibited document merely amounts to a request for Gbao's opinion and advice. This happens to be entirely consistent with what DAG-048 said within the excerpt cited above. With that in mind, we submit it can hardly be argued that the officers named in Exhibit 378 were operating under Gbao's command and

³¹⁷ DAG-080, Transcript 6 June 2008, p.84.

³¹⁸ DAG-080, Transcript 6 June 2008, pp.85-86.

³¹⁹ DAG-047, Transcript 17 June 2008, p.3.

³²⁰ DAG-047, Transcript 17 June 2008, p.3.

³²¹ DAG-047, Transcript 17 June 2008, pp.5-6.

control. This was the only document submitted in support of the Prosecution's otherwise unsubstantiated claim that the overall security commander regularly received documents from other units. We trust that the Prosecution will pause before suggesting that a single letter merely requesting Gbao's **advice** can amount to evidence of guilt. Perhaps the letter's origin could be more accurately explained as no more than a lower-level MP commander's attempt to seek an opinion from an educated and experienced former police officer.

197. The Prosecution also employed Exhibit 378 and 379 to demonstrate that Gbao was receiving reports from the IO. [REDACTED]

[REDACTED].³²² We would submit that even if the document were genuine it hardly demonstrates that Gbao had any command and control over the IO, especially considering the opinion of DAG-080.

IV. The Joint Security Board of Investigations

198. As overall security commander, Gbao was the titular chairman of the Joint Security Board of Investigations.³²³ The Joint Security Board of Investigations (JSBI) was designed to create a framework for investigations when more than one unit was investigating a particular crime. This promoted transparency and co-operation between the various units, encouraged trust between unit commanders, and provided the various unit officers an opportunity to monitor the actions and investigations of the other units.³²⁴ As stated by Prosecution witness TF1-367, the Joint Investigation Board was created by Sankoh to allay suspicions between the various units and to promote a feeling of inclusivity.³²⁵ However, the board did not have the power to interfere in the internal affairs of the various units. By the same token, units had no power to interfere with the military command structure in their area.³²⁶

199. Joint security boards were created to investigate alleged serious crimes committed by RUF fighters.³²⁷ These traditionally included allegations of innocent killing, rape, and the burning of houses.³²⁸ "The Joint Security Board of Investigation would be set on crimes of serious nature, for

³²² DAG-080, Transcript 9 June 2008, pp.33-34.

³²³ DIS-188, Transcript 1 November 2007, p.34.

³²⁴ DIS-188, Transcript 1 November 2007, pp.31, 33; *also see* DAG-101, Transcript 9 June 2008, p.107.

³²⁵ TF1-367, Transcript 26 June 2006, p.59.

³²⁶ *Id.*

³²⁷ DIS-069, Transcript 22 October 2007, p.69.

³²⁸ DAG-048, Transcript 3 June 2008, p.54.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

example, killing innocently, raping, and so on...”³²⁹ DIS-188 stated that JSBIs were “[r]esponsible to investigate cases that are being reported...[the JSBI] investigates major cases, like rape, robbery, harassment...[a]rson and desertion, are some of the crimes that are investigated”.³³⁰

A. Creation of Joint Security Boards

200. The Leader, Battlefield commander, and Battlegroup commander had the power to instigate Joint Security Boards of Investigation.³³¹ **Gbao, as overall joint security commander, could not create a board. Neither did Gbao, in his role as overall IDU commander, have the power to create a board.**³³² Nor did area or unit commanders have this authority.³³³ The decision invariably came straight from the High Command. Issa Sesay confirmed as much when cross examined by counsel for Gbao.³³⁴

B. Composition and Location of the Joint Security Boards of Investigation

201. JSBIs were constituted by representatives from the MP, IDU, IO, and G5.³³⁵ DAG-101 stated that Black Guards also served occasionally.³³⁶ Additionally, overall unit commanders might appoint representatives to sit on a board.³³⁷

202. A preliminary investigation usually took place once a JSBI had been convened, followed by a written report laid before a full JSBI meeting.

203. “Normally [JSBIs] meet at the [Defence Headquarters].” But, “[i]f it is done within that area, [the JSBI] meet there. Or sometimes we meet at the battalion level, if it is done there”.³³⁸

C. Procedure and Practices of Joint Security Boards

204. The JSBI operated in a fairly formalised manner once a complaint had been made to the MP;³³⁹ the MP’s arrest of the suspect would follow.³⁴⁰ According to DAG-048, “[a]fter effecting an

³²⁹ DAG-048, Transcript 3 June 2008, p.54.

³³⁰ DIS-188, Transcript 25 October 2007, pp.103-04.

³³¹ DAG-080, Transcript 9 June 2008, p.37.

³³² DAG-080, Transcript 6 June 2008, p.71.

³³³ DAG-080, Transcript 6 June 2008, p.71.

³³⁴ Issa Sesay, Transcript 1 June 2007, pp.7-8.

³³⁵ DAG-048, Transcript 3 June 2008, p.54.

³³⁶ DAG-101, Transcript 9 June 2008, p.108.

³³⁷ DAG-080, Transcript 6 June 2008, p.74.

³³⁸ DAG-080, Transcript 6 June 2008, p.74.

³³⁹ DAG-048, Transcript 3 June 2008, p.55.

³⁴⁰ DAG-048, Transcript 3 June 2008, p.55.

arrest, the arrestee or the culprit would be sent to this board of investigation to be investigated".³⁴¹

205. According to DIS-188, each unit commander would usually delegate investigatory work to named subordinates who would in turn submit their findings to the JSBI in order that recommendations could be made as to whether or not RUF laws had been infringed. These findings were then relayed to the RUF High Command, copying the other authorities.³⁴² DIS-188 also stated that the final determination of a JSBI would usually lie with the chairman of that particular board.³⁴³ The chairman could be from any unit.³⁴⁴

206. Specifically, DAG-080 stated that once the report was ready and its recommendations available, "it was formalised by the signature of all joint securities who will be present at the board. They all sign...[t]hey come up with the—with the document to the overall security..."³⁴⁵

207. The "unit representatives, after the investigation, they will all sit down and write their individual reports to their unit commanders".³⁴⁶ Overall unit commanders could **not** intervene on the report's recommendations.³⁴⁷

208. After the investigation, the findings and recommendations would sometimes be sent to the Leader through Augustine Gbao.³⁴⁸ DAG-101 stated that Gbao would ensure the "various units did the investigation correctly, and then he will pass the report to the high in command, and he [the High Command] will have to take his decision".³⁴⁹ The High Command would usually pass such an order orally.³⁵⁰

209. Importantly the JSBI findings were often not relayed to the High Command via Augustine Gbao. DIS-149 testified that the report would only go to the overall security commander if the brigade commander of the particular area was not available.³⁵¹ Many Prosecution exhibits do

341 DAG-048, Transcript 3 June 2008, p.55.

342 DIS-188, Transcript, 1 November 2007, p.34. Note, however, that this is not always the case. In fact, it could possibly have only been a matter of courtesy that a copy was sent, and not a firm rule. See Exhibit 107, which is a report from the Joint Security Board that Gbao did not receive a copy.

343 DIS-188, Transcript 25 October 2007, p.111.

344 *Id.*

345 DAG-080, Transcript 6 June 2008, p.79.

346 DAG-101, Transcript 9 June 2008, pp.113-114; also see DAG-080, Transcript 6 June 2008, p.78.

347 DAG-080, Transcript 6 June 2008, p.79.

348 DAG-048, Transcript 3 June 2008, p.54; also see DAG-048, Transcript 3 June 2008, p.58; also see DAG-080, Transcript 6 June 2008, p.81.

349 DAG-101, Transcript 9 June 2008, pp.109-10.

350 DAG-101, Transcript 10 June 2008, p.6.

351 DIS-149, Transcript 5 November 2007, pp.80-81.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

demonstrate this (discussed below).

210. Where the High Command disagreed with a JSBI recommendation of guilt, “they will release that person”.³⁵² If the High Command supported such a finding, he “will send orders to the Joint Security Commander that the investigation done by the board, the recommendation should be carried on. He will send it to the Joint Security Commander. Then the Joint Security Commander will in turn request the MP to carry on the punishment”.³⁵³ *This was not the only method to inform and punish or release the detainee, however.*

211. [REDACTED]

[REDACTED] offered another scenario of reporting to the MP. He stated that “the higher quarter would take decisions upon the [JSBI] report. If disciplinary action needed to be taken then the battle field commander would instruct the military police”.³⁵⁴

212. Thereafter, the MP was required to carry out the action instructed by the leader. If he failed to do so, “Mr Gbao will write and—will write under one sort of warning or advice to the MP as to take that matter seriously. If the MP failed, then Mr Gbao will have to contact the leader again for final instruction on the matter”.³⁵⁵ According to TF1-371, the same applied to brigade commanders. TF1-371 claimed that Gbao had no authority to act against any brigade commander who had failed to follow Bockarie’s recommendation. The most he could do was inform the leadership.³⁵⁶ TF1-367 testified to the same effect, in that if the IDU discovered a problem in implementation it could inform the area or brigade commander and recommend measures to be taken. The final decision would, however, lie with the area/brigade commander. All an IDU agent could do in the face of continued inaction would be to write to the battlefield commander (or Sankoh) explaining the situation.

D. Important Additional Notes on Joint Security Boards

213. The Overall Security Commander could not overrule a JSBI recommendation³⁵⁷ or alter or amend it before relaying it to the High Command.³⁵⁸

³⁵² DAG-080, Transcript 6 June 2008, p.83.

³⁵³ DAG-080, Transcript 6 June 2008, p.83.

³⁵⁴ TF1-036, Transcript, 3 August 2005, p.80.

³⁵⁵ DAG-048, Transcript 3 June 2008, p.62; *also see* DAG-101, Transcript 9 June 2008, p.113.

³⁵⁶ TF1-371, Transcript 1 August 2006, pp.144-145.

³⁵⁷ DAG-048, Transcript 3 June 2008, p.58.

³⁵⁸ DAG-080, Transcript 6 June 2008, p.82; *also see* DAG-101, Transcript 9 June 2008, p.112.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

214. Augustine Gbao similarly had no power to intervene in a Joint Security Board's ongoing investigation.³⁵⁹

215. Nor could Gbao make further recommendations as OSC.³⁶⁰

216. Sometimes the overall unit commanders would partake in a JSBI. “When sometimes the—the circumstances involve—would be a little bit greater, a greater offence.³⁶¹ However, within the IDU, “Most times the [district] IDU chaired the JSBI”.³⁶²

217. No JSBI was ever convened to investigate allegations of forced marriage.³⁶³

218. There is no evidence to support the Prosecution's suggestion that Gbao could somehow instruct the panel on the punishment it should impose. This was a typical example of the Prosecution's continual habit of making assertions of fact during cross examination of Defence witnesses whilst having no evidence in support- a reprehensible practice which at the bar of England and Wales would merit a sharp rebuke from the Judge, since it necessarily misleads the jury by implying that the Prosecution had an evidential basis for an assertion when the reverse was true.

219. Ongoing JSBIs were often interrupted, either through supervening events in the war or the absconding of suspects.³⁶⁴

E. Augustine Gbao's Role in the Joint Security Boards

220. Aside from his ceremonial chairmanship of the JSBI (evidenced by others holding de facto chairmanship of individual boards)³⁶⁵, Gbao had little if any involvement with case investigations. DIS-188 stated that Gbao was personally involved in only two investigations: the killing of Jah-Glory on the Bunumbu training base, and allegations made against Kennedy (for which Gbao was

³⁵⁹ DAG-080, Transcript 6 June 2008, p.82.

³⁶⁰ DAG-048, Transcript 3 June 2008, p.61.

³⁶¹ DAG-080, Transcript 6 June 2008, p.73.

³⁶² DAG-101, Transcript 10 June 2008, p.5.

³⁶³ DAG-080, Transcript 9 June 2008, p.37.

³⁶⁴ DIS-149, Transcript 6 November 2007, p. 8.

³⁶⁵ For example, see Exhibit 44, where Major AS Kallon serves as Joint Security Chairman; *also see* DAG-101, Transcript 10 June 2008, p.5, where DAG-101 states that Francis Musa normally served as Chair in Joint Security Board investigations.

molested by Bockarie).³⁶⁶

221. According to DAG-080 Gbao was appointed OSC because he was a Vanguard³⁶⁷ and because he was better educated generally and in RUF ideology in particular than Prince Taylor, the G5 overall commander who may have been the only other contender for the position in 1996.³⁶⁸

F. Exhibited Joint Security Board Cases Demonstrate Gbao's Limited Role

1. DAG-101's case

222. DAG-101 participated in one JSBI. She stated that “I witnessed an innocent killing matter in Giema and the matter was investigated and we found the doer—we found him guilty of the crime and the information was sent to the leader, by then Foday Sankoh, and the punishment was left on the doer”.³⁶⁹ The punishment was execution.³⁷⁰

2. Exhibit 380

223. This ‘Death Warrant’ was presumably put to DAG-080 as an attempt by the Prosecution to suggest that Gbao was ordering punishments unilaterally, illustrative of a powerful autonomy to act without reference to his superiors. DAG-080 reminded Prosecution counsel that, in fact, the document referred to ‘the panel’ rather than to Gbao passing the order to execute alone.³⁷¹ Clearly, we submit, the death warrant was nothing more than a reflection of what had been ordered from above: presumably by Bockarie, following a JSBI’s recommendation. There is certainly nothing in the document to gainsay that suggestion. DAG-080 was adamant that Gbao did not pass the order himself, stating “[I]t must have been done by the recommendation of the joint security”.³⁷² “If [redacted] were...within that particular panel of investigation, that would have been the order or the—recommendation I would have given. If even I were to write this type of document, I would have written almost the same because Alusine Kamara went against the—the ideology of the—one of the serious ideology of the RUF...I want to believe this document was from Augustine Gbao through the joint investigation. What he received from the panel. What he received from the joint security panel is what he has also recommended”.³⁷³

³⁶⁶ DIS-188, Transcript, 1 November 2007, p.101.

³⁶⁷ DAG-080, Transcript 6 June 2008, p.80.

³⁶⁸ DAG-080, Transcript 6 June 2008, p.81.

³⁶⁹ DAG-101, Transcript 9 June 2008, p.108.

³⁷⁰ DAG-101, Transcript 9 June 2008, p.108.

³⁷¹ DAG-080, Transcript 9 June 2008, pp.42-43.

³⁷² DAG-080, Transcript 9 June 2008, p.43.

³⁷³ *Id.*

224. It is important to note that “an Accused’s signature on...a document may not necessarily be indicative of actual authority to release as it may be purely formal or merely aimed at implementing a decision made by others”.³⁷⁴

3. *Exhibit 107*

225. Exhibit 107 also refers to a Joint Security Board investigation sitting in Kono. Importantly, the document makes no mention of Gbao: nor is it signed by Gbao or-significantly, we suggest- is it copied to him. It was, in fact, sent by the JSBI in Kono directly to Peter Vandi, the “overall brigade commander”.

4. *Exhibit 44*

226. Exhibit 44 is a letter written by Major AS Kallon to Sam Bockarie detailing his Joint Security Board investigation. Three important points support the position of the Third Accused in this Exhibit. Firstly, Major AS Kallon explains the board’s mandate clearly in paragraph 3 as to “investigate, evaluate and recommend” for the High Command’s review and instruction.³⁷⁵ Secondly, one recalls the Prosecution’s suggestion during cross examination of Gbao witnesses that Gbao was invariably the chairman of every JSBI that was convened. This document, naming Major AS Kallon as chairman of this particular JSBI, mocks that theory and is another illustration of how utterly confused the Prosecution case against Gbao really is.³⁷⁶ Thirdly, Augustine Gbao’s name is again not mentioned in this document. One can draw one’s own conclusions as to Gbao’s actual involvement in these boards. The reality, we suggest, is that JSBIs were organised on a far more spontaneous, ad hoc basis according to the wartime conditions prevailing in the RUF zones at the time.

5. *Exhibit 80*

227. This contains an instruction from the fourth battalion G5 commander (name unknown) to various RUF staff being investigated for wrongdoings. Again, there is no reference to Gbao’s involvement in this matter. This document is significant because it originates from Kailahun (town or district is not clear). Significantly, it was approved by the local MP commander. Gbao is not named.

³⁷⁴ *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-T, Judgement, Trial Chamber, 26 February 2001, para. 421 (“Kordic and Cerkez Trial Judgement”).

³⁷⁵ Exhibit 44, para. 3.

³⁷⁶ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

6. *Exhibit 264*

228. This also refers to a Joint Security Board investigation, the result being submitted to the Deputy Overall Security Commander. Corroborative of DAG-080, it is signed by Gbao as Overall IDU commander, in conjunction with signatures by the overall IO and MP commanders.

7. *Exhibit 268*

229. Again resulting from a JSBI, this document was sent to a recipient person other than Gbao, who is referred to only as being copied, along with 6 other RUF groups.

8. *Exhibit 271*

230. This document purports to have resulted from a JSBI which appears not to have followed the usual procedures. Instead, it is in the form of an emergency report from Makeni. It is important to note that whilst the local IDU and MP commanders signed this document, Gbao did not.

231. We submit these documents are not probative for the reasons given in our commentary above. In relation to the death warrant, we assume the Prosecution would have challenged the testimony of numerous Defence witnesses (which included those called on behalf of Sesay) if they were seriously asserting that Gbao had the power to order executions unilaterally. The Prosecution never suggested that Gbao had such power- not even to the witnesses to whom the exhibit was shown.

F. The People's Court Handled the Most Serious of Alleged Crimes

232. The People's Court was "[t]he most supreme court of the RUF."³⁷⁷ DAG-080 stated that "[i]t was quite different from the Joint Security Board of Investigation. That was the most top court within the RUF".³⁷⁸ It handled the most serious offences.³⁷⁹ [REDACTED]

[REDACTED]³⁸⁰ Unlike the JSBI, the People's Court tried both civilians and soldiers.³⁸¹

233. The judicial procedure was different to that of the JSBI. In the People's Court, "[t]he leader will appoint the chairperson. The High Command, they will appoint the chairperson of the court".³⁸²

³⁷⁷ DAG-080, Transcript 6 June 2008, p.72.

³⁷⁸ DAG-080, Transcript 6 June 2008, p.62.

³⁷⁹ DAG-080, Transcript 6 June 2008, p.72.

³⁸⁰ TF1-168, Transcript 31 March 2006, p.58.

³⁸¹ DAG-080, Transcript 6 June 2008, p.62.

³⁸² DAG-080, Transcript 6 June 2008, p.62.

The investigation was carried out by **both** civilians and soldiers.³⁸³ The panel (of seven) was selected by the chairman.³⁸⁴

V. Punishment in the RUF

234. Reference has been made above to this topic. However, key questions remain. An important issue in this case has been whether Gbao had the power to punish an RUF soldier for offences against RUF law. The Prosecution have sought through cross examination of Gbao witnesses to establish that Gbao did hold such power, in order to establish, by the same token, that a degree of command and control was vested in him. There is an uncomfortable irony here: on the Prosecution's analysis if Gbao were found to be upholding law and order (by virtue of administering punishments) he must, *a fortiori*, have a degree of command and control upon which the Prosecution may see fit to plead his guilt upon the command responsibility mode of liability. Conversely, we anticipate there will be areas in this case (the killing of the Kamajors springing immediately to mind) where Gbao may be impugned for failure to prevent or punish. To a critical mind it might appear that Gbao was damned if he did and damned if he didn't order punishments unilaterally.

235. We continue to submit that, with the exception of on-the-spot corporal punishment for minor or anti-social offences Gbao had no power to unilaterally punish whatsoever.

1. *Minor Crimes Punished Informally*

236. By virtue of a commander's seniority within the RUF movement, Gbao had informal powers to prevent and punish minor misdemeanours on the spot. We submit there was nothing unusual about this. DAG-080 stated "[i]f a soldier is found committing minor offences like—sometimes insulting a civilian or insulting a High Command or a senior ranking officer or sometimes just found taking food from a civilian like that, you know, those were minor offences".³⁸⁵

237. The type of corporal punishment meted out varied from rolling on the ground to being ordered to perform press-ups. Occasionally it could extend to a "few lashes".³⁸⁶

238. It would appear this 'power' was vested in any combatant of rank, almost as a social duty:

³⁸³ DAG-080, Transcript 6 June 2008, pp.62-63.

³⁸⁴ DAG-080, Transcript 6 June 2008, p.63.

³⁸⁵ DAG-080, Transcript 6 June 2008, p.54, 56.

³⁸⁶ DAG-080, Transcript 6 June 2008, p.55.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

DAG-080 stated that “[I]f I come across a soldier harassing a very little boy, I will just say hey you, stop that. Come and roll...[I]leave that small boy...press-up...and I move”.³⁸⁷ There is no formal procedure followed, it just happens in the moment. There is no investigation.³⁸⁸

a. Gbao's Power to Order Punishments in Makeni

239. DAG-047 related a story of losing his hunting gun. Gbao had one of his men find a soldier named “Put Fire”. When he was caught Put Fire was allegedly beaten, although upon whose authority is unclear. The officer who was “behind him” was arrested. Gbao retrieved and handed back the gun.³⁸⁹ According to DAG-047, the investigation into this relatively minor matter was done by “Robin White”. The witness stated that “I want to believe [Robin White] was part of the IDU because he did the minor investigations and report[ed] certain things to Mr Gbao, but I don't know exactly”.³⁹⁰

240. He continued “[T]he punishment, [it] had a limit. There was certain times when a report went to him; he [would] investigate”.³⁹¹ According to DAG-047, when Gbao ordered a punishment, it would be carried out, but only “with a minor, minor punishments. He orders minor punishments...like beating”.³⁹² If the alleged crime was more severe, “he prepared a report and sent it to the authorities. That was what I was able to understand. So whatever came to him I think he had a limit where to stop. That sometimes investigating if he felt it was within his power to punish the person he did. If not, then he forwards a report”.³⁹³

³⁸⁷ DAG-080, Transcript 6 June 2008, pp.55-56.

³⁸⁸ DAG-080, Transcript 6 June 2008, p.56.

³⁸⁹ DAG-047, Transcript 16 June 2008, p.85.

³⁹⁰ DAG-047, Transcript 16 June 2008, p.85.

³⁹¹ DAG-047, Transcript 17 June 2008, p.4.

³⁹² DAG-047, Transcript 17 June 2008, p.34.

³⁹³ DAG-047, Transcript 17 June 2008, p.4.

I. Introduction

A. General Rule

241. It is established law at the Special Court for Sierra Leone that “[w]here no guidance is given by the Rules, the Trial Chamber, pursuant to Rule 89(B) of the Rules, [will assess] the evidence in such a way as will best favour a fair determination of the case and which is consistent with the spirit of the Statute and the general principles of law.”³⁹⁴

B. Presumption of Innocence

242. An Accused shall be presumed innocent until proved guilty.³⁹⁵ This presumption places on the Prosecution the burden of establishing the guilt of each Accused, a burden which remains on the Prosecution throughout the entire trial.³⁹⁶ The guilt of the Accused must be proved beyond reasonable doubt.³⁹⁷ Proof beyond reasonable doubt has to be established, on the basis of the whole of the evidence, in respect of every element of the crime and the Accused's responsibility thereto, and for each count against each of the Accused.³⁹⁸ Each fact on which the Accused's conviction is based must be proved beyond a reasonable doubt.³⁹⁹

243. The ICTY Appeals Chamber has held that “[t]he difficulty of obtaining all relevant evidence, so inherent in the cases that come before this Tribunal, cannot be permitted to reduce the Prosecution's burden of proving the guilt of the accused to one below the unassailable standard of proof 'beyond reasonable doubt'”.⁴⁰⁰

244. It is established that when more than one inference was reasonably open from the facts, especially one inconsistent with the guilt of the Accused, the onus and the standard of proof require that an acquittal be entered in respect of that particular count.⁴⁰¹

³⁹⁴ *Prosecutor v. Kamara, Brima and Kanu*, Case No. SCSL-04-16-T, Judgement, Trial Chamber, 20 June 2007, para. 96. ('AFRC Trial Judgement'). See also *Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgement, Trial Chamber, 2 August 2007, para. 252. ('CDF Trial Judgement')

³⁹⁵ CDF Trial Judgement, para. 254; AFRC Trial Judgement, para.97.

³⁹⁶ CDF Trial Judgement, paras. 254 and 287; AFRC Trial Judgement, para.97.

³⁹⁷ CDF Trial Judgement, para. 254; AFRC Trial Judgement, para. 98.

³⁹⁸ AFRC Trial Judgement, para. 98.

³⁹⁹ CDF Trial Judgement, para.254.

⁴⁰⁰ *Prosecutor v. Kupreskic et al*, Case No. IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001, para. 190. ('Kupreskic Appeals Judgement')

⁴⁰¹ AFRC Trial Judgement, para. 98.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

C. Hearsay Evidence

245. Even though hearsay evidence is admissible, it has been the practice of the Special Court for Sierra Leone to carefully examine such evidence before determining whether to rely on it, taking into account that its source has neither been tested in cross-examination nor been the subject of an oath or solemn declaration.⁴⁰²

D. Circumstantial Evidence

246. In cases where it is necessary for the Trial Chamber to resort to circumstantial evidence in proof of a fact at issue, it needs to consider whether there is any other reasonable conclusion rather than that which leads to a finding of guilt.⁴⁰³ If such a conclusion is possible, the Chamber has to err on the side of caution and to adopt the explanation which best favours the Accused.⁴⁰⁴

E. Corroboration

247. It is established in the case law of international criminal tribunals that the testimony of a single witness on a material fact does not require corroboration.⁴⁰⁵ However in such case, the evidence of a single witness has been examined with particular care and in light of the overall evidence adduced before attaching any weight to it.⁴⁰⁶

248. Corroboration does not, however, establish the credibility of those testimonies;⁴⁰⁷ and cannot be taken as confirmation that the alleged events took place.⁴⁰⁸

II. Assessment of Witness Evidence

249. It is the responsibility of the Trial Chamber to resolve any inconsistencies that may arise

402 CDF Trial Judgement para. 264; AFRC Trial Judgement para. 100. See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para.136 ('Akayesu Trial Judgement'); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement, Trial Chamber, 20 January 2000, para.51 ('Musema Trial Judgement'); *Prosecutor v. Kajelijeli*, Case No. ICTR- 98-44A-T, Judgement, Trial Chamber, 1 December 2003, para. 45 ('Kajelijeli Trial Judgement').

403 CDF Trial Judgement, para. 255. See also *Prosecutor v. Delalic et al.* "Celibici", Case No. IT-96-21-A, Judgement, Appeals Chamber, 20 February 2001, para.458 ("Celibici Appeals Judgement").

404 CDF Trial Judgement, para. 255.

405 *Prosecutor v. Kamara et al.*, Case No. SCSL-04-16-A, Judgement, Appeals Chamber, 22 February 2008, para. 129 ('AFRC Appeals Judgement'); CDF Trial Judgement, para. 265; AFRC Trial Judgement para. 109. See also *Akayesu* Trial Judgement, para. 135; *Kajelijeli* Trial Judgement, para. 43.

406 CDF Trial Judgement Para. 265; AFRC Trial Judgement para. 109.

407 *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement, Appeals Chamber, 16 November 2001, paras.37-38 ("Musema Appeals Judgement"); *Kajelijeli* Trial Judgement, para. 43.

408 *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, para.70 ("Kayishema Trial Judgement").

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

within and/or amongst witnesses' testimonies.⁴⁰⁹ A Trial Chamber must look at the totality of the evidence on record in evaluating the credibility of a witness.⁴¹⁰

A. Special Considerations

250. The possibility that any observations made by the witnesses at the relevant time may have been affected by terror or stress has also been taken into account by the Trial Chamber. While these circumstances do not necessarily mean that such evidence is not reliable, the Trial Chamber has to weigh it with particular scrutiny.⁴¹¹

251. In relation to witnesses involved in the commission of crimes who could be considered as co-perpetrators or accomplices, a trier of fact has to exercise particular caution in examining every detail of the witness's testimony.⁴¹² In assessing the reliability of accomplice evidence the main consideration for the Trial Chamber should be whether or not the witness has an ulterior motive to testify.⁴¹³

252. Testimony punctuated by evasiveness and reluctance (to self-incriminate) have been found to reduce a witnesses' credibility.⁴¹⁴

1. Identification Evidence

253. As stated in the CDF Trial Judgement, "Identification evidence is affected by the vagaries of human perception and recollection. Its probative value depends upon the credibility of the witness but also on other circumstances surrounding the identification."⁴¹⁵ In assessing reliability of identification evidence, the Trial Chamber has taken into account the following: the circumstances in which each witness claimed to have observed the Accused, the length of that observation, the familiarity of a witness with that Accused prior to the identification and the description given by the witness.⁴¹⁶

254. Similarly, with regards to occasions when a witness identified the Accused in the courtroom, the Trial Chamber must reflect that it may be possible for a witness to point out an accused person

⁴⁰⁹ AFRC Trial Judgement, para.110. *See also Kupreskic Appeals Judgement, para.31.*

⁴¹⁰ AFRC Appeals Judgement, para. 146. *See also Kupreskic Appeals Judgement, para. 202.*

⁴¹¹ AFRC Trial Judgement, para. 111.

⁴¹² CDF Trial Judgement, para. 278.

⁴¹³ AFRC Appeals Judgement, para. 128.

⁴¹⁴ *Akayesu* Trial Judgement, para.302.

⁴¹⁵ CDF Trial Judgement, para. 259.

⁴¹⁶ CDF Trial Judgement, para. 259.

due to their physical placement in the courtroom, and, in a multi-Accused trial, to pick out the Accused person who most closely resembles an individual they previously saw.⁴¹⁷

255. As was held by the ICTY Appeals Chamber “[w]hile a Trial Chamber is not obliged to refer to every piece of evidence on the trial record in its Judgement, where a finding of guilt is made on the basis of identification evidence given by a witness under difficult circumstances, the Trial Chamber must rigorously implement its duty to provide a ‘reasoned opinion’.”⁴¹⁸

256. An illustration of this principle can be found in the AFRC case where the Trial Chamber disregarded the evidence of a witness who described one of the Accused in chief as “huge, fat, tall, fair, black, carrying a stick that shot bombs, and wearing ronko” and in cross-examination as huge, tall, and had body guards. The Trial Chamber noted that the description given by the witness did not correspond with the physical features of the accused who was a thin man of medium height and therefore did not rely on her evidence in this regard.⁴¹⁹

2. Evidence on Military Structure

257. In the AFRC case, the Trial Chamber found that the evidence of Prosecution witnesses on the military structure of the AFRC was much more detailed than that of the Defence witnesses.⁴²⁰ The Trial Chamber correspondingly placed more weight on the evidence of the Prosecution witnesses as they were able to give an overall view of the dynamics and functioning of the troop.⁴²¹

B. Factors taken into Account When Assessing the Credibility of Witnesses

258. Several factors have been taken into account when evaluating the credibility of witnesses: the demeanour,⁴²² conduct and character, where possible,⁴²³ the knowledge of the facts to which they testified,⁴²⁴ their proximity to the events described,⁴²⁵ the impartiality of the witness and any personal interest a witness may have that may influence his motivation to tell the truth,⁴²⁶ the lapse

⁴¹⁷ CDF Trial Judgement, para.260.

⁴¹⁸ *Kupreskic* Appeals Judgement, para. 39.

⁴¹⁹ AFRC Trial Judgement, paras. 1089, 1178.

⁴²⁰ "Prosecution witnesses were able to describe a hierarchy with identified positions ascribed to particular commanders, while Defence witnesses tended to state that one individual was the overall commander, another was the deputy and then other individuals were referred to collectively as ‘commanders’." AFRC Trial Judgement, para.561.

⁴²¹ AFRC Trial Judgement, para.561.

⁴²² CDF Trial Judgement, para. 256; AFRC Trial Judgement, paras. 359, 366, and 370. *See also* Kajelijeli Trial Judgement, paras. 467, 680 and 704.

⁴²³ CDF Trial Judgement, para. 256; AFRC Trial Judgement, para.108.

⁴²⁴ *Id.*

⁴²⁵ *Id.*

⁴²⁶ *Id.*

of time between the events and the testimony,⁴²⁷ the possible involvement of the witness in the events⁴²⁸ and the risk of self-incrimination,⁴²⁹ the relationship of the witness with the Accused,⁴³⁰ internal consistency of the witness' testimony⁴³¹ and inconsistency with other evidence in the case.⁴³²

259. Other elements to be taken into account include the level of detail of the evidence,⁴³³ the witness' presence at the place where he/she gives evidence about,⁴³⁴ whether there were doubts as to his or her accurate recollection of events,⁴³⁵ the reaction of the witness in cross-examination,⁴³⁶ his or her acceptance or denial that certain crimes took place,⁴³⁷ whether the witness was equivocal or exaggerated in his responses,⁴³⁸ or the presence of corroboration by other witnesses.⁴³⁹

C. Discrepancies/Contradictions

260. It is within the discretion of the Trial Chamber to determine the weight to be given to discrepancies within and/or amongst witness' testimony,⁴⁴⁰ and when faced with competing versions of events, it is the prerogative of the Trial Chamber to determine which one is more credible.⁴⁴¹

261. The ICTR Appeals Chamber affirmed that in a case where there are two conflicting testimonies, it falls to the Trial Chamber, before which the witnesses testified, to decide which of the testimonies has more weight.⁴⁴²

1. Major and Minor Discrepancies

427 *Id.*

428 *Id.*

429 *Id.*

430 *Id.*

431 CDF Trial Judgement, para. 256; AFRC Trial Judgement para. 370; *see also Kajelijeli* Trial Judgement, paras. 468 and 704.

432 CDF Trial Judgement, para. 256.

433 AFRC Trial Judgement, paras. 359, 370, 375, 376, 407, 853, 1048, 1300 and 1347. *See also Kajelijeli* Trial Judgement, para. 704.

434 AFRC Trial Judgement, para. 487.

435 CDF Trial Judgement, para. 281.

436 AFRC Trial Judgement, paras. 359, 362, 370, 407, 926, 956, 1048 and 1300. *See also Akayesu* Trial Judgement, para. 299.

437 AFRC Trial Judgement, paras. 375, 376 and 894. *See also Kajelijeli* Trial Judgement, para. 602; *Akayesu* Trial Judgement, para. 457.

438 CDF Trial Judgement, paras 280 and 283.

439 AFRC Trial Judgement, paras. 359 and 362.

440 AFRC Appeals Judgement, paras. 120 and 154.

441 *See* AFRC Trial Judgement, para.110. *See also Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para.29 ('Rutaganda Appeals Judgement').

442 *Prosecutor v. Kayishema et al*, Case No. ICTR-95-1-A, Judgement, Appeals Chamber, 1 June 2001, para. 325 ('Kayishema Appeals Judgement').

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

262. In general, minor discrepancies between testimony and previous statements will not entirely discredit the evidence of a witness when the incident had nevertheless been recounted in acceptable detail.⁴⁴³ The real question, we submit, is what constitutes “minor”. Examples of insignificant inconsistencies in other cases found not to affect the credibility of witnesses include confusion between the composition of a brigade (battalions or companies) in witnesses who did not have any military training,⁴⁴⁴ confusion as to the name of the international organisation where a burglary took place (Medecins Sans Frontieres and ICRC)⁴⁴⁵ confusion between an imam (who had left) and the person actually leading prayers at the time of the crime (and killed, referred to as the imam),⁴⁴⁶ discrepancies in describing the layout of the state house's kitchen⁴⁴⁷ or a victim of rape stating that the rebels cut off her skirt before raping her whilst she had stated in a prior statement that they cut off her lappa.⁴⁴⁸

263. Corroboration is deemed necessary where a Court finds that internal inconsistencies and contradictions with other evidence demonstrate a poor, selective or tainted recollection of events.⁴⁴⁹

264. Similarly, the ICTY Trial Chamber held that “in cases of repeated contradictions within a witness’s testimony, the Trial Chamber has disregarded his or her evidence unless it is sufficiently corroborated.”⁴⁵⁰ We submit this standard should apply whether the inconsistencies are considered minor or major.

265. The case law shows that minor inconsistencies may raise doubts in relation to a particular piece of evidence. However, when such inconsistencies are found to be material, this raises doubt as to the evidence as a whole.⁴⁵¹ For instance in the *Kupreskic case*, the ICTY Appeals Chamber overruled the Trial Chamber, finding that it failed to take into account material inconsistencies.⁴⁵² After a thorough analysis of the evidence⁴⁵³ and in view of the fact that the evidence was

443 AFRC Trial Judgement, para. 113.

444 *Id.* at para. 581.

445 *Id.* at para. 835.

446 *Id.* at para. 893.

447 *Id.* at para. 916.

448 *Id.* at para. 975.

449 CDF Trial Judgement, para. 283.

450 *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 23 ('Blagojevic Trial Judgment'). See also *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para. 17 ('Halilovic Trial Judgment').

451 *Prosecutor v. Akayesu*, Case No. ICTR-96-4-A, Judgement, Appeals Chamber, 1 June 2001, para.142 ('Akayesu Appeals Judgement'). See also *Prosecutor v. Kayishema et al*, Case No. ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, para.77 ('Kayishema Trial Judgment').

452 *Kupreskic Appeals Judgement*, para. 157.

453 *Kupreskic Appeals Judgement*, paras. 157 to 232.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

uncorroborated, the Appeals Chamber held that a miscarriage of justice occurred and reversed the finding of guilt.⁴⁵⁴

266. In the AFRC Trial, the Trial Chamber found that the fact that witnesses gave substantially different accounts cast doubts on their credibility and reliability.⁴⁵⁵

2. *Inconsistencies with Prior Statements*

267. It is accepted that information given in a prior statement and evidence in court might differ. Regarding minor inconsistencies (as described above), the passage of time may understandably affect a witness's recollection. However, there is a limit to evidence that one is not likely to forget, whether time passes or not. Material evidence, we suggest, is not likely to be forgotten and should be judged with the utmost scepticism when contradictory. The ICTR Trial Chamber found that “a significant problem arises where the oral testimony of a witness contradicts, or is inconsistent with, prior statements made by the witness which have been admitted as documentary evidence into the proceedings”.⁴⁵⁶

268. For instance in the *Akayesu* case, the ICTR Trial Chamber found that the inconsistencies between a pre-trial statement of a witness and his testimony in court were too numerous and too significant to justify a finding of credibility without corroboration of other testimony.⁴⁵⁷

3. *Ulterior Motive to Testify*

269. We submit that in the RUF case several Prosecution witnesses appeared to testify in order to, simply, to incriminate the Accused rather than to tell the truth. This is especially true with regard to Gbao, when one takes into consideration the fact that his name was not mentioned in the prior statements of many witnesses, was often mentioned just before the witness was to testify, and that the witness had to be prompted at times in his interviews. It is submitted that if the Trial Chamber finds a witness's evidence deserves little weight because that witness gave the impression of dishonestly assisting one of the Accused, the same reasoning should apply to Prosecution witnesses who may have acted in the same way. The evidence of these witnesses should, at least, be assessed with particular caution.

454 *Kupreskic* Appeals Judgement, para. 246.

455 AFRC Trial Judgement, para. 387.

456 *Musema* Trial Judgement, para.82.

457 *Akayesu* Trial Judgement, para. 408.

4. *Explanation of Inconsistencies*

270. In both the ICTR and ICTY special attention has been given to explanation of inconsistencies by witnesses. It has been noted that “to be released from doubt the Trial Chamber generally demands an explanation of substance rather than mere procedure [regarding the discrepancies].”⁴⁵⁸ The fact that a witness was unable to provide a convincing explanation of material inconsistencies led the Trial Chamber to disregard his evidence, as it created reasonable doubt.⁴⁵⁹

271. In the RUF case, several witnesses explained the inconsistencies and contradictions between their prior statements and their evidence in court by stating the investigator did not accurately take their statement. When faced with such situation the ICTR held that “[a]lthough such an explanation may well be true, particularly considering the translation difficulties, in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process.”⁴⁶⁰

5. *Situations Where a Witness's Evidence has been Discredited*

272. In the CDF case the Trial Chamber found a witness to be “an example of a self serving witness more interested in bolstering his own role in the events rather than assisting the court” and accepted his evidence given in this vein only where corroborated.⁴⁶¹

273. In discounting most of one particular witnesses' evidence, the Trial Chamber took his general demeanour into account.

274. In the AFRC case, the Trial Chamber held that part of George Johnson's evidence was unreliable since cross-examination showed that he had given contradictory evidence on a particular issue. In the absence of corroboration, the Trial Chamber did not accept his evidence.⁴⁶²

275. The ICTY Trial Chamber found that the evidence of two witnesses to the same event lacked

⁴⁵⁸ *Kayishema* Trial Judgement, para.78.

⁴⁵⁹ *Rutaganda* Trial Judgement, para. 227. See also *Rutaganda Appeals Judgement*, para.190; *Kayishema Trial Judgement*, para. 443.

⁴⁶⁰ *Kayishema* Trial Judgement, para.78.

⁴⁶¹ CDF Trial Judgement, para.281. For a similar finding see also para. 286.

⁴⁶² AFRC Trial Judgement, para. 520.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

coherence and specificity with regard to important details.⁴⁶³ For instance, in court the witness stated that she was left naked for two days while in a prior statement she said that she was allowed to dress after half an hour.⁴⁶⁴ The other witness, who was there most of the time, testified that she did not notice that she was naked.⁴⁶⁵ Similarly the former witness stated that her father was mistreated but did not provide details.⁴⁶⁶ Finally their evidence did not coincide on the arrival of the car that allegedly took them from their homes.⁴⁶⁷ In view of the significance of the inconsistencies and the lack of corroboration of important details, the Trial Chamber found that **the evidence did not show beyond reasonable doubt that a crime was committed**,⁴⁶⁸ and acquitted the three Accused for this count.⁴⁶⁹

⁴⁶³ *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgement, Trial Chamber, 3 April 2008, para. 169 ('Haradinaj Trial Judgement').

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.*

⁴⁶⁸ *Id.* at para. 170.

⁴⁶⁹ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

III. Overall Credibility of Prosecution Witnesses

29647

276. A repetitive and disturbing feature of many of the prosecution witnesses-particularly RUF insiders- was their tendency to contradict themselves. Given the time lapse between the events and the testimony this could be, to an extent, understandable.⁴⁷⁰ However, the inconsistencies were often so stark as to raise questions over the truthfulness of several witnesses, thus bringing their true motive, reliability and credibility into question. Many insiders were confronted by Defence counsel with their sudden ability- notwithstanding years of contact with the Prosecution to miraculously produce additional material detrimental to Mr. Gbao just weeks before they testified.

277. TF1-168, perhaps the most crucial witness concerning the allegation of the killing of the 65 supposed Kamajors in Kailahun Town in 1998, was unable to satisfactorily explain why he made no reference to Augustine Gbao playing any role during a 175 page interview with an expert investigator, Corinne Dufka, in April 2003, whilst suddenly managing to recall Gbao's role to damning effect in February 2006, just 8 weeks before he testified.⁴⁷¹

278. Others, such as TF1-366, provided evidence that was so utterly inconsistent it caused one to wonder whether he was making it up as he went along. Leaving aside TF1-366's true motive for testifying (given his murderous past) one can only speculate how the prosecution may attempt to cite him as worthy of belief on any of the widespread allegations he made. Under cross examination from counsel for Gbao the inconsistencies with his own previous statements and oral testimony became countless, culminating in counsel's facetious reminder (following TF1-366's memorable failure to remember the call signs he had attributed to Issa Sesay just the day before) that this was a serious criminal trial, not a 'game show'.⁴⁷² In particular, TF1-366's inconsistencies on his evidence relating to the killing of the 65 alleged Kamajors were spectacular.⁴⁷³ TF1-366's impeached

470 It is commonly accepted in case law that the years that have passed since the events in the Indictment may have affected the accuracy and reliability of the memories of witnesses. CDF Trial Judgement, para. 256; AFRC Trial Judgement, para. 112. See also *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para. 137 ("Akayesu Trial Judgement"); *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement, Trial Chamber, 6 December 1999, para. 19 ("Rutaganda Trial Judgement"); *Prosecutor v. Delalic et al.* "Celibici", Case No. IT-96-21-T, Judgement, Trial Chamber, 16 November 1998, para. 596. ("Celibici Trial Judgement").

471 TF1-168, Transcript of 4 April 2006, pp.32-54, contains a lengthy tract of cross examination in which the witness is confronted with his failure to disclose Gbao's alleged role in the chain of command of the killings; See also *ibid*, p. 46: "TF1-168's obfuscation of the issue is uncomfortably clear claiming that the interview (that lasted many hours) 'took me by surprise'. See also TF1-366, Transcript of 18 November 2005, p.24.

472 TF1-366, Transcript of 18 November 2005, p.24.

473 TF1-366, Transcript of 17 November 2005, pp.37 *et sep* (cross examination by counsel for Gbao), revealed inconsistencies regarding how long after the AFRC fell did TF1-366 enter Kailahun Town, the precise location of the killings, the fact of Issa Sesay's presence (as distinct from every other Kamajor killing witness in the case), the

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

credibility deserves far greater coverage and may be studied in the section of these submissions concerning Unlawful Killings.

279. Motive, of course, can never be far from one's consideration of insider evidence. TF1-045, another insider who gave particularly damning evidence against Issa Sesay, admitted under cross examination from counsel for Gbao that he felt he may have been on the Special Court's 'wanted list', and that, having testified, he was now 'confident' that he would not be prosecuted. Similarly, the Prosecution's most highly ranked insider, TF1-371, admitted receiving a letter from the Chief Prosecutor promising immunity should he testify.⁴⁷⁴ TF1-371 went on to deliver widespread evidence against all three defendants which, nevertheless, was damaged as to its credit.

280. It is established law in relation to evidence of witnesses who can be considered as co-perpetrators or accomplices, "a trier of fact has to exercise particular caution in examining every detail of the witness' testimony."⁴⁷⁵ In assessing the reliability of accomplice evidence, the main consideration for the Trial Chamber should be whether or not the witness had an ulterior motive to testify as he did.⁴⁷⁶ The evidence of TF1-366 and TF1 045 should therefore be viewed with extreme caution.

281. Detailed analysis of witness credibility forms a large part of our submissions on the indictment. There can be no dispute that the burden of proof requires more than just lip service: assessment of witness credibility can be the only proper foundation for consideration of verdicts. The standard of proof demands that any reasonable doubt in the evidence goes to the defendant's favour.⁴⁷⁷ It is our submission that the majority of insider evidence against Gbao is so riven with inconsistency and bad faith that it is fundamentally flawed. While it is accepted that minor inconsistencies can occur, the present case concerns major ones that go to the core of the witness' evidence. This leaves the Trial Chamber with the option to either accept or reject their evidence in part or in whole.⁴⁷⁸ We deal with these issues on an individual, witness-by-witness basis, count by count, elsewhere in these pages.

fact of Sam Bockarie's absence (as distinct from every other Kamajor killing witness in the case), the contradiction- within a few pages- as to whether it was Sesay or Gbao who ordered the killings, et al.

474 TF1-371, Transcript of 2 August 2006, p.51.

475 CDF Trial Judgement, para. 278.

476 AFRC Appeals Judgement, para. 128.

477 CDF Trial Judgement, para. 258. *See also* AFRC Trial Judgement, para. 98.

478 CDF Trial Judgement, para. 258. *See also* *Prosecutor v. Strugar*, Case No. IT-01-42-T, Judgement, Trial Chamber, 31 January 2005, para.10 ('Strugar Trial Judgement').

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

282. Upon reflection, however, we also submit that there is a separate category of witnesses that deserve special attention. These are the celebrated few who traversed the bounds of integrity to such a degree that they deserve no further consideration in this trial; moreover, that to admit any of their testimony in support of the prosecution case would be to mock the basic standards of justice that this Tribunal demands in order to remain morally valid.

283. In our submission there are five Prosecution witnesses that fall into this category: TF1-108, 117, 314, 054 and 113. In our respectful submission these witnesses should, by virtue of their proven lack of veracity and integrity or utter lack of belief be immediately discounted. Another Prosecution witness, the disgraced John Tarnue (TFI-139) was so fundamentally impeached (for example by lying to the court about his cynically dishonest attempt to telephone Prosecution counsel whilst he was still under oath; his questionable motive for testifying in light of his exposure in cross examination as a major war criminal with the revelation that he had been relocated in the USA; not to mention his tendency to compulsively lie on oath) and so irrelevant to the Gbao case that we do not propose to mention him further-save to question once again how Mr Crane felt his attendance at this trial could possibly serve international justice and elevate the reputation of this tribunal.

A. TF1-108

1. *Summary of Evidence*

284. Prior to TF1-108 there had been but scant evidence in relation to allegations of Forced Labour. TF1-108 spent four full days in the witness box from March 8th to the 13th 2006, testimony that runs to approximately 700 pages, and purported to implicate Gbao and Sesay, in particular, in a whole range of offences within Kailahun District. TF1-108 was, despite the case by now having run for almost two years, the first significant witness against Gbao on Forced Labour, Forced Marriage, Unlawful Killing (outside the killing of the Kamajors), and Forced Mining.

285. In short, TF1-108 purported to implicate Gbao in the following ways:

- a. That Gbao reported to both his co-defendants Sesay and Kallon;
- b. That Gbao was head of the G5, and as such acted as the 'go-between' between civilians and fighters, before he became chief of security;
- c. That Gbao was ultimately responsible for acts of enslavement and pillage by calling meetings with civilian commanders in which he would order work to be done and food requisitioned;

29650

- d. That Gbao had forced wives at his home;
- e. That Gbao was guilty of unlawful killings of civilians, and
- f. That Gbao displayed a wicked, callous character by showing no sympathy to TF1-108 upon the death of his wife, who died-allegedly-after being raped by 8 RUF combatants.

286. However, close scrutiny of TF1-108's evidence, including the revelation during cross examination that he had actually supported the RUF at the 2001 general election, followed by dramatic events during the Sesay defence case expose him as a fraud unworthy of belief who should be disregarded. Subsequent revelations, and the manner in which he testified, let alone the multifarious content, was suggestive of malice aforethought.

2. Evidence on Forced Labour (Count 13)

a. Exaggerated Account

287. The witness stated that "the commander that was the go-between the civilians and the RUF fighters was CO Augustine Gbao...Beginning from 1995 till 1996 he was the G5 commander"⁴⁷⁹. He continued "In 1997 he was chief security officer...till 1999", reporting to Sam Bockarie, Issa Sesay and Morris Kallon.⁴⁸⁰

288. The witness stated that Gbao ordered the civilian commanders to Kailahun Town in 1996 to attend meetings in which Gbao would "inform our people that we should give subscriptions to support the war, that we should cultivate a farm...and the women should go out to fishing...if you refused to go to do that work or to go out hunting or to brush a farm, or to brush a swamp, or to transport properties, you would be in trouble. You would prefer death to be alive...".⁴⁸¹

289. Speaking about his experience in his home town of Giema, TF1-108 claimed that the food supplies would be handed to Gbao himself.⁴⁸²

290. Although Gbao apparently said civilians should also "farm for ourselves" when they returned after work to their hometowns⁴⁸³ TF1-108 maintained that the work done on the farms was forced: "They would force us...and if that person is wielding a gun, whatever he commands you to

⁴⁷⁹ TF1-108, Transcript 7 March 2006, p.87.

⁴⁸⁰ *Id.* at p.89.

⁴⁸¹ *Id.* at p.93.

⁴⁸² *Id.* at p.98.

⁴⁸³ *Id.* at p.104.

29657

do you would have to do...".⁴⁸⁴

291. Dissatisfied with the impact of this evidence, TF1-108 suddenly went further, stating that not even the civilians' personal farms to which he had just referred were safe: "They would just say these farms are for civilians but they would take everything from us so we had nothing on our own...they would wait for us to harvest everything and would take it..."⁴⁸⁵ Meanwhile, civilians in Giema "working and delivering goods for Augustine Gbao" were not paid "in the least"⁴⁸⁶; people often walked 25 miles in the process.⁴⁸⁷

292. At first glance, this was highly damaging to Gbao. However, close inspection, particularly after cross-examination and a contrast with other testimony demonstrated that TF1-108 was just not credible.

293. First, it was significant that he stated that Gbao was 'the go-between the civilians and the fighters': an interesting turn of phrase, loaded with potential legal meaning, that could almost have been put in the witness's mouth.

294. Secondly, it was interesting that, apart from Sam Bockarie, TF1-108 claimed that Gbao was reporting to his co-defendants Sesay and Kallon. While there is no dispute that Gbao and Sesay both resided in Kailahun District for much of 1998 and 1999, there is no prosecution evidence in the case that Kallon resided in the District other than for a short period of a few weeks following his recall from Kono in mid 1998. Again, this evidence, neatly as it encapsulates all three defendants in a joint criminal enterprise context in relation to the litany of offences TF1-108 relates, appears extremely convenient for the prosecution to say the least. TF1-108's explanation that "He (Gbao) said that to us in a meeting" (ie that he was reporting to Sesay and Kallon as well as Bockarie) was, we submit, a convenient way of avoiding the issue of knowledge.

295. Under cross examination TF1-108 refused to accept any notion that the people of Kailahun actively engaged in group farming in a consensual war effort, despite agreeing that the families of the vast majority of RUF combatants were Kailahun people.⁴⁸⁸ Similarly he refused, time and again,

484 *Id.* at p.105.

485 *Id.* at p.109.

486 TF1-108, Transcript 8 March 2006, p.22.

487 *Id.* at p.24.

488 TF1-108, Transcript 10 March 2006, p.101.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

to accept that Kailahun District had been under siege from enemy forces from the end of 1996⁴⁸⁹ and that any work collectively done was done by an agreement between the civilian authorities.⁴⁹⁰

b. Lack of Knowledge

296. His knowledge of command and control in Kailahun was shown to be rather at odds with other witnesses when he claimed that Gbao relinquished the G5 “commandership...At the end of 1996, because in 1997 he was in the position of chief security officer”,⁴⁹¹ further stating that Prince Taylor (who in fact was made G5 commander at Zogoda in early 1996) took over when Gbao left the position- an account at odds with any witness, prosecution or defence, who testified on this subject.

297. The witness’s true knowledge as to the reality of rank and command within various RUF units was exemplified by his ignorance of the fact that Gbao was made Overall IDU commander in early 1996, replacing Dean-Jalloh⁴⁹². Further, he then disagreed that Gbao was made chief security officer not at the end of 1996, as he had previously stated, but in February 1996, responding with the characteristically odd comment “If it is true, I will agree”.⁴⁹³

c. Unrealistic and Contradictory Evidence

298. In response to counsel’s questions about the conditions prevailing in the District, TF1-108 emphatically denied the suggestion that Kailahun was effectively under siege, and somewhat unrealistically maintained that the only people being killed in Kailahun were being killed by the RUF themselves,⁴⁹⁴ despite his claim that there were jet bombing attacks in the region leading to the use of alarm bells being rung from village to village to provide warning.⁴⁹⁵ The fact that there was never an attempt at an insurrection by the local inhabitants (“if we had attempted that, they would have killed all of us”⁴⁹⁶) is almost as surprising as TF1-108’s decision to support the RUF at the end of the war⁴⁹⁷- noting that at the end of counsel for Gbao’s cross examination the witness had to be asked three times “what was it that led you to support the political wing of the RUF at the 2001 election”⁴⁹⁸ before he contradicted what he had told counsel on 10 March (and indeed what he had

489 *Id.* at p.116.

490 TF1-108, Transcript 13 March 2006, p.19.

491 TF1-108, Transcript 10 March 2006, TF1-108, p.106.

492 TF1-108, Transcript 10 March 2006, pp.113-114.

493 *Id.* at p.114.

494 TF1-108, Transcript 13 March 2006, p.19.

495 *Id.* at pp.19-24.

496 *Id.* at p.25.

497 TF1-108, Transcript 10 March 2006, p.100.

498 TF1-108, Transcript 13 March 2006, p.99-100.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

told the court during Kallon's cross examination) by replying "I did not support RUF".⁴⁹⁹

299. At this point it is perhaps important to strike a note of realism: the defence for Gbao have never denied that subscriptions of foodstuffs were employed during the years of the war in Kailahun District. There is no issue that quantities of cocoa, palm oil, rice et al had to be given up to the authorities. Nor is there any dispute that these loads had to be carried.

300. What was in dispute was TF1-108's allegation that such goods were to be handed over to Gbao, and his assertion that '...All the agriculture was under the G5', of which, of course, he maintained Gbao was overall in charge until he allegedly became chief of security in '1997'. The witness utterly refuted the process of production and supply of foodstuffs prior to bartering as suggested by counsel for Gbao,⁵⁰⁰ which involved paramount chiefs, the S4 Unit and the Agricultural Unit at the Guinea trading posts. He furthermore stated that farms in Giema were manned by armed guards whose main job was to beat the farmers if they did not work properly, rather than to protect them from the enemy.⁵⁰¹

301. But how realistic was this account? Was it first hand, the product of brutal personal experience? Apparently not. Instead, the basis for such testimony, we submit, lay in the witness's desire to assist the prosecution with yet another sweeping statement designed to cause maximum damage to the defence, yet one which when closely examined appears, once again, utterly bogus.

302. TF1-108 was asked by counsel for Gbao to name some of the civilian's farms where personal harvests were taken, as he had previously alleged. Instead of the prompt reply one might expect from [REDACTED] who might be expected to know the answer, the witness prevaricated over several exchanges with counsel before naming four citizens of Kailahun Town.⁵⁰² Even then, it transpired the names were the product of a hearsay report, seemingly impossible to verify. When asked how it was he did not observe the events himself, the witness again prevaricated in order to dodge the question. When Mr Justice Boutet intervened TF1-108 replied, rather vacuously, that although he had been based in Kailahun Town at the time, he would regularly go to Giema "to look after my farm"⁵⁰³- a feeble answer automatically giving rise to the question as to whether his claim that farms had been looted by the RUF was in fact a lie.

⁴⁹⁹ *Id.*

⁵⁰⁰ *Id.* at pp.32 *et seq.*

⁵⁰¹ *Id.* at p.37.

⁵⁰² TF1-108, Transcript 13 March 2006, pp.39, 40.

⁵⁰³ *Id.* at p.41.

29654

d. Inconsistencies

303. The witness implied in chief that Gbao had employed forced labour at his farm in Sandiaru. Indeed, he alleged that he himself had worked there in 1996 brushing and felling trees. Strangely, he could not name any workers there except Gbao's bodyguard Korpomeh; and denied counsel's suggestion that Korpomeh never actually worked there at all.⁵⁰⁴ Somewhat surprisingly the witness claimed not to have seen Gbao's wife Hawa at the house at all that year⁵⁰⁵ notwithstanding the regularity of his visits. Nor was he aware of the birth of Gbao and Hawa's first child, Sylvester One, on 16 May 2006, perversely explaining "I did not know about that. I was not based in Sandiaru. I was based in Giema. I used to leave there to go to Kailahun. We only went to Sandiaru to work".⁵⁰⁶ This answer, it is suggested, is in line with a variety of similarly illogical non sequiturs which TF1-108 seemed unable to avoid as the pressure upon him to tell the truth increased. Nevertheless, the witness still felt able to assert that civilians did work there under force, as opposed to as a goodwill gesture by local Sandiaru people.⁵⁰⁷ Under the circumstances he described, one might expect that the witness may have heard complaints about Gbao's conduct in Sandiaru. None were forthcoming.

e. Poor Demeanour During Cross-Examination

304. As the cross examination continued TF1-108 employed a variety of tactics, such as pretending not to have heard or understood the question, or by replying with non-sensical non-sequiturs. This was in direct contrast to his comparatively concise answers in examination in chief. Few witnesses, we submit, betrayed themselves by their obstructive demeanour as TF1-108 did, particularly during counsel for Gbao's cross examination.

305. On 13 March TFI-108 was asked by counsel for Gbao about Joint Security Boards and the IDU (in relation to which, compared to his professed knowledge of Gbao, TF1-108 had staggeringly little knowledge). In response to counsel's assertion that Francis Musa was Gbao's IDU deputy in Kailahun District the witness said 'Yes, I know Francis Musa, but I never knew if he was the deputy to Augustine Gbao'.⁵⁰⁸ This, it is suggested, is remarkable: one may be surprised that a witness who claimed to know so much about Gbao and his misdeeds was nevertheless unaware of Gbao's true assignment or title, let alone whether he had a deputy.

⁵⁰⁴ *Id.* at p.42.

⁵⁰⁵ *Id.* at p.45.

⁵⁰⁶ *Id.*

⁵⁰⁷ *Id.* at p.46.

⁵⁰⁸ TF1-108, Transcript 13 March 2006, p.16.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29655

306. TF1-108's lack of knowledge on this subject was confirmed by his equally astonishing admission that he "never knew" who the RUF IDU commander was from 1996 "until the end of the war", culminating in his dogmatic refusal to accept counsel's suggestion that it was, in fact, Augustine Gbao.⁵⁰⁹

307. We submit that one cannot, and indeed must not ignore this portion of TF1-108's testimony. The witness's extraordinary display of ignorance as to Gbao's real identity and role begs the biggest question of all- how much did TF1-108 really know about Augustine Gbao? It throws an altogether different light on what-if one takes the examination in chief in isolation- was potentially consistent, dangerous and convincing implicatory evidence.

308. Recalling TF1-108's account in chief that Gbao's bodyguard had been capturing civilians in order to fetch coffee for Gbao in Sandiaru,⁵¹⁰ counsel for Gbao had to ask the witness no less than SEVEN times whether anyone had complained to TF1-108 as civilian commander, culminating in this remarkable exchange:

"Q: Didn't you tell us a moment ago that somebody did make a complaint to you?

A: It was NOT a complaint."⁵¹¹

309. This, we submit, rather shatters any remaining doubt as to whether Gbao did employ forced labour at his home.

f. Conclusion

310. TF1-108's evidence on forced labour presents an almost exhaustive list of factors relevant to the assessment of witness credibility: we submit a clear lack of knowledge may be deduced from the lack of detail and clarity of TFI-108's evidence as well as from the several contradictions and inconsistencies within his evidence. Additionally, his general demeanour- his tendency to prevaricate and obfuscate simple (if challenging) questions created the gravest concerns as to his true motive for testifying. It is submitted that TF1 108 came to testify before the Special Court not to tell the truth, but to provide incriminating evidence against the RUF Accused and in particular Augustine Gbao. This is further exemplified below.

⁵⁰⁹ *Id.* at p.17.

⁵¹⁰ TF1-108, Transcript 8 March 2006, p.22.

⁵¹¹ TF1-108, Transcript 13 March 2006, p.53-55.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

311. In cases where the evidence of a witness is inconsistent or contradictory, or otherwise defective, it is for the witness to provide a substantial and reasonable explanation for it. However, TF1 108 failed to provide the court with any credible explanation whatsoever. Given the fact that so many specific allegations in his evidence were not corroborated by any other Prosecution witness, it is submitted that the whole of his evidence on forced labour should be disregarded.

3. Evidence on Unlawful Killings (Counts 3-5)

312. TF1-108 was the only witness who alleged Gbao had any involvement in unlawful killings besides those of the Kamajors. It is established in the case law of international criminal tribunals that the testimony of a single witness on a material fact does not require corroboration.⁵¹² However in such cases, the evidence of a single witness has been examined with particular care before any weight has been attached to it.⁵¹³

a. Unrealistic, Inconsistent and Exaggerated Evidence

313. The circumstances giving rise to the first allegation of unlawful killing for which Gbao is potentially individually responsible were outlined in evidence in chief where TF1-108 described being told one night by Gbao to supply civilian manpower after which he was placed in a cell near the MP office in Kailahun Town. A truck apparently arrived from Liberia; boxes of ammunition were unloaded and “All of us carried these things to Pendembu...17 miles.” During the march one of TF1-108’s “siblings” felt tired; he was shot dead.⁵¹⁴ He stated “They said he was shot by one commando because they said my brother has become tired...he was lying in a gutter, dead, on the road.”⁵¹⁵ TF1-108 was cross examined by counsel for Gbao on this event, and as to why he had not complained to the G5 about what happened. He replied that if you continued to complain to the RUF “they will kill you”- rather lame, one might suggest, when the event concerned [REDACTED] [REDACTED] who had allegedly lost *his own brother* in a senseless killing⁵¹⁶. As the exchange continued TF1-108 made the extraordinary claim, never even alleged by the prosecution themselves, that the RUF was attempting to starve their own people⁵¹⁷. It is submitted that the witness had now reached a stage where in terms of attacking the RUF he had thrown all caution-as

512CDF Trial Judgement, para.265; AFRC Trial Judgement, para. 109. *See also Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para.62 ('Aleksovski Appeals Judgement'); Celibici Trial Judgement, para. 594; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-A, Judgement, Appeals Chamber, 23 October 2001, para.33 (“Kupresic Appeals Judgement”); Kajelijeli Trial Judgement, para.42.

513CDF Trial Judgement, para. 265; AFRC Trial Judgement, para. 109.

514 TF1-108, Transcript 8 March 2006, p.29.

515 *Id.* at p.30.

516 TF1-108, Transcript 13 March 2006, p.63.

517 *Id.* at p.67.

well as integrity-to the wind.

29657

314. If Gbao's connection to that murder were seen to be remote his alleged proximity to the next was far more incriminating. In chief, TF1-108 related the story of how four civilians were caught by the RUF trying to cross over to Guinea in 1998 or 1999. They were arrested, taken to the Kailahun court barri and shot dead. The witness stated "Mr Augustine Gbao was there. Mr Martin George was there. Mr Sam Koroma was there, and Tom Sandy...Mr Gbao was, the way I saw it, the most senior among them".⁵¹⁸ In cross examination TF1-108 was asked to repeat the names of those present. Strangely he forgot Tom Sandy's name.⁵¹⁹

315. Given the significance of the event, and that the question was being asked just days after TF1-108 had in chief listed those present this error is remarkable, but nevertheless this remains potentially damaging evidence against the defendant no matter what care is taken over its utter lack of corroboration elsewhere in the prosecution's case.

316. Similar to that of Forced Labour, TF1-108's evidence on unlawful killings lacked detail and clarity and was exaggerated. Under cross examination TF1-108 failed to dispel the doubts surrounding his evidence, which simply grew more opaque. It is submitted that it was inherently unreliable and should be discounted.

317. It is to be hoped that, even had TF1-108 not been exposed as a liar by the Lazarus-like reappearance of his wife, ██████████, who he alleged had been raped and then beaten to such an extent that she died later of her injuries, the inconsistencies and obstructive demeanour he had displayed would already have disqualified him from any serious probative value in this case. Before arriving at the ██████████ issue one should perhaps examine three final pieces of evidence that are not worthy of credit: TF1-108's account of the training camps, his account of Gbao's involvement in forced marriage, and his account of his own true role in the war.

4. Evidence on Child Soldiers (Count 12)

a. Incoherent Evidence

317. In chief TF1-108 stated that from 1997 up to 2000 the Bunumbu training camp trained children aged from 8 or 9 years old.⁵²⁰ There is no mention of Gbao being involved at Bunumbu

⁵¹⁸ TF1-108, Transcript 8 March 2006, p.50.

⁵¹⁹ TF1-108, Transcript 13 March 2006, p.79.

⁵²⁰ TF1-108, Transcript 8 March 2006, p.43.

base, nor at its predecessor Bayama. However we submit the following provides another example of TF1-108's lack of credibility. The witness's peculiar personality shone through when, asked by the prosecution whether all civilians at the camp were the same age, he gave an amusingly ironic exposition of the blindingly obvious:

"No, some of them were older than the others. Because everybody in the world were not born at the same time and in the same year. Even if you are living in the same village, they wouldn't have given birth to you on the same day..."⁵²¹

318. It is not likely that TF1-108 was attempting a joke here.

319. Under cross-examination by counsel for Gbao, TF1-108's account was placed into a more realistic context. Although people were allegedly being captured "like animals" and forcefully conscripted, such conscription began in the NPRC time in 1993.⁵²² Asked how he avoided such conscription himself, the witness replied "I was now a bit tired."⁵²³

320. Counsel for Gbao having by now established that TF1-108 was never in either Bayama or Bunumbu camps, it may be surprising that the witness nevertheless maintained he had seen the RUF taking children to the base. Yet that is what he said.⁵²⁴

321. The witness continued with an anecdote which beggared belief. According to him, his sister was captured and taken to Bunumbu (given the loss of his brother and his wife he appears to have suffered more than most if he is to be believed) but escaped. After she was found in nearby Talia, Talia was looted and burned as a punishment.⁵²⁵ Once again the story appears as an attempt to damage the indictees with an uncorroborated, unattributed story which lacks any degree of specificity. As such, and in common with so many other prosecution allegations since 2004 it is difficult, if not impossible to defend.

322. However, TF1-108 did state that his "sister" was just SIX years old. Not only might this be rather young for a girl to be expected to train, she may rightly be seen to be a little too young to effect an escape from a military training camp⁵²⁶. More to the point was the fact that the witness stated he was born in 1950. To have a 6 year old sister in the late 1990's (presumably born from the

⁵²¹ *Id.*

⁵²² TF1-108, Transcript 13 March 2006, p.72.

⁵²³ *Id.*

⁵²⁴ TF1-108, Transcript 13 March 2006, p.77.

⁵²⁵ TF1-108, Transcript 8 March 2006, p 47.

⁵²⁶ *Id.* at pp.46-47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

same mother) was, even by TF1-108's fanciful standards, a little too much to believe.

5. *Evidence on Forced Marriage (Count 8)*

a. Hearsay Evidence

323. TF1-108's testimony linking Gbao to forced marriage was, yet again, vague and non-specific. He apparently recalled seeing two Kono women who said they were the wives of Augustine Gbao in Sandialu. No time frame was given. He stated "they said they were held, they're wives of him, they do work for him, they do sleep in the same house."⁵²⁷

324. Thus, in one short sentence, TF1-108 appeared to have enlisted all the ingredients of forced marriage-that they were held, forced to work...and forced to sleep there. He concluded "they said they were not happy with it".

325. In our submission these were vicious lies, and we do not wish to speculate as to their origin. This hearsay allegation should at the very least be assessed with special caution, especially in view of the overall quality of TF1-108's evidence and the fact that it has been established that TF1-108 lied about the rape and death of his wife while under oath before the Court.

b. Inconsistencies

326. It was significant, in our submission, that in counsel for Gbao's cross examination the witness failed to recall the names of these women, conceding he had, in fact, only met ONE of them⁵²⁸- which gave the lie to his statement in chief that "they" had said they were not happy.⁵²⁹ It was equally significant that the witness could not remember the names of the two wives as suggested by counsel whom Gbao admits lived there at the time; nor could TF1-108 remember the names of Gbao's children.

327. To summarise, TF1-108's evidence of forced marriage lacks substance and detail, and is based on hearsay. In addition, TF1-108 severally impeached himself during cross examination. Taking into account the fact that TF1-108 was the only witness to allege that Augustine Gbao had forced wives at home it is submitted that his evidence be disregarded. It was unreliable and entirely without credibility.

⁵²⁷ TF1-108, Transcript 9 March 2006, pp.4-5.

⁵²⁸ TF1-108, Transcript 13 March 2006, pp.88-89.

⁵²⁹ TF1-108, Transcript 9 March 2006, p.5.

6. *TF1-107's Evidence on His Own Role During the War*

328. Given the degree of personal suffering that TF1-108 wanted the court to accept he had endured it was a surprise to find, buried in interview notes dated of 4 February 2004⁵³⁰ "I knew all these things because *I was Gbao's bodyguard.*" This was remarkable enough, but it was contrasted with the contents of his additional information dated 19 November 2005 to 7 December 2005: "Unlike what is said in one of my previous statements I was never a bodyguard of Augustine Gbao".⁵³¹ When counsel for Gbao asked TF1-108 for an explanation, he claimed he did not know why that had been written in 2004.⁵³²

329. We submit the massive significance of this inconsistency speaks for itself.⁵³³ If TF1-108's evidence has by now been shown to be defective in many aspects, there is yet more.

7. *TF1-108's Evidence Concerning His Wife*

330. TF1-108 did not only suffer the tragedies of the murder of his brother and the capture of his 6 year old sister. He also suffered the tragic death of his wife, [REDACTED], who died after 8 RUF combatants brutally raped and beat her. At least, that's what he told the court on 8 March 2006.⁵³⁴ The witness stated that when he reported the matter to Gbao, Gbao spitefully replied that "if I (TF1-108 was not bothered about those who were dying at the war front then I should...accept my wife being killed, then-accept my wife being raped".⁵³⁵ If believed, this evidence may conceivably be seen to support the contention that Gbao was, in fact, a figure of authority in Kailahun whose brutal attitudes were indicative of joint criminal enterprise liability on his part. If not that, it is certainly deeply prejudicial as to character.

331. Investigation of how the Prosecution's allegation of TF1-108's wife's death came to light reveals a frightening tale of falsehood, leading, in its final act, to a grotesque attempt by the witness to pervert the course of justice.

⁵³⁰ Exhibit 78A, p.10768.

⁵³¹ Exhibit 78B, p.17452.

⁵³² TF1-108, Transcript 13 March 2006, p.87.

⁵³³ It was held by the ICTR that "in the absence of evidence that corroborates the explanation, it is generally not enough to remove doubt. Indeed, it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution's investigative process." *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, para.78 ("Kayishema Trial Judgement").

⁵³⁴ TF1-108, Transcript 8 March 2006, p.50.

⁵³⁵ TF1-108, Transcript 8 March 2006, pp.50, 51.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29661

332. The indictment never averred the details of TF1-108's wife's death. Indeed, it never even mentioned it. In total disregard of the Defence's right to know the nature of the Prosecution case in order that they may prepare against it the prosecution waited no less than 18 months until after the trial had started until they disclosed a proofing note alleging that TF1-108's wife was raped in 1996, and that TF1-108 "reported it to Augustine Gbao himself."⁵³⁶

333. On 7 March 2006 TF1-108 commenced his evidence at trial. He went further than the proofing notes alleged. For the first time, he alleged that the rape had been committed by 8 men, and that his wife had "died in that week".⁵³⁷ To make matters worse, the witness now recalled that, contrary to his proofing note claim that his wife died pre-indictment in 1996, she had in fact died in 1998.⁵³⁸ Quite why the witness needed to correct such an error, particularly given the personal impact his wife's death would presumably have made, is a matter one can only speculate upon. One can only comment that it was surprising that the prosecution had not "proofed" TF1-108 accurately in December 2005.

334. Counsel for Sesay suggested the wife's name was [REDACTED].⁵³⁹ The witness agreed. During cross-examination by counsel for Gbao, TF1-108 claimed his wife did not receive a formal funeral attended by any other chiefs-despite his standing in the community- because "It was during the war." Further, he stated that he didn't mention [REDACTED] death to "any other person".⁵⁴⁰ This, it may be said, was a muted response to the death of a loved one.

335. In early 2008 the prosecution took statements from TF1-108 and 330, who knew TF1-108 well. As a result of this process the defence for Sesay filed proceedings citing TF1-108 for attempting to pervert the course of justice for apparently telling TF1-330 to give a false account regarding the death of his (108's) former wife, who the Sesay defence had found to be alive and well.

336. A Sesay witness, DIS-164 identified a photograph in court as being that of TF1-108's former wife [REDACTED].⁵⁴¹ Remarkably the Prosecution chose not to challenge the identification, implicitly, it would seem, accepting that TF1-108 had been lying in his account of the death of his

536 Proofing Note dated of 7 December 2005, disclosed to the Defence on 13 January 2006.

537 TF1-108, Transcript 8 March 2006, p.50.

538 *Id.*

539 TF1-108, Transcript 9 March 2006, p.68.

540 TF1-108, Transcript 13 March 2006, pp.84-85.

541 DIS-164, Transcript 28 January 2008, pp.78-79.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29662

wife. ██████ herself testified shortly afterwards,⁵⁴² stating that she had been married to TF1-108, that she had never been raped by RUF soldiers, and that she had left Sierra Leone after her marriage ended. Again, the prosecution chose not to challenge her evidence-implicitly withdrawing their case regarding ██████ death.

337. It is deeply regrettable that the Prosecution never saw fit to announce a formal withdrawal of their case on the issue.

338. The evidence spoke for itself: the mere presence of TF1 108's wife in court proved she was still alive. In addition, she provided directly contradictory evidence to his claim that she was raped by the RUF. One's evidence could not be more dramatically impeached; TF1 108 was simply not telling the truth while under oath before the Court. The fact that he changed his evidence from what he stated in prior witness statements further supports the perception that TF1 108 was so eager to provide incriminating evidence against the RUF Accused- and Augustine Gbao in particular -that he was ready lie about his wife's death. A more wicked and spiteful attempt to pervert the course of justice is hard to imagine.

8. Conclusion

339. We submit the evidence of TF1-108 is not worthy of this Tribunal and that the Chamber need not trouble itself with the evidence.

340. First, it has been demonstrated that his evidence was unclear, lacked detail, coherence and substance. Additionally the evidence contained significant inconsistencies, which of themselves fatally discredit the totality of his evidence.

341. The witness gave uncorroborated evidence of the death of a brother- a matter which he felt did not warrant a complaint at the time. He testified to a 6 year old sister- remarkable given his old age- being forced to train. He testified to deliberate starvation of civilians by the RUF. He testified to brutal forced labour and forced marriage whilst time and again being impeached or failing to give adequate detail. He testified to Augustine Gbao's brutality and his work as a G5 whilst apparently knowing nothing about Gbao's actual unit, the IDU. **Yet, in a statement taken in 2004, he claimed to have been one of Augustine Gbao's bodyguards.** Even more astonishing (given the personal tragedy he claimed to have suffered) was his admission that in 2001 he actively supported the

⁵⁴² DIS-164, Transcript 29 January 2008, pp.2-20.

RUF in the general election. That was comparable to a Loyalist campaigning for Sinn Fein in an election in Northern Ireland having lost his wife and brother to IRA terrorism.

342. Secondly, TF1 108 presented a poor demeanour in cross examination, repeatedly claiming not to understand counsel's questions or providing vague answers.

343. The questions concerning TFI-108's true motive were further raised by his tendency to exaggerate his evidence on several occasions, culminating in his offensive attempt to pervert the course of justice by providing false evidence concerning the rape and death of his wife.

344. The witness has been so utterly impeached he is not worthy of credit. His integrity has been destroyed to such an extent that the Chamber should not attach any weight to any of the allegations therein.

345. We submit that the only proper course for the court to take under the circumstances is to ignore TF1-108's evidence in its entirety.

B. TF1-117

i. Summary of Evidence

346. TF1-117 was a dangerous witness in that his claim to have been captured, drugged, trained and inducted as a child soldier will undoubtedly attract sympathy since the media-driven issue of child soldiers has touched the conscience of people all over the world. For that very reason we submit that extra care needs to be taken in relation to what he said, lest there is a temptation to use a witness's evidence emblematically rather than to take it on its merits.

347. The Gbao defence has been candid in its approach to the issue of child soldiers. We have never suggested they did not exist; indeed, by virtue of the testimony we called as well as comments herein we accept that child soldiers were used in the war by both sides. We stop short, however, of admitting this was either widespread or systematic. We do not accept it was propped by RUF ideology and we do not accept it was approved of by the RUF as a whole. In a disorganised group like the RUF, fractured by internal disputes and poor communications, riven with disparate mini-power bases and private agendas, it would have been impossible for day-to-day conduct to have been monitored in anything other than an *ad hoc* way. Taking advantage of this, renegade commanders were all too often free to prosecute their war on their own terms, using whatever

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29664

means they felt appropriate to further their selfish motives. We dispute emphatically that in the areas where Augustine Gbao was based, such as Kailahun Town from 1997 to 1999, and Makeni thereafter, he did his level best to speak out against such practices.

348. In Augustine Gbao's case the allegations that he used child soldiers in war are baseless. Most witnesses who purported to incriminate Gbao simply and blandly alleged "Augustine Gbao had child soldiers" without further detail. TF1-117 was the only witness who suggested that Augustine Gbao went into combat: this was not supported elsewhere; nor did Prosecution counsel at any time during the case seek to elicit such evidence. Such allegations were never put by the prosecution in their cross examination of Defence witnesses. Neither is it in evidence that Augustine Gbao employed child soldiers in a more auxillary sense, such as for carrying guns or ammunition. It is sadly ironic, we submit, that a man who has been so widely spoken of in terms of caring for people young and old should be attacked by the Prosecution simply for allowing children to stay in his house at a time when they would otherwise have been desperately vulnerable.

349. TF1-117 testified having spent several years with Augustine Gbao. According to TF1-117, during these years Augustine Gbao led him into battle as a small boy, was present during Operation Pay Yourself and raped a Lebanese woman in Makeni in 1997. The fact that this evidence was almost entirely at odds with the Prosecution case against Gbao was one thing-the fact that, having apparently spent years alongside the Third Accused he nonetheless pointed to Kallon when asked to identify Gbao⁵⁴³ demonstrated in a moment how cynical and dangerous TF1-117 was. Cynical, we say, because the witness seemingly had no compunction in giving false evidence. Dangerous because, even today, Gbao is at risk of this evidence being held against him.

350. TF1-117's evidence, we suggest, was a work of an overly-productive imagination. Perhaps he was inducted as a child soldier; perhaps he suffered terrible abuse in so doing. We do not challenge that he may have fought in battle, or partaken in some of the horrors he described. However we do challenge the reliability and credibility of his evidence. In the following analysis we seek to demonstrate how this witness was an affront to this trial and to international justice and should be disregarded without further debate.

2. *Evidence of Enlistment, Conscription and Use of Child Soldiers (Count 12)*⁵⁴⁴

⁵⁴³ TF1-117, Transcript 30 June 2006, pp.51-52.

⁵⁴⁴ The witness' evidence also incidentally related to some other counts in the RUF Indictment, such as looting or attack on civilians. However the heading of "count 12" was chosen for clarity purposes.

351. As the witness testified to such broad experience, his evidence in chief is sub-divided into topics below; the results of cross examination (together with references to what other witnesses said as to relevant issues) follow in the next section.

Period of 1992 to February 1998

a. Victim of Trauma (Taking Drugs)

352. TF1-117 testified in chief on 29 and 30 June 2006 at some length. He claimed he was captured after an attack led by Augustine Gbao on his village in 1992 in which his house was burned, his father killed and he, his sister and mother were captured.⁵⁴⁵ He was taken to Kono where, allegedly frightened by the amount of killing he saw, he was given drugs which made him afraid no more: "By that time I developed great mind."⁵⁴⁶ With all due respect to the witness we submit that there is a possibility that he suffered serious psychological damage at this time-judging by the cold, detached way he later described atrocities he witnessed, and the mechanical way he seemed to impugn Gbao (let alone others) with criminal events in which he could not possibly have been present begs the question why the Prosecution never had this young man psychiatrically evaluated before putting him forward as a reliable witness. This is the minimum safeguard one would expect in any self-respecting criminal jurisdiction and it should have been done here.

353. The witness's account of his early experiences is, we submit, difficult to accept in its entirety. We do not suggest that he was not captured or abused in the manner he described, but we do submit that the trauma he suffered - particularly in view of his age (he claimed to have been 10 years old when his village was attacked in 1992)⁵⁴⁷-requires that his evidence be examined with utmost scrutiny. This need was exemplified, we suggest, by the nature of many of the claims he made.

354. From the very beginning of counsel for Sesay's cross examination of TF1-117 it was clear that his memory was impaired. In relation to his capture in 1992, counsel put the witness's first statement of 17 January 2003 to TF1-117⁵⁴⁸ where he stated "I was captured by Akim who sent me to the training base in Kono. It was called Lion Base". In response, TF1-117 denied giving that account to the Prosecution's investigator in 2003; he also failed to remember the commandant, Monica Pearson, had particularly protruding teeth-something a young boy may have been expected

⁵⁴⁵ TF1-117, Transcript 29 June 2006, pp. 88-89.

⁵⁴⁶ *Id.* at pp.89-90.

⁵⁴⁷ *Id.* at p. 86.

⁵⁴⁸ TF1-117, Transcript 3 July 2006, p.11. The relevant parts of the statement have been exhibited under Exhibit Number 114 (filed under seal).

to remember in such circumstances.⁵⁴⁹

29666

355. Furthermore, it is now established in international criminal case law that the evidence of witnesses who suffered traumatic experiences should be taken with particular care.⁵⁵⁰ As stated in the ICTR “Inconsistencies or imprecisions in the testimonies, accordingly, have been assessed in the light of this assumption, personal background and the atrocities they have experienced or have been subjected to.”⁵⁵¹ The fact that the witness also mentioned being under the effect of drugs at the time of the events he testified upon should be taken into consideration, as it might have affected his recollection and might have left some psychological damage as of today. One should also keep in mind that the witness alleged to have been 10 years old at the time of the events.

b. Exaggeration and Unrealistic Account

356. The witness allegedly trained in Kono and stayed with “CO Issa” with other “colleagues” in the SBU,⁵⁵² before being sent to Camp Zogoda. No further mention was made of his sister or mother. After Zogoda, TF1-117 described partaking in attacks on a litany of locations: Liberia, Kenema, Tongo, Pondoru, Banguma, Dodo and Pujehun were all targeted in a virtual tour of southern Sierra Leone.

357. His commanders included Augustine Gbao in Kailahun; the period stretching “from 1992 up to...1995.”⁵⁵³ Having stayed in Kono after the above-named attacks for an unspecified period the witness found himself in Kailahun some time after the coup. He described being in a group led by Issa Sesay that was asked to carry a message from CO Mosquito to Augustine Gbao, the “ground commander” in Kailahun saying that “we should all gather, Johnny Paul said we should all come together with the SLA.”⁵⁵⁴ The witness described the meeting in Kono, and then being part of a group led by Gbao and CO Issa that went to Makeni. Strangely-given the lack of evidence elsewhere that Mosquito ever left Kailahun- he remembered other commanders in that group to include Kallon and Mosquito himself.⁵⁵⁵

549 *Id.* at pp.12-14.

550 Akayesu Trial Judgement, para. 142. *See also Prosecutor v. Kajelijeli*, Case No. ICTR-98-44A-A, Judgement, Appeals Chamber, 23 May 2005, para.13 (“Kajelijeli Appeals Judgement”). *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-T, Judgement, Trial Chamber, 21 May 1999, para.75 (“Kayishema Trial Judgement”).

551 Akayesu Trial Judgement, para. 143.

552 TF1-117, Transcript 29 June 2006, pp. 91-92.

553 *Id.* at pp.95-96.

554 *Id.* at pp.97-98.

555 *Id.* at p.98.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

358. In relation to the attacks in which TF1-117 partook, the allegations that Augustine Gbao was an "advance commander" and "senior commander" of his squad are entirely at odds with every single piece of evidence in the case concerning Augustine Gbao's real role. The suggestion that he commanded attacks between 1992 and 1995 runs contrary to one's perception of the facts.⁵⁵⁶ No highly placed RUF insider ever suggested Gbao was a front line combatant⁵⁵⁷ at any stage-either pre or post indictment period. The evidence flies in the face of accounts of Gbao's role prior to his late 1995 appointment as Ideology Instructor at Bayama Training Base.⁵⁵⁸ This fact alone, we suggest, pours scorn on TF1-117's fanciful account of Gbao's military activity.

c. Contradictions with Prior Statements

359. On the subject of TF1-117's 1992 excursion to Liberia, counsel for Sesay reminded the witness what he told the Prosecution in his original statement where he had stated "I ran away from Liberia back to Kailahun...Gbao followed us to Kailahun and said he was going to kill all the boys who had run away from Liberia...All this was happening at Pumpkin Ground the...RUF HQ in Kailahun."⁵⁵⁹

360. Counsel then asked why, in a statement given to the Prosecution in 2005, the witness had stated Pumpkin Ground was in Kabala in northern Sierra Leone. In response TF1-117 contradicted himself. At first he accepted he did tell the Prosecution in 2003 that Pumpkin Ground was in Kailahun, but moments later he said that he had told the Prosecution in October 2005⁵⁶⁰ that Pumpkin Ground was in Kabala, explaining that Zogoda was the camp in Kailahun, not Pumpkin Ground.⁵⁶¹ One was left at a loss to understand which story the witness was expecting the Court to accept, and matters were not helped by the fact that Zogoda has been widely accepted as being in Kenema District rather than Kailahun.

d. Failure to Mention the Capture of His Mother and Sister

361. A further issue arising from the witness's evidence was his failure to mention his mother or

⁵⁵⁶ In cross examination by counsel for Gbao TF1-117 stated that having mounted attacks from Kailahun over a 3 year period (1992-1995) he was with Gbao when Kenema was attacked, followed by Pujehun, Benguema and Dodo; Gbao was the advance commander. TF1-117, Transcript 4 July 2006, p.66-67.

⁵⁵⁷ For more details see above part II-E-iii.

⁵⁵⁸ DAG-048, Transcript 3 June 2008, p.28; also see DAG-101, Transcript 9 June 2008, pp.86-87; DIS-188, Transcript 1 November 2007, p.26.

⁵⁵⁹ TF1-117, Transcript 3 July 2006, p.11. The relevant parts of the statement have been exhibited under Exhibit Number 114 (filed under seal).

⁵⁶⁰ TF1-117, Transcript 4 July 2006, pp.101-102. The relevant portions of the 2005 statement have been exhibited as Exhibit 115 (filed under seal).

⁵⁶¹ TF1-117, Transcript 3 July 2006, pp.17-18.

sister again in evidence in chief. Since they were all captured together, and in light of his father's death at the scene, one would have expected that TF1-117 might have said more about his family- after all, he was only 10 at the time and this was a terribly traumatic event for TF1-117. Not to mention his family again in chief was remarkable and causes one to wonder how true the story was.

e. Failure to Identify Augustine Gbao in the Courtroom Despite the Claim that He Spent Years with Him

362. When questioned by counsel for Gbao TF1-117 confirmed that he remained with Gbao from when he was captured in his village until when he was taken to Kono in 1992; he recalled that Gbao talked to him during the journey.⁵⁶² Further, the witness recalled that Gbao came to the training camp where he was based in Kono and that he followed Gbao into the attack on Koidu Town that took place shortly after - Gbao being an armed senior commander of the squad in which TF1-117 served.⁵⁶³ Not surprisingly the witness agreed that he knew Gbao "very, very well"⁵⁶⁴ by the time that he left Gbao to train at Camp Zogoda.⁵⁶⁵ Later that year, and following his return from Liberia, TF1-117 recalled seeing Gbao again in Kailahun; he stated that he then saw Gbao regularly until 1995. Such familiarity with Gbao becomes significant, of course, when one recalls TF1-117's failure to identify him in the dock at the end of the prosecution's examination in chief.⁵⁶⁶

Period of February 1998 to May 2000

a. Exaggeration and Unrealistic Account

363. In Makeni, TF1-117 found himself handed over to a Father Victor, presumably at CARITAS, and remained in the pastoral centre until Johnny Paul was overthrown (February 1998), at which point the witness took up arms again and went to the RUF task force office.⁵⁶⁷ From then he was in a fighting group led by "Superman, CO Issa...General Bropleh, Augustine Gbao and some other commanders" to "come to take Johnny Paul Koroma".⁵⁶⁸ As with his account that he served under Gbao as a child combatant we suggest this story is utterly fabricated and bears no resemblance to undisputed historical facts. Indeed, the witness's story was so fantastic one is led to wonder about his cognitive abilities considering the trauma and abuse he must have endured.

⁵⁶² TF1-117, Transcript 4 July 2006, p.43.

⁵⁶³ *Id.* at p.51.

⁵⁶⁴ *Id.* at p.66.

⁵⁶⁵ *Id.* at p.52.

⁵⁶⁶ TF1-117, Transcript 30 June 2006, pp.51-52.

⁵⁶⁷ TF1-117, Transcript 29 June 2006, pp. 99-100.

⁵⁶⁸ *Id.* at p.100.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

364. The plan was apparently to go to Freetown, but they only got as far as Waterloo. Johnny Paul had already passed through Tombu where he said the soldiers should fend for themselves through “Operation Pay Yourself”.⁵⁶⁹ TF1-117 described widespread looting all the way to Makeni; he had been in a convoy with “Superman...General Bropleh, Augustine Gbao, CO Morris Kallon”.⁵⁷⁰ He described the looting of Lebanese shops in Makeni and the capture and rape of a Lebanese woman by Gbao, as a result of which he was punished by CO Issa who fired around Gbao’s feet.⁵⁷¹

365. In the wake of jet bombing attacks TF1-117 then left in a mixed group of RUF and AFRC to Kabala led by SAJ Musa, and spent the next portion of his evidence describing atrocities in that area with seeming abandon.⁵⁷² Having stayed in Kabala for a week the group headed for Kono, where they met “master” (Issa Sesay) and Augustine Gbao; they then headed directly for Kailahun⁵⁷³, where a meeting was held between Issa, Mosquito and Johnny Paul.⁵⁷⁴ Issa Sesay allegedly brought ammunition which was distributed to commanders: “Then we started advancing...I was still with my commander...Augustine Gbao”.⁵⁷⁵

366. The witness alleged he was part of a group that then attacked Tongo (where houses were burned and people were captured and killed), laid an ambush at Sewafe in Kono where hands were amputated and where “we killed so many” ECOMOG soldiers; finally arriving in and capturing Makeni⁵⁷⁶. Over the next pages the witness described the lurid killing of an ECOMOG “moak” driver⁵⁷⁷ and his promotion to RSM by Sesay following the taking of Makeni⁵⁷⁸ (which must have been late December 1998).

367. The witness also gave evidence that he was in a group led by Issa Sesay that was asked to carry a message from CO Mosquito to Augustine Gbao, saying that “we should all gather, Johnny Paul said we should all come together with the SLA.”⁵⁷⁹ The witness described the meeting in Kono, and then being part of a group led by Gbao and CO Issa that went to Makeni. We submit that the suggestion that Gbao was the intended recipient of a message urging unification with the SLA

⁵⁶⁹ *Id.* at p.101.

⁵⁷⁰ *Id.* at p.102-103.

⁵⁷¹ *Id.* at p.105-106.

⁵⁷² *Id.* at pp.108 *et seq.*

⁵⁷³ TF1-117, Transcript 30 June 2006, pp.5-7.

⁵⁷⁴ *Id.* at p.8.

⁵⁷⁵ *Id.* at pp.10 -11.

⁵⁷⁶ *Id.* at pp.11-12.

⁵⁷⁷ *Id.* at pp.15.

⁵⁷⁸ *Id.* at pp.17.

⁵⁷⁹ TF1-117, Transcript 29 June 2006, pp. 97-98.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

does not bear scrutiny. As evidence of Gbao's alleged power and command responsibility in eastern Sierra Leone this would, if it were true, be highly damaging evidence. However, it was supported nowhere else and, given the evidence of highly placed RUF insiders, it was clearly unfounded.

368. Cross examined by counsel for Sesay, TF1-117 claimed that he had been collected at "task force" in Makeni (where he had stayed throughout the life of the junta with Father Victor) in order to fight ECOMOG in the wake of the intervention and overthrow of the AFRC junta (which occurred in February 1998).⁵⁸⁰ Under cross examination by counsel for Gbao TF1-117 asserted that as the boys dispersed from Father Victor's facility after the overthrow, he saw Gbao at task force, tellingly stating "I recognised him immediately".⁵⁸¹ TF1-117 went further stating that Gbao (who was allegedly holding a pistol, contrary to several witnesses in the case who said he was never armed) demanded they "come and receive Johnny Paul. That was our target."⁵⁸² The witness continued by asserting that he travelled to Adra Camp near Waterloo with Gbao, and retreated back to Makeni with him.⁵⁸³ Yet further, the witness attempted to incriminate Gbao in a way that we suggest-even in light of other Prosecution evidence- was blatantly fabricated and offensive to the court. TF1-117 claimed he made the trip in a vehicle with Augustine Gbao in a convoy of commanders including Base Marine, Fokia, Superman, General Bropleh and Morris Kallon. This convoy was allegedly heading from Makeni to Freetown to recue JPK.⁵⁸⁴

369. This account should be disregarded for several reasons. First, there is no evidence anywhere in this case that Gbao was ever in Makeni prior to his posting there in February 1999. Secondly, the suggestion that Gbao was apparently travelling in a convoy of top military commanders, surely anticipating military action (to extract JPK from Freetown where the junta had fallen), is laughable. It is unsupported elsewhere and flies in the face of all evidence from Prosecution and Defence alike that put Gbao in Kailahun District for the entire indictment period until late 1998. Furthermore, it flies in the face of the unchallenged evidence that Gbao was not a combatant. The fact that TF1-117 failed during his entire testimony to refer to Gbao's status as overall IDU and security commander is, we suggest, rather telling- leading one to wonder (even had he identified Gbao correctly) whether TF1-117 had ever seen Gbao's face until June 2006 when he testified.

370. We submit it was capricious of the Prosecution to lead this evidence. We submit that had the

⁵⁸⁰ TF1-117, Transcript 3 July 2006, p.33.

⁵⁸¹ TF1-117, Transcript 4 July 2006, pp.70-71.

⁵⁸² TF1-117, Transcript 4 July 2006, p.72.

⁵⁸³ *Id.* at pp.71-72.

⁵⁸⁴ *Id.* at pp.34-35.

witness been even moderately scrutinised by Prosecution staff prior to testifying the folly of his evidence would have been exposed. This may have saved the Prosecution's blushes as well as having removed a witness who, if believed, could yet contribute to a miscarriage of justice. We submit that the prosecution's duty to impartiality was ignored: in TF1-117 they had a witness who they felt could provide evidence- no matter how far fetched and impeachable-of a link between Gbao and the AFRC as well as with the events of Operation Pay Yourself along the Freetown-Makeni-Kono Highway in early 1998. No matter how incongruous his evidence was compared to other Prosecution witnesses, the temptation was too strong to be ignored. We submit the Prosecution should not be allowed to present TF1-117 as a witness of truth, and their conduct in leading a witness of this quality should be noted: to rely on the evidence provided by TF1-117 would be offensive to justice.

371. As a point of interest, one cannot but marvel at the coincidence that so many RUF commanders found themselves in Makeni when JPK's government had been based in Freetown. Quite why they were all based in Makeni is unclear: the defence suggestion that this was a worthless lie uttered by an increasingly worthless witness is perhaps more likely to be true.

372. Under cross examination by counsel for Sesay TF1-117 stated that the convoy returned to Makeni having received information at Adra Camp near Waterloo that JPK had already left and had ordered the commission of Operation Pay Yourself. TF1-117 said he arrived back in Makeni with Superman.⁵⁸⁵

373. TF1-117 told counsel for Sesay that he stayed in Makeni for a week with Augustine Gbao, who lived at task force at the time.⁵⁸⁶ This assertion is again denied; not only do the defence assert that Gbao was living in Kailahun at this time, so does the body of relevant and credible Prosecution evidence. One should note that the killing of the Kamajors, which allegedly occurred in February or March 1998⁵⁸⁷ took place - by agreement of both Prosecution and Defence witnesses - at the time when Gbao was in Kailahun. The evidence of TF1-117 thereby once more directly contradicts the evidence provided by other witnesses. To accept it would be tantamount to finding that Gbao was in two places at the same time. This is rejected by the Third Accused and has never been part of the Prosecution's case.

⁵⁸⁵ TF1-117, Transcript 3 July 2006, p.41-42.

⁵⁸⁶ TF1-117, Transcript 3 July 2006, p.43.

⁵⁸⁷ TF1-168, Transcript 4 April 2006, p.18: "The killing of the 65 occurred the 19 February 1998

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

b. Contradictions with Prior Statements

374. TF1-117's hapless dishonesty was further demonstrated in cross examination by counsel for Sesay, who reminded the witness what he told the Prosecution in October 2005:

"Witness was in Kono when he learnt of Johnny Paul Koroma's overthrow of Pres Kabbah's SLPP government. That was when he left Mosquito's group to join Augustine Gbao in Kailahun."⁵⁸⁸

Counsel for Sesay asked:

"Q: 'But no mention here about returning to Kono after joining Augustine Gbao in Kailahun, and from Kono to Makeni. No mention of that?"

A: It's there.

Q: It's not there."⁵⁸⁹

375. In addition to casting doubt on TF1-117's evidence that he joined Augustine Gbao, this exchange shows the witness being caught lying yet again in a feeble attempt to mislead the court into believing that he had told the truth ("It's there"), rather than a lie on a previous occasion.

376. Returning to the period immediately after the intervention and the junta's fall, counsel for Sesay put another section of Exhibit 114 to the witness⁵⁹⁰ where he stated "We left Four Mile in a convoy which Johnny Paul was leading all the way to Makeni." In response, TF1-117 denied he had told the Prosecution in 2003 that JPK had led the convoy.⁵⁹¹ When asked why he had not bothered to correct that statement since, he replied that he had not been asked about it.⁵⁹² This, we suggest, was another pathetic lie by this witness whose true motive for testifying was by then clearly in doubt.

377. Counsel for Sesay also identified other inexplicable inconsistencies. Among them, he referred to TF1-117's evidence in chief which stated "We left Kabala to Kono because those of us who were RUFs were not many altogether with the AFRC men because they said we had a meeting in Kailahun. That was the time we went to Kono".⁵⁹³ When asked how long he stayed in Kono the witness replied "We didn't even sleep there."⁵⁹⁴ However few days later the witness said that he stayed in Kono "up to 3 or 4 weeks".⁵⁹⁵

⁵⁸⁸ Exhibit 115, p.16851 (Filed under seal).

⁵⁸⁹ TF1-117, Transcript 3 July 2006, p.46.

⁵⁹⁰ Exhibit 114, p.12208 (Filed under seal).

⁵⁹¹ TF1-117, Transcript 3 July 2006, p.52.

⁵⁹² *Id.*

⁵⁹³ *Id.* at p.67, referring to TF1-117, Transcript 30 June 2006, p.6.

⁵⁹⁴ *Id.*

⁵⁹⁵ TF1-117, Transcript 3 July 2006, p.63.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

378. The witness then stated that he had never met Sesay in Kono⁵⁹⁶ at that time. In response, counsel for Sesay put another tract of his evidence in chief:

“Q: Did you meet anyone in Kono?

A: Yes...we met Master (TF1-117's epithet for Sesay) there and Augustine Gbao and others... prior to going to Kailahun for the meeting.”⁵⁹⁷

c. Exaggerated and Unrealistic Account

379. The same comment might be made of TF1-117's claim a few moments later that, after a week in Kailahun he went on an attack of Tongo in Kenema District with Morris Kallon, Augustine Gbao and-just as perversely-CO Mosquito.⁵⁹⁸ Thereafter the witness stated that he accompanied Gbao to Kono-another attempt by the Prosecution to link Gbao to the Kono crime base in 1998-and continued the attack to Makeni.

380. This account is fantasy. There is no evidence anywhere else in the case that Gbao left Kailahun Town until late 1998 when he was summoned to Buedu by Mosquito for failing to do his job properly. There is no evidence elsewhere in the Prosecution case that Gbao went on any attacks in the indictment period, to Tongo or elsewhere. There is no evidence of Gbao and Kallon being seen together until 1999 in Makeni. There is no evidence whatsoever that Mosquito ever went on an attack himself. Finally, as stated, there is no evidence that Gbao ever went to Kono -unless one wishes to believe the utterly discredited and malevolent nonsense that this witness seeks to purvey.

381. The witness's anxiety to place himself in the heat of the action was characteristic of his evidence concerning previous actions throughout Sierra Leone. In cross examination he referred to shooting at Mabanta: “we seized their vehicles. When the chopper came to pick them up, they too started returning fire.”⁵⁹⁹ Testifying as to UNAMSIL troops who were allegedly captured at Mabanta TF1-117 stated “we brought them to the task force. That's where we left them.”⁶⁰⁰ Leaving aside the fact that this action was reported nowhere else in the Prosecution case, TF1-117 then appeared to cite a roll-call of major RUF commanders present at the same time and place: “CO Issa was there, Morris Kallon was there, CO Gibril was there, Superman was there” as well as Augustine Gbao.⁶⁰¹ This, we submit, is untrue. Leaving aside Gbao's known fear of combat, this inventory of

⁵⁹⁶ *Id.* at p.67.

⁵⁹⁷ *Id.* at p.67, referring to TF1-117, Transcript 30 June 2006, p.6.

⁵⁹⁸ *Id.* at pp.71-72.

⁵⁹⁹ TF1-117, Transcript 4 July 2006, p. 77.

⁶⁰⁰ *Id.*

⁶⁰¹ *Id.* at p.78.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

commanders may not be as helpful to the Prosecution as the witness may have intended. Both Superman and Massaquoi had been ejected from Makeni when Issa Sesay re-entered in October 1999; there is no suggestion anywhere else in this case that they were anywhere near Makeni at this time.

382. For the same reasons as previously mentioned, we submit that the evidence of TF1-117 should be treated with extreme caution. At the very least it was exaggerated and unrealistic.

d. Conclusion

383. Thus, the witness had again been shown to have told different stories within the same evidence-begging the question whether he was ever even there. We submit that as far as the Prosecution was concerned it was highly important to adduce evidence that Gbao was in Kono, since it would provide the missing substance – after a year and a half of testimonies by Prosecution’s witnesses - to the allegation that he was part of a joint criminal enterprise to take over Sierra Leone by all means, including the commission of crimes. TF1-117 was also tendered by the prosecution to fill in the yawning gaps left by 77 witnesses in relation to Augustine Gbao’s position of command and control. We submit TF1-117’s evidence was wholly out of line with the rest of the Prosecution case against Gbao; it was uncorroborated and should be disregarded.

384. A summary of TF1-117 would amount to the following: he spent 3 or 4 weeks in Kono after the February 1998 intervention, followed by a week in Kailahun for the meeting, followed by an attack on Tongo leading to an attack on Kono - which the Prosecution case itself alleges took place in December 1998 prior to the RUF’s advance on the Western Area.⁶⁰² Somehow, the chronology does not quite add up, we suggest, nor does the account of the personnel involved. Quite how the Prosecution could honestly propose to use this evidence is frankly beyond us.

3. *Evidence on UNAMSIL (Counts 15-18)*

a. Exaggeration and Unrealistic Account

385. Whilst Freetown was attacked in January 1999 TF1-117 remained in Makeni where he was taken in by Father Victor at St Francis’ school. According to the witness Father Victor later “went to the task force office, and he said he wanted to get all the child soldiers to be given to him. He was going to take care of us and put us back to school.”⁶⁰³ He claimed that “we were attending school

⁶⁰² TF1-117, Transcript 3 July 2006, p.74.

⁶⁰³ TF1-117, Transcript 30 June 2006, p.23.

there and that was where we were when the UNAMSIL people were attacked and then we all scattered about in the camp...We were there at St Francis when CO Morris Kallon and Augustine Gbao, they went and met us there in St Francis camp, and said that moment we should leave the camp and they said they just took us there and kept us there just to make fool of us and they were just giving us rice and clothing, they don't give us money...He (either Kallon or Gbao) said the father was just fooling us around. They said they were going to lock us all up. That is why we were kept there. He (Gbao) took out his pistol."⁶⁰⁴ Later, the witness went further: "He took out his pistol and he asked for the boss who was there in he camp, and they called on the manager and he said that from today he does not want to see any boy here again."

386. Having accused Gbao of effectively ruining the pastor's work at the CARITAS hostel at St Francis School, TF1-117 recalled that he then embarked on looting the Kenyan UNAMSIL and attacking their camps at Mabanta, Mankineh and Makump.⁶⁰⁵ At Makump he reported that Gbao and Sesay destroyed the Makump camp and took the ammunition.⁶⁰⁶ He stated that Gbao and Kallon had gone to the CARITAS camp and had told all the boys to leave, from which point they all scattered. He stated: "we came to task force and that was the time we knew that it was CO Issa and Augustine Gbao that have gone to Makump and destroyed the camp. And that was from there we teamed up again and started attacking the camps..at Mabanta and Mankneh." He stated that vehicles were captured at both camps.⁶⁰⁷ When asked who was in command of the operations at Mabanta and Mankineh he said "There was no order at that time. Except later, when we came to the task force office...the commanders were now there...Gibril Massequoi was there, Morris Kallon was there, Augustine Gbao was there, General Bopleh was there. Digba was there".⁶⁰⁸ TF1-117 purported to identify Gbao in the dock but pointed out to Morris Kallon.⁶⁰⁹

b. Hearsay

387. TF1-117's evidence regarding the UNAMSIL attacks has been largely exploded elsewhere in these submissions. The following excerpts of TF1-117's testimony simply re-emphasise his total lack of credibility. He probably put his entire account on the matter into context when, in cross examination by counsel for Sesay, he conceded that anything he could say about what happened at Makump (the only UNAMSIL camp at which the Prosecution alleged Gbao was present) was the

⁶⁰⁴ *Id.* at pp.24-25.

⁶⁰⁵ *Id.* at p.26.

⁶⁰⁶ *Id.* at p.27.

⁶⁰⁷ *Id.* at p.31.

⁶⁰⁸ *Id.* at p.32.

⁶⁰⁹ *Id.* at p.51.

product of what someone else had told him.⁶¹⁰

29676

c. Contradiction with Prior Statements

387. Further doubt on who actually took part in the Mabanta attack was cast by counsel for Sesay, who elicited another remarkable inconsistency. He reminded TF1-117 that in Exhibit 116, containing information he gave to the Prosecution in February 2006,⁶¹¹ the witness stated that Issa Sesay stood observing the attack on Mabanta with ‘pistols raised in either hand’. Counsel asked “So you told Mr Bangura (prosecution counsel who took the information) that during the Mabanta attack Issa Sesay was standing observing with pistols in his hands, did you?” The witness blatantly denied doing so.⁶¹²

388. Furthermore, the witness then denied that, contrary to what he was reported to have said just 4 months before, he had told the Prosecution “what happened at the second location was more or less a repeat of the first incident except that Issa Sesay stayed behind at the first location near his vehicle.”⁶¹³ Given that this information was given to the prosecution just 4 months before TF1-117 testified, the fact that he then denied it in the witness box speaks volumes about his lack of reliability once more. This demonstrated beyond argument how wrong it would be for TFI-117’s evidence to be considered at all.

4. *Evidence on Sexual Violence (Counts 6-9)*

389. During cross examination, counsel for Sesay put another tract of Exhibit 114 to the witness, where he had stated “I was in the company of some colleagues on Rogbane Road when Augustine Gbao gave some instructions to his boys to open fire on one Lebanese owned house. They did and then Gbao ordered his deputy to go inside and take the Lebanese woman out. She was taken to the RUF office and Gbao raped her.”⁶¹⁴

390. This was the only allegation of rape made against Gbao in the entire case. The suggestion that Gbao was even in Makeni at this time is clearly false, as has been argued above. Not only that, when counsel reminded the witness that he had alleged the woman was taken from her house in his 2003 statement, the witness stated she had been taken from a shop, and assured counsel that is what

610 TF1-117, Transcript 3 July 2006, p.89.

611 Exhibit 116, p.18204, para.2 (Filed under seal).

612 TF1-117, Transcript 3 July 2006, p.92.

613 *Id.*

614 TF1-117, Transcript 3 July 2006, pp.53-54. Exhibit 114, p.12209 (Filed under seal).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

he had told the Prosecution in 2003.⁶¹⁵ This is another example, we suggest, of a Prosecution witness having no credible explanation for his inconsistencies and blaming Prosecution inefficiency. Elsewhere in international jurisprudence this type of explanation for inconsistency has been rejected. In this case, compounded with the other factors above, we submit this was another spiteful attempt by TF1-117 to lay false testimony at Gbao's door and should be disregarded.

391. TF1-117 was the only witness who gave any evidence of sexual violence against Augustine Gbao. In view of TFI-117's proven tendency to be inconsistent, contradictory and exaggerated his evidence should be entirely disregarded. The defects are too numerous to be justified. However, should the Trial Chamber decide to consider this evidence, the Third Accused submits that it should be viewed with extreme caution, and that in the absence of any corroboration it should be rejected.

5. *Identification Evidence*

392. Little need be said, considering the sheer amount of time the witness claimed to have spent with Gbao 1992-1995, 1997, 1998 and 2000, about his failure to identify the Defendant when requested by Prosecution counsel. The fact that TF1-117 not only failed to identify Gbao but also identified another co-defendant instead demonstrates conclusively the witness was prepared to make up his story as he went along. The contempt he showed to the court and administration of justice, let alone to the accused, was appalling.

393. To summarise this point, counsel for Gbao asked TF1-117 the following: "you knew Augustine Gbao extremely well over a period of a number of years..." to which TF1-117 confidently replied "YES".⁶¹⁶ TF1-117 similarly responded in the affirmative to the question "And you would be in a position to recognise him at any time; that's correct isn't it?"⁶¹⁷

394. It is established that identification evidence should be approached with caution.⁶¹⁸ The fact that TFI-117 not only failed to identify Gbao but identified someone else instead illustrates the need for such strict rules of identification evidence. We submit there is no other reasonable explanation for TFI-117's failure than that he was not telling the truth. A similar example - while much less striking than the present one - arose in the AFRC case when a witness testified to seeing one of the Accused with five to ten child combatants. He then purported to describe the Accused. The Trial

⁶¹⁵ *Id.*, at p. 54.

⁶¹⁶ TF1-117, Transcript 4 July 2006, p.99.

⁶¹⁷ *Id.*

⁶¹⁸ *Supra* paras. 253-256.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Chamber found this evidence was too vague and chose not to rely on his evidence.⁶¹⁹ Elsewhere the Trial Chamber ruled the identification evidence of an alleged victim of rape unreliable.⁶²⁰

6. *Conclusion*

395. The Third Accused does not aim to diminish the trauma that TFI-117 may have suffered. But this does not automatically render him credible as a witness. To the contrary, it is established in case law that victims of trauma should be assessed with particular care. Moreover, TFI-117 was of a very young age at the time, which casts an additional doubt on his ability to recall names, places and dates let alone the full details of each crime he alleges were committed.

396. In our submission, to import this witness as one of truth in this trial would not only be wholly unfair to the Defendants, it would run contrary to the very spirit of international justice and its fundamental principles of fairness. His constant prevarication, self-contradiction and blatant dishonesty, culminating in his spiteful attempt to identify a man we suggest he had never even met warrants the immediate disregard of his evidence.

397. The fact alone that TFI-117, despite claiming having lived with Augustine Gbao for several years, identified Morris Kallon when asked to identify the Third Accused should alone suffice to cast reasonable doubt on the veracity of his evidence. The fact that he admitted having been under drugs at the time of the events and that he had difficulties in recalling events should equally put the reliability, if not credibility, of his evidence into doubt.

398. We suggest this alone should be sufficient to discredit the entirety of TFI-117's evidence. However, it is not all: TFI-117 constantly and regularly contradicted himself, whether with prior statements or with previous evidence given under oath. The witness failed to provide any reasonable explanation for such serious and repeated inconsistencies or contradictions. When confronted with his previous contradictory statements the witness either blamed the prosecution for failing to record them properly or avoided the question.

399. The fact that TFI-117's evidence was entirely uncorroborated serves as yet another reason to treat this evidence with the gravest of doubt.

619 AFRC Trial Judgement, para.1263.

620 AFRC Trial Judgement, para.1178.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29679

C. TF1-054

1. *Introduction and Overview of Evidence*

400. TF1-054 was a building supervisor, born and educated in Bo District. In our submission he was called for one reason: to place Augustine Gbao within the May 1997 AFRC/RUF alleged joint criminal enterprise. The witness suggested that around June 1997 Gbao was part of a five man "junta" delegation that came to Bo to persuade town elders to work hand in hand with the new regime. In cross examination TF1-054 was made to look rather silly, however. He was reminded of a series of previous statements and interviews he had previously given to the Prosecution since 2002 that contrasted with information proofed just before he was due to testify. Yet again, one saw another witness who had a sudden and remarkable epiphany of memory.

401. TF1-054 was called to allege that Gbao had indirect involvement in the horrid murder [REDACTED] [REDACTED] As the evidence transpired, replete with inconsistencies and non sequiturs, we submit it rapidly appeared that the witness was inherently unreliable. Moreover, since TF1-054 was the ONLY prosecution witness (unless one counts the far fetched and discredited claims of TF1-117) attempting to associate Augustine Gbao with the 1997 junta, we submit that the prosecution's case on that issue cannot be sustained.

402. The witness claimed to be staying at the Demby Hotel in Gerihun, Bo District in May 1997 when armed soldiers entered the hotel in search of Kamajors and the Paramount Chief, AS Demby. The witness's uncle and others were beaten; soldiers also stole his uncle's jewellery and other items. TF1-054 recognised the AFRC Brigade Commander for Bo, Boysie Palmer, AF Kamara and "ABK".⁶²¹

403. A few days later at the Paramount Chief's house the witness saw a Landcruiser arrive with "a Kamajor sat on the bonnet";⁶²² five men alighted and went to the Paramount Chief's room. He was blind and suffering from stomach problems. After the meeting TF1-054 led the five to a meeting of a delegation of the township in a nearby schoolroom.⁶²³ One of the five announced himself as "Tommy", a native of Gerihun; "The other man introduced himself. He said he was Augustine Gbao".⁶²⁴ TF1-054 continued "The other man introduced himself as Mike Lamin. Another young man...I cannot recall his name...There was another man called Morris Kallon". Crucially for the

⁶²¹ TF1-054, Transcript 30 November 2005, pp.15 et seq.

⁶²² *Id.* at p.20.

⁶²³ *Id.* at p.21.

⁶²⁴ *Id.* at p.22.

prosecution, TF1-054 then said "They told the people that [they] came from Freetown..." and explained they had met Boysie Palmer and others before coming.⁶²⁵

404. After discussions wherein the five tried to persuade the town delegation to accept the junta, the meeting broke at 3pm to listen to the news. The witness recalled hearing gunshots and bombardment in the direction of Gerihun; he ran for the Paramount Chief's house and found the Chief lying on his bed.⁶²⁶ TF1-054 hid "right up the house and went and hid by the window. And I was watching, peeping, and I saw everything that was happening".⁶²⁷

405. He continued "While I was up there, at the upstairs, I saw people in soldier's uniform and the five man delegation that was talking to us was among the people, the soldiers, that were coming towards the Paramount Chief's compound". He saw Palmer, Kamara and ABK enter the Chief's house-there was no mention of Gbao.⁶²⁸ TF1-054 left his hiding place and went to the Chief's bedroom window to observe: he saw the Chief's catheter detached from his penis and heard Kamara saying he should be shot. Allegedly the Chief was then shot; Palmer said "He hasn't given up the ghost yet...Stab him".⁶²⁹ The Chief "shouted" as he was stabbed; TF1-054 jumped from the window and was shot at by soldiers who believed they had killed him. Next day he returned to find the bodies of civilians in the street. He also found the Chief and Pa Sumaila in the bedroom lying dead.⁶³⁰

406. TF1-054's responses in cross examination should be seen in context of his concession that as a matter of common sense one's memory is more likely to be accurate the closer one is to the event having taken place.⁶³¹

2. *The Number of Participants*

a. Material Contradictions with Prior Statements

407. During his cross-examination Counsel for Gbao commenced by reminding the witness of what he said earlier about the arrival of the red Landcruiser and the **five** men delegation. He put the witness's statement, taken exactly three years before he testified (and just five years after the event

⁶²⁵*Id.* at pp.22-23.

⁶²⁶ *Id.* at p.29.

⁶²⁷ *Id.* at p.30

⁶²⁸ *Id.* at p.31.

⁶²⁹ *Id.* at pp.32-33.

⁶³⁰ *Id.* at p.34.

⁶³¹ *Id.* at p.51.

as opposed to 8 years after at the time of testimony): "On July 1997 at about 9 o'clock in the morning, **three** men in a red Land Cruiser went to the PC, AS Demby".⁶³²

408. Counsel for Gbao asked the witness why he had told prosecution counsel in evidence the event happened between 11 and 12 o'clock; TF1-054 replied by blaming the person writing the statement for getting it wrong.⁶³³ The witness then stated that it was the same person's fault for recording the total of three men in the statement as opposed to the five he had mentioned in chief.⁶³⁴ Given that answer one might find the following exchange a little contradictory:

"Q: You were asked on 2nd November 2003 by Ms Parmar (prosecution counsel) whether your statement dated 20th November 2002 was correct and...you agreed that it was..?'

A: Yes, at that time when she asked me".⁶³⁵

409. Within a very short time the witness had been exposed by cross examination as being seemingly incapable of maintaining a consistent story; and yet again the temptation of blaming the prosecution for failing to record statements properly proved too hard to resist:

"Q: Would you explain why it is then that on 2nd November 2003, about a year after your original statement, it is written: "In his follow up interview, the witness stated that his existing statement, 26th November 2002, was correct". That's the fault of somebody else again, is it...?'

A: Yes, because I told them I was sceptical about the issue..."⁶³⁶

410. TF1-054's explanation for his ability to suddenly remember the names of the five-not three-men delegation was, we suggest, a tissue of lies, as shown by the following exchanges:

"Q: Mr Witness, would you agree that in your original statement of 26th November 2002 you failed to name any of the five man delegate team?

A: Yes...I told them that I could not recall the names of those people."⁶³⁷

411. Shortly afterwards, the witness made his first reference to his diary, in answer to the question:

"Q: The first time you mentioned any names was in your interview notes, that's page 14140 dated 24th November 2004; a year ago-7 years after the event. Why was that?

A: I forgot because I forgot...I wrote everything down, all these incidents. Now, since I've laid hands on the document that I wrote the event, then I've looked through them".⁶³⁸

⁶³² Witness Statement of TF1-054 dated 26 November 2002, p.14137. Referred to in TF1-054, transcript 30 November 2005, p.53.

⁶³³ *Id.*

⁶³⁴ *Id.*

⁶³⁵ TF1-054, Transcript 30 November 2005, p.56.

⁶³⁶ *Id.* at p.57.

⁶³⁷ *Id.* at pp.58-59.

⁶³⁸ *Id.* at p.59.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

412. The document that TF1-054 mentioned was never produced, and the later testimony of TF1-054 raised serious doubts at to its existence.

b. Contradictions with Prior Testimony in the AFRC Case

413. From then on the witness's hapless evidence was, we submit, shown to be utterly self-contradictory and unreliable. Contrast with his evidence to the AFRC trial showed beyond recall how this witness was just not capable of belief. His "diary" came to the fore in word if not deed: when asked why in the AFRC trial in July 2005 he said there were **four** delegates at the Chief's house, TF1-054 said: "I had my small diary, which I lost, you know, for some time. Thank God that I've been able to see it..."⁶³⁹ Indeed.

414. Further, when asked about when exactly he wrote about the events that took place in Gerihun, he said "The day I put this on paper was the time that I had run away and went into Bo town...The next day when I came to Bo town, that is the time that I myself put down these things on record."

415. He clarified that this was the day after his grandfather had been killed. He also assured counsel that it was finding the diary that had enabled him to alter the figure from three to five.⁶⁴⁰ Why the existence or discovery of the diary was never mentioned in a single statement or proofing note to the Prosecution was not explained; nor was the reason for telling the AFRC Trial Chamber just four months previously (July 2005) that the number of delegates was four.

416. Counsel for Gbao was understandably interested in TF1-054's diary-particularly as to whether it was merely a figment of the witness's imagination. Production of the diary may have confirmed several issues for the Prosecution, and may thereby have prevented the need for time consuming cross examination. Not wishing to take an unfair point, counsel asked where the notebook currently was. The witness helpfully replied that it was in Gerihun, adding "Just after when I had left there, they had been doing some cleaning to do some painting for Christmas, that I discovered it..."⁶⁴¹

417. Was it still available? One was sadly disappointed: "No, it's just a book. You see, I'm not

639 TF1-054, Transcript 1 December 2005, p.5.

640 *Id.* at p.6.

641 *Id.* at p.8.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

interested in it anymore because all that is there, it's no more material to me. What I was able to pick is from it was what I am telling you now. But it is no longer necessary for me to have it anymore, because we had done a thorough cleaning for Christmas."

418. Asked for details (to allay any suspicion that the witness may have been telling laughable lies), TF1-054 enlightened the court further: "After when we had cleaned the house, **we put it in the dustbin.**" Counsel for Gbao reminded TF1-054 that earlier he had agreed the "diary" was a very important document, but the witness assuaged the court: "What was there, which was important, I had picked it from that and now it's in my brain...**So it's in the dustbin now**".⁶⁴²

419. Resisting the temptation to draw a correlation between what was in the witness's brain and the contents of his dustbin, counsel summed TF1-054's account as follows: "It's a pack of lies, isn't it, Mr Witness, this story about a diary...you've made up this morning to justify the fact that you've moved from three to five to four people and then to five again in four separate accounts as to the number of people in the Land cruiser.."⁶⁴³

420. This sums up the witness's reliability on the issue of Gbao allegedly arriving within a group of "junta delegates". The story lacks any coherence and reliability. Had the witness produced the "diary" at any stage to a Prosecution investigator he may have been worthy of some credit; instead we submit that in order to protect himself from further impeachment he opportunistically made up a feeble lie on the spot and was exposed.

In so doing the witness did at least inject some light relief into these proceedings.

3. *Evidence on the Number of Delegates*

a. *Significant Inconsistencies*

421. Having comprehensively dealt with the contradictions relating to the number of delegates, counsel for Gbao now moved on to their names. As a basic standpoint, TF1-054 agreed with counsel that by the time the prosecution came to take his statement of November 2004, he had still by that time not named any of the alleged delegates.⁶⁴⁴

422. Counsel for Gbao started with the witness's November 2004 interview notes⁶⁴⁵ where, listing

⁶⁴² *Id.* at p.9.

⁶⁴³ *Id.* at p.11.

⁶⁴⁴ *Id.* at p.13.

⁶⁴⁵ *Id.* at p.21. Referring to the interview notes of 24 November 2004, para.8.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

the delegates, he mentioned the two defendants Kallon and Gbao - but not Mike Lamin or Tommy. Counsel then put to TF1-054 that the first time he mentioned Mike Lamin was as recent as four months previously, in the AFRC trial in July 2005.⁶⁴⁶ Counsel then pointed out to TF1-054 that the first time he ever mentioned Tommy was when he was re-proofed by the prosecution in August 2005-8 years after the event: and just 3 months before he testified in the RUF case (but a month after he had testified in the AFRC case!).⁶⁴⁷ TF1-054 had his excuse ready, saying "I am just telling you that I told these people that other people's names were there whose names I couldn't recall".⁶⁴⁸

423. Counsel for Gbao then moved to the several contradictions in relation to when TF1-054 claimed he had last seen the delegates. He started by reading a portion of the witness's November 2004 interview notes,⁶⁴⁹ having confirmed in cross examination that he saw the five delegates "coming back towards my grandfather's house I saw them" when the AFRC bombardment of Gerihun started.⁶⁵⁰ The interview notes read "The five people from the meeting ran back towards the place from which the gunfire was coming. **I never saw these five people again**".⁶⁵¹

b. Failure to Provide a Substantial Explanation for the Inconsistencies

424. The witness was confronted with the inconsistency between what he said to the Prosecution's interviewer in 2004 as opposed to what he said in Court. He explained: "That particular statement I didn't talk about that. I was not there when they ran to these people. But I saw them when they were going towards the house".⁶⁵² A few moments later the witness expanded: "This one (ie the November 2004 interview), in which they said I saw the five men going towards where the firing was coming from, **I never said that**".⁶⁵³ Challenged by counsel he agreed this was "another example of somebody in the OTP blatantly misrepresenting on paper what you told them face to face...it's their fault".⁶⁵⁴

425. Whatever this witness saw, it has been established that he did not attempt to name **any** of the delegates until *after* the RUF trial had started. We submit, as counsel put, that it was no coincidence that the two men TF1-054 finally mentioned in the November 2004's interview notes - 7 years after

⁶⁴⁶ *Id.* at p.22.

⁶⁴⁷ *Id.* at p.22.

⁶⁴⁸ *Id.* at p.22.

⁶⁴⁹ *Id.* at p.26. Referring to the interview notes of 24 November 2004, para.24.

⁶⁵⁰ *Id.* at p.25.

⁶⁵¹ *Id.* at p.26. Referring to the interview notes of 24 November 2004, para.24.

⁶⁵² TF1-054, Transcript 1 December 2005, p.25.

⁶⁵³ *Id.* at p.27.

⁶⁵⁴ *Id.*

the event and more than 2 years after his first statement - happened to be two of the Defendants in the RUF trial – Augustine Gbao and Morris Kallon.⁶⁵⁵

4. Conclusion

426. We submit that this witness showed nothing but contempt for the judicial process and should be disregarded without further debate. The chaos of his earlier accounts is juxtaposed by the epiphany of his late recollection in this way:

"Q: But you did forget these people...if you are to be believed. You forgot them in November 2002, you forgot them in November 2003. Lamin and Tommy you forgot in November 2004. Tommy you forgot in July 2005... You are not a witness of truth, are you?

A: ...I do forget."⁶⁵⁶

427. In short, we submit that TF1-054 was called for one purpose: by naming Gbao as part of the delegation he attempted to associate him with the coup leaders of May 1997. Happily for the Third Accused and the interests of justice, TF1-054's lack of reliability has been amply demonstrated. The focus of his evidence – the presence of Augustine Gbao and others – has been materially impaired by the repeated inconsistencies with statements previously given to the Prosecution. More significantly, the witness was shown to give different accounts of the facts while under oath. It has been stated by the ICTR that “inconsistency between two testimonies of the same witness, both given under solemn declaration, affects the credibility and reliability of the later testimony.”⁶⁵⁷ Indeed, TF1-054's credibility was seriously affected, and his explanations – rather than being substantial and reasonable – further demonstrated his lack of credibility. Given that TF1-054 was the only witness testifying about this event, his evidence should be disregarded in their entirety.

D. TF1-314

1. Summary of Evidence

428. TF1-314 testified on a variety of counts on the indictment against all 3 defendants. She claimed to have been captured by the RUF in 1994 and remained with them thereafter, frequently bearing their children. In particular she testified about Augustine Gbao being involved with the crimes of forced labour, child soldiers, forced marriage and in the UNAMSIL attacks.

429. It is submitted that not only did her evidence lack specificity, its content was also completely

⁶⁵⁵ *Id.* at p.30.

⁶⁵⁶ *Id.* at p.32.

⁶⁵⁷ *Prosecutor v. Musema*, Case No. ICTR-96-13-A, Judgement and Sentence, Trial Chamber, 27 January 2000, para.89. (“*Musema* Trial Judgement”).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

discredited during cross-examination. In order to explain why she too deserves to be disregarded out of hand we present evidence of her lack of credibility/reliability below.

2. *Evidence on Forced Labour (Count 13)*

a. Inconsistency with the Prosecution's case

430. TF1-314 stated in examination in chief that during her training she saw Sesay, Gbao and Kallon altogether in Buedu.⁶⁵⁸ She stated that during that time she was ordered to go food finding on two occasions with 25 civilians by CO Scorpion, thus raising a joint enterprise liability upon the defendants who were allegedly in Buedu at the time.⁶⁵⁹

431. Her claim that all 3 defendants were in Buedu together is very strange: the prosecution case only refers to Kallon being in Buedu for a brief time after he was recalled to Kailahun after the Kono atrocities in mid-1998, and to Gbao being there only in late 1998 after he had been summoned by Bockarie.

432. In any event, TF1-314 did not place Gbao in Buedu in late 1998. The time she claims he was there was unspecified, but was presumably prior to late 1998 because, according to her, she moved to Kono in 1998 and stayed there one month after which she went to Makeni.⁶⁶⁰

433. The witness implied that Gbao, Sesay and Kallon were together in Buedu for some time-an allegation repeated nowhere else in the entire prosecution case- by virtue of her comment that she saw all three, with CO Scorpion and other bosses choosing people to go on attacks⁶⁶¹. With the exception of the bizarre testimony of TF1-117, the suggestion that Gbao was involved in planning attacks is, likewise, alleged nowhere else.

434. For the sake of clarity, the Gbao defence case remains that Gbao was never based or resident in Buedu until the latter part of 1998 when he was summoned there as a punishment by Mosquito with whom Gbao had fallen out of favour.

435. For the reasons stated above, we submit that TF1-314 is wrong in her assertion that Gbao was party to crimes of Forced Labour. There is insufficient evidence that he was anywhere other

658 TF1-314, Transcript 2 November 2005, p.31.

659 *Id.* at p.31.

660 *Id.* at pp.44-46.

661 *Id.* at p.33.

than in Kailahun Town throughout 1998. To list the number of prosecution and defence witnesses who attest to that fact would be too onerous-it was a generally accepted fact in this case and we do not propose to waste time by producing a litany of testimony supporting that well known fact here.

b. Lack of knowledge/detail raises doubts of her actual presence in Kailahun District

436. While she provided evidence on forced labour and of the Accused being present in Buedu, an appropriate question with regards her evidence is whether TF1-314 *herself* actually lived in Buedu at all. Remarkably for someone who claimed to have lived in Kailahun District for years was the fact that TF1-314 could not name any villages.⁶⁶² Similarly she was unable to name a single RUF commander, apart from the three defendants and CO Scorpion, who was involved in ordering food finding.⁶⁶³ When asked to describe the relative size of Buedu, where she had allegedly lived for years, she was unable to do so, or even to compare its size to the Special Court. She was unable to describe details such as whereabouts in the town Issa Sesay's house was⁶⁶⁴, she was unable to name the MP commander of Buedu⁶⁶⁵, and nor could she recall the name of the town doctor.⁶⁶⁶

437. Examples of TF1-314's lack of recall are not limited to the above. Another illustration is contrary to what she had told the Prosecution, she testified that she never saw Morris Kallon in Buedu.⁶⁶⁷ Similarly - even though she claimed having gone to church every Sunday - TF1-314 was unable to give the name of the church in Buedu and changed her story, stating that she had NOT gone to church in Buedu and that she had gone to church all her life EXCEPT for the time she had lived there.⁶⁶⁸ This evidence, it is submitted, was a tissue of lies designed to mislead the court.⁶⁶⁹

438. This was followed by a final capitulation in relation to her allegations against Gbao in Buedu: asked whether she really had seen Gbao in Buedu she said 'I don't know him...the top commanders, I did not see them there'. She then conceded "I only heard about him that he was a rebel...I don't know whether he was a top commander or not, until he came to town (Makeni, 1999 in context)".⁶⁷⁰

⁶⁶² *Id.* at pp. 58 and 59; TF1-314, Transcript 4 November 2005, pp.43 and 52.

⁶⁶³ TF1-314, Transcript 2 November 2005, p.59.

⁶⁶⁴ *Id.* at pp.60-61.

⁶⁶⁵ *Id.* at p.61.

⁶⁶⁶ *Id.* at p.61.

⁶⁶⁷ TF1-314, Transcript 7 November 2005, pp.3-4.

⁶⁶⁸ *Id.*

⁶⁶⁹ *Id.*

⁶⁷⁰ *Id.* at p.5.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

439. In our submission TF1-314's astonishing withdrawal of her allegations against Gbao destroyed any evidence she gave against him of ANY crimes committed in Buedu, many of which were contradicted during cross examination anyway. This was another example of a lack of credibility in TF1 314, who was repeatedly unable to provide basic details and kept changing her evidence during cross examination.

440. As stated earlier, when significant inconsistencies or contradictions are found within a witness's evidence, the Trial Chamber should take into account the explanation provided by the witness. In the present case the witness gave a response that directly contradicted the evidence given during her examination in chief, and which demonstrated that she was not telling the truth. In our submission, her capitulation was evidence of a tendency to lie to such an extent that the rest of her evidence was irredeemably tainted. However, to ensure her evidence is disregarded, it is appropriate to carefully examine the rest of it.

2. *Evidence on Child Soldiers (Count 12)*

a. Speculation

441. In chief, TF1-314 stated there were 'many' SBUs and SGUs in Buedu. She claimed that Gbao had an SBU himself.⁶⁷¹ Given her admission during counsel for Gbao's cross examination that she never actually saw Gbao in Buedu this allegation was swiftly exposed as a lie.⁶⁷² This was emphasized by the fact that during cross examination TF1-314 admitted that her allegation that Augustine Gbao had SBUs was mere speculation. She stated that "because when we are in the jungle, all commanders had women. *I did not see him, but I take it that he had.*"⁶⁷³ We submit that the witness is free to assume all she likes: that does not amount to admissible evidence.

442. Whilst testifying on the UNAMSIL incident in chief, TF1-314 stated that after the attack on Makump, 'they were using the vehicles belonging to the UNAMSIL people-Augustine Gbao, Morris Kallon, and even SBUs'.⁶⁷⁴ At first glance this appeared to be probative evidence against Gbao. However, with the witness's credibility already tainted by the 'Buedu' analysis espoused above, it would be difficult in our submission to hold the quoted comment, devoid of context as it is, against Gbao with any weight.

⁶⁷¹ TF1-314, Transcript 2 November 2005, p.34.

⁶⁷² TF1-314, Transcript 7 November 2005, p.37.

⁶⁷³ *Id.*

⁶⁷⁴ TF1-314, Transcript 2 November 2005, p.48.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

443. The evidence of TF1 314 concerning child soldiers cannot be found to be reliable. Not only is there no detailed evidence, the witness herself admitted she had speculated as to whether Augustine Gbao had child soldiers during the events of the UNAMSIL abduction. As submitted above, TF1 314 is simply not a credible witness. Her lack of credibility fundamentally damages the totality of her evidence before the Court.

3. Evidence on Forced Marriage (Count 8)

a. Speculation

444. In chief the witness told of how she was taken as a forced wife at a young age, giving birth when she was 11 years old. She then asserted that Gbao knew that girls of 10-15 years were taken as RUF wives in Buedu. Quite how she professed to know Gbao's state of knowledge was not explained, but the issue is, of course, cancelled out by her admission in cross examination that she had never seen Gbao in Buedu (see above). Under cross examination from Gbao's counsel TF1-314 candidly admitted that she had merely 'assumed' that Gbao was one of the commanders with 'wives', conceding: *'I don't know the person, how would I be able to know the person's mind?'*⁶⁷⁵

445. In continuity with her evidence on forced labour and child soldiers, TF1 314's evidence on Augustine Gbao and forced marriage was once again seen to be merely speculative. Her evidence lacks any credibility in view of the fact that she admitted having not seen Augustine Gbao in Buedu.

4. UNAMSIL Attacks (Count 15)

446. Another example demonstrating TF1-314's lack of credibility was her evidence on the UNAMSIL attacks. It was neither impressive nor credible, as will be shown below.

a. Hearsay Evidence

447. In chief, TF1-314, relying entirely on hearsay incapable of being tested by the defence (a matter of massive significance given the wholesale inconsistency of her testimony against Gbao thus far) implicated Gbao and Kallon with instigating the UNAMSIL attacks: *"Morris Kallon and Augustine Gbao called a meeting to attack UNAMSIL- I know because a boy at my house attended the meeting."*⁶⁷⁶

448. Interestingly, the witness did not state that Gbao or Kallon took part in the violence, but did give hearsay evidence of looting: "According to boys who went to set up the ambush, Morris

⁶⁷⁵ TF1-314, Transcript 7 November 2005, p.14.

⁶⁷⁶ TF1-314, Transcript 2 November 2005, p.47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Kallon and Augustine Gbao were not in the ambush. Morris Kallon and Augustine Gbao met UNAMSIL at Makump...I was not there. After an hour, we saw RUF, Morris Kallon in his own vehicle, Augustine Gbao in his own vehicle, then the others passing by with their vehicles... vehicles that belonged to the UNAMSILs, after they'd removed them from their own vehicles, they were using the vehicles belonging to the UNAMSIL people – Augustine Gbao, Morris Kallon and even SBUS.”⁶⁷⁷

449. Additionally, TF1-314 claimed-presumably through hearsay again- that “It was Augustine Gbao and Morris Kallon that took the UNAMSILs away”;⁶⁷⁸ and “I don’t know where Augustine Gbao and Morris Kallon took them, but they said they were taking them to Kono.”⁶⁷⁹

450. TF1 314’s evidence on UNAMSIL was based entirely on hearsay. While hearsay is admissible before the Court, and could even be used to form the basis of a conviction, such evidence needs to be assessed with caution.⁶⁸⁰ In view of the speculative and unreliable nature of TF1 314’s evidence in general, such evidence should be disregarded.

b. Inconsistencies and Contradictions with Prior Statements

451. Having been contradicted with the contents of her previous statements to the Prosecution (Exhibits 49, 50 and 51) during the Sesay cross examination in relation to earlier events⁶⁸¹ the witness was then cross examined by the Kallon team⁶⁸² who pointed out that the witness had stated in an earlier witness statement that it was Superman and Gbao who had led the men that kidnapped the UNAMSIL at Makeni,⁶⁸³ contrary to the claim repeated above where she had said it was Kallon and Gbao.⁶⁸⁴ TF1-314 replied: ‘That was what I said, but at that time (ie presumably the day before) I did not recollect correctly’.⁶⁸⁵

452. This, we submit, was yet another example of a witness impeaching his or her own credibility

⁶⁷⁷ *Id.* at p.48.

⁶⁷⁸ *Id.* at p.49.

⁶⁷⁹ *Id.* at p.50.

⁶⁸⁰ CDF Trial Judgement, para. 264; AFRC Trial Judgement, para. 100. *See also Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, Trial Chamber, 2 September 1998, para.136 (“Akayesu Trial Judgement”); *Prosecutor v. Musema*, Case No. ICTR-96-13-T, Judgement, Trial Chamber, 20 January 2000, para.51 (“Musema Trial Judgement”); *Prosecutor v. Kajelijeli*, Case No. ICTR- 98-44A-T, Judgement, Trial Chamber, 1 December 2003, para. 45 (“Kajelijeli Trial Judgement”).

⁶⁸¹ TF1-314, Transcript 4 November 2005, p.11-50 (Exhibits 49, 50 and 51.)

⁶⁸² *Id.* at pp.61-67.

⁶⁸³ Exhibit 49, p.10729.

⁶⁸⁴ TF1-314, Transcript 2 November 2005, pp.47-48.

⁶⁸⁵ TF1-314, Transcript 4 November 2005, p. 100.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

with a casualness that speaks volumes of their lack of appreciation of the importance of the truth.

453. During TF1-314's cross examination by counsel for Gbao she made some comments that were, in fact, well received by the defence, such as the fact that after she saw Gbao in Makeni 'from that time when we were in Makeni, everybody has its freedom, his or her freedom of movement..' ⁶⁸⁶ as well as her interesting claim, given the amount of knowledge she professed to have about Gbao, that she did not know his job. ⁶⁸⁷

454. Cross examination brought the inconsistencies, speculative evidence and lack of particularity to the court's attention as follows:

455. First, TF1-314 was reminded of her statement of 29 October 2003 where she stated 'It was Superman and Gbao that led the men who kidnapped the UNAMSIL...at Makoth. I knew because I was in Makeni.' ⁶⁸⁸ Second, in an earlier statement dated 19-20 July 2005, she recalled 'Augustine Gbao and Superman had a meeting where they planned an ambush of UNAMSIL. They led a group to Makoth and laid the ambush'. ⁶⁸⁹ Third, on 20 October 2005 – two weeks before she testified, she had stated "It was Augustine Gbao and Morris Kallon who carried out an ambush of UNAMSIL trucks at Makoth". ⁶⁹⁰ Counsel then reminded TF1-314 of her testimony in court on 2 November 2005 where she stated that "Morris Kallon and Augustine Gbao called a meeting that they should attack UNAMSIL." ⁶⁹¹

456. The witness appeared to have shifted her ground- as late as three months before testifying, she was still maintaining her position that the attack had been ordered by Gbao and Superman. Yet, as the trial approached, she seemed to be correcting herself, citing Kallon-coincidentally a defendant (unlike Superman who was dead) along with Gbao. Can her motive be seen to be sound? Can she be trusted? The point-aside from motive-is this: if she was unsure about Kallon's presence at the meeting to attack Makoth, can she be seen to be sure about Gbao?

457. The absence of any other evidence of Augustine Gbao being involved with the attacks on the Zambians at Makoth supports, in our submission, that at best, TF1-314 didn't really know what she

⁶⁸⁶ TF1-314, Transcript 7 November 2005, p.8.

⁶⁸⁷ *Id.* at p.9.

⁶⁸⁸ *Id.* at p.16.

⁶⁸⁹ *Id.* at p.17.

⁶⁹⁰ *Id.* at p.18.

⁶⁹¹ TF1-314, Transcript 2 November 2005, p.47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

was talking about. At worst she was lying cynically. .

29692

c. Failure to Provide Reasonable and Substantive Explanation for Defects in Evidence

458. The evidence of TF1-314 was perfectly summarised in the following exchange between the witness and counsel for Gbao:

“Q: You have changed your story in relation to many matters before even reaching this court room, haven’t you?”

“A: ‘YES’.”⁶⁹²

459. During the same exchange the witness frankly admitted that she was ‘not able to recall things well.’⁶⁹³

5. *Conclusion*

460. TF1 314's evidence contained a rash of the factors that upon assessment may demonstrate inherent unreliability: repeated inconsistencies, contradictions, a lack of detail and lack of knowledge. Much of TF1 314's evidence was based on speculation and hearsay. Last but not least, she admitted that she “changed her story” before she testified.

461. The significance and cumulative effect of the manifold defects within TF1 314's evidence point to only one reasonable conclusion: it was neither not credible nor reliable. As such we submit it should be entirely disregarded.

E. TF1-113

1. *Introduction*

462. TFI-113 was called by the prosecution to incriminate Gbao in the killing of the suspected Kamajors, Forced Labour, Child Soldiers and presumably Sexual Violence. We submit that here evidence was not worthy of consideration as it was riddled with contradictions and inconsistencies, and appeared to be generated by a desire for personal revenge. At one point she openly confessed to lying to the court. In our submission such an admission irrevocably taints the entirety of her evidence to the extent that none of it may be safely used against the defendant. Should that submission fail, we submit the particular details of her account require strong corroboration: such corroboration is, however, absent.

692 TF1-314, Transcript 7 November 2005, p.34.

693 *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29693

2. *Impeachment on Evidence of Killing of Kamajors*

a. Evidence in Chief

463. TFI-113 [REDACTED]

[REDACTED]⁶⁹⁴ In chief, she described how 67 suspected Kamajors were being investigated in Kailahun where they had been placed in a cell⁶⁹⁵. On the day of the massacre she met Joe Fatorma, the local MP commander⁶⁹⁶ who told her that Mosquito wanted to meet the suspects in the jail. Whilst she was out buying pepper that evening she heard shooting. She recalled:

464. 'After I heard these gunshots, I ran to the roundabout. When I came there, I met a large crowd. There were 2 corpses there. Mosquito had a pistol. When I stood there, we were there, there were 8 people whom he shot in their heads. The MP commanders were there'⁶⁹⁷. She confirmed those present included 'Issa Sesay, Mosquito, Augustine Gbao, MP commander and their bodyguards..'.⁶⁹⁸ According to TFI-113 Mosquito told Joe Fatorma the rest of the people should also be killed.

465. She then went on to describe how the remaining 57 were shot at the 'police station',⁶⁹⁹ and recalled

'I went there. I was standing at the station. They were bringing them out, one after the other out of the cell, and they would kill that person. When they bring one person out, they would shoot that person and he would fall down; then they would bring him out another and shoot him down'⁷⁰⁰.

466. The witnesses stated that the MP agents were doing the shooting: 2 SLAs and 2 RUF soldiers.⁷⁰¹ She said that no less than 4 of her brothers and siblings died.

b. Cross Examination by counsel for Gbao

467. Counsel attempted to ask introductory questions which met with a rather obstructive response. It appeared odd that TFI-113 was unable to name the RUF commander [REDACTED]⁷⁰² and she claimed she 'didn't know' whether she recalled that Foday Sankoh organised the movement into the jungles, despite counsel's suggestion

694 TFI-113 tept March 2nd 2006 p41

695 Id p50

696 Id p55, ref to JF as MP commander at p48

697 TFI-113 tept March 2nd 2006 p55-56

698 Id p57

699 Id p60

700 Id p60

701 Id p62

702 March 6th tept p53

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29694

that must have been a major event in RUF history. Whilst not relevant per se, the manner of the witness's response was indicative of the attitude she began to adopt to counsel's questions.

i. Questions about the MPs [REDACTED]

468. Significantly TFI-113's [REDACTED]
[REDACTED]
[REDACTED] 703 [REDACTED]
[REDACTED]
[REDACTED] 704

469. Counsel asked:

'Q: [REDACTED]
[REDACTED] 705 [REDACTED]
[REDACTED]

470. [REDACTED], TFI-113

hastened to add:

"At that time they were killing those people, he was not present...because they sent him out to other stations.'As with her alleged re-marriage to a man she had not seen for 13 years, this too seemed a fortunate coincidence".

471. Further indications that TF1-113 was desperately trying to protect [REDACTED] were demonstrated in the following extract of counsel for Gbao's cross examination:

'Q: It's right isn't it that [REDACTED]
[REDACTED]
A: I did not know that. The time I was talking about when they killed his people, my husband was not in Kailahun. It was Joe Fatorma who was there.
Q: I suggest that is incorrect, that [REDACTED] was there and that at that precise time, he was Joe Fatorma's deputy'
A: He was not there at the time...'
Q: He wasn't his deputy?
A: **I don't know**'.

472. At this point, it was clear that TFI-113 had no intention of answering the question. Did she have something to hide? How could it be that she [REDACTED] and not truly know

703 Tcpt March 6th 2006 p61

704 Id p61

705 Id p61

29695

whether he was the local deputy MP commander? That, we suggest, was just not believable and supports our contention that TFI-113 was doing all she could to shield [REDACTED] from being exposed as having played any part in the Kailahun killings.

473. Whether she was trying to protect [REDACTED], what became absolutely clear from the following extract of her evidence was that she was doing everything possible to evade the issue of the identities of the shooters. Asked how many MPs were stationed and living in Kailahun Town at the time of the killings she replied:

“A: I do not know their number
Q: ...less than 10?
A: I said I do not know their number.
Q: Well try and help us, please...there weren't as many as 100?
A: I do not know their number.
Q: [REDACTED]
[REDACTED] Did you meet any of the other MPs?
A: I said I do not know their number.’

Eventually she was forced to concede:
‘A: ...the only MP that I knew was Joe Fatorma...I knew some but I did not know their names.’⁷⁰⁶
We suggest this is unlikely to be true given the intimate surroundings of Kailahun Town and the close-knit rank and file of the RUF”.

474. Counsel for Gbao decided to pursue the issue, and [REDACTED]
[REDACTED] He asked:

“Q: What about their (the MPs) names, Madam. Between the shooting, which would have been in approximately the middle of 1998 and disarmament...middle of 2000, that is two years. You must be able to remember some of the names [REDACTED]
A: ...as long as you drink water, you can forget’.
Rather perplexed by this response counsel suggested
‘Q: Is the case you don't want to name those names because you want to protect them?
A: I said I don't know their names. It's not a question of protecting them...I don't want to tell lies’.⁷⁰⁷
We suggest it was the witness who was lying for the reason counsel suggested.”

ii. Questions about the Number of Kamajors Detained in Kailahun

475. In chief, TFI-113 had carefully stated the number of Kamajors detained to be 67. This was a precise piece of evidence compared to her inability to recall the names of the people who murdered them.

706 TFI-113 tcpt March 6th 2006 p63-64
707 Id p65-67
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Counsel for Gbao asked whether she had actually counted them; she said she had.⁷⁰⁸

After a brief interlude came this astonishing exchange:

'Q: You told us that you counted 67 and I'm suggesting that's a lie. And it is a lie, isn't it.'

A: Yes'.

476. Dramatic courtroom confessions are rare; to arise in the midst of a War Crimes trial such as this, for it to be made by one of the most incriminating witnesses against our client in the case and with regard to the gravest allegation against him was unforgettable, and immediately placed the integrity of TFI-113's entire evidence into the gravest doubt.

477. A further contradiction was then put; citing the witness's statement of 4th February 2004⁷⁰⁹ where TFI-113 had stated:

"I saw the killing of 65 people who were accused of being Kamajors".

Asked about this discrepancy the witness produced an imaginative explanation:

'...The person who wrote it (ie the figure 65) probably wrote it that way...'

Once again, the writer was blamed by a witness who had been exposed as being unable to keep to her story.

478. TFI-113's credibility was now falling apart; but worse was to follow.

3. *Questions about Shootings at the Roundabout*

Contradiction 1:

479. TFI-113's demeanour continued to deteriorate while counsel for Gbao asked her about who actually witnessed the first shooting at the roundabout; following an exchange with the Chamber in which counsel complained that the witness was deliberately obfuscating the questions and playing for time Mr Justice Boutet was moved to observe

'We are looking and observing the witness very carefully as well as closely as you do'.⁷¹⁰

480. The witness now embarked on a series of contradictory statements that, we submit, render her overall testimony entirely unreliable. In relation to the first round of executions, she stated:

"I was there when he (Mosquito) **shot them with a gun. I was there...Eight of them**'.

Counsel for Gbao put it to the witness that she was lying, and sought to justify the assertion by putting her statement of 27th March 2003 at p10750 (Exh 73 B)"

⁷⁰⁸ Id p105

⁷⁰⁹ Exh 74, TFI-113 tcpt March 6th 2006 p105

⁷¹⁰ Tcpt March 7th 2006 p6

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29697

'Q: On 27th March 2003...almost exactly 3 years ago...only 5 years after the event... you told the prosecution...the first time you spoke...about what happened in Kailahun... "At the roundabout at the centre of the town I saw 8 dead bodies. In my presence I saw Mosquito kill 2 others. Mosquito used a pistol. The 2 civilians were standing in a line. He shot them at short range, less than a metre, in the head". Why did you tell the prosecution that Mosquito **shot only 2 and that there were already 8 dead?**'

481. There were no prizes for the response:

'A: ...Probably the person who wrote it, wrote that one...What those Pa's are writing up there, I don't know'⁷¹¹.

482. This, we assert, was a contradiction of huge significance that cast fatal doubt on TFI-113's reliability. She had, in effect, **reversed** her account of what must have been the single most grotesque and unforgettable event she had yet witnessed in her life. Lapse of time explains many inaccuracies; but nothing, surely, can explain her failure to maintain a consistent story as to how many people Mosquito shot when the difference between the two accounts was so stark. How could a witness possibly confuse observing 8 shootings, right before their eyes, with just 2? Had the ratio been closer, such as 6 and 4, she may have been given the benefit of the doubt. But to confuse actually seeing 8 shot before her very eyes with just 2 is quite beyond understanding. This cannot, under any circumstances, amount to probative evidence for one simple, inescapable reason: TFI-113 must have been lying either in her 2003 statement or to the court- posing an equally inescapable question: **Was she really there at all?**

483. If the prosecution were hoping TFI-113 was not going to get worse they were sadly disappointed.

Contradiction 2

484. Counsel for Gbao next put TFI-113's 'Additional Information' of 28th April 2005 at p11291 (Exh 75):

'Q: ... "I saw Mosquito **when he killed 7** of the 10 men suspected of being Kamajors at the roundabout. **3 had already been killed** before I arrived at the scene"..''

Yet again came the hapless response:

'A: I've not said that before...Probably those who wrote it wrote it that way...'⁷¹²

485. The Chamber cannot, we respectfully submit, allow these repetitive and false excuses to

711 TFI-113 tcpt 7th March 2006 p16

712 TFI-113 tcpt March 7th 2006 p17

obscure the fact that this witness-like so many others who were similarly caught out and tried to pass the blame in the same way-was fundamentally incapable of belief.

Contradiction 3

486. To be fair to TFI-113, it was noted that she had testified recently in the AFRC trial. Perhaps she may at least have replicated her account on this subject to that Trial Chamber? Inspection of the AFRC transcript of July 18th 2005 (Exh 76) caused the prosecution yet *further* embarrassment:

“ When I came at the roundabout at Kailahun, **I saw 8 corpses** there and I was standing right in my presence when **Mosquito shot 2 of them**. So that summed the number up to 10 corpses”.⁷¹³

This contradicted what she had told this court, as well as what she told the prosecution on 28th April 2005. It was consistent with what she told the prosecution in her statement of 27th March 2003, but she contradicted that in her evidence to this court; her 28th April Additional Information, meanwhile, was contradicted by what she told the prosecution in March 2003, what she told the AFRC trial in July 2005 and what she told the RUF trial on this occasion, whilst what she told the AFRC and RUF trials contradicted each other...

Quite a mess, we suggest.

487. The simple truth is that TFI-113 *cannot have been there*. Common sense dictates that, when recalling a dramatic event, one has a mental picture of what one saw. In TFI-113's case the mental picture of observing people being shot in the head at close range would be unforgettable. There would be no room for confusion. There would be no possibility of becoming confused, over time, as to whether, for example, 8 were shot rather than as few as two.

The reality of TFI-113's confusion lies in not having a poor memory of what she saw, but in trying to recall what she told others on a previous occasion. Her confusion over the numbers can only be explained by the fact she never witnessed the event, whilst failing to remember the details she had concocted in previous statements.

488. The witness agreed with counsel this was an 'awful, unforgettable sight'. Her attitude- and the way she was being perceived in the courtroom by this point in the proceedings was amply summed up by this exchange:

'Q: That's my point, that you *have* forgotten it, haven't you, because you keep giving different accounts?'

⁷¹³ AFRC trial 18th July 2005 p88 (Exh 76).
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29699

A: I've not said a different thing.

Q: (Mr Justice Itoe) Were you there, madame...?'⁷¹⁴

iv. Questions about the Shooting of the 57

489. TFI-113 repeatedly asserted the victims shot later (by the police barracks) were brought out 'one after the other'.

490. Counsel for Gbao suggested that, in fact, the victims were led out five by five, as asserted by TFI-045, an RUF insider who even confessed to involvement in the killings himself.⁷¹⁵ The witness confirmed again they were taken 'one after the other'. She was asked

"Q: (Mr Justice Itoe) Not...a bunch of five each...?"

A: ...When they bring out one, they would shoot that person and they would bring out another and they would shoot that person".

491. This presents a fundamental inconsistency with an insider prosecution witness who claimed to be party to the crime. We submit that, once again, the evidence tends to show that it would be highly dangerous to rely on TFI-113's account. As a logical extension, if she is found to be unreliable or lying on a matter as grave as this, the rest of her evidence must be similarly tainted and unworthy of credit.

2. Impeachment on Other Matters

i. Questions about the Arrival of Johnny Paul Koroma

492. Nobody in this case suggested that JPK arrived in Kailahun Town before the suspected Kamajors were killed-except TFI-113. Similarly, nobody has suggested JPK had anything to do with the killings-except TFI-113, as the following shows:

'A: I was there. I said he reached there first before they could kill them. I was there. He was, in fact, in Kamgama when he killed those people'.⁷¹⁶

This flies in the face of all the evidence, we submit, and yet again casts a shadow over TFI-113's reliability.

Contradictions about number of nights and with whom JPK stayed in Kailahun

493. Further inconsistencies with what she had earlier told the prosecution about how long JPK had stayed in Kailahun were now adduced. Counsel for Gbao started by putting the witness's

⁷¹⁴ TFI-113 tcpt March 7th 2006 p20

⁷¹⁵ Id p22, citing TFI-045, tcpt November 20th 2005 p45

⁷¹⁶ TFI-113 tcpt March 7th 2006 p38

29700

statement of 27th March 2003⁷¹⁷ (Exh 73 A):

“JPK was not an abductee, but he came with the retreating rebels. I saw him in Kailahun. He spent 2 nights there”.

TFI-113 contradicted herself:

‘A: I know about *one night* when I saw him. That other night I do not know whether he slept in Kailahun or not. That was what I said’.

494. She then stated that JPK spent the night in *Augustine Gbao’s* house.

In reply, counsel put the rest of the paragraph:

“He spent 2 nights there. I wasn’t around when he entered Kailahun. In Kailahun, he stayed in a house (*I don’t know who owns it*) in Gbanyawalu section, in Kailahun. This is after the chief’s compound”.

495. Counsel then suggested:

‘Q: ...there’s nothing there about JPK spending the night in Augustine Gbao’s house, is there, because you say I don’t know who owns it?

A: Augustine Gbao was in Gbanyawalu, that was where JPK came and slept...’

Q: You say that now, madam, but you didn’t tell the prosecution that, did you, in 2003?

A: I’ve said it ever since’.⁷¹⁸

496. In our submission TFI-113 was once again found to be unworthy of belief. Worse than that, it would appear from the above extracts that she had gone out of her way in oral testimony to implicate Augustine Gbao (as having owned the house where JPK stayed) when she had failed to do so in her previous statement. This, again, casts doubt not only upon her credibility but also on her motive-which we suggest was malign from the start, as the following section will show.

3. *TFI-113’s Improper Motive for Implicating Gbao*

497. Some time has been spent above in indicating how TFI-113 was seemingly unable to give any details wherein they may have adversely impacted upon her [REDACTED]

[REDACTED]

[REDACTED] as was her inability to name any of their colleagues despite having all lived in Kailahun together for a number of years. For these reasons alone-besides the myriad inconsistencies she gave (not all of which have been listed here for lack of time)- we cannot, with respect, possibly see how this witness may be treated as a reliable witness of truth.

717 27th March 2003 p10748, Exh 73 A

718 TFI-113 tcpt March 7th 2006 p42

498. TFI-113's memory came under special scrutiny from Gbao's counsel; close examination of her testimony as a whole, we submit, revealed that memory to be especially *selective*.

499. We submit that the incriminating evidence TFI-113 gave against Gbao-starkly contrasting with her ability to recall more 'inconvenient' issues – was not only a tissue of lies, but was a malignant attempt to exercise a long standing vendetta. TFI-113 had asserted Gbao was at all times the G5 boss of Kailahun, and as such was directly responsible for all manner of Forced Labour allegations. She also implicated Gbao with the use of Child Soldiers and alleged he had had her beaten. We submit these allegations are spiteful and false. Counsel for Gbao summed the matter up in this way:

'...you've told us you had a nephew [REDACTED]⁷¹⁹), who was a ranking RUF officer who I've suggested was Augustine Gbao's direct deputy in the IDU. You've told us you have, I assume, [REDACTED] who was in charge of all the RUF wives. It's emerged that you had [REDACTED] If you were this close to so many individuals, I suggest you must have known full well that Augustine Gbao was never in the G5. He was simply the boss of the IDU. You must have known that, madam'.⁷²⁰

We wish to point to two improper motives this woman may have had. The first refers to Gbao individually, the second is more general. We wish to emphasise the first.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷²¹

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]⁷²²

719 TFI-113 tcpt March 7th 2006 discussed at p51-55
720 TFI-113 tcpt March 7th 2006 p59
721 Id p61
722 Id p61
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

[REDACTED]

[REDACTED] 723

[REDACTED] 724

504. [REDACTED] We submit that TFI-113 found herself with an opportunity to take revenge on the man [REDACTED] - and she took it with both hands. When one considers the flagrant lies, contradictions and inconsistencies that flew from her evidence we suggest there is every reason to suspect she had an ulterior motive in testifying in the way she did.

DIS-069 Suggestion that OTP provided funds sufficient to build new house

505. DIS-069 alleged that the prosecution gave TFI-113 a house in return for testifying against Issa Sesay and 'that was the time she was given...money because she gave them the problem that she had no house to sleep. So the money was given to her'.⁷²⁵ Whilst we do not wish to dwell on this issue, DIS-069 was adamant of the truth of what he said. It is also undeniably true, we submit,

723 TFI-113 tcpt March 7th 2006 p64
724 Id p66
725 DIS-069 tcpt 23rd March 2008 p104
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

that (unlike witnesses for the defence) certain prosecution witnesses were provided with 'incentives' to testify. This issue was raised on countless occasions in the trial and causes misgivings surrounding the quality of several prosecution witnesses.

Conclusion

506. We submit that TFI-113 was damaged beyond recall in cross examination. She was shown to be inherently unreliable; at times she was simply not worthy of credit: even confessing to having lied on one occasion. Her poor demeanour attracted the attention of the bench and caused comment. A raft of inconsistencies were exposed; whilst this section has concentrated on the most memorable one can look to the subsection dedicated to TFI-113 within our submissions on the Kailahun killings for further failings in her testimony on forgotten details regarding events and people in Kailahun.

507. Counsel for Gbao exhibited no less than **seven** separate documents containing what TFI-113 had said on previous occasions either to the prosecution or to the AFRC Trial Chamber. That was more than was ever exhibited against the credibility of any other witness the Gbao defence cross examined.

508. In conclusion we submit that the quality of this evidence is such that none of it may safely be used against Augustine Gbao. It is so inherently and fundamentally unreliable it should be rejected as a whole. Should the Chamber be against us, we emphatically submit that any allegation against Gbao that is deemed worthy of consideration against him must be corroborated.

29704

I. Crimes Against Humanity (Article 2 of the Statute)

509. The following crimes were charged under Article two of the Statute as Crimes Against Humanity: Extermination (count 3) and Murder (count 4) ("Unlawful Killings"), Rape (Count 6), Sexual Slavery and Other Forms of Sexual Violence (Count 7)⁷²⁶ and Other Inhumane Acts (Count 8) ("Sexual Violence"), Other Inhumane Acts (count 11) ("Physical Violence"), Enslavement (Count 13) ("Abductions and Forced Labour"), and Murder (Count 16) ("Attack on UNAMSIL Personnel").

A. General Requirements

510. The common elements for a crime against humanity are as follows:⁷²⁷

1. There must be an attack;
2. The attack must be widespread or systematic;
3. The attack must be directed against any civilian population;
4. The acts of the accused must be part of the attack; and
5. The accused knew or had reason to know that his acts constitute part of a widespread or systematic attack directed against any civilian population.

511. Article 2 of the Statute differs from similar provisions in the governing statutes of other international tribunals in that it does not require such crime to have been committed "during armed conflict" (unlike the ICTY), or "on national, political, ethnic, racial or religious grounds" (unlike the ICTR), or with the perpetrator's "knowledge of the attack" (unlike the ICC).⁷²⁸

B. Attack

512. An attack is defined as a campaign, operation or course of conduct.⁷²⁹ In the context of crimes against humanity the term attack is not limited to the use of armed forces but encompasses any mistreatment of the civilian population.⁷³⁰

⁷²⁶ On 29 April 2008 the Prosecution filed a notice informing the Trial Chamber and the parties that hat count 7 should be read to allege the crime of sexual slavery. It added that the charge of "other forms of sexual violence" in count 7 should not be considered. *Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-1105, Notice Re Count 7 of the Indictment, 29 April 2008.

⁷²⁷ CDF Appeals Judgement, para. 233; *see also* CDF Trial Judgement, para.110; AFRC Trial Judgement, paras. 214-222.

⁷²⁸ AFRC Trial Judgement, para. 212.

⁷²⁹ CDF Trial Judgement, para.111; AFRC Trial Judgement, para. 214.

⁷³⁰ CDF Trial Judgement, para.111. *See also* AFRC Trial Judgement, para. 214; *Prosecutor v. Kunarac et al.*, Case No. IT-96-23/1-A, Judgement, Appeals Chamber, 12 June 2002, para. 86. ('Kunarac Appeals Judgement'); *Prosecutor v. Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

29705

C. Widespread or Systematic

513. It is now accepted in case law that an attack, for the purposes of crimes against humanity, must be either widespread or systematic.⁷³¹ The proof that the attack occurred either on a widespread basis or in a systematic manner is sufficient **to exclude isolated or random acts**.⁷³²

514. A widespread attack is determined by the large scale nature of the attack and the number of victims.⁷³³ It denotes “massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed at multiple victims”.⁷³⁴

515. A systematic attack relates to the organised nature of the acts of violence and the improbability of their random occurrence.⁷³⁵ It denotes “organised action following a regular pattern and carried out pursuant to a pre-conceived plan or policy, whether formalised or not”.⁷³⁶ Patterns of crimes – non-accidental repetition of similar criminal conduct on a regular basis – are a common expression of such systematic occurrence.⁷³⁷

516. The Assessment of what constitutes a widespread or systematic attack is relative: it depends upon the civilian population which is allegedly attacked.⁷³⁸ The Trial Chamber must first identify the population which is the object of the attacks and in light of the means, methods, resources and result of the attack upon the population, ascertain whether attack was widespread or systematic.⁷³⁹

517. Other elements to be taken into account are the consequences of the attacks upon the civilian

Limaj et al., Case No. IT-03-66-T, Judgement, Trial Chamber, 30 November 2005, para. 182 (*‘Limaj Trial Judgement’*); *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgement, Trial Chamber, 29 November 2002, para.29 (*‘Vasiljevic Trial Judgement’*).

731 CDF Trial Judgement, paras. 112; *see also* AFRC Trial Judgement, para. 215; *Limaj Trial Judgement*, para. 183; *Kunarac Appeals Judgement*, para. 97; *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 93 (*‘Kordic and Cerkez Appeals Judgement’*).

732 AFRC Trial Judgement, para. 215; *see also* *Prosecutor v. Tadic*, Case No. IT-94-1-T, Judgement, Trial Chamber, 7 May 1997, para. 646 (*‘Tadic Trial Judgement’*).

733 CDF Trial Judgement, paras. 112; *see also* *Kunarac Appeals Judgement*, para.94; *Prosecutor v. Blaskic*, Case No. IT-95-14-A, Judgement, Appeals Chamber, 29 July 2004, para. 101 (*‘Blaskic Appeals Judgement’*); *Limaj Trial Judgement*, para. 183.

734 AFRC Trial Judgement, para. 215.

735 CDF Trial Judgement, para. 112; *see also* *Kunarac Appeals Judgement*, para.94; *Blaskic Appeals Judgement*, para. 101; *Limaj Trial Judgement*, para. 183.

736 AFRC Trial Judgement, para. 215.

737 CDF Trial Judgement, para. 112; *see also* AFRC Trial Judgement, para. 215; *Kunarac Appeals Judgement*, para. 94.

738 CDF Trial Judgement, paras. 112; *see also* AFRC Trial Judgement, para. 215; *Kunarac Appeals Judgement*, para. 95.

739 *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

population, the number of victims, nature of the acts, possible participation of officials or authorities or any identifiable pattern of crimes.⁷⁴⁰

518. Existence of a policy or plan, or that crimes were supported by a policy or a plan, may be evidentially relevant to establish the widespread and systematic nature of the attack and that it was directed against a civilian population, but is not a separate legal requirement.⁷⁴¹

519. Each act occurring within the attack need not itself be widespread or systematic. While isolated or random acts unrelated to the attack are usually excluded from the definition of crimes against humanity, a single act perpetrated in the context of a widespread or systematic attack upon a civilian population is sufficient to bestow individual criminal liability upon the perpetrator.⁷⁴²

D. Directed Against Any Civilian Population

520. To be considered a crime against humanity a crime needs to have taken place within an attack directed against any civilian population. In other words, the civilian population must be the primary rather than an incidental target of the attack.⁷⁴³

521. In order to determine whether an attack was directed at the civilian population, the following elements are taken into consideration: the means and methods used during the attack, the status of the victims, the number of victims, the nature of crimes committed during attack, the resistance to the assailants, and the extent to which attacking forced may be said to have complied or attempted to comply with International Humanitarian Law.⁷⁴⁴

E. Acts of the Accused Must be Part of the Attack

522. To be considered to be part of the attack, the acts of the Accused must be, by its nature or consequences, objectively part of the attack.⁷⁴⁵ It must be established that the alleged crimes were related to the attack on a civilian population, even though they need not have been committed in the midst of that attack.⁷⁴⁶

⁷⁴⁰ *Id.*

⁷⁴¹ CDF Trial Judgement, para. 113 *see also* AFRC Trial Judgement, para. 215; Kunarac Appeals Judgement, para. 98.

⁷⁴² AFRC Trial Judgement, para. 215.

⁷⁴³ CDF Appeals Judgement, para. 299; *see also* CDF Trial Judgement, para.114; AFRC Trial Judgement, para. 216; Kunarac Appeals Judgement, para. 92.

⁷⁴⁴ CDF Trial Judgement, para. 114, *quoting* Kunarac Appeals Judgement, para. 91; *see also* AFRC Trial Judgement, para. 216.

⁷⁴⁵ CDF Trial Judgement, para. 120; *see also* Kunarac Appeals Judgement, para. 99; Limaj Trial Judgement, para. 188; Tadic Appeals Judgement, para. 271.

⁷⁴⁶ CDF Trial Judgement, para. 120.

523. A crime which is committed before or after the main attack or away from it needs to be sufficiently connected to the attack to be considered as part of that attack.⁷⁴⁷

524. An isolated act, i.e. an act so far removed from that attack that, having considered the context and circumstances in which it was committed, cannot reasonably be said to have been part of the attack, does not meet the requirements to be a crime against humanity.⁷⁴⁸

525. The nexus between the acts of the Accused and the attack needs to be assessed on a case-by-case basis. However some reliable indicia of such nexus include the similarities between the perpetrator's acts and the acts occurring within the attack, the nature of the events and the circumstances surrounding the perpetrator's acts, the temporal and geographic proximity of the perpetrator's acts with the attack, and the nature and extent of the perpetrator's knowledge of the attack when he commits the acts.⁷⁴⁹

F. The Accused Knew or had Reason to Know that his Acts Constitute Part of a Pattern of Widespread or Systematic Crimes Directed Against a Civilian Population

526. To be found that a crime committed by an Accused constitutes a crime against Humanity, it must be established that the Accused knew or had reason to know there was an attack on the civilian population and that his acts comprised part of the attack.⁷⁵⁰

527. However in cases where the Accused was not the perpetrator of the crime, for instance in cases where article 6(3) is at stake, it must be shown that the **actual perpetrator of the crime** knew or had reason to know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.⁷⁵¹

528. Knowledge needs to be established on a case-by-case basis.⁷⁵² It does not suffice that an accused knowingly took the risk of participating in the implementation of a policy, plan or

⁷⁴⁷ *Id.*

⁷⁴⁸ CDF Trial Judgement, para. 120; *see also* *Kunarac* Appeals Judgement, para. 100; *Prosecutor v. Kupreskic et al.*, Case No. IT-95-16-T, Judgement, Trial Chamber 14 January 2000, para. 543 ("*Kupreskic* Trial Judgement"); *Limaj* Trial Judgement, para. 189; *Prosecutor v. Tadic*, Case No. IT-94-1-A, Judgement, Appeals Chamber, 15 July 1999, para. 217 ("*Tadic* Appeals Judgement"); *Akayesu* Trial Judgement, para. 579.

⁷⁴⁹ AFRC Trial Judgement, para. 220.

⁷⁵⁰ CDF Trial Judgement, para. 121. *See also* AFRC Trial Judgement, para. 221; *Kunarac* Appeals Judgement, para. 102.

⁷⁵¹ CDF Appeals Judgement, para. 315.

⁷⁵² CDF Trial Judgement, para. 121. *See also* AFRC Trial Judgement, para. 221; *Limaj* Trial Judgement, para. 190; *Blaskic* Appeals Judgement para. 126.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

ideology.⁷⁵³ The Accused needs to understand the overall context in which his acts took place⁷⁵⁴ but need not to know the details of the attack or share the purpose or goal behind the attack.⁷⁵⁵

529. It is irrelevant whether the Accused intended his acts to be directed against the targeted population or merely against his victim. It is the attack, not the acts of the Accused, which must be directed against the targeted population.⁷⁵⁶

II. Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II (Article 3 of the Special Court Statute)

530. In the RUF indictment the following counts are charged as violation of Article III and Additional Protocol II (hereinafter "war crimes"): count 1, acts of terrorism (Terrorising the Civilian Population and Collective Punishment); count 2, collective punishments (Terrorising the Civilian Population and Collective Punishment); count 5, violence to life, health, physical or mental well-being of persons, in particular murder (Unlawful Killings); count 9, outrages upon personal dignity (Sexual Violence); count 10, violence to life, health, physical or mental well-being of persons, in particular mutilation (Physical Violence); count 14, Pillage (Looting and Burning); count 17, violence to life, health, physical or mental well-being of persons, in particular murder (Attacks on UNAMSIL Personnel) and count 18, Taking of Hostages (Attacks on UNAMSIL Personnel).

A. Elements

531. A crime, to be considered a war crime, needs to fulfil the following elements:⁷⁵⁷

1. An armed conflict existed at the time of the alleged violation of Common Article 3 or Additional Protocol II;
2. There existed a nexus between the alleged violation and the armed conflict;
3. The victim was a person taking no direct part in the hostilities at the time of the alleged violation, and
4. The Accused knew or had reason to know that the person was not taking a direct part in the hostilities at the time of the act or omission.

⁷⁵³ AFRC Trial Judgement, para. 222. *See also* Limaj Trial Judgement, para. 190; Blaskic Appeals Judgement, paras. 126.

⁷⁵⁴ CDF Trial Judgement, para. 121. *See also* AFRC Trial Judgement, para. 222; Limaj Trial Judgement, para. 190; Kordic and Cerkez Trial Judgement, para. 185.

⁷⁵⁵ CDF Trial Judgement, para. 121; *See also* Kunarac Appeals Judgement, paras. 102-103.

⁷⁵⁶ CDF Trial Judgement, para. 121. *See also* Kunarac Appeals Judgement, para. 103; Limaj Trial Judgement, para. 190.

⁷⁵⁷ *Id.* at para. 122; *see also* Transcript of 25 October 2006, p. 14-15. ('RUF Rule 98 Decision').

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

B. Existence of an Armed Conflict

532. An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.⁷⁵⁸ The criteria for establishing the existence of an armed conflict are the intensity of the conflict and the degree of organisation of the warring factions.⁷⁵⁹ These criteria are used “solely for the purpose, *as a minimum*, of distinguishing an armed conflict from banditry, unorganised and short-lived insurrections, or terrorist activities, which are not subject to international humanitarian law”.⁷⁶⁰

533. Additional Protocol II contains a stricter threshold for the establishment of an armed conflict than Common Article 3.⁷⁶¹ Any armed conflict satisfying the higher threshold of the Additional Protocol II test would automatically constitute an armed conflict under Common Article 3.⁷⁶²

534. The term ‘armed forces’ is to be interpreted broadly;⁷⁶³ the fact that the armed forces or groups must be under responsible command implies a degree of organisation to enable them to plan and carry out concerted military operations and to impose discipline in the name of a *de facto* authority.⁷⁶⁴ They must also be able to control a part of the territory of the country, enabling them “to carry out sustained and concerted military operations” and to implement Additional Protocol II.⁷⁶⁵

535. International Humanitarian Law applies on the whole territory of the warring States or, in the case of internal conflicts, the whole territory under the control of a party, whether or not actual combat takes place there.⁷⁶⁶ It applies from the beginning of the armed conflict and extends beyond the cessation of hostilities until a general conclusion of peace is reached.⁷⁶⁷

C. Nexus Between the Alleged Violation and the Armed Conflict

536. The nexus requirement is fulfilled if the alleged violation was closely related to the armed

⁷⁵⁸ AFRC Trial Judgement, para. 243.

⁷⁵⁹ AFRC Trial Judgement para. 244. See also Tadic Trial Judgement, para. 562; Limaj Trial Judgement, paras 84 and 89.

⁷⁶⁰ *Id.*

⁷⁶¹ CDF Trial Judgement, para. 125.

⁷⁶² *Id.* at para. 127.

⁷⁶³ *Id.*

⁷⁶⁴ *Id.*

⁷⁶⁵ *Id.*

⁷⁶⁶ AFRC Trial Judgement para. 245. *Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para. 26 (*‘Halilovic Trial Judgement’*); *Kunarac Appeals Judgement*, para. 64.

⁷⁶⁷ CDF Trial Judgement, para. 128; *see also* AFRC Trial Judgement, para. 245.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

conflict.⁷⁶⁸ This nexus can be fulfilled if the alleged crimes are closely related to hostilities occurring in other parts of the territories controlled by the parties to the conflict.⁷⁶⁹

537. The armed conflict need not to have been causal to the commission of the crimes.⁷⁷⁰ However the existence of the armed conflict must, as a minimum, have played a substantial part in the perpetrator's ability/decision/manner to commit the crime the manner in which it was committed or the purpose for which it was committed.⁷⁷¹

538. The determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, which include:⁷⁷² **the fact that accused is a combatant**, the fact that the victim is a non combatant, the fact that the victim was a member of the opposing party, the fact that the act was serving the ultimate goal of the military campaign, and whether the crime was part or committed in the context of the Accused's official duties.

539. The determination of a close relationship between particular offences and an armed conflict will usually require consideration of several factors, not just one.⁷⁷³

D. The Victim was a Person Taking no Direct Part in the Hostilities at the Time of the Alleged Violation

540. To fulfil this requirement, the Prosecution must prove the relevant facts of each victim with a view to ascertain whether that person was actively involved in the hostilities at the relevant time.⁷⁷⁴

541. The test applying is whether, at the time of the alleged offence, the alleged victim of the said offence was directly taking part in the hostilities, being those hostilities in the context of which the

⁷⁶⁸ CDF Trial Judgement, para. 129; *see also* Rutaganda Appeals Judgement, paras 569-570; Kunarac Appeals Judgement, paras 58-59.

⁷⁶⁹ CDF Trial Judgement, para. 129; *see also* Kunarac Appeals Judgement, paras. 57.

⁷⁷⁰ CDF Trial Judgement, para. 129.

⁷⁷¹ CDF Trial Judgement, para. 129. *See also* AFRC Trial Judgement, para. 243; Halilovic Trial Judgement, para. 29; Kunarac Appeals Judgement, para. 58.

⁷⁷² CDF Trial Judgement, para. 130. *See also* AFRC Trial Judgement, para. 247; Kunarac Appeals Judgement, para. 59.

⁷⁷³ CDF Trial Judgement, para. 130; *see also* Rutaganda Appeals Judgement, para. 570.

⁷⁷⁴ AFRC Trial Judgement, para. 248. *See also* Tadic Trial Judgement, para. 616; *Prosecutor v. Oric*, Case No. IT-03-68-T, Judgement, Trial Chamber, 30 June 2006, para. 258 ('*Oric* Trial Judgement'); *Prosecutor v. Semanza*, Case No. IT-97-20-T, Judgement, Trial Chamber, 15 May 2003, paras. 365-366 ('*Semanza* Trial Judgement'); *Halilovic* Trial Judgement, paras. 32-33.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

alleged offences are said to have been committed.⁷⁷⁵ Direct participation should be understood as acts which, by their nature and purpose, are intended to cause actual harm to the enemy personnel and material.⁷⁷⁶

542. It is the specific situation of the victim at the moment the crime was committed that must be taken into account in determining his or her protection under Common Article 3. Relevant factors include the activity of the victim, whether or not the victim was carrying weapons, his/her clothing, age and gender at the time of the crime. While membership of the armed forces can be a strong indication that the victim is directly participating in the hostilities, it is not an indicator which in and of itself is sufficient to establish this. Whether a person did or did not enjoy protection of Common Article 3 has to be determined on a case-by-case basis.⁷⁷⁷

543. Persons accused of collaborating with the fighting forces would only become legitimate targets if they were taking direct part in the hostilities. Indirectly supporting or failing to resist an attacking force is insufficient.⁷⁷⁸ In addition, even if such civilians could be considered to have taken a direct part in hostilities, they would only have qualified as legitimate military targets during the period of their direct participation.⁷⁷⁹

544. The Prosecution bears the onus of demonstrating that the victim had civilian status.⁷⁸⁰

E. The Accused Knew or Had Reason to Know that the Person was not Taking a Direct Part in the Hostilities at the Time of the Act or Omission

545. The perpetrator must know or should have known the status of the victims as persons taking no active part in the hostilities.⁷⁸¹

F. Serious Violations

546. Article 3 of the statute gives jurisdiction to the Special Court to prosecute “serious violations” of Article 3. In other words, the violation must reach a certain threshold of seriousness to be found to be a serious violation of article 3. In order to be found a serious violation of article 3,

⁷⁷⁵ CDF Trial Judgement, para. 132. *See also Halilovic Trial Judgement, para. 33; Tadic Trial Judgement, para. 615; Semanza Trial Judgement, para. 366.*

⁷⁷⁶ CDF Trial Judgement, para. 134.

⁷⁷⁷ *Halilovic Trial Judgement, para. 34.*

⁷⁷⁸ CDF Trial Judgement, para. 135.

⁷⁷⁹ *Id.*

⁷⁸⁰ CDF Trial Judgement, para. 135; *see also Blaskic Appeals Judgement, para. 111.*

⁷⁸¹ *Limaj Trial Judgement, para. 847.*

the conduct of the Accused must "breach of a rule protecting important values with grave consequences for the victim."⁷⁸² In other words, not all acts will meet the jurisdictional requirement of article 3.⁷⁸³

III. Other Serious Violations of International Humanitarian Law (Article 4 of the Special Court Statute)

547. Two counts are charged as "Other serious violations of International Humanitarian Law" in the RUF Indictment: Count 12, conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities (Use of Child Soldiers) and Count 15: intentionally directing attacks against personnel involved in a humanitarian assistance or peacekeeping mission (Attacks on UNAMSIL Personnel).

A. Elements

548. In order to find a serious violation of International Humanitarian Law, two elements are to be met:⁷⁸⁴

1. An armed conflict existed at the time of the alleged violation; and
2. There existed a nexus between the alleged violation and the armed conflict.

549. A serious violation of International Humanitarian Law takes place when a rule protecting important values is breached, resulting in grave consequences for the victim.⁷⁸⁵

550. It was held in the CDF case that all the crimes listed in Article 4 of the Court's statute ("Other serious violations of International Humanitarian Law") constituted serious violations of International Humanitarian Law by definition.⁷⁸⁶ The Trial Chamber also held that "[w]hether or not the acts alleged against the Accused would, if proven, amount to the crimes charged, is a matter for legal findings."⁷⁸⁷

551. As stated above, the Trial Chamber of the Special Court for Sierra Leone already found that an armed conflict took place in Sierra Leone from March 1991 until January 2002.⁷⁸⁸

⁷⁸² CDF Trial Judgement, para.94. *See also* Semanza Trial Judgement, para.370.

⁷⁸³ *See for instance* CDF Trial Judgement, para.161.

⁷⁸⁴ CDF Trial Judgement, paras. 138 and 698. *See also* Rule 98 Transcripts of 25 October 2006, p.16.

⁷⁸⁵ CDF Trial Judgement, para.94.

⁷⁸⁶ *Id.* at para.106.

⁷⁸⁷ *Id.* at para.107.

⁷⁸⁸ *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T-174, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 24 June 2004, Annex 1, fact A. *See also* CDF Trial Judgement, paras. 696 and 699; *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

552. In terms of establishing the nexus between the alleged violation and armed conflict, the considerations are the same as for Violation of article 3 Common to the Geneva Conventions and Additional Protocol II.⁷⁸⁹

AFRC Trial Judgement, para. 249.

789 CDF Trial Judgement, para. 139; AFRC Trial Judgement, para. 257.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Modes of Liability Alleged in the Indictment Against the Third Accused

I. Article 6(1)

A. Introduction

553. Article 6(1) of the Statute of the Special Court for Sierra Leone sets forth the legal standard under which an Accused can be found criminally responsible. It states that “[a] person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime”.⁷⁹⁰

B. Different Modes of Liability Under Article 6(1)

1. *Planning the Execution of a Crime in Articles 2 to 4 of the Special Court Statute*

554. The Special Court has clearly defined what constitutes “planning” under Article 6(1) of the Statute. Planning a crime “implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases”.⁷⁹¹

555. The *actus reus* required in proving that planning of a crime under Articles 2-4 took place “requires that the Accused, alone or together with others, designated the criminal conduct constituting the crimes charged”.⁷⁹² The AFRC Trial and Appellate Chamber stated that the “[r]esponsibility is incurred when the level of the accused’s participation is substantial, even when the crime is actually committed by another person”.⁷⁹³ The ICTR has helpfully illuminated what constitutes “substantial” by stating that it includes “actually formulating the accomplishment or endorsing a plan proposed by another individual”.⁷⁹⁴

556. The *mens rea* necessary to prove that an Accused can be found to have planned a crime as listed in the Statute requires that the “Prosecution [] prove that the Accused acted with an intent that a crime provided for in the statute be committed or with the reasonable knowledge that the crime

⁷⁹⁰ Statute of the Special Court for Sierra Leone, Article 6(1).

⁷⁹¹ AFRC Appeals Judgement, para.301; CDF Trial Judgement, para. 221; AFRC Trial Judgement, para.766; *see also* *Limaj* Trial Judgement, para. 513; *Prosecutor v. Brđanin*, Case No. IT-99-36-T, Judgement, Trial Chamber, 1 September 2004, para. 268 (*‘Brđanin Trial Judgement’*); *Prosecutor v. Gacumbitsi*, Case No. ICTR-2001-64-T, Judgement, Trial Chamber, 17 June 2004, para. 271 (*‘Gacumbitsi Trial Judgement’*); *Semanza* Trial Judgement, para. 380.

⁷⁹² AFRC Appeals Judgement para.301; CDF Trial Judgement, para. 221; AFRC Trial Judgement, para.766.

⁷⁹³ AFRC Appeals Judgement, para. 301; CDF Trial Judgement, para. 221; AFRC TC Judgement, para.765; AFRC Appeals Chamber Judgement para.301; *also see* *Limaj* Trial Chamber Judgement para. 513; *Kordic and Cerkez* Appeals Judgement, para.26.

⁷⁹⁴ *Kajelijeli* Trial Judgement, para.761; *also see* *Prosecutor v. Bagilishema*, Case No. ICTR-95-1A-T, Judgement, Trial Chamber, 7 June 2001, para. 30 (*‘Bagilishema Trial Judgement’*); *Semanza* Trial Judgement, para. 380.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

would likely be committed in execution of that plan”.⁷⁹⁵ The Accused “must be aware of the essential elements of the crime, and must be seen to have acted with awareness that he or she thereby supported the commission of the crime”.⁷⁹⁶

2. *Instigating the Execution of a Crime in Articles 2 to 4 of the Special Court Statute*

557. According to the Court in the CDF case, instigating a crime “means urging, encouraging or prompting another to commit an offence”.⁷⁹⁷ It is an “act or omission, covering both express and implied conduct of the Accused which is shown to be a factor substantially contributing to the conduct of another person committing the crime”.⁷⁹⁸ A causal relationship, or a nexus, between the instigation and the perpetration of the crime must be demonstrated”.⁷⁹⁹ Having a “certain influence” in the community is not sufficient.⁸⁰⁰

558. According to the AFRC Trial Chamber, finding that the Third Accused “instigated” the commission of a crime in the Special Court statute requires a high standard be met; it requires some kind of “influencing the principal perpetrator by way of inciting, soliciting or otherwise inducing him or her to commit the crime”.⁸⁰¹

559. In terms of *mens rea*, the “Prosecution must prove that the Accused intended to provoke or induce the commission of the crime or had reasonable knowledge that a crime would likely be committed as a result of that instigation”.⁸⁰² Cases in the ICTY have required that the Accused be aware of the “substantial likelihood” that a crime would be committed in the execution of that instigation.⁸⁰³

560. The *Oric* case in the ICTY provides helpful guidance by discussing the notion of a “double

⁷⁹⁵ AFRC Appeals Judgement, para. 301; CDF Trial Judgement, para.221; also see *Limaj* Trial Judgement para. 513. See also *Kordic* Appeals Judgement, para 31.

⁷⁹⁶ *Kajileji* Trial Judgement, para.768.

⁷⁹⁷ CDF Trial Judgement, para. 223; AFRC Trial Judgement, para. 769; see also *Semanza* Trial Judgement, para. 381; *Bagilishema*, Trial Judgement, para. 30.

⁷⁹⁸ *Id.*; see also *Limaj* Trial Judgement para. 514; *Kordic and Cerkez* Appeals Judgement, para 27; *Oric* Trial Judgement para. 274; *Bagilishema* Trial Judgement, para. 30.

⁷⁹⁹ CDF Trial Judgement, para.223; AFRC Trial Judgement, para.769 and 770. Also see *Gacumbitsi* Appeals Judgement, para.129; *Kajelijeli* Trial Judgement, para.762; *Kordic and Cerkez* Appeals Judgement, para 27. Although phrased differently, the Trial Chamber in *Bagilishema* case speaks of “urging and encouraging”, which is likely meant in the same sense. *Bagilishema* Trial Judgement, para. 30.

⁸⁰⁰ *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-A, Judgement, Appeals Chamber, 19 September 2005, para. 65 (“*Kamuhanda* Trial Judgement”).

⁸⁰¹ AFRC Trial Judgement para. 769; see also *Oric* Trial Judgement, para.271.

⁸⁰² CDF Trial Judgement, para.223; see also AFRC Trial Judgement, para.770.

⁸⁰³ *Limaj* Trial Judgement, para. 514; see also *Kordic and Cerkez* Appeals Judgement, para 32.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

intent” required to prove instigation. It notes that the instigator must “be aware of his influencing effect on the principal perpetrator to commit the crime, as well as the instigator...must at least accept that the crime be committed. Second, with regard to the principal perpetrator, the instigator must be both aware of, and agree to, the intentional completion of the principal crime. Third, with regard to the volitional element of intent, the instigator, when aware that the commission of the crime will more likely than not result from his conduct, may be regarded as accepting its occurrence”.⁸⁰⁴

3. *Ordering the Execution of a Crime in Articles 2 to 4 of the Special Court Statute*

561. In the Special Court “ordering” requires “a person who is in a position of authority [to] order a person in a subordinate position to commit an offence”.⁸⁰⁵ “The causal link between the act of ordering and the physical perpetration of a crime also needs to be demonstrated as part of the *Actus Reus* of ordering”.⁸⁰⁶

562. The Trial Chamber in the *Gacumbitsi* case clarifies what ordering means by explaining that:

When people are confronted with an emergency or danger, they can naturally turn to such influential person, expecting him to provide a solution, assistance or take measures to deal with the crisis.⁸⁰⁷ When he speaks, everyone listens to him with keen interest; his advice commands overriding respect over all others and the people could easily see his actions as an encouragement.⁸⁰⁸

563. In terms of *mens rea*, the “Prosecution must prove that the Accused either intended to bring about the commission of the crime or that the Accused had reasonable knowledge that the crime would likely be committed as a consequence of the execution or implementation of the order”.⁸⁰⁹ The ICTY has what appears to be a slightly higher standard to satisfy the *mens rea* of ordering. It states that, in regards to “reasonable knowledge” standard in this Court, that the Accused must be aware of the “substantial likelihood” that a crime will be committed as a consequence of the execution of an order.⁸¹⁰

564. While true that “[t]he state of mind of an accused may also be inferred from the

⁸⁰⁴ *Oric* Trial Judgment, para. 279.

⁸⁰⁵ CDF Trial Judgment, para. 225; AFRC Trial Judgment, para.772; *see also Prosecutor v. Semanza*, Case No. IT-97-20-A, Judgment, Appeals Chamber, 20 May 2005, para. 361 (*‘Semanza Appeals Judgment’*), quoting *Kordic and Cerkez Appeals Judgment*, para 28.

⁸⁰⁶ *Id.*

⁸⁰⁷ *Gacumbitsi* Trial Chamber Judgment, para. 282.

⁸⁰⁸ *Id.*

⁸⁰⁹ CDF Trial Judgment, para.226; *also see* AFRC Trial Judgment, para.773.

⁸¹⁰ *Kordic and Cerkez Appeals Judgment*, para 30 (emphasis added); *Limaj* Trial Judgment, para. 515. *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

circumstances”, this is only possible when “it is the only reasonable inference to be drawn”.⁸¹¹

4. *Committing the Execution of a Crime in Articles 2 to 4 of the Special Court Statute*

565. Committing a crime means “physically perpetrating a crime or engendering a culpable omission in violation of criminal law”.⁸¹² It is the “[p]roscribed act of participation, physical or otherwise direct, in a crime provided for by the statute, through positive acts or culpable omission, whether individually or jointly with others”.⁸¹³ Additionally, there must be an “[i]ntention to commit the crime, or acting with reasonable knowledge that the crime would likely occur as a consequence of his conduct”.⁸¹⁴ As stated in the ICTR, an individual who commits a crime as a principal perpetrator “must possess the requisite *mens rea* for the underlying crime”.⁸¹⁵ The ICTY, again, seems to set a slightly higher standard in that it requires that the Accused acted with reasonable knowledge of the substantial likelihood that a crime will occur as a consequence of the Accused's conduct.⁸¹⁶

566. In the *Vasiljevic* case it was held that the Accused “will only incur individual criminal responsibility for committing a crime under Article 7(1) where it is proved that he personally physically perpetrated the criminal act in question or personally omitted to do something in violation of international humanitarian law”.⁸¹⁷

567. Being member to a joint criminal enterprise is considered an act of “committing”, and thus is placed as an additional mode of individual responsibility under Article 6(1). The CDF Trial Court Judgement stated that “[e]ven though Article 6(1) does not make a specific reference to joint criminal enterprise, it is indeed included in Article 6(1) as a means of 'committing’”.⁸¹⁸ It continues: “[...] the verb “commit” is sufficiently protean in nature as to include participation in a joint criminal enterprise to commit the crime”.⁸¹⁹ Joint criminal enterprise will be separately considered below.

⁸¹¹ AFRC Trial Judgement, para.773.

⁸¹² CDF Trial Judgement, para. 205.

⁸¹³ CDF Trial Judgement, para. 205; AFRC Trial Judgement, para.762; *Limaj*, Trial Judgement, para. 509; *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-1, Judgement, Trial Chamber, 2 November 2001, para. 251 (‘*Kvočka* Trial Judgement’).

⁸¹⁴ CDF Trial Judgement, para. 205; AFRC Trial Judgement, para.763

⁸¹⁵ *Semanza* Trial Judgement, para. 387.

⁸¹⁶ *Limaj*, Trial Judgement, para. 509 (emphasis added); also see *Kvočka* Trial Judgement, para. 251.

⁸¹⁷ *Prosecutor v. Vasiljevic*, Case No. IT-98-32-T, Judgement, Trial Chamber, 29 November 2002, para.62(‘*Vasiljevic* Trial Judgement’).

⁸¹⁸ CDF Trial Chamber Judgment, para. 207.

⁸¹⁹ CDF Trial Chamber Judgment, para. 208.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

5. *Aiding and Abetting in the Execution of a Crime in Articles 2 to 4 of the Special Court Statute*

568. Aiding and abetting consists of “the act of rendering practical assistance, encouragement or moral support, which has a *substantial effect* on the perpetration of a certain crime”.⁸²⁰ It “can include providing assistance, helping, encouraging, advising or being sympathetic to the commission of a particular act by the principal offender”.⁸²¹

569. Aiding and abetting may be constituted by “contribution to the planning, preparation or execution of a finally completed crime”.⁸²² There should only be criminal responsibility, however, if the criminal act is actually committed.⁸²³

570. Mere presence at the scene of a crime will not usually constitute aiding and abetting,⁸²⁴ unless it provides significant legitimising or encouraging effect or the Accused's presence serves to support the principal offender.⁸²⁵ The *Semanza* case in the ICTR addresses this point broadly by stating that “the nature of the accused's presence must be considered against the background of the factual circumstances,”⁸²⁶ as mere presence does not automatically provoke a finding of criminal responsibility.

571. Finding the *mens rea* in the Special Court requires the Prosecution to show that the Accused knew that the acts performed by the Accused would assist the commission of the crime by the principal offender⁸²⁷ or that he was aware of the substantial likelihood that his acts would assist the commission of a crime by the perpetrator.⁸²⁸ The aider and abettor need not share the *mens rea* of the perpetrator, but “he or she *must* be aware of the essential elements of the crime ultimately committed by the perpetrator, and must be aware of the perpetrator's state of mind”.⁸²⁹ This awareness must take place “at the time of planning, preparation or execution of the crime”.⁸³⁰

820 *Id.* at paras. 228, 229(emphasis added); AFRC Trial Judgement, para. 775, quoting *Blaškić Appeals Judgement*, para.46; *Prosecutor v. Kayishema and Ruzindana*, Case No. ICTR-95-1-A, Judgement, Appeals Chamber, 1 June 2001, para.186; *Prosecutor v. Krnojelac*, Case No. IT-97-25-A, Judgement, Appeals Chamber, 17 September 2003, para. 37 (*‘Krnojelac Appeals Judgement’*).

821 CDF Trial Judgement para. 228.

822 AFRC Trial Judgement, para. 775.

823 *Kajileji*, Trial Judgement, para.758.

824 CDF Appeals Judgement para. 102.

825 AFRC Trial Judgement, para.775; also see *Vasijljevic* Trial Judgement, para. 70; *Oric* Trial judgement, para.283.

826 *Semanza* Trial Judgement, para. 386.

827 AFRC Trial Judgement, para. 776.

828 CDF Appeals Judgement, para.366; AFRC Appeals Judgement, paras. 241-251.

829 CDF Appeals Judgment, para.367; see also *Limaj* Trial judgement, para. 518.

830 *Prosecutor v. Blagojevic and Jokic*, Case No. IT- 02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 728 (*‘Blagojevic Trial Judgement’*).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

572. The *Kajelijeli* case states that “the requisite *mens rea* may be established from an assessment of the circumstances, including the accused’s prior and similar behaviour, failure to punish or verbal encouragement”.⁸³¹ In terms of the *mens rea* requirement when someone is merely present at the scene of the crime, the *Semanza* case states that “the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support”.⁸³²

573. The *Oric* Trial Judgement sets forth a three-part test for assessing whether one can be found criminally responsible under Article 6(1) for accessory liability, of which aiding and abetting is a form. It states that the following three steps must be satisfied:

1. On the side of the principal perpetrator, there must be proof of the conduct which is punishable under the Statute;
2. From the side of the participant, the commission of the principal crime(s) must either be instigated or otherwise aided or abetted; and
3. With regard to the participant’s state of mind, the acts of participation must be performed with the awareness that they will assist the principal perpetrator in the commission of the crime”.⁸³³

574. There are various forms of aiding and abetting. One is when the aiding and abetting is perpetrated through omission. For this to be established, the *actus reus* requires that the omission to act had a “decisive effect on the commission of the crime and that it was coupled with the requisite *mens rea*”.⁸³⁴ The omission, it follows, must be done with the awareness of the substantial likelihood that the omission to act would assist in the commission of a crime by the perpetrator.

575. Aiding and abetting is commonly considered as a less grave mode of participation,⁸³⁵ as it generally involves a lesser degree of individual criminal responsibility than co-perpetration in a joint criminal enterprise.⁸³⁶

II. Joint Criminal Enterprise

831 *Kajelijeli* Trial Judgement, para.769; also see *Bagilishema* Trial Judgement, para.36.

832 *Semanza* Trial Judgement, para.389.

833 *Oric* Trial judgement para.269.

834 *Prosecutor v. Blaskic*, Case No. IT-95-14-T, Judgement, Trial Chamber, 3 March 2000, para. 285 (*Blaskic* Trial Judgement’).

835 *Prosecutor v. Vasiljevic*, Case No. IT-98-32-A, Judgement, Appeals Chamber, 25 February 2004, para. 102 (*Vasiljevic* Appeals Judgement’). 281; also see *Oric* Trial Judgement, para. 281.

836 *Prosecutor v. Kvočka et al.*, Case No. IT-98-30/1-A, Judgement, Appeals Chamber, 28 February 2005, para. 92 (*Kvočka* Appeals Judgement’).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

576. Joint criminal enterprise is a mode of individual responsibility. It is contained in Article 6(1) of the Statute even though it is not explicitly mentioned.⁸³⁷

577. A joint criminal enterprise (“JCE”) is defined as a common plan, design or purpose, which amounts to or involves the commission of a crime prohibited under international or national law. According to this doctrine, an Accused can be found responsible for a crime committed within the JCE or for a crime which took place as a foreseeable consequence thereof. Liability for participation in the JCE should not arise for mere membership in an organisation or for conspiring to commit crimes, as it is a form of liability concerned with the participation in the commission of a crime as part of a joint criminal enterprise. Simply put, liability under joint criminal enterprise is a liability for co-perpetration.

A. Categories of Joint Criminal Enterprise

578. There are three categories of JCE.⁸³⁸ The first category is the “basic” form. In this form all the co-perpetrators, acting pursuant to a common purpose, possess the same criminal intention. The second category is a “systemic” form. It is a variant of the basic form, characterised by the existence of an organised system of ill-treatment. The third category of JCE is an “extended” form. It concerns cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose.

B. Elements of Joint Criminal Enterprise

579. The *Actus Reus* is the same for all three categories of JCE:⁸³⁹

1. A plurality of persons acting in concert with each other in the implementation of a common purpose;⁸⁴⁰
2. The existence of a common purpose which amounts to or involves the commission of a crime provided for in the statute.⁸⁴¹
3. The participation of the Accused in the common purpose involving the perpetration of crimes.⁸⁴²

⁸³⁷ CDF Trial Judgement, para. 207; see also *Kvočka Appeals Judgement*, para.79.

⁸³⁸ CDF Trial Judgement, para. 210, quoting *Vasiljevic Appeal Judgement*, paras 97-99 and *Tadic Appeal Judgement*, paras 196, 202, 204.; see also *AFRC Trial Judgement*, para.61.

⁸³⁹ *AFRC Appeals Chamber Judgement*, para.75; *CDF Trial Judgement*, para. 212; *AFRC Trial Judgement*, para. 63.

⁸⁴⁰ *AFRC Appeals Judgement*, para.75; *CDF Trial Judgement*, para. 213.

⁸⁴¹ *CDF Trial Judgement*, para. 214.

⁸⁴² *Id.* at para. 215.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

580. The *Mens Rea* differs depending upon the type of JCE pleaded. For the first category, the Accused must intend to commit the crime (intent which is shared with all participants in the JCE)⁸⁴³ and intend to participate in a common plan whose object was the commission of the crime.⁸⁴⁴ For the second category, the Accused must know about the system of repression and intend to further it.⁸⁴⁵ Finally, for the third category it must be established that the Accused had the intention to take part in and to contribute to the common purpose—that he intended to further it.

581. It must additionally be established, for the third form of JCE, that the Accused had sufficient knowledge that a crime which was not part of the common purpose might be perpetrated by a member of the group (or a person used by members of the JCE). The Accused must willingly take the risk that crime might occur by joining or continuing to participate in the enterprise. The Trial Chamber can only find that the Accused had the requisite intent **if this is the only reasonable inference from the evidence.**⁸⁴⁶

582. Each of the elements of JCE needs to be established beyond reasonable doubt.⁸⁴⁷ Any doubt should be resolved in favour of the Accused.

1. *Plurality of Persons*

583. In order to find the existence of a JCE, it needs to be established beyond reasonable doubt that there was a plurality of persons who acted in concert with each other. Having a common objective is not always sufficient, as different and independent groups can share identical objectives.⁸⁴⁸ In addition to their common objective, it is the interactions or cooperation among persons – **their joint action** – that makes these persons a group.⁸⁴⁹ As stated in the ICTY, "[t]he persons in a criminal enterprise must be shown to act together, or in concert with each other in the implementation of a common objective, if they are to share responsibility for the crimes committed

⁸⁴³ *Id.* at para. 218.

⁸⁴⁴ *Id.*

⁸⁴⁵ *Kvočka* Appeals Judgement, para.82.

⁸⁴⁶ *Kvočka* Appeals Judgement, para. 83; see also *Prosecutor v. Ntakirutimana*, Case No. ICTR-96-10-A & ICTR-96-17-A, Judgement, Appeals Chamber, 13 December 2004, para. 467 ('*Ntakirutimana* Appeals Judgement'); *Prosecutor v. Brdjanin*, Case No. IT-99-36-A, Judgement, Appeals Chamber, 3 April 2007, para. 429 ('*Brdjanin* Appeals Judgement').

⁸⁴⁷ *Brdjanin* Appeals Judgement, paras. 428 and 431; see also *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, Judgement, Trial Chamber, 3 April 2008, para. 475 ('*Haradinaj* Trial Judgement').

⁸⁴⁸ *Haradinaj* Trial Judgment, para. 139. See also *Prosecutor v. Krajsnik*, Case No. IT-00-39-T, Judgement, Trial Chamber, 27 September 2006, para. 884 ('*Krajsnik* Trial Judgement').

⁸⁴⁹ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

in the Joint Criminal Enterprise."⁸⁵⁰

29722

2. *Common Purpose Which Amounts to or Involves the Commission of a Crime*

584. The common purpose does not need to have been previously arranged or formulated. It can materialise extemporaneously and be inferred from the facts.⁸⁵¹ However in such case the existence of a common purpose which amounts to or involves the commission of crimes must be the *only* reasonable conclusion on the evidence.⁸⁵² The criminal purpose or plan must be linked to specific material elements that demonstrate the existence of an objectively punishable criminal act.⁸⁵³

585. The Appeals Chamber stated that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective.⁸⁵⁴ Since we submit the objective of the JCE is not inherently criminal, the only means of demonstrating criminal responsibility under JCE is to demonstrate beyond reasonable doubt that the Accused contemplated crimes within the statute as a means of achieving the objective of JCE—taking over Sierra Leone.

3. *Participation of Accused in Common Purpose Involving the Commission of Crimes*

586. This element may be satisfied when the Accused's commission of a crime formed part of the common objective.⁸⁵⁵ The Accused must have participated or contributed in furthering the common purpose at the core of the JCE.⁸⁵⁶ **This contribution must be significant.**⁸⁵⁷ Considerations which may be taken into account in determining whether the participation of the Accused meets the standard include: the size of the criminal enterprise, the functions performed by the Accused, the position of the Accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, the efforts made to prevent criminal activity or to impede the efficient functioning of the system, the seriousness and scope of the crimes committed.⁸⁵⁸ An individual's

⁸⁵⁰ *Id.*

⁸⁵¹ AFRC Appeals Judgement, para.75; CDF Trial Judgement, para. 214; *see also Ntakirutimana Appeals Judgement*, para. 466.

⁸⁵² Haradinaj Trial Judgement, para. 475.

⁸⁵³ *Prosecutor v. Sagahutu*, Case No. ICTR-00-56-T, Decision on Sagahutu's Preliminary Provisional Release and Severance Motions, Trial Chamber, 25 September 2002, para. 39 (Sagahutu's Decision on Severance').

⁸⁵⁴ AFRC Appeals Judgement, para.80.

⁸⁵⁵ Haradinaj Trial Judgement, para.138; *see also Tadic Appeals Judgement*, para. 227.

⁸⁵⁶ Brdjanin Appeals Judgment, para. 427.

⁸⁵⁷ CDF Trial Judgement, para. 215; *also see Prosecutor v. Stakic*, Case No. IT-97-24, Judgement, Appeals Chamber, 22 March 2006, para 64 ('*Stakic Appeals Judgement*'); *Brdnanin Appeal Judgement*, para. 430; *Prosecutor v. Martić*, Case No. IT-95-11-T, Judgement, Trial Chamber, 12 June 2007, para. 440 ('*Martić Trial Judgement*'); *Haradinaj Trial Judgment*, para.138; *Krajisnik Trial Judgement*, para 883.

⁸⁵⁸ *Kvočka Trial Judgement*, paras. 309 and 311.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

position of authority may be relevant evidence for establishing the Accused's awareness of the system and in establishing his participation in enforcing or perpetuating the common criminal purpose of the system.⁸⁵⁹

587. In both the first and third forms of JCE the Accused must voluntarily participate in one aspect of the common design.⁸⁶⁰ For the second form, the required *Actus Reus* is the active participation in the enforcement of repression, as it could be inferred from the position of authority and the specific functions held by each Accused.⁸⁶¹

588. The Accused does not need to be involved in the commission of a specific crime under one of the provisions,⁸⁶² but may take the form of assistance in, or contribution to, the execution of the common purpose.⁸⁶³ However, as stated by the ICTY "JCE is not an open-ended concept that permits convictions based on guilt by association."⁸⁶⁴ Simply, "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the Accused regarding the crime in question".⁸⁶⁵

589. In practice, the significance of the Accused's contribution will be relevant to demonstrating that the Accused shared the intent to pursue the common purpose.⁸⁶⁶

4. *Mens Rea*

590. Under the basic form of JCE, the Accused must have had a common state of mind, namely the state of mind that the crime(s) forming part of the objective should be carried out.⁸⁶⁷ The Accused must both intend the commission of the crime and intend to participate in a common plan aimed or involving its commission.⁸⁶⁸

591. A participant in a basic or systemic form of JCE must be shown to share the required intent of the principal perpetrators.⁸⁶⁹ This means that for crimes which require a specific intent, the

859 *Kvočka* Appeals Judgement, para. 101.

860 *Krajisnik* Trial Judgement, para. 879.

861 *Tadić* Appeals Judgement, July 15, 1999, para. 203.

862 *Brdjanin* Appeals Judgment, para. 427; *see also Martić* Trial Judgment, para. 440.

863 CDF Trial Judgement, para. 215, *See also Brdjanin* Appeals Judgment, para.427; *Martić* Trial Judgment, para. 440; *Ntakirutimana* Appeals Judgement, para. 466.

864 *Brdjanin* Appeals Judgment, para. 428.

865 *Brdjanin* Appeals Judgment, para. 427.

866 *Kvočka* Appeals Judgement, para. 97.

867 *Haradinaj* Trial Judgement, para. 138; *see also Tadić* Appeal Judgement, paras 227-228.

868 *Brdjanin*, Appeals Judgement, para. 365.

869 *Kvočka* Appeals Judgement, para. 110.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Accused must share the specific intent of the physical perpetrator.

29724

592. For the second category of JCE, the accused must be shown to have personal knowledge of an organised criminal system and intent on furthering the criminal purpose of that system. In some cases this intent may be inferred from the position of authority.⁸⁷⁰

593. The *Mens Rea* in the third category of JCE is two-fold.⁸⁷¹ First, the Accused must have had the intention to take part in and contribute to the common purpose.⁸⁷² Second, the Prosecution must prove that the Accused had sufficient knowledge of a crime that was not part of the common purpose but was a natural and foreseeable consequence of the JCE and that such crime might be perpetrated by a member of the group (or by a person used by the Accused or another member of the group).⁸⁷³ The Accused must willingly take the risk that the crime might occur by joining or continuing to participate in the enterprise.⁸⁷⁴

594. The third form requires careful scrutiny of the Accused's *mens rea*. After all, what is natural and foreseeable to one person participating in a JCE might not be natural and foreseeable to another—it largely depends on the information available to them. A participant may be responsible for such crimes only if the Prosecution proves beyond reasonable doubt that the Accused had sufficient knowledge such that the additional crimes were a natural and foreseeable consequence to him individually.⁸⁷⁵

595. A Chamber can only find that the accused has the requisite intent if this is the **only reasonable inference** on the evidence.⁸⁷⁶ It is settled that the benefit of the doubt must always go to the Accused.⁸⁷⁷

C. Submissions on Behalf of the Third Accused

1. Preliminary Remarks

⁸⁷⁰ *Tadic* Appeals Judgement, para. 203.

⁸⁷¹ CDF Trial Judgement, para. 219.

⁸⁷² *Id.*; see also *Stakic* Appeal Judgement, Para. 65.

⁸⁷³ *Id.*; see also *Brdjanin* Appeal Judgement, para. 411.

⁸⁷⁴ *Id.*; see also *Brdnanin* Appeals Chamber Judgment, para. 411; *Kvocka* Appeals Judgement, para. 83; *Vasiljevic* Appeals Judgement, para. 99; *Tadic* Appeals Judgement, paras 204, 227-228; *Stakic* Appeals Judgement, para. 65. (Emphasis added).

⁸⁷⁵ *Kvocka* Appeals Judgement, para 86. See also *Brdnanin* Appeals Judgement, paras. 365 and 366; *Limaj* Trial Judgement, para. 512; See also *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-AR72, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, Appeals Chamber, 12 April 2006, para.17.

⁸⁷⁶ CDF Trial Judgement, para. 219. *Brdnanin*, Appeal Judgement, para. 429. *Kvocka* Appeals Judgement, para.237.

⁸⁷⁷ *Kvocka* Appeals Judgement, para. 237.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

a. Lack of Clarity on the Nature and Form of the Alleged Joint Criminal Enterprise

596. The Prosecution has failed throughout the case to provide timely notice to the Third Accused concerning the nature, form and material facts underlying the alleged JCE and misled the Accused with the filing of further, and sometime contradictory, information in purported clarification of the JCE.

597. In the Amended Consolidated Indictment filed on 2 August 2006, the Prosecution presented the alleged JCE between the AFRC and the RUF as follows:

"[A] common plan, purpose or design (Joint Criminal Enterprise) which was **to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone**, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the Joint Criminal Enterprise.⁸⁷⁸ The Joint Criminal Enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the Joint Criminal Enterprise."⁸⁷⁹

598. In its final submissions in the AFRC case - where the JCE originally pleaded in the Indictment was identical as for the RUF Accused - the Prosecution seemed to have changed the "common plan" from "A common plan...to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. gaining and exercising political power and control⁸⁸⁰ to "[a] plan...amounting to an organized system to to terrorize the civilian population into submission and ensure its political and practical support for the Junta through forced labour, killings and serious physical and mental injury."⁸⁸¹

599. In a last effort to mould its case, on 3 August 2007 the Prosecution filed a notice stating that the JCE was undertaken between the RUF and the AFRC to "**carry out a campaign of terror and collective punishments in order to pillage the resources in Sierra Leone and to control forcibly the population and territory of Sierra Leone.**"⁸⁸² Surprisingly, the Prosecution maintained that this JCE pleading was "as charged in the Indictment".⁸⁸³ A cursory review of the Indictment

⁸⁷⁸ RUF Indictment, para. 36.(emphasis added). See also Prosecution Pre Trial Brief, para. 120 and Prosecution Supplemental Pre-Trial Brief, para.8.

⁸⁷⁹ RUF Indictment, para. 37; see also Prosecution Pre Trial Brief, para. 121.

⁸⁸⁰ AFRC Indictment, para.33; see also RUF Indictment, para.36.

⁸⁸¹ *Prosecutor v. Brima et al.*, Doc. No. SCSL-04-16-T-601, Prosecution Final Trial Brief, 6 December 2006, paras. 484 and 727 ('Prosecution's Final Brief in the AFRC Case'); see also AFRC Transcript of 12 November 2007, p.26.

⁸⁸² *Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-812, Prosecution Notice Concerning Joint Criminal Enterprise and Defects in the Indictment, 3 August 2008, para.6.

⁸⁸³ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

demonstrates that this is not the case.

600. Rather than clarifying the JCE pleading in the RUF Indictment, the Prosecution's 2007 filing seemed to plead a new JCE. The common purpose has changed from taking any actions necessary to gain political power over the territory of Sierra Leone to terrorising and collectively punishing the population. If this is indeed the case, the Third Accused was provided insufficient notice to counter the charges against him.⁸⁸⁴

601. Neither the Accused nor the Trial Chamber should have to analyse each allegation of JCE within the Prosecution's case and determine which one is the one pleaded in the case. The Prosecution had the opportunity to plead the Joint Criminal Enterprise within the Indictment, and did so. It should not be allowed to later mould its pleading in order to suit its shifting goals.

b. Unclear Nature of Categories of JCE Alleged

602. In the Indictment, the Prosecution pleaded the first and third form of JCE:

"The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either **actions within the Joint Criminal Enterprise or were a reasonably foreseeable consequence of the Joint Criminal Enterprise.**"⁸⁸⁵

603. This notice was mirrored in the Prosecution's pre-trial brief where it was repeatedly stated that the crimes enumerated in indictment "resulted from the participation of Augustine Gbao in the common plan" or "were a foreseeable risk of the common plan to gain and exercise political power and control over the territory of Sierra Leone".

604. However, in its Rule 98 submissions, the Prosecution stated that it pleaded all three forms of JCE while it simultaneously asserting that "[t]he Accused are specifically alleged to have acted pursuant to a basic or alternatively extended Joint Criminal Enterprise with respect to the acts charged."⁸⁸⁶

605. The Prosecution's "clarification" on JCE in its 3 August 2007 filing does not refer to the second form of JCE. Instead, the Prosecution stated that counts 1 to 14 were *within* the Joint

⁸⁸⁴ Article 17(4) (a) Statute of the Special Court for Sierra Leone; *see also* AFRC Trial Judgement, para. 71. *Kvočka* Appeal Judgement, Para. 42.

⁸⁸⁵ RUF Indictment, para. 37. (Emphasis added)

⁸⁸⁶ *Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-650, Consolidated Prosecution Skeleton Response to the Rule 98 Motions by the Three Accused, 6 November 2006, para.10. ("Prosecution's Rule 98 Submissions").

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Criminal Enterprise (Form 1).⁸⁸⁷ In this same filing, the Prosecution stated that, in the alternative, counts 1, 2, 12, 13 and 14 were within the JCE, and that counts 3 to 11 were the foreseeable consequences of the JCE.⁸⁸⁸

606. The Prosecution has never pleaded the second form of Joint Criminal Enterprise. This is another example of the Prosecution not knowing their case and moulding it as time passes. Allowing the Prosecution to do so and to add a new form of Joint Criminal Enterprise pleaded would simply destroy the *raison d'etre* of the Indictment and would simply negate the right of the Accused to be informed of the charges against him.

607. Finally, in the CDF Case, where the Prosecution formulated its categories of JCE in a similar manner as the RUF case,⁸⁸⁹ the Trial Chamber found that "the pleading in the Indictment is limited to an alternative pleading of the first and third categories of Joint Criminal Enterprise."⁸⁹⁰

2. Conclusion on Defective Pleading

608. It is established that the form and description of the JCE pleaded in a particular case need to be included in the Indictment.⁸⁹¹ This is part of the fundamental right of the Accused to have notice of the charges against him.⁸⁹² In the present case it is manifest that the RUF Accused have been denied clear notice of the nature and form of the alleged JCE. Where the Prosecution had the opportunity to state its case clearly it tended to only created more confusion.

609. Accepting that the Appeals Chamber decided that the JCE in the AFRC case was not defectively pleaded, its analysis and findings only discussed the issue of whether a JCE could still be properly pleaded even if the common purpose alleged was not criminal in itself. The Appeals Chamber did not address other elements such as for instance the *multiplication* of Joint Criminal Enterprises.

610. In the absence of any indicia as to what really is the Joint Criminal Enterprise as alleged by

⁸⁸⁷ Prosecution's Notice on Joint Criminal Enterprise, para.7.

⁸⁸⁸ Prosecution's Notice on Joint Criminal Enterprise, para.8.

⁸⁸⁹ Paragraph 20 of the CDF Indictment alleged that the crimes alleged in the Indictment 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". *Prosecutor v. Norman et al.*, Doc. No. 2004-14-PT-003, Indictment, 5 February 2004, para. 20. ('CDF Indictment').

⁸⁹⁰ CDF Trial Judgement, para.211.

⁸⁹¹ AFRC Trial Judgement, para. 64.

⁸⁹² Article 17(4) (a) Statute of the Special Court for Sierra Leone. *See also* AFRC Trial Judgement, ara. 71; Kvočka Appeal Judgement,, para. 42.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

the Prosecution in the RUF Indictment, it is submitted that the Trial Chamber should not consider this as a mode of liability. Only a precise and decisively pleaded JCE, a serious mode of liability, could permit the court to make any findings on this mode of liability.

611. In the alternative, the Trial Chamber should not accept any modification of the common purpose alleged to be the Joint Criminal Enterprise and address consider the Joint Criminal Enterprise as pleaded in the RUF Amended Indictment.

612. For the reasons presented below, there are no modes of JCE liability under which the Third Accused should be found criminally responsible.

b. Elements Common to the Three Forms of JCE are Not Satisfied for Augustine Gbao

1. *Gbao was not Acting in Concert with the Alleged Plurality of AFRC and RUF*

613. As stated above, in order to find the first element of a JCE it needs to be established beyond reasonable doubt that a plurality of persons **acted in concert together**.

614. The RUF Indictment alleges that Augustine Gbao acted in concert with Johnny Paul Koroma, Foday Sankoh, Sam Bockarie, Alex Tamba Brima, Brima Bazzy Kamara, Santigie Bobor Kanue and with other superior in the RUF, Junta, AFRC/RUF Forces. Nonetheless, the evidence presented by the Prosecution – even taken as a whole - does not provide any material support for such allegation. The Third Accused submits that there is no evidence that allows for a finding of such concerted action beyond reasonable doubt as it pertains to the Third Accused.

615. Even if all the above-mentioned had a certain commonality with Augustine Gbao, this commonality is one strictly limited to them being members of the RUF, nothing more.

616. First of all, the Prosecution was never successful in pleading that Gbao had any relationship with the AFRC, much less that he ever jointly acted with them. There has been no credible evidence on the matter. One known attempt to link Gbao to the AFRC was the testimony of TF1-054. However, as described in the paragraphs above, this witness was entirely discredited in cross-examination by Defence counsel. Otherwise, Gbao spent 1991-1999 in Kailahun District with no known interaction with any of the three AFRC Accused, or any AFRC altogether, owing to his presence in Kailahun Town, not Freetown, during the junta period. This indicates a disconnect with the AFRC and RUF leadership—one that likely conclusively demonstrates he was not acting in

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

concert. A striking and self-explaning fact demonstrating the absence of joint action with the AFRC/ RUF is the absence of Augustine Gbao within the AFRC Ruling Council.⁸⁹³ Such participation would appear to be at least, a strong indicia of a lack of action in concert between Augustine Gbao and the AFRC.

617. Secondly, even within the RUF itself, Augustine Gbao held no role or responsibility for planning military operations, which would have made it difficult for him to act in concert with the AFRC and the RUF in a JCE aiming to take over the country of Sierra Leone. Similarly there is no evidence of Augustine Gbao participating in high level meetings with the RUF – whether in Freetown with the AFRC Ruling Council or otherwise.

618. Additionally, evidence has been presented of Augustine Gbao being harassed and molested, both by the high command and by regular soldiers.⁸⁹⁴ Evidence has also been led that Augustine Gbao was not listened to, held a low rank, and had no command and control RUF outside the IDU (and even that authority was limited). Interestingly, Sam Bockarie aka ‘Mosquito’ is listed as a participant to the JCE.⁸⁹⁵ In view of the above mentioned examples of him constantly harassing Augustine Gbao,⁸⁹⁶ finding that they two, together with all the other alleged JCE participants, acted in concert would be contrary to the fundamentals of JCE as a mode of responsibility. .

619. In the absence of any joint action between the alleged participants of the JCE, it seems difficult if not impossible to find that the first element of JCE is fulfilled. Should the Trial Chamber find that the existence of a plurality of persons can be inferred from circumstantial evidence, the Third Accused submits that in such case, the guilt of the Accused must be the only reasonable inference from the facts. In view of the rarity of the evidence – if found credible – that might demonstrate that Augustine Gbao acted in concert with people like Foday Sankoh, Johnny Paul Koroma or any of the AFRC and RUF Accused, and in view of the previously presented evidence that Augustine Gbao took measures within his material ability to prevent and repress the commission of crimes, we submit a reasonable doubt has been raised as to the existence of the first element of JCE.

620. In view of the state of the evidence, it seems difficult to find beyond reasonable doubt that,

⁸⁹³ Exhibit 6.

⁸⁹⁴ *Supra*, paras. 24-44.

⁸⁹⁵ RUF Indictment, para. 34.

⁸⁹⁶ All of this evidence is detailed below in the section on Article 6(3) liability

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

in these conditions, Augustine Gbao acted in concert with members of the AFRC and RUF. In the absence of the first element of JCE being met, JCE as a mode of responsibility should not be considered in relation to the Third Accused.

2. *Existence of a Common Purpose Amounting to or Involving the Commission of Crimes*

621. Despite the Prosecution's effort to criminalise the purpose of the alleged JCE, the purpose in itself - taking over Sierra Leone - is not criminal. However, finding a JCE is still possible if the Prosecution demonstrates beyond reasonable doubt that the means used to achieve this purpose were criminal, and that the commission of such criminal acts as means to commit the JCE was part of the common plan. The common criminal purpose is therefore the taking over of Sierra Leone *and* the alleged criminal means used to further it. The Prosecution must therefore prove that the alleged participants in the JCE, including the Third Accused, had an implicit agreement – a common plan - to pursue their goal of taking over Sierra Leone, *through the commission of crimes* within the jurisdiction of the Court. In the absence of evidence of the existence of such agreement – whether explicit or implicit- to commit crimes, there would be no JCE.

622. In the *Furundzija case* the ICTY Appeals Chamber found that a common purpose existed "[w]here the act of one accused contributes to the purpose of the other, and both acted simultaneously, in the same place and within full view of each other, over a prolonged period of time".⁸⁹⁷ There is no such evidence in the present case. Nowhere can it be found that Augustine Gbao acted simultaneously with for instance, the AFRC or the RUF high command, or that he contributed to their actions.

623. While a common purpose can be inferred from the circumstances, it must be the only inference possible. The Third Accused submits that the common purpose of taking over Sierra Leone involved the commission of crimes is not the only possible inference beyond reasonable doubt that may be drawn from the facts.

624. Even if the evidence appeared to indicate that crimes were committed in a systematic way, the evidence before the Trial Chamber has to be sufficient to infer the existence of a single common criminal objective, shared by the Accused.⁸⁹⁸

⁸⁹⁷ *Prosecutor v. Furundzija*, Case No. IT-95-17/1-A, Judgement, Appeals Chamber, 21 July 2000, para. 120 ('Furundzija Appeals Judgement').

⁸⁹⁸ Haradinaj Trial Judgement, para. 476; *see also* para. 477 of same case.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

625. Once again, the fact that the Third Accused was within the RUF does not lead to a finding beyond reasonable doubt that he was part of a plan to take over Sierra Leone through the commission of crimes common to all the alleged participants in the JCE. There is no evidence that can directly or indirectly prove beyond reasonable doubt that Augustine Gbao and the other alleged JCE participants were following a common plan- involving the commission of crimes, nor can it be deduced from the facts.

3. *Participation of the Accused in the Common Purpose, which Involves the Commission of Crimes*

a. *General Remarks*

626. In view of the large scope of the alleged common purpose – which can basically include anything – it is submitted that particular care should be taken when assessing whether the Accused took part in it. Indeed, JCE is above all a mode of criminal responsibility concerned with the commission of crime as a co-perpetrator. This requires a certain level of seriousness to be found in the acts of the Accused, since a finding that an Accused is part of a JCE would result in the possibility that he may be held responsible for every crime committed within the JCE as well as for its reasonable and foreseeable consequences. That said, it is submitted that the participation of an Accused in a JCE should be subject to a strict threshold.

627. There is no evidence in this case that demonstrates Gbao playing any role, much less a significant one, in furtherance of the criminal purpose of the alleged JCE. Augustine Gbao never acted in any way to further the alleged criminal enterprise: he never took part in any attacks on civilians, whether on the ground (he was not a combatant) or at the planning level. Neither was he ever involved in looting or in mutilations, nor did he have any involvement with forced labour or physical violence.

628. There is likewise insufficient evidence that he procured or otherwise gave assistance to others alleged to be part of the JCE. This assertion will be noted in each count in the indictment. Cumulatively this shows that Gbao, no matter his *de jure* status as overall IDU commander and security commander, was a neglected figure in the RUF hierarchy. He was there, but did not have any influence.

629. As a general observation, Gbao did not further the alleged criminal purpose as a combatant on

the frontlines, as he was never a combatant during the war. He never killed anyone during the war, had no power over military activities of the RUF, was never involved in the alleged looting and burning of houses in Sierra Leone, nor did he have anything to do with the alleged amputations that took place throughout the country. Neither did he have any responsibility regarding farming in Kailahun District. He was not a military man—rarely carrying a weapon (usually a pistol) or using bodyguards.

630. Amongst the elements of the JCE pleaded by the Prosecution in the Indictment is the use of the nature resources of Sierra Leone in order to achieve the criminal enterprise.⁸⁹⁹ The fact that Augustine Gbao has never been involved with diamond mining or diamond trafficking is another illustration of him not sharing a common purpose with the alleged participants in the JCE and not contributing to it.

631. When the AFRC took over power in Freetown and invited the RUF to join their government, most, if not all, high-ranking RUF went there. Gbao did not, instead staying in rural Kailahun District, hundreds of miles from Freetown. In fact, there is no credible evidence in the case demonstrating that Gbao ever travelled to Freetown (before 2000), Bo, Kono, Koinadugu, Port Loko and Bombali District (before late 1999).

632. Not only is there no evidence of Augustine Gbao acting in furtherance of the JCE, there is evidence to the contrary. The Court has heard evidence of Augustine Gbao investigating an allegation of rape, punishing soldiers for using DAG-018 to carry loads, and teaching the RUF ideology to others.

633. Should the Trial Chamber find that Augustine Gbao participated in some way in the JCE, we submit that his acts do not qualify as a 'significant contribution' to it.

Significant Contribution

634. In order to be found responsible under JCE, the Accused must have participated in the common purpose. The significant contribution of the Accused on the common purpose needs to be established beyond reasonable doubt.⁹⁰⁰

⁸⁹⁹ RUF Indictment, para. 36.

⁹⁰⁰ Brdjanin Appeals Judgment, para. 431 ("all these requirements for JCE liability are met beyond a reasonable doubt.")

635. According to the ICTY an Accused can participate in a joint criminal enterprise in three ways:

1. "by personally committing the agreed crime as a principal offender;
2. by assisting or encouraging the principal offender in committing the agreed crime as a co-perpetrator who shares the intent of the joint criminal enterprise;
3. by acting in furtherance of a particular system in which the crime is committed by reason of the accused's position of authority or function and with knowledge of the nature of that system and intent to further it."⁹⁰¹

636. The participation does not need to amount to the commission of a specific crime, and may take the form of assistance or contribution in the execution of the common purpose.⁹⁰² While it does not need to be demonstrated that such participation was necessary or substantial, the participation of the Accused must have at least made a significant contribution to the crime for which he is held responsible.⁹⁰³ In other words, "not every type of conduct amounts to a sufficiently significant contribution to the common purpose to impute criminal liability to the accused for crimes committed."⁹⁰⁴

637. In the *Kvočka case*,⁹⁰⁵ the Trial Chamber provided several factors to be taken into account when assessing whether the contribution of an Accused was significant.⁹⁰⁶ The factors to be taken into account to see if the threshold was reached include:

- The size of the criminal enterprise,
- The functions performed by the Accused,
- The position of the accused,
- The amount of time of the Accused spent participating after acquiring knowledge of the criminality of the system,
- The efforts made to prevent criminal activity or to impede the efficient functioning of the system,

⁹⁰¹ Stakic Trial Judgement, para.435. Citing Vasiljević Trial Judgement, para. 67; Krnojelac Trial Judgement, para. 81. (last one not checked).

⁹⁰² CDF Trial Judgement, para.215.

⁹⁰³ CDF Trial Judgement, para.215. See also Brdjanin Appeals Judgement, para. 427; Haradinaj Trial Judgement, para. 138; Martić Trial Judgement, 440.

⁹⁰⁴ Boskoski Trial Judgement, para. 395.

⁹⁰⁵ *Prosecutor v. Kvočka et al*, Case No. IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, para. 311. ('Kvočka Trial Judgement').

⁹⁰⁶ See the beginning of the paragraph 311: "The Trial Chamber finds that during periods of war or mass violence, the threshold required to **impute criminal responsibility to a mid or low level participant in a joint criminal enterprise as an aider and abettor or co-perpetrator of such an enterprise** normally requires a more substantial level of participation than simply following orders to perform some low level function in the criminal endeavor on a single occasion."

The seriousness and scope of the crimes committed and the efficiency, zealousness or gratuitous cruelty exhibited in performing the actor's function.⁹⁰⁷

638. The Trial Chamber also noted that any direct evidence of a shared intent or agreement of the Accused with the criminal endeavour, such as "repeated, continuous, or extensive participation in the system, verbal expressions, or physical perpetration of a crime".⁹⁰⁸ As a final say, it held perhaps the most important factor to examine is **the role the accused played vis-à-vis the seriousness and scope of the crimes committed**: even a lowly guard who pulls the switch to release poisonous gas into the gas chamber holding hundreds of victims would be more culpable than a supervising guard stationed at the perimeter of the camp who shoots a prisoner attempting to escape."⁹⁰⁹

639. It is submitted the Trial Chamber should take into account the position and powers of Augustine Gbao and his lack of interaction with other RUF and AFRC as well as the evidence of various Prosecution witnesses concerning his involvement in the crimes allegedly committed as part or as a reasonable consequence of the JCE. The Third Accused submits that there is simply not enough evidence for the Trial Chamber to find that the acts of Augustine Gbao meet the threshold of significant participation in the JCE. Alternatively, we submit that the evidence before this court does not point to any significant contribution by Augustine Gbao in the JCE.

640. The JCE alleged in the RUF case is characterised by its wide ambit. It is alleged that the RUF and the AFRC - two groups which contained thousands of members - had agreed to take over Sierra Leone through the commission of 14 different crimes, during a period of more than 4 years, in most of the territory of Sierra Leone. In order to find that an Accused was a participant in this JCE, a minimum degree of participation is required: it should be established that, **beyond reasonable doubt**, he provided a significant contribution to the JCE. It is difficult to see how Augustine Gbao's actions, in view of the evidence concerning his position, powers and activities, could have had any impact on such a broadly defined JCE. The participation of Augustine Gbao within the RUF is minimal when put into context. JCE cannot be made out by mere membership of an organisation.⁹¹⁰

640. The seriousness of crimes committed and the participation of the Accused thereto also need

⁹⁰⁷ Kvočka Trial Judgement, para. 311.

⁹⁰⁸ Kvočka Trial Judgement, para. 311.

⁹⁰⁹ Kvočka Trial Judgement, para. 311.

⁹¹⁰ Stakić Trial Judgement, para. 433.

to be taken into account when assessing his participation in the JCE. While there has been evidence of serious crimes committed by some AFRC and RUF elements, no evidence of rape, of attacks on civilians, of burning or looting, or of physical violence have been presented against Augustine Gbao by the Prosecution's witnesses.

641. It is also necessary that the position and function of the Accused be considered in order to assess whether his contribution to the common purpose was significant. Indeed, this would have an impact on the effect of the Accused acts. Evidence has been led by the Third Accused aimed at presenting who Gbao really was and what he was doing. The evidence presented –by credible and sober-minded witnesses – stands in contrast and contextualises the ‘multi-purpose’ evidence provided by the Prosecution.

642. It is clear from the evidence that Augustine Gbao had little authority over other RUF members. He did not have the ability to issue orders to anyone, and even his own subordinates - the IDU - did not always report to him. The fact that Gbao was often with civilians should also be taken into account, as should the fact that he was often publicly molested, harassed and humiliated by other RUF members.

643. Augustine Gbao was never one of the main actors in the RUF; he was never involved with the AFRC (he did not even go to Freetown), and was never a member of the AFRC Supreme Ruling Council. He was not present when meetings between the alleged members of the JCE took place, and was never an active "advocate" of the JCE.

644. The Third Accused submits that, even if Trial Chamber found that the first two elements of joint criminal enterprise are met - plurality of person and existence of a common plan involving the commission of crimes - it could not find that the Accused's acts amounted to the minimum threshold of "significant contribution".

645. It is submitted that one should look at the effects of the acts of the Accused on the JCE in order to determine whether his contribution was significant. One should ask "[w]hat were the consequences of Augustine Gbao's actions on the achievement of the common purpose? How did his actions contribute to the JCE's progress?"

647. Gbaos' participation, if any, cannot amount to a significant contribution to the common purpose.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

pose, for the simple reason that it has not been demonstrated that his actions ever had any such impact. To find otherwise would run contrary to the core theory of JCE: to take into account the criminal responsibility of the co-perpetrators who, in some way, made it possible for the perpetrator physically to carry out that criminal act.⁹¹¹ We submit Augustine Gbao in no way assisted in the furtherance of the alleged criminal purpose and that the evidence is clear on this.

4. *Mens Rea*

a. Common State of Mind with Physical Perpetrator/ Intention to Commit the Specific Crime

648. Gbao was not of the same state of mind as the other alleged members of the JCE or other physical perpetrators of the alleged crimes. There is insufficient evidence to demonstrate that he shared the same intention to commit crimes in order to achieve the common goal: exercising political power and control over the territory of Sierra Leone. This cannot be deduced from either direct or indirect evidence. The intent of the Accused to participate in the JCE through the commission of crimes – and shared with the other alleged members of the JCE – is far from being the only reasonable inference from the evidence.

649. The ICTY Appeals Chamber held that “apart from the specific case of the extended form of Joint Criminal Enterprise, the very concept of Joint Criminal Enterprise presupposes that its participants, other than the principal perpetrator(s) of the crimes committed, **share the perpetrators’ joint criminal intent.**”⁹¹² This is not the case for Gbao.

b. Intention to Contribute to the Common Purpose

650. Gbao's alleged intent should be also seen in the overall context that there is no credible evidence of Augustine Gbao taking any action aimed at furthering the commission of crimes, whether as a group or individually. To the contrary, the evidence suggests that when it was within his material ability, Gbao took action to prevent the commission of the very crimes alleged to be the means through which the JCE was pursued.

651. As stated in the previous paragraphs, the level of contribution of an Accused has been taken into account to assess whether he had requisite intent for the JCE. In the present case, should the Trial Chamber reject the Defence’s argument that Augustine Gbao did not contribute to the JCE, the Third Accused submits that his level of participation does not go to demonstrate that he had the

⁹¹¹Tadic Appeals Judgement, para. 192.

⁹¹²Krnjelac Appeals Judgement, para. 84.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

intent to further the criminal goal. We submit that the Prosecution have failed to present sufficient evidence from which, beyond reasonable doubt, the only inference that may be drawn is that Gbao had the requisite intent to further the JCE.

c. Knowledge that Crimes not part of common purpose but that natural and Foreseeable Consequence of JCE/ Knowledge that Likelihood of Such Crime be Committed

653. The test of what constitutes a natural and foreseeable consequence of a JCE is subjective, to be assessed on an individual basis. It depends on how much information the Defendant was privy to under the particular circumstances. It also depends on the complexity of the JCE alleged: the smaller and more focused it is, the easier it would be to determine that certain crimes may flow as a foreseeable consequence thereto. In the present all-encompassing JCE, particular caution needs to be taken. Indeed, we submit that if the common purpose itself is not clear, and perhaps not even criminal (taking over Sierra Leone) - how could someone know that certain crimes were likely to occur as a result?

4. Conclusion on JCE

654. We submit that the JCE as pleaded is intended as a 'residual' mode of responsibility, to be invoked against the Third Accused in the absence of evidence of his individual participation in crimes.

655. One must not forget the purpose that underlines the JCE mode of responsibility: to take into account the criminal responsibility of the co-perpetrators who, in some way, **made it possible for the perpetrator physically to carry out that criminal act.**⁹¹³ It is not designed to create responsibility based on mere membership of an organisation, some members of which have committed crimes.

656. As Mr Justice Thompson put it in his separate, dissenting opinion to the CDF Judgement the state of the law on Joint Criminal Enterprise is unsettled.⁹¹⁴ Mr Justice Thompson noted "the lack of judicial consensus on the scope of the doctrine and the unsettled state of the law."⁹¹⁵ He stated that "the rationale behind the third category of the doctrine is to create some form of implied

⁹¹³Tadic Appeals Judgement, para. 192.

⁹¹⁴*Prosecutor v. Fofana and Kondewa*, Case No. SCSL-04-14-T, Judgement, Trial Chamber, 2 August 2007, Annex C – Separate Concurring and Partially Dissenting Opinion on Hon. Justice Bankole Thompson Filed Pursuant to Article 18 of the Statute, para. 24. ('Separate Opinion of Justice Thompson in the CDF Case').

⁹¹⁵*Id.* at para.24.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

criminal liability [...] in respect of persons accused of crimes against humanity and war crimes **where direct or circumstantial evidence of their participation in the alleged crimes may be lacking**"⁹¹⁶ and that "judicial circumspection and vigilance"⁹¹⁷ should be used when applying the second and third forms of JCE. We respectfully share that view.

657. For that reason we submit that the participation of the Accused should be assessed with extreme caution. The link between an Accused and a crime can only be extended to a certain point. Evidence suggesting that Augustine Gbao was part of a JCE is too vague and remote to allow for a legal finding on individual responsibility against him.

658. In conclusion, the notion that JCE is a sensitive one, and must be assessed with caution. In order to avoid collective responsibility, the Third Accused submits that there should be proof beyond reasonable doubt before an Accused may be held responsible for crimes under its doctrine. He cannot be found criminally responsible for merely being a member of an organisation, some members of which committed serious crimes. A strong link between the acts or omissions of the Accused and the commission of crimes within or as a result of the JCE must be proved. Such link is missing in the present case.

916 *Id.* at para.27.

917 *Id.* at para.27.

29739

II. Article 6(3): Superior Responsibility

A. Introduction

660. Article 6(3) of the Special Court statute reads:

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

661. This article mirrors other articles in the ICTY and ICTR statutes and has been an established principle of customary international law since 1992.⁹¹⁸ Article 28 of the statute of the International Criminal Court also addresses superior responsibility, but in a more detailed manner. Part (a) is concerned with superior responsibility of military commanders, and need not be discussed in connection with the defence of Augustine Gbao. However, part (b) states that a superior shall be criminally responsible for failing to exercise control where “i) [t]he superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes; ii) [t]he crimes concerned activities that were within the effective responsibility and control of the superior; and iii) [t]he superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution”.

B. Elements for Superior Responsibility

662. In the Special Court for Sierra Leone, there are three elements that the Prosecution must prove beyond reasonable doubt to demonstrate that the Third Accused should be found criminally responsible under Article 6(3):

1. The existence of a superior-subordinate relationship between the superior and the offender of the criminal act;
2. The superior knew or had reason to know that the criminal act was about to be or had been committed; and
3. The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the offender thereof.⁹¹⁹

⁹¹⁸ CDF Trial Chamber judgement, Para. 233 (other citations omitted); *also see* AFRC Trial Chamber judgement, para.782.

⁹¹⁹ AFRC Trial Chamber judgement, para.781; *also see* CDF Trial Chamber judgement, Para. 235 quoting *Blaskic* Appeal Judgement, para. 484; *Kordic and Cerkez* Appeal Judgement, para. 827; *Aleksovski* Appeal Judgement, para. 72; *Gacumbitsi* Appeal Judgement, para. 143; *Celibici* Trial Chamber para.346; *Bagilishema* Trial Chamber para.38; *Kajileji* Trial Chamber para.772; *Galic* Trial Chamber para.173.

663. Each of these elements will be discussed below.

29740

C. The Existence of a Superior-Subordinate Relationship

664. Command responsibility is “ultimately predicated upon the power of the superior to control the acts of his subordinates”.⁹²⁰ Ascertaining whether this relationship exists requires the Chamber to ask whether the superior had “effective control” over a subordinate who perpetrated a crime. This assessment is of critical importance and must be evaluated very carefully “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”.⁹²¹

665. In making this assessment, the AFRC case suggested certain indicators that may serve as *de jure* or *de facto* authority over someone. They included considerations of the superior's appointment and the formality attached to it; the power of the superior to issue orders or take disciplinary action; the level of subordinate's discipline when the superior is present; the profile of the superior (evidenced through public appearances and statements); and the ability of the superior to transmit reports to competent authorities to take certain measures.⁹²²

666. The Chamber then expanded these indicators, as those listed above were found to be more suitable for traditional armies rather than irregular armies or rebel groups.⁹²³ It stated that “the formality of an organisation's structure is relevant to, but not determinative of, the question of the effective control of its leaders. The less developed the structure, the more important it becomes to focus on the nature of the superior's authority *rather than his or her formal designation*”.⁹²⁴

667. In regard to discerning effective control in irregular armies or rebel groups, the Chamber set forth additional indicators. They include situations where the superior:

1. Had first entitlement to the profits of war, such as looted property and natural resources;
2. Exercised control over the fate of vulnerable persons such as women and children;
3. Had independent access to and/or control of the means to wage war, including arms and ammunition and communications equipment;
4. Rewarded himself or herself with positions of power and influence;

⁹²⁰ AFRC Trial Chamber Judgement, para. 784, citing *Celebici* Trial Chamber Judgement, para. 377.

⁹²¹ **Celibici Trial Chamber Judgment, 16 November 1998** para.377.

⁹²² AFRC Trial Chamber Judgement, para. 785.

⁹²³ *Id.* at para. 787.

⁹²⁴ *Id.* (emphasis added).

5. Had the capacity to intimidate subordinates into compliance and was willing to do so;
6. Was protected by personal security guards, loyal to him or her, akin to a modern praetorian guard; and
7. Fuels or represents the ideology of the movement to which the subordinates adhere; and the superior interacts with external bodies or individuals on behalf of the group⁹²⁵.

668. The power of the superior to issue orders was found to be crucial.⁹²⁶ Similarly, the superior must be capable of taking disciplinary action.⁹²⁷ The Appeals Chamber in the ICTY also made clear that "[t]he Appeals Chamber recalls that whether a superior's orders are in fact followed can be indicative of a superior's effective control over his subordinates."⁹²⁸

669. It is important to note that for a finding that Gbao exercised effective control, it should be shown he had this control *at the time* the subordinates committed the offences.⁹²⁹

670. The *Blaskic* case in the ICTY provided additional indicia that may assist this Chamber in resolving whether Augustine Gbao exercised effective control: presence on the battlefield, close proximity to the frontline, cognisance of the situation on the battlefield, properly working monitoring and reporting systems (orders went down the chain of command properly), a good position to order and instruct his troops, a degree of command the same as regular armies, competent personnel, and for shelling activities to be under the strict control of the chain of command.⁹³⁰

1. "Effective Control" in the Special Court

671. The AFRC Chamber found that the AFRC Accused exercised effective control in many areas throughout the country where crimes were committed. For example, so far as Freetown was concerned, the Court found that Brima ordered the attack and instructed that looting was generally permissible.⁹³¹ The troops advanced to State House only after waiting for Brima (because he instructed so). Kamara was deputy commander for the attack; he was present at meetings where planning took place (although there was no evidence as to his contribution). He arrived at the State House

925 AFRC Trial Chamber judgement, para. 788.

926 See AFRC Trial judgement, para.789.

927 AFRC Trial Chamber judgement, para. 789.

928 Strugar Appeals Judgement, para. 256. Quoting Halilovic Appeals Judgement, para.207.

929 para.628.

930 Blaskic Trial Judgement, paras.660 and 661.

931 AFRC Trial Chamber Judgment, para. 1790.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

shortly after its capture; he ordered the release of prisoners at Pademba Road prison and he was also present at a meeting in which Brima ordered AFRC troops to start the burning of houses. Additionally, he participated in the decision-making and did not distance himself from the decisions that were made. This was found to amount to effective control.⁹³²

672. Kanu was chief of staff and commander in charge of civilians during the attack on Freetown.⁹³³ He was also tasked with commanding troops during the attack. During the attack, he was third in command and was being reported to directly by the operations director, the operations commander, the task force commander and the head of military police.⁹³⁴ He was based at AFRC headquarters at State House, and attended a meeting of commanders when an attack on Wilberforce was discussed. Finally, he commanded troops that attacked Tumbo,⁹³⁵ ordered the MP to move dead bodies that were piling up around State House,⁹³⁶ had soldiers reporting ECOMOG troop positions to him,⁹³⁷ and he ordered men to set houses on fire.⁹³⁸ The position Kanu held, together with evidence that certain orders he gave were obeyed, satisfied the court that he had the ability to effectively control troops in Freetown.⁹³⁹

673. There was evidence that Kamara played a role at a senior level in military operations in Port Loko. It was found that he had established the command structure of the AFRC in that area, issued orders that were followed, that he appointed and promoted commanders, enforced discipline within the ranks and was reported to by other high level commanders.⁹⁴⁰ He also ordered troops to burn down villages and kill civilians, whilst all the time keeping in touch with commanders on the ground.⁹⁴¹ The combination of these factors was held to demonstrate effective control.

674. In Bombali District, Kamara was based at the headquarters from where operations were planned and orders issued.⁹⁴² He issued orders that were obeyed, and participated in the decision making. He exercised effective control and was aware that the troops under his control committed crimes in Bombali District.⁹⁴³

⁹³² *Id.*, paras. 1944, 1945, 1949.

⁹³³ *Id.*, para. 2067.

⁹³⁴ *Id.*, para. 2070.

⁹³⁵ *Id.*, para. 2073.

⁹³⁶ *Id.*

⁹³⁷ *Id.*

⁹³⁸ *Id.*

⁹³⁹ *Id.*, para. 2072.

⁹⁴⁰ *Id.*, para. 1959.

⁹⁴¹ *Id.*, paras. 1963, 1964.

⁹⁴² *Id.*, para. 1924.

⁹⁴³ *Id.*, para. 1925.

675. In Kono, the most senior AFRC commander was found to be Kamara,⁹⁴⁴ who gave orders through his subordinates to operations commanders, appointed deputies, and was reported to directly by battalion commanders;⁹⁴⁵ he held regular discussions with military supervisors, and evidence was adduced that whilst orders were being followed that was not enough to establish effective control over all AFRC and RUF forces in Kono.⁹⁴⁶

2. “Effective Control” In Other International Tribunals

676. The *Bagilishema* case in the ICTR considered whether superior responsibility could be found in situations where the Accused holds a supervisory position over others. It found that effective control will not necessarily be found in all situations. Indeed, in this case, the Accused was *bourgmestre* for an area in Rwanda. In this position, he supervised the work of the Conseil communal (roughly, community council) who were an elected advisory board of representatives from within the area. The Chamber found that, even though the Accused had supervisory powers over the council, they were not found to be subordinates of the Accused.⁹⁴⁷

677. The *Akayesu* case also considered an issue relating to a *bourgmestre* in Rwanda. It held that the Accused, who was a town *bourgmestre*, had control over the security, economic and social well-being of everyone in his village. However, he had no superior role within the *Interhamwe* local militia; therefore, it was found that he could not be held responsible for actions of the *Interhamwe* under the superior responsibility mode of liability.⁹⁴⁸

678. In the *Gacumbitsi* case, it was shown that the Accused had general authority as *bourgmestre* to impose law and order in the commune. The Accused also played a leading role in the genocidal campaign. Yet, notwithstanding these factual findings, it was held that the exercise of effective control over every person present in the commune during the time in question could not in the circumstances be found to be established.⁹⁴⁹

679. In the ICTY, the *Oric* judgement indicated that signing orders was not enough to indicate effective control. It stated that “[t]he capacity to sign orders is an indicator of effective control,

944 *Id.*, para.1867.

945 *Id.*, para. 1868

946 *Id.*, para. 1869.

947 *Bagilishema* Trial Chamber Judgment, 7 June 2001, para.166.

948 para.691.

949 *Gacumbitsi* Appeals Chamber Judgment, 7 July 2006, para.144.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

provided that the signature on a document is not purely formal or merely aimed at implementing a decision made by others, but that the indicated power is supported by the substance of the document or that it is obviously complied with".⁹⁵⁰

680. The Appeals Chamber of the ICTY recently supported the Trial Chamber findings in the *Halilovic* case, and stated that "a superior's authority to issue orders does not automatically establish that a superior had effective control over his subordinates, but is one of the indicators to be taken into account when establishing the effective control [...] the orders in question will rather have to be carefully assessed in light of the rest of the evidence in order to ascertain the degree of control over the perpetrators."⁹⁵¹ It then refers to an instance in the *Blaskic* case where it found that "the issuing of humanitarian orders does not by itself establish that the Appellant had effective control over the troops that received the orders".⁹⁵²

681. It also referred to its finding in the *Blaskic* case where it held that "the indicators of effective control are more a matter of evidence than of substantive law, and those indicators are limited to showing that the accused had the power to prevent, punish, or initiate measures leading to proceedings against the alleged perpetrators where appropriate".⁹⁵³ It emphasized the fact that whether a given form of authority possessed by a superior amounted to an indicator of effective control depends on the circumstances of the case and held that "[f]or example, with respect to the capacity to issue orders, the nature of the orders which the superior has the capacity to issue, the nature of his capacity to do so as well as whether or not his orders are actually followed would be relevant to the assessment of whether a superior had the material ability to prevent or punish."⁹⁵⁴

D. The Superior Knew or had Reason to Know that the Criminal Act was About to be or had been Committed

682. As stated above, the prosecution must prove that the superior knew or had reasons to know that his subordinate was about to commit a crime or had committed such crimes.⁹⁵⁵ This evaluation is traditionally made on a case-by-case basis, taking into account the specific situation of the superior concerned at the time in question.⁹⁵⁶

⁹⁵⁰ Oric Trial Judgement, para.312.

⁹⁵¹ *Prosecutor v. Strugar*, Case No. IT-01-42-A, Judgement, Appeals Chamber, 17 July 2008, para.253. ("Strugar Appeals Judgement").

⁹⁵² Strugar Appeals Judgement, para. 253. Quoting Blaskic Appeals Judgement, para. 485.

⁹⁵³ Strugar Appeals Judgement, para. 254. Quoting Blaskic Appeals Judgement, para. 69.

⁹⁵⁴ Strugar Appeals Judgement, para. 254.

⁹⁵⁵ CDF Trial Chamber judgement, para. 242.

⁹⁵⁶ CDF Trial Chamber judgement, Para. 245. quoting *Krnjelac* Appeal Judgement, para. 156 (other citations *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

1. *Actual Knowledge of the Superior*

683. It is not permissible to presume knowledge; instead, knowledge may only be imputed by direct or circumstantial evidence.⁹⁵⁷ Again, the AFRC Trial Chamber illustrated different indicia evidential of knowledge by the superior:

1. The number, type and scope of crimes;
2. The time during which the illegal acts occurred;
3. The number and types of subordinates involved;
4. The logistics involved, if any;
5. The means of communication available;
6. The geographic location of the area;
7. The widespread occurrence of the acts;
8. The tactical tempo of operations;
9. The modus operandi of similar illegal acts;
10. The officers and staff involved; and
11. The location of the superior at the time and proximity of the acts to the location of the superior.⁹⁵⁸

684. As stated by the AFRC Trial Chamber (and in the Prosecution pre-trial brief), “the evidence required to demonstrate actual knowledge may differ depending on the position of authority held by a superior and the level of responsibility in the chain of command. The membership of the accused in an organised and disciplined structure with reporting and monitoring mechanisms has been found to facilitate proof of actual knowledge. Conversely, the standard of proof of the actual knowledge of a superior exercising a more informal type of authority will be higher”.⁹⁵⁹

2. *The Superior “had reason to know”*

685. The CDF Trial Chamber clearly set forth the standard for having “reason to know” as “only be[ing] satisfied if information was available to the superior which would have put him on notice of

omitted).

957 CDF Trial Chamber judgement, Para. 243. *quoting Oric* Trial Judgement, para. 319; *also see* AFRC Trial Chamber judgement, para. 792, *Celibici* Trial Chamber para.386; Galic, Trial Chamber para.174.

958 CDF Trial Chamber judgement, para. 243, *quoting Celebici* Trial Judgement, para. 386; *Strugar* Trial Judgement, para. 368; *Limaj et al.* Trial Judgement, paras. 319 and 524; *Blaskic* Trial Judgement, para. 307 *endorsed in Blaskic* Appeal Judgement, para. 57; *also see Oric* Trial Judgement, fn 909; AFRC Trial Chamber judgement, para. 792. *Stakic* Trial Chamber para. 466.

959 AFRC Trial Chamber judgement, para. 793. *see also* OTP PT Brief, para.227.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29746

offences committed by his subordinates or about to be committed by them”.⁹⁶⁰

686. While the information available to the superior need be encapsulated within a formal report, it must be “sufficiently alarming” to apprise the superior of the subordinate's likelihood to commit a crime. Negligent ignorance may be a defence to this issue; he may not be held responsible for failing to acquire information that would have led him to believe that he should have known that certain crimes would be committed.⁹⁶¹

E. The Superior Failed to Take Necessary and Reasonable Measures to Prevent the Criminal Act or Punish the Offender

687. To establish that the Accused had “effective control” over certain subordinates who subsequently committed crimes, the superior must be found to have failed to take necessary and reasonable steps to prevent or punish a criminal actor. This factor is closely related to the first factor, as a superior can only be found responsible for failing to take measures if it is within his “material ability”⁹⁶² - which relates closely to whether he can be found as a “superior” in the first place.

688. As stated in the AFRC case, “[t]he kind and extent of measures to be taken depend on the degree of effective control exercised by the superior at the relevant time, and on the severity and imminence of the crimes that are about to be committed”.⁹⁶³

689. The *Halilovic* appeals judgement illustrated the necessity for there first to be a superior-subordinate relationship between the Accused and the perpetrator of a crime before considering whether the failure to prevent a crime or punish it could thereafter be considered criminal.

690. It stated that “[e]ven assuming that [the Accused] had the ability to contribute to an investigation or to the punishment of the perpetrators of the crimes committed, these abilities can only amount to effective control...if they are the consequence of a relationship of subordination

960 CDF Trial Chamber judgement, para. 244, quoting *Galic* Appeal Judgement, para. 184, referring to *Celebici* Appeal Judgement, para. 241; also see *Blaskic* Appeal Judgement, paras 62-63; *Celebici* Trial Judgement, para. 393, *Strugar* Trial Judgement, para. 369; *Krnjelac* Appeal Judgement, para. 154.

961 AFRC Trial Chamber judgement, para. 794, 796; also see CDF Trial Chamber Judgement, Para. 245; *Blaskic* Appeal Judgement, paras 62-63; *Celebici* Appeal Judgement, para. 226; *Halilovic* Trial Chamber para.69.

962 CDF Trial Chamber judgement, Para. 246; also see AFRC Trial Chamber judgement, para. 797; *Limaj et al.*, Trial Judgement, para. 526; *Halilovic* Trial Judgement, para. 73; *Blaskic* Trial Chamber para.176.

963 AFRC Trial Chamber judgement, para. 798.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

between [the Accused] and these perpetrators.⁹⁶⁴ Therefore, having a material ability to punish must be premised upon a pre-existing superior-subordinate relationship between the Accused and the perpetrators.⁹⁶⁵

691. The judgement continued by considering the mandate of the investigative team that the Accused was operating. It stated that the Prosecution had failed to show that the Trial Chamber erred in finding that the mandate of the Inspection Team did not include duties or obligations related to the effective prevention or punishment of crimes (which would have formed the required basis for Halilovic's effective control over the perpetrators). The Appeals Chamber considered that, while it was true that the Inspection Team suggested the initiation of some criminal proceedings in its Final Report, a reasonable tribunal of fact could reach the conclusion that these amounted to *mere "suggestions"*, in the context of an *"estimate of the overall situation in the Neretva valley"*, and did not establish beyond reasonable doubt even a *"very limited degree"* of effective control of Halilović over the perpetrators.⁹⁶⁶

692. The duty to prevent and the duty to punish arise chronologically in relation to the actual commission of a crime. For both, the primary requirement is that the superior act as soon as he acquires knowledge that a particular crime is going to be committed. For example, the superior may not lawfully wait and do nothing until a crime occurs and only punish afterwards if it were clear on the facts that he could have acted to prevent the crime from occurring.⁹⁶⁷

693. Again, various factors may be observed in order to assess whether the superior had such a duty to prevent the commission of a crime by a subordinate. They include the failure

1. To secure reports that military action have been carried out in accordance with international law;
2. To issue orders aimed at bringing the relevant practices into accord with the rules of war;
3. To protest against or to criticise criminal action;
4. To take disciplinary measures to prevent the commission of atrocities by the troops under the superior's command; and

⁹⁶⁴ Halilovic Appeals Judgement, para.210.

⁹⁶⁵ Halilovic Appeals Judgement, para.210.

⁹⁶⁶ Halilovic Appeals Judgement, para.214 (emphasis added).

⁹⁶⁷ CDF Trial Judgement, para. 247; *see generally* Limaj et al., Trial Judgement, para. 527, Blaskic Appeal Judgement, para. 83; Kordic and Cerkez Trial Judgement, paras 445-446, 447. Halilovic Trial Judgement, para.79; Bagilishema, Trial Judgement, para. 49.

29748

5. To insist before a superior authority that immediate action be taken.⁹⁶⁸

694. The duty to punish subordinates after a crime has been committed requires that the superior investigate in order to determine whether a crime has taken place. After that, “the superior may exercise his own power of sanction or, if he lacks such powers, report the offender to the competent authorities”.⁹⁶⁹

⁹⁶⁸ CDF Trial Chamber judgement, *Ibid.* Strugar Trial Judgement, para. 374 and footnoted references; *also see* Limaj *et al.* Trial Judgement, para. 528; *Oric* Trial Judgement, para. 331; *Halilovic* Trial Judgement, para. 89.
⁹⁶⁹ CDF Trial Chamber judgement, Para.250; *also see* AFRC Trial Chamber judgement, para.799.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29749

V. **General Submissions on Article 6(3) Liability and Augustine Gbao**

695. As alleged in the Indictment, Augustine Gbao was junior only to Foday Sankoh and Johnny Paul Koroma in the RUF and AFRC.⁹⁷⁰ The Prosecution amended this allegation in its pre-trial brief, where it noted that Gbao was subordinate to Sankoh, Koroma, as well as the “battlefield commander”.⁹⁷¹ As originally conceived, therefore, Gbao was alleged to be superior to every other RUF and AFRC in Sierra Leone. It is upon this basis that the Third Accused will respond in averring that he did not possess superior responsibility over RUF and AFRC who were allegedly committing crimes throughout Sierra Leone during the Indictment period.

696. This section reviews Augustine Gbao's position in the RUF and presents arguments applicable to all counts in the indictment that oppose the claim that he held superior responsibility under Article 6(3) of the Statute. What follows are general considerations that the Third Accused submits demonstrate that Gbao cannot be found criminally responsible as a superior for any crimes committed by the RUF during the war in Sierra Leone. **However, it is imperative that they be considered jointly with the submissions we make above relating to Gbao's rank, role and personality, as well as our separate, count-specific defences.**

697. We submit that the following considerations will assist:

A. **Element 1: The Alleged Superior-Subordinate Relationship Between Gbao and Offenders of a Criminal Act is Not Satisfied**

698. In attempting to satisfy the first element under Article 6(3), the Prosecution must demonstrate that Gbao had “effective control” over subordinate members of the RUF who were committing acts prohibited under the statute. This section will first consider Gbao's rank in comparison to other that of RUF commanders. While not determinative, comparing Gbao's rank to others we submit contextualises his ability to exercise control over them. Second, we present a brief comparison of the power of area commanders compared to that of unit commanders. We then seek to evaluate Gbao's responsibilities as overall IDU commander and security commander through the prism of whether these activities would give him “effective control”.

1. *Introduction: Former President Kabbah's Testimony*

699. A significant moment that aptly illustrated Augustine Gbao's status in the RUF came near the end of the trial when former President Kabbah testified for the Sesay defence. It was typical of

⁹⁷⁰ Indictment, paras .31, 32.

⁹⁷¹ Prosecution Pre-trial Brief, para. 33.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

testimony from witnesses for the Defence, as well as many Prosecution witnesses, in that the former President characterised Gbao as an unknown or lower-ranking officer. Counsel for the Gbao began his cross-examination:

“Q. Mr Witness, good afternoon. I don't have any many questions for you but there are one or two issues I would like you to help me with, if you can. I represent Mr Augustine Gbao, who is the defendant sitting furthest away from you in the dock.

A. Can he stand? Let me see him. I've never seen him before”.⁹⁷²

700. The former President was then asked about his knowledge of the events of the war in Sierra Leone. He assured the court that he “was fully briefed about every movement of the rebels. Now, they will say they are moving from—they briefed me that they are moving from here to there, and what do we do? They will brief me that so many people have been killed somewhere there and so on; what do we do? And they will give me this type of information”.⁹⁷³

701. With this knowledge, if Gbao were truly junior in ranking to only Sankoh and Koroma, one could expect former President Kabbah to know Augustine Gbao. But he was unsure:

“A. But not the names of the people who will be involved in these atrocities, and that's why I asked for Mr Gbao to stand up, because I heard his name around, but I never met him.

Q. Yes.

A. **And I never heard anything directly to do with him as an individual**”.⁹⁷⁴

702. The former President's testimony was admittedly anecdotal (as was Gbao's salute and winning smile as the former President asked him to stand), but it succinctly underscores the position of the Third Accused—that Gbao was a little-known, lower-ranking participant in the Sierra Leone conflict. He hadn't the rank, role or responsibility to be considered a “superior” commander in this war. Instead, he spent most of war in RUF safety zones sitting as the titular head of investigations.

2. *Gbao was not a High-Ranking Officer in the RUF*

a. Prosecution Witnesses Support the Lower-Ranking Position of Gbao

703. Gbao's lower rank and relevance in the RUF was supported by many Prosecution witnesses. Notably, those testifying to Gbao's lower status were often either high-ranking or knowledgeable RUF insiders. TF1-361, a radio operator within the RUF, importantly supported the position that Gbao was not a senior man in the RUF. He testified that Gbao was a commander, but he was “far off”.⁹⁷⁵ He testified that:

⁹⁷² Tejan Kabbah, Transcript 16 May 2008, p.61

⁹⁷³ *Id.* at p.63.

⁹⁷⁴ *Id.* at p.61.

⁹⁷⁵ TF1-361, Transcript 19 July 2005, p.69.

“We did not concentrate on him much. The only thing, we considered him as a senior officer because he was a vanguard, but to say he participated too much on command structure, no”.⁹⁷⁶

704. TF1-361 agreed that Gbao was simply a police chief with a duty to administer law and order when he lived in Kailahun Town and Makeni.⁹⁷⁷ He concurred that Gbao did not issue operational commands in a military sense, nor was his job to interfere with the execution of any operational or military command.⁹⁷⁸

705. At another point in his testimony, TF1-361 agreed that Gbao was not based in Buedu and that his role as overall security commander had nothing to do with operational command. TF1-361 accepted that, in fact, Gbao had no control whatsoever over military activity.⁹⁷⁹

706. TF1-361 also agreed that Gbao was never mentioned as being involved in relation to any military operation between 1996 and 2000 and was never mentioned by the witness in connection with any atrocities like burning or looting, mistreatment of civilians, or sexual violence.⁹⁸⁰

707. TF1-361 continued to state that the RUF base/HQ from 1996 to end 1999 was in Buedu, and that Gbao was stationed in Kailahun Town. **He also stated that Gbao has never been the senior commander in Kailahun District, as alleged by the Prosecution.**⁹⁸¹ According to the witness Gbao never rose above the rank of colonel, which itself only happened late in the war.⁹⁸²

708. TF1-361 finally asserted that Gbao stayed in Kailahun Town from 1997-1999,⁹⁸³ and was not in Makeni during any of the fighting.⁹⁸⁴

709. TF1-360 agreed with TF1-361. In his testimony, he agreed that, as overall security commander, Gbao had no authority to order any particular operations—for men to take up arms and

⁹⁷⁶ *Id.* (emphasis added).

⁹⁷⁷ *Id.*

⁹⁷⁸ *Id.*

⁹⁷⁹ *Id.*, p.50.

⁹⁸⁰ *Id.*, p.68.

⁹⁸¹ *Id.*, p.71.

⁹⁸² *Id.*, p.63.

⁹⁸³ *Id.*, p.60.

⁹⁸⁴ *Id.*

29782

fight an enemy.⁹⁸⁵ His responsibility was to investigate alleged crimes committed by RUF soldiers.⁹⁸⁶

710. TF1-167 was another particularly important insider witness for the Prosecution. However- and one might say remarkably given Gbao's putative status as one who bore the greatest responsibility- he did not even know Gbao was a commander in 1998 (sometime after March). In fact, he characterised Gbao simply thus: "he was a low rank and I did not know him [in 1998]".⁹⁸⁷ Moreover, he stated "I did not even know Augustine Gbao until after the 8th May 2000 incident".⁹⁸⁸

711. TF1-371 presented himself as one of the most knowledgeable in the RUF. He was undeniably a senior RUF member, participating in many of its organisational decisions. In relation to Gbao, he stated that, from 1991 or 1992 until March 1998, he never saw or heard anything about Augustine Gbao. He was asked "[w]hen you returned to Freetown in 1997 [he had been out of the country], did you hear of Augustine Gbao as a member of the RUF?"⁹⁸⁹ He responded: "**No...I really didn't bother too much about him**".⁹⁹⁰ An unusual statement, one might think, if Gbao was senior to TF1-371.

712. TF1-168 stated that Gbao was never in Freetown. He testified that after the 25 May 1997 coup, the AFRC invited the RUF to join them in government, and that most of the vanguards went to Freetown and other big cities but Gbao stayed behind in Kailahun and never went to Freetown.⁹⁹¹ Again, it is unusual that Gbao stayed hundreds of miles away from the RUF and AFRC leadership without effective communication devices if he were superior to everyone on the AFRC Ruling Council except Sankoh and Koroma.

713. TF1-041, [REDACTED] testified that he did not know Gbao before December 1998.⁹⁹²

714. Of equally remarkable significance, given the Prosecution theory was that TF1-071, [REDACTED] [REDACTED] had never heard of Gbao before 2000 and did not meet Gbao

985TF1-360, Transcript 26 July 2005, p.95.

986*Id.*

987 TF1-167 20 October 2004, p.59; *also see id.* at p.49.

988 *Id.* at p.58.

989 TF1-371 Transcript 1 August 2006, pp.102, 103.

990 TF1-371, Transcript 1 August 2006, p.102.

991TF1-168, 4 April 2006, p.16.

992TF1-041, 10 July 2006, p.64

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

until 2000-2001.⁹⁹³

29753

b. List of Known RUF with Higher Ranking than Augustine Gbao

715. We submit that Gbao's designated military rank also illustrates his lower status in the RUF. As listed above, Gbao was promoted to captain in 1996.⁹⁹⁴ Around May 1998, he was promoted from captain to major,⁹⁹⁵ at a time when all other unit commanders were promoted.⁹⁹⁶ Issa Sesay testified that Gbao was promoted to Lieutenant Colonel in October 1998.⁹⁹⁷ At some point afterwards in late 1999 or early 2000 Gbao was promoted to Colonel. Reference to these ranks and dates demonstrates that certain RUF members maintained a superior ranking to Gbao.

716. Prosecution Exhibit 6 shows that the following RUF members had superior ranking to Gbao at the time of the coup in 1997. They were also all members of the AFRC Ruling Council, **while Gbao was not**: Corporal Foday Sankoh, Colonel Sam Bockarie, Colonel Gibril Massaquoi, Colonel Michael Lamin, Major Morris Kallon, and Major Issa Sesay.

717. On 13th August 1997 Gbao held the rank of captain. Prosecution Exhibit 30 shows the following RUF with the same- or superior- ranking to Gbao at that time. The list includes includes Colonel Sam Bockarie, Colonel Isaac Mongo, Colonel Mike Lamin, Lieutenant Colonel Issa Sesay, Lieutenant Colonel Peter Vandy, Lieutenant Eldred Collins, Captain Patrick S. Bainda, and Captain Lawrence Womandia.

718. Other exhibits demonstrate that the following held superior rank to Gbao: Brigadier General Dennis Mingo (aka Superman);⁹⁹⁸ Captain Arthur;⁹⁹⁹ Colonel Alfred Brown;¹⁰⁰⁰ Brigadier General Rambo;¹⁰⁰¹ Colonel Akim;¹⁰⁰² Colonel Isaac;¹⁰⁰³ Colonel Bai Bureh;¹⁰⁰⁴ Colonel Musa S Kamara (6 May 1998);¹⁰⁰⁵ Major Kennedy (6 May 1998); Major AS Kallon (6 May 1998).

993 TF1-071, Transcript 26 January 2005, p.62.

994 DAG-048, Transcript 3 June 2008, p.29.

995 Issa Sesay, Transcript 31 May 2007, p.31.

996 DIS-188, Transcript 1 November 2007, p.29.

997 Issa Sesay, Transcript 31 May 2007, p.32.

998 Exhibit 7

999 *Id.*

1000 *Id.*

1001 *Id.*

1002 Exhibit 42.

1003 Exhibit 43.

1004 *Id.*

1005 Exhibit 44

2975H

719. This is far from an exhaustive list. However, it provides a plethora of RUF with in possession of higher rank than Gbao. There are, we submit, many more. Our intention is to illustrate that there were many men in the RUF with a superior ranking during the Indictment period.

B. RUF Hierarchy Demonstrates that Gbao's Administrative Positions did not Provide him with Effective Control

720. The Prosecution has insisted throughout the case that Gbao held prestige similar in stature to an area commander. This, we submit, is a reckless allegation with little credible foundation in the evidence.

721. As has been shown throughout this case, area commanders were endowed with significant powers within the area they were operating. DAG-080 clearly testified that “[T]he area commander ha[s] control over the entire people within his area”.¹⁰⁰⁶

722. Muster parades were led by military commanders, who then instructed local unit commanders.¹⁰⁰⁷ Area commanders had the power to instruct units such as the MP.¹⁰⁰⁸ An area commander was free to interfere with the day-to-day functioning inside a unit.¹⁰⁰⁹ All area commanders allegedly had radio sets.¹⁰¹⁰

723. IDU reports (and probably others) were often sent to these local area commanders (or the highest ranking combatant commander in the area) in which the IDU agent was investigating. The area commander would then instruct on the matter.¹⁰¹¹ In those cases, as stated above, Gbao would eventually receive reports by way of retrospective accounts of disciplinary action taken in the field upon the area commander’s instructions.¹⁰¹²

724. By contrast, unit commanders could not issue orders to an area commander.¹⁰¹³ Evidence was

1006 DAG-080, Transcript 6 June 2008, p.51.

1007 DAG-048, Transcript 3 June 2008, p.24.

1008 DAG-048, Transcript 3 June 2008, pp.25-26.

1009 DAG-048, Transcript 3 June 2008, pp.51-52.

1010 TF1-361, 18 July 2005, p.114.

1011 DAG-101, Transcript 9 June 2008, p.96.

1012 DIS-069, for example, testified that a man named John Gavawo, who was an IDU commander in Pendembu, reported directly to the area commander at the time-Issa Sesay, 23 October 2007, pp.5-6; also see DIS-069 discussing reports made directly to Issa Sesay as area commander by the Overall MP Commander Jalloh. DIS-069, Transcript 22 October 2007, p.107; also see DIS-174, Transcript 21 January 2008, pp.68-69, where he states that IDU agents had a role to play at the frontlines, namely to “inform the commander on the ground”; also see DAG-101, Transcript 9 June 2008, p.96; DAG-048, Transcript 3 June 2008, p.31.

1013 DAG-080, Transcript 6 June 2008, p.51.

also tendered that the overall security commander could not issue orders on any matter to a brigade or area commander.¹⁰¹⁴

C. Gbao's Responsibilities do not Meet the Threshold Needed to Demonstrate He Had Effective Control Over Those Committing Crimes

725. The foundational question of where command responsibility lay—and as to whether Gbao's power as a superior provided him effective control over a group of subordinates in the RUF—can clearly be answered when one reviews the evidence adduced over the course of this trial. We submit that the evidence, when considered comprehensively, leads one to the conclusion that the link is too tenuous to impute Gbao with any criminal responsibility under Article 6(3) of the statute.

726. Many indicia have been presented, in the Special Court and other international tribunals, to assist this Chamber in answering whether the Third Accused should in fact be considered to possess effective control over certain subordinates. While far from exhaustive, these indicia can be helpful in considering whether the requisite superior-subordinate condition exists.

1. Power to Issue Orders

727. As stated in the AFRC Appeals Court Judgement, the power to issue orders is crucial. We submit that the paucity of alleged orders issued by Gbao, credible or not, should be striking and instructive in assessing Gbao's as a "superior" in the RUF. There were, simply put, few if any orders made by Gbao presented to the Court.

728. The Prosecution based their case on the virtue of Gbao's position as overall IDU commander and/or overall security commander and the resultant power that those positions entailed. What has been lacking is evidence that Gbao held *de facto* power to issue orders to subordinates to commit crimes that may be subject to criminal responsibility under the counts in the indictment. Is there any evidence of orders in the court record issued by Gbao to his subordinates to kill, rape, commit acts of physical violence, loot and burn, etc.? We say not.

2. Alleged Subordinates did not Show Greater Discipline in Gbao's Presence

729. Another indicator as to whether Gbao had any effective control is whether alleged subordinates showed Gbao respect and discipline in his presence. In fact, the opposite was true. The

1014DIS-069, 23 October 2007, p.50.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

harassment faced by Gbao, from both the high command, senior leadership, and even junior commandos leads one to the conclusion that fighters may actually have observed *less* discipline in Gbao's presence. Combatants did not seem to respect Gbao for his unwillingness to go to the frontlines and the perception of him as a “book” person. These reasons are covered in great detail above and needn't be repeated.¹⁰¹⁵

730. Additionally, as was explained above by DAG-048, many combatants did not approve of the IDU. Its mandate, after all, was to oversee, investigate and report on the behaviour of fighters. DAG-080 testified about the rank and file resentment of those with an education.¹⁰¹⁶

3. *Gbao's Public Profile in the RUF*

731. DAG-111 and DAG-110 did not even know that Gbao was the overall IDU commander.¹⁰¹⁷ Both witnesses saw Gbao often [REDACTED]. TF1-371, a very high-ranking RUF, did not see or hear or “concern” himself with Gbao from 1991 or 1992 until 1998. TF1-071, TF1-041, and TF1-167—major witnesses for the Prosecution—did not know Gbao until 2000. Without prompting, DIS-069 called Gbao's position as overall security commander as “ceremonial” in nature. Surely he cannot be said to have had a significant public profile in the RUF.

732. Gbao operated without pomp in his day-to-day life, thus reinforcing his low public profile. DAG-110 explained that he was mocked as the “civilian commander” by junior and even senior commanders.¹⁰¹⁸ He largely lived like a civilian, not as the alleged third-in-command. DAG-047 explained that his dress included a “short pair of trousers and a T-shirt”.¹⁰¹⁹ He drove around an old car with no windshield. He was mocked for not taking care of his day-to-day needs.

4. *Transmission of Reports to Competent Authorities for Action*

733. Gbao had a limited ability as overall IDU commander to transmit reports to the higher authorities recommending that action be taken against an RUF for violating RUF ideology. However, these reports were not often sent to Gbao, even though he was overall IDU commander. They would instead be sent to the local area commanders in which the IDU agent was investigating, who would instruct on the matter.

¹⁰¹⁵ See *eg.* paras. 24-44.

¹⁰¹⁶ DAG-080, Transcript 6 June 2008, p.17.

¹⁰¹⁷ DAG-111, Transcript 19 June 2008, p.18; also see DAG-110, 2 June 2008, p.140.

¹⁰¹⁸ DAG-080, Transcript 6 June 2008, p.14.

¹⁰¹⁹ DAG-047, Transcript 17 June 2008, p.10.

734. As overall security commander and titular head of the Joint Security Board of Investigations, Gbao would in theory receive recommendations from joint security panels for transmission to the High Command. However, as was shown above, not all recommendations filtered through Gbao before reaching the High Command. This is shown in Exhibits 44, 107, 80, 264, 268 and 271. In fact, it appears that none of the Prosecution Joint Security Board exhibits bear relation to Gbao.

735. A comprehensive explanation on the reporting structure in the IDU is listed above.¹⁰²⁰

5. *Gbao did not Profit from the War*

736. There is no evidence that Gbao profited from the war, either in money, diamonds or other properties. Not only that, witnesses for both those Prosecution and Defence who were asked universally concurred that Gbao was in no way materialistic, thus having no desire to seek out these items.¹⁰²¹

6. *Gbao Held no Power of Appointment*

737. Gbao played no role in handing out appointments or promoting commanders in the RUF. No evidence was presented to show he held power, even within the IDU. Conversely, there was no evidence in this case to show that he had the power to dismiss anyone.

7. *Miscellaneous Factors*

738. There was no evidence adduced that Gbao had independent access to the means to wage war. In fact, Gbao was not even a fighter, was rarely armed, and never at the frontline. IDU agents did not have any direct power over military activities.¹⁰²²

739. Additionally, Gbao had no independent access to a radio or any other communicative device.¹⁰²³ TF1-361 did not monitor even one radio message from Gbao from 1997 to 1999.¹⁰²⁴

740. In terms of military affairs, Gbao had no role. No evidence was adduced that Gbao addressed the troops in any war setting, including at muster parades. Neither is there evidence that

¹⁰²⁰ See *supra*, paragraphs 125-158.

¹⁰²¹ DAG-080, Transcript 3 June 2008, p.35; also see DIS-078, 11 October 2007, pp.90-91; TF1-168, Transcript 4 April 2006, p.168; TF1-371, Transcript 2 August 2006, p.9.

¹⁰²² DIS-069, Transcript 23 October 2007, p.50.

¹⁰²³ DAG-048, Transcript 3 June 2008, p.38.

¹⁰²⁴ *Id.* at 19 July 2005, p.79.

he would have had the power to assemble and address the troops in the first place. It was also not shown that Gbao had any role to play in military planning.

741. Gbao had no presence on the battlefield (or was even near the battlefield). Due to technological and geographic barriers to communication, his knowledge of the day-to-day events on the battlefield was limited. He did not facilitate progress on the battlefield. Neither is there any evidence that he had any communication with people on the frontlines or participated in any way with military decision-making.

742. Gbao was also not in close proximity to the frontlines. There is no evidence that he was routinely apprised of the situation on the battlefield.

743. In his role as overall IDU commander and security commander, there was no evidence to show that any high-ranking RUF officer was reporting to him. In fact, he was moved away from the High Command when headquarters moved from Giema to Buedu. All the other units moved from Giema to Buedu, except for the IDU, which was moved to Kailahun Town.¹⁰²⁵

D. Gbao's Knowledge or Reason to Know that a Criminal Act Was About to or had Been Committed

744. One can review the sections at the beginning of the brief in general support of our position that Gbao did not have actual knowledge and did not have reason to know that a subordinate was about to commit a crime.

745. In general, because effective control has in our submission not been established, it should not be necessary to evaluate whether the second factor required in the evaluation of superior responsibility has been satisfied. However, should the court find that Gbao did have effective control over subordinates in the RUF who were committing crimes, it is necessary to consider whether Gbao was aware that these crimes were being committed or were about to be committed.

746. Direct and circumstantial evidence is required to demonstrate that Gbao was aware of subordinates committing or about to commit crimes. The Prosecution spent little time demonstrating Gbao's knowledge over his ostensible "subordinates" and any potential crimes committed. Consid-

¹⁰²⁵ DIS-188, Transcript 1 November 2007, pp.27-29.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

ering the higher standard needed to prove knowledge in an informal organisation like the RUF, it is unclear how they intend to satisfy this element of Article 6(3).

747. The Trial Chamber in the AFRC case presented indicia that could potentially be utilised in assessing Gbao's knowledge when needing to infer through circumstantial evidence. One factor is the number, type and scope of crimes. Gbao had few if any men who were under his effective day-to-day control. If any, they were likely IDU agents. There are no allegations over the four years of the trial of any IDU agent participating in a crime.

748. Gbao's knowledge would also be limited because he could not easily communicate with IDU agents in the field. As stated above, he had no radio and neither did the IDU agents. Area commanders had the radio sets in a particular area.

749. Written reports were received only inconsistently. The nature in which Gbao would receive reports from IDU agents in the field demonstrates that he may not have had "reason to know" about a crime that was about to be committed by them. Reasons supporting Gbao's inconsistent reception of IDU reports is listed above.¹⁰²⁶

750. The reasons why we suggest Gbao did not have actual knowledge similarly apply to the reasons why we suggest he did not "have reason to know".

E. Whether Gbao Failed to Take Necessary and Reasonable Steps to Prevent Criminal Act or Punish Offender Thereof

751. Again, it should not be necessary to consider this element, as Gbao had no effective control over alleged subordinates in the RUF (everyone except Sankoh and Koroma) that were committing crimes of which he had knowledge. Gbao can only be found failing to prevent or punish the offender of a crime if he had the material ability to do so. However, should the court consider that he did have effective control over certain subordinates, the Prosecution must prove beyond reasonable doubt that Gbao did not take steps to prevent or punish these subordinates from committing a crime.

752. Gbao was the overall IDU commander and security commander whose primary function was to investigate alleged crimes committed by RUF combatants. Gbao performed his functions in this

¹⁰²⁶ See *supra*, paragraphs 125-158.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

role.

753. There were, however, certain limitations in implementing his responsibilities as an investigator. Firstly, as discussed above in detail, Gbao could not create a joint security board.¹⁰²⁷ Secondly, Gbao could only *recommend* punishments to the High Command at the conclusion of the IDU's investigation. At the conclusion of a joint security board investigation, it was the same—he could only forward the recommendations to the High Command for instruction,¹⁰²⁸ assuming he received the joint security board's recommendation.

754. Gbao could not amend or otherwise overrule the recommendation of the Board.¹⁰²⁹ DIS-149 testified that the report would only go to the overall security commander if the brigade commander of the particular area was not available.¹⁰³⁰ And sometimes, as shown through the Prosecution's own exhibits, joint security panels skipped the step of sending a report through Gbao altogether. Only if the High Command disagreed with the board's recommendation of guilt or agreed with a recommendation of innocence, “they will release that person”.¹⁰³¹ That decision was not subject to Gbao's discretion.

755. Also, it is hard to distinguish which types of cases would be referred to the IDU, as opposed to other administrative units. Whilst investigation of alleged crimes by RUF combatants was a primary IDU function, it was not the only investigative body. The other three security units (MP, G5, and IO), for example, had simultaneous “mandate[s]” to investigate on alleged crimes between soldiers and civilians.¹⁰³² Gbao could not issue orders to these units.¹⁰³³

756. There was also a limit to the information that Gbao received. As stated, Gbao did not receive the IDU reports with any regularity, as they were often kept local with the military commander. Some IDU, such as men located in Superman's area of control (as testified by TF1-361) had no access to Gbao from Koinadugu District altogether.¹⁰³⁴

VI. Prosecution Witnesses do Not Demonstrate Gbao's Superior Responsibility

¹⁰²⁷ DAG-080, Transcript 6 June 2008, p.71.

¹⁰²⁸ *Supra* paras. 198-231.

¹⁰²⁹ DAG-080, Transcript 6 June 2008, p.82; also see DAG-101, Transcript 9 June 2008, p.112.

¹⁰³⁰ DIS-149, Transcript 5 November 2007, pp.80-81.

¹⁰³¹ DAG-080, Transcript 6 June 2008, p.83.

¹⁰³² DAG-080, Transcript 6 June 2008, p.69.

¹⁰³³ DAG-080, Transcript 6 June 2008, p.21

¹⁰³⁴ TF1-361, Transcript 19 July 2005, p.67.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

757. The Prosecution presented TF1-371 in order to characterise Gbao's roles as IDU head and overall security commander. While it was true that TF1-071 also testified on the RUF command structure, he failed therein to mention Gbao altogether.

758. While not not seeing or hearing from Gbao from 1992-1998,¹⁰³⁵ TF1-371 did testify about Gbao's alleged role and responsibilities during the war. However, in common with many witnesses that follow, TF1-371's testimony was tainted with lies, material inconsistencies and non-specific allegations to the extent that we suggest his testimony relating to Gbao should be be disregarded.

A. TF1-371

1. *The Witness Lied about Trafficking Arms for the RUF*

759. If TF1-371 is to be taken as a witness of truth in support of the Prosecution's case against Augustine Gbao, then accommodation will have to be made for the lies he told concerning his disgraceful attempt to re-ignite the Sierra Leone civil war in February 1997, just three months after the Abidjan Peace Accord. By TF1-371's own admission in a document he had submitted to the Prosecution on an earlier occasion, he had travelled covertly to the Ivory Coast in an attempt to seal an arms deal that would, in his own words, "ignite the crisis": a mission that led to his arrest in Danane. One might think that that conduct was despicable enough, but to be caught lying in a War Crimes Tribunal (for which he had been granted immunity from prosecution for any crimes he himself committed) about it in a cynical attempt to protect himself said even more about the witness's true character and motives. We submit that TF1-371's exposure was a devastating blow not only to his credibility as a witness, but yet another to the Prosecution—whose habitual use of criminal insiders had by now seriously damaged the integrity of their case.

760. Early in his cross-examination by counsel for Gbao, on 1st August 2006, TF1-371 was asked whether Foday Sankoh had asked him to bring in arms for the RUF whilst he was on a trip to the Ivory Coast. The witness stated that he had travelled in February 1997. Rather than enhance his credibility as a witness by providing a candid account of his true purpose in going to the Ivory Coast, TF1-371 sought to hide the truth, simply stating that he had travelled there in February 1997 to meet Foday Sankoh. Whether TF1-371 knew about the documents counsel had in his possession is unknown, but what is clear is that he chose to take a risk and seek to protect himself from exposure as the following exchange shows:

“Q: I'm just asking whether there was any attempt by Sankoh or by you to bring you

¹⁰³⁵ TF1-371, Transcript 1 August 2006, p.102.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

into that process of bringing arms in?
A: **No, no. This was already ongoing**".¹⁰³⁶

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761. Later the court heard the following:

"Q: So whatever was going on in relation to this---let's use the words arms deal---there never was any---you were never going to be involved?

A: No, no of course, I only meant that---

Q: Sankoh didn't attempt to bring you, or to get you involved?

A: No, no.

Q: You were completely outside of it?

A: Yes. I mean---yeah."¹⁰³⁷

762. Having committed himself thus, TF1-371 may have felt safe from further enquiry. In actual fact, he had fallen into a trap, which counsel exposed the next day.

763. On August 2nd, during the same cross-examination counsel for Gbao challenged TF1-371 with a previous statement he had given to the Prosecution. In it, TF1-371 had stated that he had, in fact, gone to the Ivory Coast in order to **traffic arms for the RUF**. Counsel for Gbao read the following passage:

"It reads as follows: "And Sankoh asked me to meet him in Abidjan. They have a message for me...I [witness was quoting words by Foday Sankoh] had taken a trip to Libya and Burkina Faso." Now, was that you taking a trip to Libya and Burkina Faso, or were you quoting somebody else?

A. I was quoting the discussion with Sankoh.

...

Q. "**He came and asked for money to ignite the crisis there**, but even before getting in touch with me, he already sent some people about four -- I mean, two of them. I think two or three of them in Monrovia. He gave them \$22000 to come and secure some arms. Actually they lied to him, that oh, we see some NPFL personnel forces that they will pay for this...So he gave some money to come and see [indiscernible] and go and wait over there. [Sankoh stated that] **I'm sending some people to you. They bringing some arms and ammunition so that you can start, you know**. You go down because I cannot talk until -- I can only talk when you're back inside Freetown. You already give the arms to the UN so I went to Abidjan. I met him in Abidjan." Now, where it reads, "You already give the arms to the UN," is that Sankoh speaking?

A. Yeah, I was trying to explain my [indiscernible] with Sankoh.

Q. Is this with reference to you surrendering a lot of logistics to -- whether it was the UN or whoever, ECOWAS, I don't know, in Liberia after you fled from Pujehun?

A. Yes.

Q. Right. "So I went to Abidjan." And there, you're referring to you going to Abidjan, I think, correct?

A. Yeah.

Q. "I met him in Abidjan." Is that you meeting Sankoh? Thank you. "He told me,

1036 TF1-371, Transcript 1 August 2006, pp.31-32 (emphasis added).

1037 *Id.* at p.82.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

okay, I'm on my way to Nigeria with Steve Bio and others. He's on his way to Nigeria to meet another businessman that he wanted to sponsor, you know. So he said, '**You know, I have the money here, but now you came, you meet me here after I get back**', you know, '**Then I will give you a lot of money.**' Because he already [indiscernible] this guy to get ammunition to go to fight. Fine. I was at Abidjan, then he left. Two weeks later we got news that he was arrested." At the foot of the page you say, "So, now, actually, I'm deciding to leave Abidjan back to Nigeria, you know, but I was arrested by the Ivorian army."

Isn't this the case that the **true** purpose of your visit to Abidjan was to facilitate the supply of arms into Sierra Leone? And isn't that why you were arrested in Danane?

A. In fact, no, at that point in time it was not even possible to facilitate arm to Abidjan to Sierra Leone".¹⁰³⁸

764. The final question on the matter by counsel for Gbao met with a rather feeble response:

"Q. What if he hadn't been arrested and had given you the money; what would you have done with it?

A. That's another question. I mean, he never give me the money, so I never knew what I would have done with it".¹⁰³⁹

765. In our submission the witness blatantly lied about trafficking arms to reignite the civil war in Sierra Leone. Once the inconsistency between his oral testimony and previous statement was indicated, he evaded the follow-up questions and failed to adequately address the inconsistency between that statement and his testimony. We suggest that this should disqualify his evidence from further consideration, as his lies on this subject irreparably taint the reliability of his evidence elsewhere. Should that argument - which we strongly maintain - not be found persuasive we submit that at the very least his evidence concerning other events must be corroborated.

2. *Witness Not Candid When Discussing His Perceived Immunity for Testifying*

766. The witness was also less than candid regarding his immunity from prosecution. We submit that there may well have been a quid pro quo for testifying; the witness was explicitly aware of it, and that he denied its existence when challenged by counsel for Gbao who asked:

"Q. On 31st October of last year[2005], which predates by almost a month your first interviews with the OTP in [REDACTED], Mr De Silva, then Chief Prosecutor, wrote you a letter, and I'll read it: "Dear [REDACTED], as the Prosecutor for the Special Court of Sierra Leone, I'd like to take this opportunity **to assure you** I have not laid any criminal charges, nor do I intend to lay any charges against you because of your affiliation with any parties that have been charged by this Court. **I trust this letter may help put your mind at ease with regards to this matter.**" Can you remember what led to that letter being written? Did you ask for such an assurance, or did it appear to you out of the blue?

¹⁰³⁸ Exhibit 185, p.23705; *also see id.* 2 August 2006, pp.36-38.

¹⁰³⁹*Id.* at 2 August 2006, p.41.

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A. I did not ask for any assurance. It appeared to me out of the blue".¹⁰⁴⁰

767. One should consider the context surrounding this letter. The immunity from being prosecuted was read into the investigative record before TF1-371 spoke to the Prosecution in [REDACTED] for the first time. Presumably, this did put his "mind at ease" sufficiently for him to feel safe to give evidence.

768. We submit that TF1-371 had every reason to fear prosecution at the Special Court. TF1-371 was always ranked towards the top of the RUF hierarchy, had been exposed as trafficking arms for the RUF, [REDACTED], was present at countless senior RUF meetings, [REDACTED]
[REDACTED]
[REDACTED]
¹⁰⁴¹ That he had always occupied a senior position to Gbao within the RUF leadership ([REDACTED]) is beyond dispute.

3. *Inconsistencies Regarding Meeting Allegedly Attended by Gbao in December 1998*

769. In his evidence in chief TF1-371 claimed that Gbao attended a meeting in Buedu in December 1998. While there is no evidence that Gbao planned anything with the senior military commanders at this meeting, there was an allegation that he was present.

a. In December 1998, Gbao was on Punishment Brushing the Bunumbu Highway

770. Bockarie sent Gbao to brush the Bunumbu to Kono highway late in 1998, as the following excerpt shows:

"Was Augustine Gbao sent to brush the Bunumbu to Kono highway at the end of 1998, by Bockarie?

A. Yes, that's what I heard.

Q. Did that mission end in February of '99 when Bockarie sent him to Makeni?

A. Well, I do not know whether it was in January, but it was in February, early February, that Augustine Gbao arrived in Makeni, when he joined us."¹⁰⁴²

b. Witness was Inconsistent in his Description of Attendees at the Meeting

771. The witness described a meeting in Buedu attended by senior commanders of both the RUF and AFRC in December 1998 to discuss the "strategic plan" for recapturing Freetown and Kono

¹⁰⁴⁰ *Id.* at p.51 (emphasis added).

¹⁰⁴¹ *Id.* at p.48.

¹⁰⁴² Issa Sesay, Transcript 30 May 2007, p.52.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

District.¹⁰⁴³ It was allegedly held at Waterworks in order to brief not only commanders but also civilians and the elders.¹⁰⁴⁴ The meeting was not large and was not attended by frontline combatants,¹⁰⁴⁵ although there was “a mixture of senior commanders and other visitors”.¹⁰⁴⁶ According to the witness Augustine Gbao was present at this meeting.¹⁰⁴⁷

772. After it concluded, a “select few” commanders ate with Bockarie in his bedroom. He had clearly not given full details of what was intended to those attending the first meeting. TF1-371 said “he withheld certain information regard[ing] his trip to Liberia and Burkina Faso, which was only revealed while selected inner commanders with him were eating in his bedroom”.¹⁰⁴⁸ The witness alleged that Gbao was at the first meeting only.

773. On 12th December 2005, TF1-371 gave further information to the Prosecution (when the his memory would surely have been fresher), wherein he mentioned the meeting that took place at Bockarie's house. He provided a long list of names; Gbao's was **not** among them.¹⁰⁴⁹ The note stated “they'd been eating at Mosquito's house in the morning” and listed Gullit, Morris Kallon, Issa Sesay, Eddie Kanneh, Mosquito and [REDACTED] as having been present.¹⁰⁵⁰

774. By contrast TF1-371 stated in evidence that Augustine Gbao **was** at the second meeting, but that he had not been in the room eating with Mosquito and the others listed above.¹⁰⁵¹ When asked why Gbao had not been in the room, the witness replied “we had a briefing first”.¹⁰⁵²

775. Counsel for Gbao then put a second previous inconsistent account to the witness. In January 2006, the Prosecution took the following note from TF1-371:

“[REDACTED] knows about the Freetown invasion. A commanders' meeting was held in Buedu and [REDACTED] was present. Also present were Issa Sesay, Morris Kallon, Peter Vandi, Denis Mingo, and Isaac Mongor. [REDACTED] cannot recall the others present”.¹⁰⁵³

776. A third inconsistency was then put to TF1-371 concerning the Buedu meeting. A further

1043 TF1-371, Transcript 21 July 2006, p.42.

1044 TF1-371, Transcript 2 August 2006, p.21.

1045 *Id.*

1046 *Id.* at p.44.

1047 *Id.* Transcript 2 August 2006, p.21.

1048 TF1-371, Transcript 21 July 2006, p.44.

1049 Exhibit 187, p.23779, *Id.* at p.22.

1050 TF1-371, Transcript 2 August 2006, p.22.

1051 *Id.* at p.23.

1052 *Id.* at p.23.

1053 Exhibit 189, p.23776; *Id.* at p.24.

reference to the Notes was put: “present from the AFRC were Bullet...Sammy and Idriss Kamara aka Leather Boot. Present from the RUF were Mosquito, Issa, Morris Kallon, Colonel Isaac, Vandy and [REDACTED]”.¹⁰⁵⁴

777. Counsel for Gbao asked TF1-371 if he might have been mistaken when he told the court that Augustine Gbao attended the Buedu meeting. The witness reacted by saying there were certain things about Gbao (specifically the car he drove) that he recalled that day.¹⁰⁵⁵ This comment prompted the following reaction from Mr Justice Itoe:

“JUDGE ITOE: But, Mr Witness, he had the car, **he had such characteristic features.**

THE WITNESS: Yes.

JUDGE ITOE: The point counsel is making is, **if he was so distinguishable, how did it come, you know, that you forgot his name?** You mentioned others and you didn't mention him?

THE WITNESS: Yes -- ...

JUDGE ITOE: **This is the crux of the matter**”.¹⁰⁵⁶

778. The witness then went into detail about what the commanders had to eat and, we submit, disingenuously noted that perhaps Gbao had not gone into the bedroom to eat with the others because he was not hungry.¹⁰⁵⁷

779. We accept that inconsistencies with previous statements will not necessarily indicate the witness is deliberately untruthful. However, in this particular example we submit the witness was, at the very least, inherently unreliable as to whether Gbao was at the commanders meeting or not. Given his repeated failure to name Gbao as being at the meeting in Bockarie's bedroom in previous interviews with the Prosecution TF1-371's evidence that Gbao was in fact there is difficult to accept, and we submit should be disregarded.

4. *Witness Denied he had Any Rank During Previous Statement*

780. TF1-371 was found to have been less than candid when being asked about his rank. He stated in evidence that when he was in Freetown he was a colonel.¹⁰⁵⁸ In a statement made earlier in the year, he stated that “he had no rank or appointment at that time”.¹⁰⁵⁹ When challenged on this by

¹⁰⁵⁴ TF1-371, Transcript 2 August 2006, p.26.

¹⁰⁵⁵ *Id.* at p.28.

¹⁰⁵⁶ *Id.* at pp.28-29 (emphasis added).

¹⁰⁵⁷ *Id.* at p.29, where the witness stated that “some who were hunger we went in to eat and he [Bockarie] continued his briefing. In fact, at this lunch, Gbao was not inside”. The response was, we submit, further undermined by the fact that counsel has never known Gbao to refuse an opportunity to eat as much as possible.

¹⁰⁵⁸ *Id.* at pp.31-32.

¹⁰⁵⁹ Exhibit 188, p.23774; *Id.* at p.32.

counsel for Gbao the witness responded initially by evading the question, finally stating that “[i]n no instance have I said I never had any rank”¹⁰⁶⁰. despite what he had told the Prosecution on a previous occasion.¹⁰⁶¹

5. *Witness was Unclear about the Role of Augustine Gbao in the RUF*

781. The witness was highly knowledgeable of the RUF as he was one of the highest in command. We suggest, however, that he made several critical errors in describing Gbao's role in the RUF's administrative structure, as follows:

a. *Witness Misunderstood the Role of the IDU and Gbao in the Administrative Setup*

782. The witness gave factually incorrect evidence about Gbao's role as Overall Security Commander. He characterised his role as follows:

“Q. What is it that the overall security commander did?

A. The overall security commander had a responsibility to co-ordinate the activities of the Internal Defence Unit, called IDU, **which comprised** of intelligence officers and also interfaced between the IDU operations and the High Command of the RUF relating to intelligence that had to do with the RUF fighters”.¹⁰⁶²

783. This definition, we submit, is incorrect because the weight of the evidence in this case suggests the IDU as a unit was on a par with the IO, G5, MP and others. Until it changed its acronym, the IDU was categorised in ‘G unit’ terminology as G2.¹⁰⁶³ That fact alone suggests the IDU (as it latterly became known) must have been widely perceived to share identical status with the other units that continued to exist. We submit that the witness’s perception that the overall security commander ran the IDU, which was itself ‘comprised’ of other units, was wholly erroneous. Not only was this view comprehensively denied by Defence witnesses it was never put forward by the Prosecution either, leaving one to wonder exactly what led to TF1-371 making such a dubious claim.

784. We suggest that TF1-371’s confusion arose because Gbao was not only overall commander for the IDU but also Overall Security Commander (“OSC”). These were distinct and mutually exclusive assignments, the title ‘OSC’ being largely ceremonial and vested with no power other than to advise or recommend measures for improved efficiency to the other security units.

1060 *Id.* at p.34.

1061 *Id.* at p.32.

1062 *Id.* at Transcript 20 July 2006, p.29

1063 Issa Sesay, Transcript 3 May 2007, p.75; *also see* DIS-188, Transcript 25 October 2007, p.87.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

b. The IO Was Not Under IDU Umbrella

785. The witness testified that the IO, headed by Ben Kenneh, was in effect under the 'umbrella' of the IDU.¹⁰⁶⁴ This is manifestly inaccurate [REDACTED]

[REDACTED]

[REDACTED].¹⁰⁶⁵

786. By contrast, TF1-371 recalled that another well-known security unit, the G5, stood alone and outside the IDU's sphere of influence, as indicated within the following exchange with Gbao's counsel:

"Q: The G5 was a self-contained unit with its own structure, duties, and responsibilities; do you agree?

A. Yes, it was.

Q. Thank you. Which no other unit commander could supersede or interfere with?

A. No, not in that respect".¹⁰⁶⁶

787. Turning to the other security unit, the MP, counsel followed the same line of enquiry:

"Q. And, again, did the MP have its own -- I will repeat the same terms -- structure, duties, responsibilities, et cetera?

A. Yes.

Q. Thank you. And who did the MP commander ultimately report to?

A. Sam Bockarie".¹⁰⁶⁷

788. Given this evidence from TF1-371 one was caused to wonder what it was that required the IO to be effectively contained within an IDU umbrella. Was there a peculiarity to its role and function that prevented its independence; if so, what was it?

789. Counsel enquired further:

"Q. All right. But, again, [REDACTED], is it fair to suggest that the IO had its own structure, duties and responsibilities?

A. Yeah. They had, of course, assigned duties and responsibilities, yes, yes.

Q. Just to delve into their purpose a little, was their specific role largely concerning activities on the front line?

A. IOs, yes.

Q. Yes. In fact, largely, were the IOs based on the front line?

A. Yes".¹⁰⁶⁸

790. Having established that IO's were largely confined to the front line, counsel then moved to

¹⁰⁶⁴ Transcript 1 August 2006, p.140

¹⁰⁶⁵ *Supra*, paras. 86-90.

¹⁰⁶⁶ Transcript 1 August 2006 p.138.

¹⁰⁶⁷ *Id.* at p.139.

¹⁰⁶⁸ *Id.* at pp.139-140.

the IDU, TF1-371 stating that “[i]t was an umbrella security unit that had specific functions...And the IO’s...were within the ambit of that—that umbrella agency’.¹⁰⁶⁹ The witness confirmed that the IDU did not operate on or outside the front lines”.¹⁰⁷⁰

791. It was immediately apparent that this analysis was not shared by a single other witness, Prosecution or Defence, in this trial. In point of fact, in 2005 TF1-071 gave exhaustive insider evidence concerning the RUF command structure: the Prosecution appeared to value his experience and knowledge of RUF activity in Kailahun and Kono during the war to such a degree they exhibited two complex charts citing the entire RUF hierarchy in 1998-99 for those areas.¹⁰⁷¹

792. According to these, all RUF auxiliary units appeared to occupy equal rank within the hierarchy. None appeared to be subordinate to another. The IDU and IO were shown to be distinct entities; and each had their own overall commander. Each overall commander was shown to be reporting directly to the High Command.

793. Just as significant was that TF1-371 was named as one of the most senior RUF commanders. **Remarkably, Augustine Gbao’s name did not appear AT ALL.** He was not named as an IDU commander at any level; neither-and perhaps more importantly-was the title ‘Overall Security Commander’ cited. This is perhaps not a surprise as TF1-071, [REDACTED] **[REDACTED] had never heard of Gbao** before 2000 and did not meet Gbao until 2000-2001.¹⁰⁷²

794. This, in our submission, defeats the impression that TF1-371 sought to give that:

1. The IO was not an independent unit;
2. The IO was subordinate to the IDU;
3. As overall commander of the IDU Gbao had power to issue orders not only to IDU agents but also to IO’s; and
4. That Gbao held a position that was ‘parallel’ or ‘horizontal’ to an area commander. Whilst one may argue there was a ‘parallel’ in as much as Gbao as overall IDU commander was likewise *bound to report directly* to the High Command, there can be no suggestion his power to *command and control* was parallel to that of an area commander. This is further examined below by reference to counsel for Gbao’s cross

¹⁰⁶⁹ *Id.* at p.140.

¹⁰⁷⁰ *Id.* at p.142.

¹⁰⁷¹ Exhibits 20, 21.

¹⁰⁷² TF1-071, Transcript 26 January 2005, p.62.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29769

examination:

6. *The Witness Agreed that Gbao had no Power to Issue Orders to Brigades*

795. In evidence in chief TF1-371 told the court :

“The overall security commander had a responsibility to co-ordinate the activities of the Internal Defence Unit, called IDU, which comprised of intelligence officers and also interfaced between the IDU operations and the High Command of the RUF relating to intelligence that had to do with RUF fighters. The movement of civilians within the territorial confines of the RUF. As well as to make known any subversive activity that may be hosted by any senior commander of RUF to the High command. He also liaised with the Military Police as well as the G5 responsible for civilian affairs”.¹⁰⁷³

796. TF1-371 was also reminded that he had told the court “[t]hen, there were other functions that were parallel to the function of an area commander, and that were the security commander, overall security commander. That vacancy was filled by Augustine Gbao...”¹⁰⁷⁴

797. In a seemingly catch-all addition, TF1-371 then stated “...the overall security commander responsible for IDU and the G5, the overall G5 and the G4 were parallel with the area commander”.¹⁰⁷⁵

798. Having confirmed that area and brigade commanders were exactly the same in all but name¹⁰⁷⁶, counsel for Gbao asked:

‘Q: I’m going back to 97, because my case is that Gbao was overall IDU commander since February of 96. So, in 97, with Gbao in that position, you had area commanders Mingo and Mongor on the Supreme Council. Gbao wouldn’t have been the horizontal or parallel with them, would he?’

A: Yes, of course.

Q: Even though they were, at the time, colonels, and Gbao was still only a captain?

A: At that time I didn’t know whether Gbao was captain or not, 97, when I came back’.¹⁰⁷⁷

799. In our submission the extracts cited above place TF1-371’s *modus operandi* in giving evidence into perfect context. Having already claimed that Gbao was in effect in overall control of the IO (an assertion that, given a welter of defence evidence, [REDACTED], as well as the highly placed insider TF1-071 who neglected to mention Gbao AT ALL in his widespread testimony as to RUF organisation and command structure) the witness

¹⁰⁷³ Transcript TF1-371 20 July 2006, p.29.

¹⁰⁷⁴ *Id.* at p.28.

¹⁰⁷⁵ Transcript 1 August 2006, p.106.

¹⁰⁷⁶ The term ‘Brigade Commander’ was in parlance during the junta; ‘Area commander’ was used thereafter in RUF zones.

¹⁰⁷⁷ Transcript, 1 August 2006, p.107.

now attempted to place Gbao at a 'parallel' level to area or brigade commanders. This, we suggest, was an utterly false claim which was dispelled in full by defence witnesses. Nevertheless it appeared as if tailor-made to inculcate Augustine Gbao in command responsibility from a variety of standpoints. Whilst appearing probative at first sight we suggest the allegations pale into insignificance when set aside the evidence of Gbao's true role and powers as set out elsewhere in the case.

800. Furthermore, the timing of the introduction of these allegations casts even more doubt on their veracity-as well as the motive of the witness in making them, as we show below.

801. Leaving aside the lengthy cross examination that demonstrated how Gbao appeared at all times to occupy a lower rank than the area or brigade commanders the witness gradually appeared to concede that, in reality, there was no such parallel power at all. With reference to Gbao's powers as overall security commander counsel suggested that, had a recommended punishment following a JSBI been ignored, all Gbao could do was

"Q:...to write a letter of warning to any brigade commander. And he...had no... responsibility to take any action against any brigade commander. His responsibility was to inform the High Command.

A. Yes."¹⁰⁷⁸

802. Enlarging on this theme, counsel asked:

"Q. My case is that Augustine Gbao never had the authority to command a brigade, or order a brigade commander to either stop doing something, or to do something. All he could do was make a recommendation, and then if the brigade commander ignored that recommendation then he, Gbao, would report that matter to the leader?

A. Yes, of course.

Q. And that's how it worked?

A. Yes".¹⁰⁷⁹

803. Placing the overall security commander's true role into perspective, the court heard the following exchange which again gave the lie to any suggestion that Gbao wielded any power at all over brigade commanders in the wake of JSBI reports:

"Q.If the magnitude was great enough, once the area of battalion commander had received the JSBI's report, was it then incumbent on that area or battalion commander to make a decision as to whether the JSBI's recommendation should be implemented?

¹⁰⁷⁸ *Id.* at p.143.

¹⁰⁷⁹ *Id.* at p.144.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

A. Yes, of course.

Q. Thank you. And if something had to be implemented, a particular action, for example, was it usually down to the MP, or was it usually an MP who was appointed to carry out that task?

A. Yes, the MP was.

Q...That the only circumstances where a report emanating from a local JSBI board actually went to Augustine Gbao was where the area or battalion commander had failed to institute that JSBI's recommendation for action?

A. No. I -- no, no. They -- of course, he was abreast with whatever decisions were taken, depending on the magnitude of the allegation at a particular battalion.

Q... And what I say happened is that if Gbao had been brought in, because an area or battalion commander had failed to act, then similar to his role within the IDU it would be his duty to write a warning letter to that area or battalion commander saying: You failed to carry out the recommendation. I have to warn you that if you continue to refuse to carry it out, I will have to inform the leader.

A. Yes. Yes. Again, depending on the magnitude of the offence.

Q. Okay.

A. Yeah".¹⁰⁸⁰

804. Whilst not exactly contradicting his earlier assertion that Gbao-in either his capacity as overall IDU or overall security commander- occupied a 'parallel' position to area or brigade commanders the foregoing cross examination perhaps places the limited nature of Gbao's influence into its proper context.

805. Why was it that TF1-371 found it necessary to describe Gbao as operating 'parallel' or 'horizontal' to area or brigade commanders? In our submission TF1-371 was in all likelihood acting with malice aforethought, for this was yet another occasion when a witness appeared to remember incriminating evidence at the last moment before he entered the witness box:

"Q: ...In July 2006, you gave further information. I'm reading the final three lines of paragraph 2. You said this "There were section commanders like S4, G5,IO, IDU," as you've told me earlier on, "and others. The section commanders were at the same level as brigade commanders in the chain of command." Now, my question, [REDACTED], is this: You have given statements to the Prosecution since, I think November of last year which run into over 100 pages...It wasn't until July of this year that you used that description that unit commanders such as Gbao were on the same level as or horizontal as area commanders. Is there any reason for that?"

806. The witness's answer is repeated in its full, obfuscated glory:

'A: Well, I --I—I'll answer it two ways. The first thing is that I don't know whether that was my first time to be confronted with such because you just mentioned that our investigator made a lot of statement. I don't know whether that exactly, because I have no record on me. Secondly, I—I'm coming. If—I'm coming. If that was the first time the person asked the question, like you are asking me now, about the money incident,

¹⁰⁸⁰ *Id.* at p.150-151.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29772

whether Gbao was involved, nobody even asked me about that. So I mean, there were a lot of events, unless you ask me a question that you interested to know, I will tell you exactly, I mean, the event'.¹⁰⁸¹

807. Perhaps TF1-371 had not expected that question.

808. TF1-371 had been exposed: although he had provided approximately 100 pages of material over the preceding 9 months, he nevertheless waited until the first week of July 2006 to cite Gbao as occupying a 'parallel' role to area or brigade commanders-despite the facts that, as cross-examination showed, area or brigade commanders occupied a higher rank than Gbao at all times and that Gbao had no power to issue military commands. To wait until **less than two weeks before** he testified on 20th July 2006 before making such a significant allegation is, we say, deeply troubling and demands utmost scrutiny.

7. Conclusion

809. While we accept that discrepancies between previous statements and in-court testimony do not necessarily fatally damage a witness's testimony, TF1-371 was found to have lied to conceal a highly material admission that strongly reflects on his character. We submit that he intentionally withheld the truth of his Ivorian Coast exploit, and that he was less than candid about how he came to receive immunity from the Prosecution in return for testifying.

810. TF1-371 was also evasive when challenged on his allegation that Gbao was present at the December 1998 meeting in Kono and made matters worse by refusing to acknowledge his previous omissions.

811. The basis of his evidence against Gbao and, perhaps, the Prosecution theory on Gbao's alleged "superior status"—that Gbao held a position "parallel" to an area commander came to light just two weeks before he gave evidence. After several hours of interview, one might have expected him to have taken this position before, but it appears he had not. This should be reviewed with suspicion.

812. In light of the foregoing arguments, we submit that the witness's evidence should be disregarded.

¹⁰⁸¹ *Id.* at pp.113-14, referring to Additional Information Proofing on 2,3 and 5 July 2006 p24031.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Killing of Suspected Kamajors in Kailahun Town

I. Introduction

813. Counts 3-5 relates to the killing of suspected Kamajors in 1998. No other evidence presented in the case need be considered under these counts.

II. Prosecution Testimony

814. Four Prosecution witnesses testified about the killing of the alleged Kamajors in Kailahun Town in 1998: TF1-045, TF1-336, TF1-168 and TF1-113.

A. TF1-045

815. This witness began his testimony by stating that Mosquito told him “there are some civilians who had surrendered” and that “he had sent [them] to Kailahun for investigations, to Augustine Gbao”.¹⁰⁸² When the witness and Mosquito reached Kailahun, they met with Augustine Gbao.¹⁰⁸³

816. Upon reaching Kailahun Town, the witness stated “I too was there when Mosquito asked Augustine Gbao about these people. Augustine Gbao said that according to investigations the people were all Kamajors”.¹⁰⁸⁴ Mosquito had passed an order for them to be killed. [REDACTED]

¹⁰⁸⁵

817. The order to kill the Kamajors was passed directly from Mosquito to the MP in Kailahun Town, which was allegedly led by Joe Vandj.¹⁰⁸⁶ TF1-045 stated that the order was not passed through Augustine Gbao to the MP (despite valiant efforts by Prosecution counsel to suggest Augustine Gbao's involvement).¹⁰⁸⁷ During cross-examination, counsel for Gbao sought clarification for this by asking if the order was “one man to another? [Bockarie to MP Vandj]”, to which the witness unequivocally replied “yes”.¹⁰⁸⁸ From that point, the witness testified that Bockarie and Vandj went to the old police station where the suspects were being held. “From there the MP Commander opened [the cells], [REDACTED]”.¹⁰⁸⁹ The people

¹⁰⁸² TF1-045, Transcript 21 November 2005, p.40.

¹⁰⁸³ *Id.* at p.41.

¹⁰⁸⁴ *Id.* at p.41.

¹⁰⁸⁵ *Id.* at p.41.

¹⁰⁸⁶ *Id.*

¹⁰⁸⁷ *Id.* at p.43.

¹⁰⁸⁸ *Id.* at 25 November 2005, p.41.

¹⁰⁸⁹ *Id.* at p.43.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

counting out those to be killed were MPs.¹⁰⁹⁰

29774

818. The witness claimed that the victims were killed at the “*junction in Kailahun...it's a place where roads meet from Buedu, coming from Buedu, the other coming from Kailahun and then the other leading to the town, Kailahun Town*”¹⁰⁹¹ It is alternatively known as the roundabout.

819. Mosquito left for Buedu, but not before confirming that the shooting had started.¹⁰⁹² [REDACTED]
[REDACTED]¹⁰⁹³ It is unclear whether he left after all the suspected Kamajors were killed or some time before. He testified that “[REDACTED]
[REDACTED].¹⁰⁹⁴ A few minutes later, he confusingly noted that “what I saw being killed before I left [to Buedu] was around 45 [people shot], around 45”.¹⁰⁹⁵

820. The witness claimed that Augustine Gbao was the most senior member of the RUF in Kailahun Town at that time.¹⁰⁹⁶ He also alleged that Augustine Gbao “was around the junction where the incident took place”.¹⁰⁹⁷ He claimed that “I saw [Gbao] when the killing started up to, I mean, 10 minutes time. After that period I was not very much concerned about him. I was only concerned about the killing, where I placed my attention”.¹⁰⁹⁸

821. Later, Mosquito and TF1-045 left Buedu and returned to Kailahun Town. When they returned, the witness testified that the MP Commander told Mosquito that the order to kill the people had been accomplished. According to the witness, Augustine Gbao was there.¹⁰⁹⁹ The witness claimed that some of the men's heads had been cut off and placed on the side of the roads leading to Kailahun.¹¹⁰⁰

B. TF1-366

822. TF1-366 testified that he came to Kailahun Town and heard about the Kamajors held captive

1090 *Id.* at p.45.
1091 *Id.* at p.45.
1092 *Id.* at p.48.
1093 *Id.* at p.46.
1094 *Id.* at pp.46-47.
1095 *Id.* at p.48.
1096 *Id.* at p.48.
1097 *Id.* at p.49.
1098 *Id.* at p.49.
1099 *Id.* at p.50.
1100 *Id.* at p.50.

there. He stated that Issa Sesay came from Buedu and was speaking to Augustine Gbao about whether these people were in fact Kamajors.¹¹⁰¹ According to TF1-366 Gbao said that these people were refusing to speak the truth.¹¹⁰² Allegedly Sesay ordered them from their cell and asked them why. TF1-366 then testified that Sesay ordered Gbao to lock them up again whereupon everyone proceeded to the roundabout.¹¹⁰³ Sesay allegedly then told Gbao that he was going to Pendembu, but that he and Sam Bockarie were ordering Gbao to kill the alleged Kamajors.¹¹⁰⁴ According to this witness, Bockarie was not in town for the killings.¹¹⁰⁵ The witness testified that he then heard gunshots at the MP office.¹¹⁰⁶ He stated that the MPs had done the shooting but that he himself was not there.¹¹⁰⁷

C. TF1-168

823. This witness testified that he was in jail in Kailahun Town at the same time as the alleged Kamajors.¹¹⁰⁸ When these men had returned to Kailahun town following the advance of government forces after the fall of the junta, they had been sent to the MP station. "Upon their arrival", according to the witness, "they (the MPs) took down their names and then they detained them. They said they were waiting for clearance from General Sam Bockarie in order to release them".¹¹⁰⁹

824. The 65 individuals held in Kailahun Town allegedly explained to TF1-168 that they had been arrested as suspected Kamajors.¹¹¹⁰ They were eventually 'paroled', however, and allowed out during the day. In fact, according to the witness, the men were "given the impression that it was just a matter of time [before] they could be released".¹¹¹¹

824. The witness continued that on the day of the shooting the alleged Kamajors were outside the MP office cooking their lunch when the MPs came and told them to return to their cells because the "CDF" (Chief of Defence Forces - Sam Bockarie) had arrived.¹¹¹²

825. Later in his testimony, TF1-168 alleged that "by the time General Sam Bockarie was

¹¹⁰¹ TF1-366, Transcript 8 November 2005, p.56.

¹¹⁰² *Id.*

¹¹⁰³ *Id.* at p.57.

¹¹⁰⁴ *Id.* at p.59.

¹¹⁰⁵ *Id.* at p.59.

¹¹⁰⁶ *Id.* at pp.60-61.

¹¹⁰⁷ TF1-366, Transcript 17 November 2005, p.55.

¹¹⁰⁸ TF1-168, Transcript 31 March 2006, p.58.

¹¹⁰⁹ *Id.* at p.73.

¹¹¹⁰ *Id.* at p.59.

¹¹¹¹ *Id.* at p.60.

¹¹¹² *Id.*

coming from Buedu to Kailahun, the message came that he was coming to see the prisoners. So they sent for all the commanders who had earlier on taken these prisoners away to bring them all back so that the General will come and meet everybody under lock and key".¹¹¹³ It is unclear which account the witness is relying upon, as he describes the same event in two different ways.

826. The news that Sam Bockarie was coming was greeted by the suspected Kamajors with excitement because "the information came that [Bockarie] was coming to free the [Kamajor] collaborators and suspects, so the morale inside the prison was high. Everybody was expecting him. But then to our dismay, when he came things took a U-turn".¹¹¹⁴

827. Eventually, John Duawo Aruna, the District MP Commander, came to the cells and ordered that ten men come with him to the roundabout. Sam Bockarie and some of his senior officers wanted to see them.¹¹¹⁵ After a short period of time, the men in the MP cells heard gunshots.¹¹¹⁶

828. TF1-168 testified that after the killing of the first ten, the MPs returned to the cells and forcefully began to remove people. He said they were killed just behind the MP office (not the roundabout).¹¹¹⁷

829. TF1-168 stated the instruction to kill came from Mosquito through the Overall MP Commander, Augustine Gbao, to the District MP commander, John D Aruna.¹¹¹⁸ However, he stated that he did not see Augustine Gbao "on the site",¹¹¹⁹ presumably referring to the MP office.

D. TF1-113

830. TF1 113 testified that the G5 and MPs were going through villages in the Kailahun Town area rounding up suspected Kamajors. They were brought to the G5 office, apparently located at the roundabout in Kailahun Town.¹¹²⁰ She stated that she had spoken to Joe Fatoma (who was an MP, according to her, but at that time in the G5 office), who said that Mosquito had asked them to round up these people for screening.¹¹²¹

¹¹¹³ *Id.* at p.66.

¹¹¹⁴ *Id.* at p.71.

¹¹¹⁵ *Id.* at p.61.

¹¹¹⁶ *Id.*

¹¹¹⁷ *Id.* at p.63.

¹¹¹⁸ *Id.* at p.64.

¹¹¹⁹ *Id.*

¹¹²⁰ TF1-113, Transcript 2 March 2006, p.50.

¹¹²¹ *Id.*

831. TF1-113 claimed that Augustine Gbao was the G5 Commander and in charge of the investigation of the suspected Kamajors.¹¹²² According to the witness, 67 people were investigated and found to be Kamajors.¹¹²³ While the 67 were in prison in Kailahun Town, they were allowed out during the day to work in the town.¹¹²⁴

832. On another day (it would appear), she recalled speaking with the MP Joe Fatoma who had told her that Mosquito had gone to Pendembu, and had summoned these men back to their cells. He wanted to speak to them.¹¹²⁵ Around 4:30pm, the witness heard that Mosquito and Issa Sesay had arrived in Kailahun Town.¹¹²⁶

833. Later, the witness heard shooting at the roundabout. She ran there and found a large crowd. The MP commanders were there. She testified that “[t]here were two corpses there. Mosquito had a pistol. When I stood there...there were eight people who he shot in their heads”.¹¹²⁷ In the AFRC trial she testified to the contrary: “[w]hen I came at the roundabout in Kailahun, **I saw eight corpses there** and I was standing right in my presence when Mosquito shot two of them”.¹¹²⁸ She also gave two differing accounts of the event in separate witness statements, as will be seen below.

834. At the roundabout, the witness testified that she saw Mosquito, Sesay, Gbao, the MP commanders and their bodyguards.¹¹²⁹ Mosquito “told the MP Commander Joe Fatoma, [that] the rest of the people should be killed, all of them”.¹¹³⁰ “Otherwise he [Joe Fatoma] would be killed”.¹¹³¹ She claimed that Mosquito left shortly thereafter.¹¹³²

835. Shortly thereafter, the witness heard gunshots at the police station in Kailahun. As stated above she hurried there to see what happened.¹¹³³ She recalled “I was standing at the station. They were bringing them out, *one after the other* out of the cell, and they would kill that person. When they bring one person out, they would shoot that person and he would fall down; then they would

¹¹²²*Id.*

¹¹²³*Id.*

¹¹²⁴*Id.* at p.51.

¹¹²⁵*Id.* at p.55.

¹¹²⁶ *Id.* at p.56.

¹¹²⁷*Id.* at p.56.

¹¹²⁸ TF1-113, Transcript 7 March 2006, p.18.

¹¹²⁹ TF1-113, Transcript 2 March 2006, p.57.

¹¹³⁰*Id.* at p.59.

¹¹³¹*Id.*

¹¹³² *Id.* at p.60.

¹¹³³*Id.* at p.60.

bring out another and shoot him down".¹¹³⁴ She claimed that the MP personnel carried out Mosquito's order: "The MP Commander [...] was passing the order and they would bring them out and kill them".¹¹³⁵ According to the witness, four MPs were doing the shooting.¹¹³⁶

836. She stated that at that time the "senior person at that police station was Joe Fatoma who was the MP Commander. There were RUF soldiers there but he was the big man who I saw there at the time that they were shooting those people".¹¹³⁷

837. The witness testified that Gbao was not present when the other 55 Kamajors were killed.

II. Defence Evidence

838. The Third Accused relies upon the evidence provided by several witnesses who testified for the First Accused.

A. Witnesses for the Sesay Defence

1. DIS-157

839. DIS-157 testified that Bockarie had heard that some suspected Kamajors had entered Kailahun District. He radioed DIS-157, who was the brigade commander currently stationed in Kailahun Town, to investigate the veracity of this report. DIS-157 was told to arrest these men and assess whether the suspicion that they were Kamajors was true or not. DIS-157 ordered MPs from Kailahun Town to find these men. The MPs conducted a full search throughout Lowa and Upper Bambara chiefdoms, eventually arresting around 100 individuals.¹¹³⁸

840. According to this witness, the IDU was instructed to investigate the arrestees to determine whether or not the allegation was true. The first 40 were investigated by the chief investigator at the time, Tom Sandy.¹¹³⁹ According to DIS-157, Sandy "told us that they were not guilty, [REDACTED]

[REDACTED].¹¹⁴⁰ Accordingly that group was released.¹¹⁴¹ Bockarie was not informed. DIS-157 testified that Gbao

¹¹³⁴ *Id.* at pp.60-61.

¹¹³⁵ *Id.* at p.61.

¹¹³⁶ *Id.* at p.61.

¹¹³⁷ *Id.* at p.62.

¹¹³⁸ DIS-157, Transcript 24 January 2008, pp.83-84.

¹¹³⁹ *Id.* at p.84.

¹¹⁴⁰ *Id.*

¹¹⁴¹ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29779

played an important role having the 40 men freed.¹¹⁴²

841. That left 65 suspected Kamajors in custody. According to DIS-157 Gbao became distressed about their plight and had been worried from the beginning about Bockarie's true intentions regardless of the investigation's outcome.¹¹⁴³

842. When Bockarie heard that the first 40 men were released he travelled from Buedu to Kailahun to see DIS-157. Bockarie asked about the prisoners and DIS-157 confirmed the first group had been released. Bockarie then "informed [DIS-157] that everyone remaining was going to die."¹¹⁴⁴

843. DIS-157 attempted to pacify Bockarie, but Bockarie was "only listening to himself" by now. He summoned the first 10 suspects and killed them on his own.¹¹⁴⁵ DIS-157 was "unhappy", as some of those killed at the roundabout were his own relatives.¹¹⁴⁶ DIS-157 said he could not dare try to stop Bockarie, explaining "[i]f I would have attempted, I would have lost my life".¹¹⁴⁷ As far as the remaining 55 Kamajors were concerned, "he ordered the MPs to kill them".¹¹⁴⁸ The MP's carried out the order.

2. DIS-188

844. DIS-188 stated that after the suspected Kamajors were arrested, they were all detained in Kailahun. From there "Sam Bockarie gave instructions that they should look for anyone [to] come forward to sign guarantee for the people" to be released.¹¹⁴⁹

845. He recalled "Sam Bockarie asked Joe Fatoma and others to get somebody, someone, to sign for the people of Kailahun. After two days he came to Kailahun. The remaining people were still there without anybody signing for them." DIS-188 advised them: "if you fail to sign for these people, [Bockarie] will conclude that the people are Kamajors."¹¹⁵⁰

1142 DIS-157, Transcript 25 January 2008, p.52.

1143 *Id.* at pp.93-95.

1144 DIS-157, Transcript 24 January 2008, pp.85-86.

1145 *Id.*

1146 *Id.*

1147 DIS-157, Transcript, 24 January 2008, p.87.

1148 DIS-157, Transcript 24 January 2008, p.86, 87.

1149 DIS-188, Transcript 26 October 2007, p.90.

1150 *Id.* at p.95.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

846. Having returned to Kailahun, Bockarie told the people at the MP office that “since you are not sure of your people, of your own relatives, [I] will not be sure of them”.¹¹⁵¹ He then asked for some of them to be brought to the roundabout. Bockarie took five men to the roundabout and executed them himself.¹¹⁵²

847. DIS-188 recalled after the executions “[Sam Bockarie] gave instructions to Joe Fatoma to execute the remaining people in the gaol, that is, the remaining suspected Kamajors, and if he fails to implement the order, he will execute he, Joe Fatoma”.¹¹⁵³ He stated that information was transmitted to him later by radio.¹¹⁵⁴

3. DIS-069

848. The witness testified that Gbao was not involved in the killing of the suspected Kamajors. He had heard that Sam Bockarie came to Kailahun Town around the time that the suspected Kamajors were on bail and that he executed them.¹¹⁵⁵ DIS-069 stated that he never heard anything to suggest that Augustine Gbao had anything to do with what happened that day.¹¹⁵⁶

B. Witnesses for the Gbao Defence

1. DAG-048

849. The witness began by discussing the peace that had returned to Kailahun District just before the arrest of the suspected Kamajors. He testified that “[e]verybody thought the war was over so these people [the suspected Kamajors] came back home. We were all living in common doing everything together. There was no intimidation as whether you are an ex-Kamajor, ex-RUF, or ex-soldier. Not at all at that time”.¹¹⁵⁷ But when news reached Mosquito that “ECOMOG alongside Kamajors [were] killing rebel suspects in Kenema, burning them alive with tyres, he passed command that all suspected Kamajors who ha[ve] come into our territory should be arrested for investigation”.¹¹⁵⁸

850. According to DAG-048 “civilians also reported that the ECOMOG alongside their Kamajors were harassing them, [and] taking away their properties from them when they were coming into our

1151 *Id.* at p.96.

1152 *Id.*

1153 *Id.*

1154 *Id.*

1155 DIS-069, Transcript 23 October 2007, p.70.

1156 *Id.*

1157 DAG-048, Transcript 3 June 2008, pp.76–77.

1158 *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

territories".¹¹⁵⁹ Civilians were moving en masse towards Kailahun District as a result.¹¹⁶⁰

851. He continued: "We immediately convened a joint security panel of screening. That was the first thing we did because [it] was [a] war situation. So whenever these people were coming it was possible that these Kamajors were coming along with them as a spy into our territory".¹¹⁶¹ The MP, IDU, and IO were charged with the responsibility for this screening.¹¹⁶²

852. Screening procedure was as follows: "[w]e call the civilians—these retreating civilians. We ask for your name. We ask where you are coming from. Why are you coming into our territory. By these things we are able to detect if you are not an enemy or if you are an enemy".¹¹⁶³ Screening was necessary because "[i]t was a war...[i]n such a case when civilians are retreating in that mass—massive manner, it will be possible that any fighter could take [off] his fighting clothes or hide his gun and follow the civilians to go and observe situations on the opponent's side".¹¹⁶⁴

853. According to DAG-048 two groups of suspected Kamajors were arrested.¹¹⁶⁵ One was from Upper Bambara Chiefdom (Pendembu area) and the other from Luawa Chiefdom (Kailahun Town area). He stated that "[a] panel of investigation was also set by the Joint Security, of which Augustine Gbao was the chairman. We did the investigation [DAG-048 was also on the Board], and we found out that the 45 were just alleged Kamajors, but they were not Kamajors, so the panel recommended to the leader that they should be released and they were released and sent back home".¹¹⁶⁶

854. The second group from Luawa Chiefdom (Kailahun Town area) was arrested after the first group had been released.¹¹⁶⁷ A Joint Security Board of Investigation (JSBI) was constituted to investigate the allegations.¹¹⁶⁸ "After the investigation it was—these people were placed on parole because the investigation was not concluded. They were placed on parole pending final investigation",¹¹⁶⁹ but under the supervision of the MP and with an obligation to return at night.¹¹⁷⁰

¹¹⁵⁹ *Id.* at p.69.

¹¹⁶⁰ *Id.*

¹¹⁶¹ *Id.* at p.70.

¹¹⁶² *Id.* at p.72.

¹¹⁶³ *Id.* at p.72.

¹¹⁶⁴ *Id.* at p.75.

¹¹⁶⁵ *Id.* at p.79.

¹¹⁶⁶ *Id.*

¹¹⁶⁷ *Id.* at p.80.

¹¹⁶⁸ *Id.* at p.81.

¹¹⁶⁹ *Id.* at p.82.

¹¹⁷⁰ *Id.*

855. One evening, John Duawo Aruna was apparently summoned to Buedu in order to receive instructions from Mosquito. The meeting took place the night before the suspected Kamajors were killed.¹¹⁷¹ “John Duawo made me [DAG-048] to understand that Mosquito had given him an instruction to recollect all the Kamajors, the 65 suspected Kamajors, and that they were going to be killed as a result of the killings that took place in Kenema by the ECOMOG and Kamajors”.¹¹⁷²

856. “I was made to understand that Augustine Gbao advised Mosquito not to kill these people, as they were under investigation. The investigation was not concluded, so they were not to be killed”.¹¹⁷³ He further stated “after [Gbao] advised, Mosquito did not listen, overruled his advice and carried out his intention”.¹¹⁷⁴ This was the end of Gbao's involvement in the matter.¹¹⁷⁵

857. “As soon as John Duawo came to Kailahun and recollected these Kamajors, Mosquito himself followed and, during the time he arrived in Kailahun, I understood that he set an example by killing three of these Kamajors himself, followed by his bodyguards who also killed another seven, making the number to ten”.¹¹⁷⁶ They were shot dead at the roundabout in Kailahun.¹¹⁷⁷

858. After that, Mosquito “left a command to Vandi Kosia, [and] who was the ground commander, John Duawo [Aruna] who was the MP Commander.”¹¹⁷⁸ He ordered that the “balance 55 should be killed before he returns...”¹¹⁷⁹ DAG-048 said “I was made to understand that the bodyguards of Mosquito carried on the execution of the balance 55”¹¹⁸⁰

2. DAG-110

859. The witness heard that Mosquito had lost three bodyguards on the Juru Highway as a result of an attack by Kamajor forces just before Mosquito ordered the execution of the Kamajors.¹¹⁸¹

860. He was in his zoo bush on the day of the actual shooting, and went to Kailahun Town shortly

¹¹⁷¹ *Id.* at p.84.

¹¹⁷² *Id.* at pp.84-85.

¹¹⁷³ *Id.* at p.87.

¹¹⁷⁴ *Id.* at p.90.

¹¹⁷⁵ *Id.*

¹¹⁷⁶ *Id.* at p.86.

¹¹⁷⁷ *Id.*

¹¹⁷⁸ *Id.* at p.89.

¹¹⁷⁹ *Id.* at p.90.

¹¹⁸⁰ *Id.* at p.90.

¹¹⁸¹ DAG-110, Transcript 2 June 2008, p.102.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

afterwards. He heard that Mosquito shot the suspected Kamajors. He “executed the first ten [himself] and left [an] order that the balance should be executed”.¹¹⁸² The first ten, he heard, were executed at the roundabout.¹¹⁸³ Mosquito left town before the rest were executed. Most of them had been shot “behind the police station. That’s about 100 to 200 metres out from the roundabout”.¹¹⁸⁴

861. The witness recalled an atmosphere of “disorder” in Kailahun Town that evening. “Friends [and] sympathisers...of the Kamajors” were telling him what had happened.¹¹⁸⁵ The people of Kailahun District were “surprised and offended” about the killing of the suspected Kamajors, as the victims were all local citizens.¹¹⁸⁶ A prominent town chief and friend of DAG-110 was among the dead.¹¹⁸⁷

III. Credibility of Prosecution’s Witnesses

A. TF1-045

862. TF1-045 admitted that he took part in the shooting. Accordingly we submit that the testimony he gave should be approached as accomplice evidence. As such, we submit the chamber should approach what he said with particular caution.¹¹⁸⁸

1. Witness Could Not have been Present for Killings in Kailahun Town

863. We submit, upon close analysis of what TF1-045 said, that this witness could not have been together with Mosquito when the suspected Kamajors were killed. We suggest that may have been lying, as he failed to recall certain crucial facts that he should have been able to recall regardless of the passage of time.

864. Firstly, TFI-045 failed to mention that Mosquito was present when the first ten were shot at the roundabout. The event was reported by almost every other witness – both for the Prosecution and Defence – who claimed to have been in Kailahun that day. If he had in fact been travelling with Mosquito that day and had been present for the several events he recalls, it is hard to understand why he makes no reference to Bockarie’s summary execution of the first ten victims.

¹¹⁸² *Id.* at p.100.

¹¹⁸³ *Id.* at p.98-99.

¹¹⁸⁴ *Id.* at p.99.

¹¹⁸⁵ *Id.* at p.99.

¹¹⁸⁶ *Id.* at pp.100, 101.

¹¹⁸⁷ *Id.* at p.100.

¹¹⁸⁸ CDF Trial Judgement, para. 278.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

865. Secondly, and just as important, the witness could not say where the other 55 suspected Kamajors were killed. He claimed that they were killed at the junction, or the roundabout, and not behind the police station as every other witness in this case has testified. Since he confessed that he was one of the shooters, we suggest that the fact he was unable to correctly state where they were shot is quite remarkable, casting the gravest doubt on his credibility as a witness.

866. TFI-045's evidence, and what appears to be the Prosecution's attempt to 'correct' it, was as follows:

"A. They were people [the suspected Kamajors] that they removed from the jail where they were, they all stood. When we count five, one to five, **we moved them out at the junction, to come to us towards the junction**".¹¹⁸⁹

867. Prosecution counsel asked the witness about the shooting again, presumably having spotted TFI-045's 'error', but the witness reaffirmed that the shooting took place at the junction:

"Q. So when they [the 55 remaining suspected Kamajors] are taken out, **where are they taken to?**

A. We removed them outside. We took them from the jail room to the outside. Going **towards the junction** in Kailahun, Kailahun Town. **There we killed them.**

Q. What do you mean by the junction?

A. Well, it's a place where roads meet from Buedu, coming from Buedu, the other coming from Kailahun and then the other leading to the town, Kailahun Town. So, it was three roads meeting point, that was the reason why -- that's the reason why I called it a junction".¹¹⁹⁰

868. The Prosecution tried again; but again the witness repeated:

"When they have been removed by the MPs there, you see so many soldier we pushed them **to the junction** until they have been killed".¹¹⁹¹

869. And, yet again (the Prosecution's second attempt to recover the testimony):

"Q. Where was it that the people were killed?

A. In Kailahun Town.

Q. Can you say where in Kailahun Town?

A. Yes. From the police junction at -- for the police station **at the junction** within that area".¹¹⁹²

870. The witness confirmed where the shooting happened yet a FIFTH time (the Prosecution's THIRD attempt to recover the testimony):

¹¹⁸⁹ TFI-045, Transcript 21 November 2005, p.44.

¹¹⁹⁰ *Id.* at p.45.

¹¹⁹¹ *Id.* at p.46

¹¹⁹² *Id.*

“A. When we [Mosquito and TF1-045] arrived there [in Kailahun Town], the same people being killed that we killed, I saw some heads that were cut off from the main body and placed on the roads leading to Kailahun. Some were brought along the road leading to Buedu. Just after the junction there is a stream there. There they went and placed them. Some, you see the blood **at the junction where they were killed.**

Q. Where did you say heads were placed?

A. The roads leading to Kailahun. Like the one from Buedu coming to Kailahun, the other from Pendembu coming to Kailahun”.¹¹⁹³

871. Incidentally, if this final, gruesome allegation fact were true—that people's heads were placed on the roads leading to Kailahun—it is disturbing to say the least that not a single other witness in this case-Prosecution or Defence-could remember it.

872. If TF1-045 could not correctly identify the location where the killings took place-despite his confession that he killed “up to five people”- we submit that the only conclusion one can draw is that he may have been lying about his presence at the scene of the event. Additionally, the fact that he failed to mention that Bockarie killed the first ten suggests that TFI-045 might not have been in Kailahun Town at all that day. Such glaring omissions go to the very essence and credibility of his testimony and, at the very least, cast a more than reasonable doubt on his reliability as a witness. Consequently, we strongly submit that TF1-045's testimony on the killings should be disregarded in whole.

2. *Witness Changes Testimony About His Participation in the Shootings*

873. TFI-045 also changed his story about number of those who died. The witness initially testified that he was present for the killing of all 65 men, directly participating in killing at least five. He stated that “[a]fter we had killed them, then we [TF1-045 and his family] followed Mosquito [to Buedu]”.¹¹⁹⁴ Confusingly, a few minutes later, he testified that “what I saw being killed before I left [to Buedu] was around 45 [people shot]”.¹¹⁹⁵ This testimony is directly contradictory and difficult to reconcile.

3. *Witness May have Testified to Avoid Being Prosecuted Himself*

874. In cross-examination, counsel for the Third Accused put to the witness that he was perhaps testifying to avoid being indicted himself for the various crimes he committed during the war in Sierra Leone. The witness agreed that he thought he may have been on the Prosecution's “wanted

¹¹⁹³ *Id.* at p.50.

¹¹⁹⁴ *Id.* at pp.46-47.

¹¹⁹⁵ *Id.* at p.48.

list”.¹¹⁹⁶ Counsel for the Third Accused then queried the witness: “...you were confident, weren’t you, after agreeing to testify, that you were not going to be prosecuted yourself, and that you were safe?”. The witness answered “yes”.¹¹⁹⁷ The spectre of an ulterior motive looms large over TF1-045’s credibility as a witness, we suggest.

875. In conclusion therefore, the evidence of TF1-045 contains significant inconsistencies, exaggerations and omissions of material facts that the witness – if he were telling the truth – surely would not have forgotten. It is submitted that in cautiously analysing *every detail* of TF1-045’s evidence – as required for accomplice/co-perpetrator’s evidence - the Trial Chamber should find his evidence unreliable in its totality.

B. TF1-168

1. *Gbao not Mentioned in Interviews for Three Years Regarding Kamajor Killings; Discussed Just Before Trial*

876. TF1-168 met Corrine Dufka, an expert Prosecution investigator, on 3 April 2003. During the 175 page interview, the witness failed to mention Gbao's role in the killing of the 65 Kamajors even ONCE, despite Dufka’s persistent attempts for him to do so. Indeed, the witness barely mentioned Gbao's name.¹¹⁹⁸ Counsel for the Third Accused asked TF1-168 about this during cross-examination:

“[D]id you get the impression during this interview that Corinne Dufka was very keen for you to talk about Augustine Gbao?...did you get the impression - and I can't think of anything other than this colloquialism, so if the Court will forgive me - did you get the impression she wanted you to dish some dirt on Augustine Gbao?

A. Probably, but I may have realised it after the interview”.¹¹⁹⁹

877. Indeed, it appeared Ms Dufka *was* prompting the witness to state that Gbao was the MP Commander in Kailahun Town, as well as the town’s most senior man. We submit the following exchanges suggest this.

878. During the interview, which took place no less than three years before he testified in court (and thereby, of course, when the events were three years fresher in his memory than in 2006 when he gave evidence), Miss Dufka probed TF1-168 repeatedly about the RUF command of Kailahun Town-with an apparent emphasis on the leadership of the IDU. It was equally apparent that Miss

¹¹⁹⁶ TF1-045, Transcript 25 November 2005, p.23.

¹¹⁹⁷ *Id.* at p.24.

¹¹⁹⁸ *See generally* TF1-168, Transcript 4 April 2006, pp.43-72.

¹¹⁹⁹ TF1-168, Transcript 4 April 2006, p.39.

Dufka may not have been getting the answers she was hoping for .

879. The witness had stated that John D Aruna “was the MP commander....[for] Kailahun Town”.¹²⁰⁰ The investigator asked: “[a]nd who was the overall RUF commander for Kailahun Town at that time”; TF1-168 answered that “**no, there was no commander.** The MP was taking care of the town”. We suggest Miss Dufka-by virtue of her next question- had been hoping the witness might have named Gbao as Kailahun Town’s overall commander : “What about the IDU...[s]o did they have a separate person who was—or who was in charge of the IDU for Kailahun at that time”? But TF1-168 tellingly replied “I cannot remember much. I cannot remember much. **Because they...were not that important. The MP was the most important unit**”. In view of his later testimony, we submit that TF1-168's failure to name Gbao, either in the context of overall commander of Kailahun Town or as IDU commander there also was of great significance.

880. Three years later, in February 2006, the Prosecution disclosed proofing notes in which TF1-168 did now describe Gbao as the most senior man in Kailahun Town as well as the Overall MP Commander. This epiphany of recall occurred, as if miraculously for the Prosecution, *just three months* before TF1-168 was due to testify.¹²⁰¹

881. During his evidence the witness was true to his latter account, depicting Gbao as the most senior man in Kailahun Town as well as overall MP commander. The Prosecution's difficulty here of course is that Gbao never was the overall MP commander. As if determined to make the point unassailable by repetition, TF1-168 incorrectly asserted that Augustine Gbao was Overall MP Commander *seven times*.¹²⁰² Besides referencing Gbao as the holder of these two positions the witness made no further mention of him save to say that Gbao was stationed in Kailahun,¹²⁰³ and that he passed the message from Sam Bockarie to John D Aruna to kill the remaining Kamajors behind the MP Office.

882. The suspicious and sudden nature of the entry of Gbao's name into the story was highlighted, we suggest, during cross-examination by counsel for Morris Kallon. The Third Accused submits that TF1-168 almost made an inadvertent error in response to a simple question:

“Q. Witness, do you know or not whether an individual called Kaisamba, AKA, alias

¹²⁰⁰ *Id.* at pp.39-40.

¹²⁰¹ See Exhibit 101, p.17684.

¹²⁰² TF1-168, Transcript 31 March 2006, pp.64, 67, 67, 70, 71, 73.

¹²⁰³ TF1-168, Transcript, 31 March 2006, p.67.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29788

Kaisuku was an MP commander in Buedu at the time in 1998?

A. Yes, **he was not only the MP commander in Buedu but he was the -- okay, Kaisamba. Yes, he was the MP commander in Buedu.**

Q. Thank you, witness. Let's move to another area very quickly".¹²⁰⁴

883. Later, counsel for Gbao challenged the witness about this near mistake.¹²⁰⁵

"Q. You were asked a question about Kaisuku and you were asked what his job was and it was in fact suggested to you by Mr Taku that he was -- Kaisuku was the MP commander for Buedu. Do you remember Mr Taku asking you about Kaisuku?

A. Yes.

Q. Your reply, and I have it precisely, I believe, was this: "He was not only the MP commander for Buedu, he was -- " and then you stopped and you simply said, "The MP commander." **What were you going to say when you said, "He was not only the MP commander for Buedu, he was -- ". He was what, please?**

A. You see, he was no other person than the MP commander in Buedu. I hadn't wanted to say anything else. **It was just a matter of language.**

Q. Is that so? Is that so?

A. Yeah. If he was anything else I would have said it. But when I realised that -- I recalled that in fact they were referring to Kaisuku

Q. Okay. **Can I suggest something else to you. That you stopped yourself just in time from saying, "He was not only the MP commander for Buedu, he was the overall MP commander for the RUF."**

A. No.

Q. Because he was, wasn't he?

A. Kaisuku?

Q. Yes. By 1998 Kaisuku was the overall MP commander for the RUF, wasn't he?

A. The time I was at Buedu 1998 -- 1997, '98, such positions couldn't have been given to a junior force, only Vanguard.

Q. Well, you told the Court that the overall MP commander in 1998 was Augustine Gbao, didn't you?"¹²⁰⁶

884. The manner of TF1-168's prevarication in this response is, we submit, suggestive that the witness understood perfectly well what counsel for Gbao was driving at—that the witness had almost veered from a pre-ordained 'script' and he knew it.

885. Replying to defence counsel's suggestion that TF1-168 had almost been about to name Kaisamba as the overall MP commander—rather than Gbao as he had stated in chief— the witness stated that Kaisamba could never have held that position anyway as he was not a Vanguard. This is clearly wrong, as Kaisamba *was* in fact the Overall MP commander.

886. We submit that if he was not simply lying to assist the Prosecution the witness was, at best,

¹²⁰⁴TF1-168, Transcript 3 April 2006, p.67.

¹²⁰⁵TF1-168, Transcript 3 April 2006, p.74.

¹²⁰⁶ Id. at pp.74-75.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

relying on assumption rather than fact. We suggest he admitted as much in counsel for Gbao's cross-examination when he attempted to explain why he believed Gbao was the overall MP Commander:

"A. Well, being that Joe Fatoma was the Kailahun Town MP commander and the John Duawo the district MP commander, and for the fact that Augustine was a Vanguard and he's senior to all of them, so that was why I came to that conclusion that he might have been the overall MP commander.

Q. Right. So you came to a conclusion that he might have been overall MP commander?

A. Yes.

Q. It wasn't something that anybody told you?

A. No, no, no.

Q. It was based on your own **presumptions**?

A. Yes".¹²⁰⁷

887. The witness's lack of knowledge was further demonstrated:

"Q. You see, my case on behalf of Augustine Gbao is this: he was an RUF commander, **never the overall MP commander**. He was since the end of 1996 the overall commander of the Internal Defence Unit, but he did live in Kailahun Town. Do you think that could be right? **Does that refresh your memory?**

A. **I didn't know**".¹²⁰⁸

888. TF1-168 also forgot to include Gbao's name later in his testimony. When referring to the killing of the first ten suspected Kamajors, he stated that John D Aruna had at first told him that the order to bring them to the roundabout had come from Mosquito.¹²⁰⁹ Three pages later, he changed his mind and stated that the order came from Mosquito to John D Aruna through Gbao.¹²¹⁰ We submit that amounted to a remarkably fundamental error by the witness given the gravity of the events he was describing.

888. It was as if the witness had 'defaulted' to the contents of his 2003 statement, which we suggest perhaps represents the true extent of his knowledge of the events in Kailahun Town. In his earlier account to the court, TF1-168 left Gbao's name out of the chain of command regarding the killing of the first ten Kamajors, making no mention of any involvement by Gbao at all.¹²¹¹ His repeated explanation for failing to include certain key facts in his statement-while managing to recall them in his evidence to the court- was that the interview "had taken him by surprise".¹²¹² We

¹²⁰⁷ TF1-168, Transcript 4 April 2006, p.20.

¹²⁰⁸ *Id.* at pp.40-41 (emphasis added).

¹²⁰⁹ TF1-168, Transcript 31 March 2006, p.61

¹²¹⁰ *Id.* at p.64.

¹²¹¹ TF1-168 at Transcript, 4 April 2006, p.45.

¹²¹² *Id.* at p.46.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

assert that was a wholly disingenuous and unlikely excuse concerning a 175-page interview that must have been arranged weeks in advance and that would have taken hours to complete.¹²¹³ Later, he stated that remembering to include Gbao in his testimony “came to [his] memory after deep reflection”.¹²¹⁴

889. In the end, counsel for the Third Accused summarised TFI-168’s evidence as follows:

“[W]hat I suggest is that the account that you gave to Corinne Dufka in the face of her repeated attempts to get you to mention Augustine Gbao's name is pretty much accurate. Do you think that that account you gave three years ago was accurate?

A. Whatever I said three years ago was what I could remember at that time. But I know I didn't lie on anybody in my interview.

Q. All right. You see, what I suggest that you've done is from January or February of this year, so nearly eight years after the event, three years after you spoke to Corinne Dufka, but ironically only a month before you were due to give evidence in this room, is you have significantly modified your story for the benefit of the Prosecution. That's right, isn't it?

A. No”.¹²¹⁵

890. Perhaps, in the end, the explanation for the witness's testimony and its sudden inclusion of Augustine Gbao may be as simple as the question asked at the end of his cross-examination:

“When you gave this story, this long account, to Corinne Dufka in April 2003 you didn't even know that Augustine Gbao was arrested, did you?

A. No”.¹²¹⁶

2. *Other Inconsistencies Damage TFI-168's Overall Credibility*

891. The witness claimed that on the day they were killed, the suspected Kamajors were outside the MP office cooking their lunch when the MPs came and told the men to go back inside their cells because the “CDF” (Chief of Defence Forces Sam Bockarie) had come.¹²¹⁷ A few minutes later in his testimony, he claimed that “by the time General Sam Bockarie was coming from Buedu to Kailahun, the message came that he was coming to see the prisoners. So they sent for all the commanders who had earlier on taken these prisoners away to bring them all back so that the General will come and meet everybody under lock and key”.¹²¹⁸ The evidence is clearly ambiguous on the point. Were the witnesses outside their cells cooking lunch outside the MP office? Or were they scattered throughout the Kailahun township?

¹²¹³*Id.* at p.46.

¹²¹⁴*Id.* at p.54.

¹²¹⁵*Id.* at p.59.

¹²¹⁶*Id.* at pp.59-60.

¹²¹⁷ TFI-168, Transcript 4 April 2006, p.44.

¹²¹⁸ TFI-168, Transcript 31 March 2006, p.66.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

892. The witness also varied his 2003 account in his 2006 Proofing Notes when describing how often he saw Augustine Gbao. In 2003, he stated that he only saw Gbao ONCE during his entire stay in Kailahun.¹²¹⁹ In the 2006 Proofing Notes, taken just weeks before giving evidence, he stated that he used to see Gbao EVERY DAY.¹²²⁰ We submit this was another far-fetched example of how the witness's memory seemed to have improved over time; and another astonishing example of how unreliable his memory must have been when he gave his 175-page interview back in 2003-if he is to be believed.

3. *Witness Seems to Admit that he was Telling Truth in 2003 and Not in Court*

893. A crucial and interesting point was made in counsel for Gbao's cross-examination of the witness. Again, counsel attacked the distinction between TF1-168's 2003 statement and his testimony:

"You say "[John Duawo] then told his boys that he [John Duawo] had got instruction from the CDS [sic] [Sam Bockarie] to come and finish the remaining people in the cell." Now, when you gave that answer to Corinne Dufka did you intend to say those words?

A. I said it.

Q. Yes, because what they appear to indicate, and you can correct me if I'm wrong, because I mustn't make assumptions, but what they appear to indicate is that Duawo had got his instructions from the CDS directly. Isn't that what really happened?

A. Well, from what is on the paper here, line 16, is implied.

Q. It's implied that the instruction was direct from the CDS to Duawo?

A. Uh-huh".¹²²¹

894. In conclusion, we emphatically assert that TF1-168's evidence is dangerously inconsistent and contradictory. He recognised himself that he had speculated in his testimony. His evidence appeared to have significantly changed over time in what we suggest was a blatant effort to incriminate Augustine Gbao in relation to the killing of the 65 suspected Kamajors in Kailahun. When asked about it in cross-examination, the witness failed to provide any reasonable and substantial explanation. This casts doubt as to the veracity of his evidence concerning the 65 killings as a whole.

895. The inadvertent mistakes during his testimony in court, the omission of critical facts in his statement from 2003 (where his memory would have been three years fresher), and his uncorroborated hearsay account should not be deemed credible enough for his evidence to be accepted. As such we submit TF1-168 is inherently unreliable and should not be considered by the

¹²¹⁹ TF1-168, Transcript 4 April 2006, pp.69-70

¹²²⁰ *Id.* at p.70; *also see* Exhibit 101, p.17684.

¹²²¹ *Id.* at pp.49-50.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29792

chamber.

C. TF1-366

896. As with his evidence, *inter alia*, on child soldiers, forced marriage, forced labour and UNAMSIL, this witness is entirely without credibility. His material and repeated lies, exaggerations, internal inconsistencies, contradictions, and general courtroom demeanour in his testimony provide, we submit, no other conclusion.

897. His claim that Sam Bockarie was not in Kailahun Town on the day the Kamajors were killed, for example, was an immediate indication that TF1-366 could not possibly have been in Kailahun on the day of the shootings. Seemingly in flat contradiction of other relevant testimony in the case on this issue, TF1-366 stated unequivocally that Sam Bockarie “was not there when those Kamajors were killed”.¹²²² Instead he stated that “no, nobody told me that. I didn’t see that. It was only Issa Sesay”.¹²²³

898. He also made the remarkable claim that there were NO dead bodies at the roundabout, implying that there were no people killed there.¹²²⁴ This again stands in direct contrast to other witnesses.

1. Inconsistencies in the Witness's Testimony

899. On page 45, the witness stated:

“I found them [the Kamajors] dead. **I was not there when they killed them.** I was about my own business in the town. I found them dead..Yes [in a police barracks], in a hole on top of a hill’.¹²²⁵

900. Yet just three pages later, the witness changed his story and said he WAS present when the Kamajors were killed. In response to a question by defence counsel for Gbao as to whether the suspected Kamajors were alive or dead when he first saw them TF1-366 replied:

‘By then they had not killed them. They were at the MP office. They were alive. **When Issa came, he gave orders to kill them. It was the time I went and saw them being killed behind the police barracks**’.¹²²⁶

901. The witness either shamelessly lied to the Court or had simply forgotten what he had said just

¹²²² TF1-366, Transcript 17 November 2005, p.60.

¹²²³ *Id.*

¹²²⁴ *Id.* at p.75.

¹²²⁵ TF1-366, Transcript 17 November 2005, p.54, 55 (emphasis added).

¹²²⁶ *Id.* at p.57 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

three pages before. Either way, it indicates that he is inherently unreliable.

2. *Failure to Explain Inconsistencies*

902. At another point in TF1-366's testimony, counsel for Gbao challenged him on the actual number of suspected Kamajors killed on that day. The witness had changed the total number several times in his previous statements and in evidence. We do not seek to argue that mistaking the precise number killed is of itself critically important. However, TF1-366's memorable intransigence and truculent attitude towards defence counsel for Sesay and Gbao take out itself raises the question of how seriously he should be taken as a witness of truth. Instead of explaining the discrepancy on three different occasions, he stated "that was not what I said",¹²²⁷ "[t]hose are not my words. I didn't say so",¹²²⁸ and "I explained everything...I explained everything".¹²²⁹ These denials are not the mature responses expected of someone intent on assisting the court.

903. On another occasion, counsel for Gbao challenged the witness as to why he did not mention that any of the suspected Kamajors were killed in Kailahun in his witness statement. After four unsuccessful attempts by counsel to get an answer to this simple question, the witness assured the court that "I did mention it [in my statement]. They were killed. I mentioned it".¹²³⁰ If the witness was attempting to be ironic it was lost in the translation.

904. Elsewhere, counsel challenged various discrepancies as to who actually ordered Gbao to investigate the suspects' tribal origin. In evidence the witness stated that it was Sesay. In his 2004 statement, he stated that it was Sam Bockarie.¹²³¹ His response was familiar: "I mentioned them, from 2003 to 2005".¹²³²

905. In a previous statement, the witness noted that Issa Sesay was one of the shooters. In his testimony, the witness stated that Sesay was NOT EVEN PRESENT when the Kamajors were shot. In response to the contradiction, the witness again took the easy option and blamed the Prosecution by stating that "I did not say so."¹²³³

¹²²⁷ *Id.* at p.63.

¹²²⁸ *Id.*

¹²²⁹ *Id.* at p.64.

¹²³⁰ *Id.* at p.65.

¹²³¹ *Id.* at p.67.

¹²³² *Id.*

¹²³³ *Id.* at p.76.

906. Finally, in a 2004 statement the witness had stated “I went to where the Pakistan battalion is now based and saw many bodies of the executed men in a ravine”. However in evidence he said “I did not say Pakistan battalion. I said at the back of the police station”.¹²³⁴

907. It has been accepted in both the ICTR and ICTY that special attention has to be given to any explanations given by witnesses containing inconsistencies in their testimony. To assuage doubts as to the witness’s overall credibility the Trial Chamber generally requires an explanation of substance rather than mere procedure.¹²³⁵ Instead of providing an explanation, TFI-366 routinely denied having said what was in his previous statements, asserting that the Prosecution’s investigator was responsible for incorrectly taking down his account. In the absence of evidence in support of his explanation, we submit TFI-366’s excuses lacked any substance and were not sufficient to explain the glaring inconsistencies that were repeatedly put to him in cross-examination.

908. This would accord with a decision in ICTR Trial Chamber, which held “it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution’s investigative process.”¹²³⁶ The fact that a witness was unable to provide a convincing explanation of the inconsistencies led the Trial Chamber in that case to disregard his evidence, since it raised reasonable doubt as to his reliability.¹²³⁷

909. In conclusion, this witness is far from credible. We submit that he lied repeatedly during his testimony on these killings; denied that undisputed events took place and substantially changed his evidence over time. Even if certain discrepancies between his statements and in-court testimony may be said to be minor, he amplified their detrimental effect on his credibility by repeatedly blaming their existence on the Prosecution’s investigative team. These serious defects in TFI-366’s testimony and the lack of explanations thereto render his testimony utterly unreliable. Considering the various admissions he made during his evidence as to his own conduct during the war we submit that, as a major insider, his true motive for testifying was brought directly into question. We emphatically submit his evidence deserves to be ignored in its entirety.

1234 *Id.* at p.80.

1235 *Kayishema* Trial Judgement, para.78.

1236 *Kayishema* Trial Judgement, para.78.

1237 *Rutaganda* Trial Judgement, para. 227. *See also* *Rutaganda* Appeals Judgement, para.190; *Kayishema* Trial Judgement, para. 443.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29795

D. TF1-113

1. Witness Admits Lying to the Court

910. TF1-113 was remarkably candid when she gave evidence:

“Q. I'm not going to mess about, madam, I'm simply going to come to the point. You didn't count them [the dead suspects] at all, did you? That's a blatant lie, I suggest. You never counted them, did you? No?

A. What I never saw I will not explain. And what I didn't say I will not talk -- if I never saw it I will say I never saw it.

Q. You never saw it, but you've just told us that you did. You told us that you counted 67 and I'm suggesting that's a lie.

And it is a lie; isn't it? **You just lied to the Court?**

A. **Yes**”.¹²³⁸

2. Countless Details “Forgotten” about Life in Kailahun and the RUF

911. The witness was obdurate in her ability to remember certain people and events, while remarkably capable of profound recall regarding the killing of the suspected Kamajors. There is a direct correlation between the former potentially exonerating the Accused and the latter seeking to implicate him. This raises suspicion. The Third Accused submits that this recall was selective and deliberate, casting grave doubt upon her overall credibility.

912. Arriving at this conclusion requires some background on the witness. She was a civilian [REDACTED]
[REDACTED]¹²³⁹ [REDACTED]
[REDACTED]
[REDACTED]¹²⁴⁰ [REDACTED]
[REDACTED]
[REDACTED]¹²⁴¹ [REDACTED]
[REDACTED]
[REDACTED]¹²⁴²

913. During the war TFI-113 [REDACTED]¹²⁴³ [REDACTED]
[REDACTED]
[REDACTED]¹²⁴⁴ Both these towns were very small. No doubt, as in any other local communities, word

1238 TF1-113, Transcript 6 March 2006, pp.105-06.
1239 TF1-113, Transcript 2 March 2006, p.39.
1240 *Id.* at 6 March 2006, pp.61-63.
1241 *Id.* at 7 March 2007, p.60.
1242 *See generally id.*, Transcript 2 March 2006, p.59.
1243 *Id.*
1244 *Id.*, Transcript 6 March 2006, p.65.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29796

travelled fast.

914. The Third Accused submits that, with her background, and living in a small town, TFI-113 must have known about particular events that happened in Kailahun District during this time beyond the evidence elicited in her direct testimony, which was comprehensive and detailed. She also surely would have known certain names mentioned to her by counsel for the Third Accused. In any criminal trial witnesses should not be afforded the luxury of limiting their testimony or denying knowledge of inconvenient facts whilst claiming to tell the truth. Nor should the Prosecution be allowed unfettered reliance on a witness who purports to act in that way. But we submit that is exactly what TFI-113 tried to do. We submit that TFI-113's obstructive demeanour damaged the quality of her evidence and seriously impaired her overall credibility.

a. Forgotten events

915. The witness claimed to have never heard about the Kamajor slaughter of local civilians at the Moa River no more than twenty miles from Kailahun Town.¹²⁴⁵ It is impossible to accept this testimony. Surely this would have been discussed amongst the civilians, as many civilians were killed at the river. They were killed because it was suspected they supported the RUF. Civilians – including the witness - would surely have feared for their safety after hearing that the Kamajors were killing innocent civilians. It is simply unacceptable that TFI-113 denied having ever heard about this attack.

916. In an equally remarkable display of ignorance TFI-113 assured the court that she had never heard of atrocities committed against civilians in Kenema.¹²⁴⁶ For a civilian who would surely have been considered an enemy by the Kamajors (by virtue of her work for the RUF as a birth attendant), she was seemingly blissfully unaware of the impending danger she faced from threats just outside Kailahun District. Alternatively she may simply have been lying.

917. Likewise, the witness claims she was never told of how to identify whether a particular person was a Kamajor or not (tattoos or other body markings).¹²⁴⁷

918. 

¹²⁴⁵ *Id.*, Transcript 6 March 2006, pp.100, 102.

¹²⁴⁶ *Id.* at p.102.

¹²⁴⁷ *Id.* at p.101.

[REDACTED] 1248 [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

919. Finally, TF1-113 was not aware that Gbao was the overall IDU commander (she claimed he was the G5 commander).¹²⁴⁹ Given the fact she claimed to have stayed in Kailahun Town for four years-inevitably overlapping with Gbao for much of that time-this was a remarkable, if incredible statement-particularly given her particular affiliation to the RUF. While the IDU was not the most important unit in the RUF, it would surely have been discussed amongst her family at some point during Gbao's tenancy in that position especially given her nephew's position in this unit.

b. Forgotten people

920. [REDACTED]. Nevertheless, she claimed to know ONLY ONE other MP—Joe Fatoma. She said she was not aware whether there were any more MPs in Kailahun Town and said she did not even know John D Aruna,¹²⁵⁰ the District MP Commander for Kailahun District [REDACTED].
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]¹²⁵¹

921. The witness also testified she did not know Vandi Kosia, who was brigade commmander in Kailahun.¹²⁵² Nor did she know Prince Taylor, who was the overall G5 commander based in Kailahun District.¹²⁵³ How could this be true?

922. While one cannot expect TFI-113 to have been an expert on RUF structure, she was part of the RUF furniture for years. Yet she purported to identify Gbao as G5 commander.¹²⁵⁴ This identification causes one to question whether she is at all credible in her recollection of precise facts and details. As stated by many witnesses, Gbao was an IDU commander, not G5. We submit this, again, raises questions as to her reliability as a witness.

1248 TF1-113, Transcript 7 March 2006, pp.63-64.
1249 TF1-113, Transcript 6 March 2008 p.88.
1250 *Id.* at p.89.
1251 *Id.* at pp.63-67.
1252 *Id.* at 7 March 2006, p.10.
1253 *Id.* at 6 March 2006, p.85.
1254 TF1-113, Transcript 2 March 2006, p.49.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

3. *Unlikely that Witness was Present for the Killings at the Roundabout in Kailahun*

923. TF1-113 testified that she was present when **Mosquito shot and killed eight at the roundabout**.¹²⁵⁵ This significantly contrasts with her testimony in the AFRC Trial and two previous statements to the Prosecution.

924. During her testimony in the AFRC trial, on 18 July 2005 she testified that:

"[w]hen I came at the roundabout in Kailahun, **I saw eight corpses there** and I was standing right in my presence when Mosquito shot two of them. So that summed up the number to ten corpses".¹²⁵⁶

925. Significantly, her evidence in the RUF trial is in direct conflict with her account in the AFRC trial just one year before.

926. In her March 2003 statement (more proximate in time to the events), she stated:

"At the roundabout at the centre of town **I saw eight dead bodies**. In my presence I saw Mosquito kill two others. Mosquito used a pistol. The two civilians were standing in a line. He shot them at short range, less than a metre, in the head."¹²⁵⁷

927. In her April 2005 statement, she changed her story again:

"I saw Mosquito when **he killed seven of the ten men** suspected of being Kamajors at the roundabout. Three had already been killed before I arrived at the scene".

928. When confronted with these inconsistencies, her response was neither imaginative nor unique: "I've not said a different thing".¹²⁵⁸ She blamed the Prosecution's investigators for making a mistake, prompting Mr Justice Itoe to ask "were you there, madam?".¹²⁵⁹ She was not, we submit, at the roundabout at the time that Sam Bockarie arrived. If she was, she was either lying in the AFRC trial or in the RUF trial. The fact that a witness lied under oath in either the AFRC or RUF trials could not better demonstrate why she cannot possibly be relied upon as a witness of truth.

4. *Miscellaneous Inconsistencies Damage Witnesses' Credibility*

929. The witness testified that she was present when the 55 suspected Kamajors were taken from their cells and killed. She repeatedly stated that the suspects were brought out to be killed "one after another".¹²⁶⁰ This contrasted with other witnesses who testified that they were brought out in groups

¹²⁵⁵TF1-113, Transcript 7 March 2006, p.14.

¹²⁵⁶ TF1-113, Transcript p.88.

¹²⁵⁷ Exhibit 73a, page 10750, para.2; also see *id.*, Transcript 7 March 2006, p.16.

¹²⁵⁸ TF1-113, Transcript 7 March 2006, p.20.

¹²⁵⁹ *Id.*

¹²⁶⁰ *Id.* at p.22.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

of five. Mr Justice Itoe asked the witness: “not...a bunch of five each..?”¹²⁶¹ No, the witness answered; “...when they bring out one, they would shoot that person and they would bring out another and they would shoot that person”¹²⁶²

930. TFI-113 also changed her story about Johnny Paul Koroma. At first, she stated that he came to Kailahun Town before the 67 suspected Kamajors were killed¹²⁶³ and claimed that he stayed at Gbao's house.¹²⁶⁴ However, in her 2003 witness statement, she stated that whilst he stayed in a house, she did not know whose house it was.¹²⁶⁵ In response to this apparent discrepancy, the witness stated that she had not changed her testimony since 2003, again implicitly blaming the OTP investigators.¹²⁶⁶ The witness continuously blamed the inconsistencies between her statement and her testimony on the investigator having written it down incorrectly.¹²⁶⁷

931. We submit that the fact that the witness failed to provide a substantive explanation for her inconsistencies creates doubt as to the credibility of her evidence, which should be disregarded by the Trial Chamber.

5. *Ulterior Motives to Testify*

932. TF1-113 was a major Prosecution witness in relation to alleged wrongdoing by Issa Sesay and Augustine Gbao in the Kailahun District. Her allegations related to the unlawful killings of 65 alleged Kamajors by CO Mosquito, as well as significant allegations on forced labour. However, she may have had ulterior motives for testifying.

933. DIS-069 alleged that the Prosecution gave her a house in order for TF1-113 to “prosecute Issa” and “that was the time she was given...money because she gave them the problem that she had no house to sleep. So the money was given to her”.¹²⁶⁸ Whilst we do not wish to dwell on the issue, the fact that certain Prosecution witnesses were provided “incentives” to testify has been mentioned numerous times in this case and contributes in casting doubt on their testimony.

934. That is not all. Based upon the anger she displayed towards counsel for the Third Accused, it

1261 *Id.*

1262 *Id.*

1263 *Id.* at p.38.

1264 *Id.* at pp.41-42.

1265 Exhibit 73a, p.10748; *also see id.* at p.42.

1266 *Id.* at p.42.

1267 *See id.* Transcript 6 March 2006, pp.106-07; *also see id.*, Transcript 7 March 2006, p16, 17.

1268 DIS-069, 23 October 2007 pp.102-03.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

would appear that TFI-113 may seriously resent Augustine Gbao to the point where her evidence against him requires extra scrutiny. [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED] 1269 [REDACTED]

[REDACTED] 1270 [REDACTED]
[REDACTED]
[REDACTED]

[REDACTED]¹²⁷¹ We submit that counsel for Gbao touched a nerve - evidenced by the fury displayed towards counsel for the Third Accused when he made the suggestion.¹²⁷²

935. Even when one leaves aside that TF1-113 admitted lying to the Court and was clearly lying in either the AFRC or RUF trial (if not both), we submit the cumulative effect of her witness testimony irreparably harms her credibility. The direct contradictions, inconsistencies, lack of detail, obstructive behaviour during cross-examination as well as potentially having a personal interest in testifying against Augustine Gbao and the RUF Accused cause one to question her true motives for testifying. The evidence of TF1-113 is, therefore, unreliable.

IV. Preliminary Remarks

A. Defence Evidence was Corroborated and Credible

936. We submit that the defence evidence on the killing of the Kamajors was both corroborated and credible. Witnesses DIS-157, DIS-188, DAG-048, and DAG-110 were unimpeached. DIS-157 had personal knowledge of the two investigations, the release of the first 45 suspected Kamajors, and the order by Bockarie to kill the other 65. The other witnesses recounted events surrounding the killing. This stands in stark contrast to the internally inconsistent, highly questionable evidence proffered by Prosecution witnesses.

B. Augustine Gbao was not the Most Senior Officer in Kailahun Town

937. It is clear that the Prosecution will seek to convict Augustine Gbao on the basis of his ostensible position as the most senior officer in Kailahun Town at the time the alleged Kamajors were killed. The issue of Gbao's position in Kailahun was a constant query throughout their case.

¹²⁶⁹ *TFI-113*, Transcript 7 March 2006, p.60.

¹²⁷⁰ *Id.* at p.61.

¹²⁷¹ *Id.* at pp.64-65.

¹²⁷² *Id.* at pp.63-66.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

938. However we emphatically submit that Gbao never held such authority. There was at least one known RUF commander in Kailahun Town that day who was senior to Gbao—DIS-157.¹²⁷³ [REDACTED]

[REDACTED]¹²⁷⁴ [REDACTED]

[REDACTED]¹²⁷⁵ [REDACTED] This was evidenced in his own testimony, in which he discussed various orders that he issued— including to arrest the suspected Kamajors and to release the first 45. There are no examples of Augustine Gbao issuing orders to anyone during this event. These positions, and the power that the witness held by virtue of these positions, were not challenged by the Prosecution in its cross-examination.

939. Additionally, Sam Koleh was battalion commander in Kailahun Town.¹²⁷⁶ Battalion commanders were superior in rank to Augustine Gbao. According to Issa Sesay, unit commanders “did not have control more than the battalion commanders. Unit commanders, more of them [] contained unarmed men and the battalion commanders, he controlled fighting forces”.¹²⁷⁷

940. Further support comes from DAG-080. When asked if he was the most senior officer in Kailahun Town, DAG-080 stated “no, no, no, he was not the highest ranking officer. We were having the area commander there. The area commander was the highest ranking officer”.¹²⁷⁸

941. Even if Gbao had been the senior RUF in Kailahun Town, he had no power to issue orders over the MPs and others involved in the Kamajor killings. This point is made clear above in the paragraphs on Gbao's command responsibility.

V. Legal Submissions Regarding Counts 3-5 of the Indictment

A. Elements of Count 3

942. The Prosecution must demonstrate, beyond reasonable doubt that:

1. The accused killed one or more persons, including by inflicting conditions of life, calculated to bring about the destruction of part of a population;
2. The conduct constituted or took place as part of a mass killing of members of a civilian population;
3. The accused intended to either kill or to cause serious bodily harm in the reasonable

¹²⁷³ DIS-157, Transcript 24 January 2008, p.85.

¹²⁷⁴ *Id.* at p.29.

¹²⁷⁵ *Id.* at pp.25-26.

¹²⁷⁶ TF1-366, Transcript 17 November 2005, p.90.

¹²⁷⁷ Issa Sesay, Transcript, 31 May 2007, p.12.

¹²⁷⁸ DAG-080, Transcript 9 June 2008, p.35.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

knowledge it would likely result in death.¹²⁷⁹

29802

B. Elements of Count 4 and 5

943. The elements of murder as a crime against humanity or as a serious violation to Article 3 are the same.¹²⁸⁰ The difference between the counts lies in the 'chapeau' requirements of proving a crime against humanity or violation of common Article III. The elements for murder are as follows:

1. The death of one or more persons;
2. The death of the person was caused by an act or omission of the accused;
3. The accused intended to either kill or cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹²⁸¹

VI. Submissions Regarding Count 3-5 of the Indictment

944. The Third Accused does not deny that the suspected Kamajors were killed. Augustine Gbao, however, had no role to play in their death. While he was part of the team investigating whether the arrestees were Kamajors, the investigation was never concluded, being cut short by Bockarie's recklessness. Based upon the past actions of Gbao and the investigation team, such as releasing the first group of 45 from Upper Bambara Chiefdom (Pendembu) and placing those from Luawa Chiefdom (Kailahun area) on 'parole', we submit that one can safely conclude that the investigative team did not share Bockarie's desire that they should be executed.

945. The Prosecution has not sought to controvert evidence presented by the defence about the 45 suspected Kamajors being released and the second group being 'paroled'. If accepted, this fact surely demonstrates the overwhelming possibility that it was Sam Bockarie alone who sought to kill these men.

A. Article 6(1) Liability

1. Planning

946. From the evidence, it is clear that Augustine Gbao played no role in planning the killing of the 65 alleged Kamajors detained in Kailahun Town. No one expected those who were detained to be killed, except perhaps Sam Bockarie. There is no evidence that Bockarie conspired to commit

¹²⁷⁹ Rule 98 Decision, Transcript, 25 October 2008, p.16. See also AFRC Trial Judgment para. 684;
¹²⁸⁰ AFRC Trial Judgement, para. 866.

¹²⁸¹ Rule 98 Decision, 25 October 2008, p.17. See also AFRC Trial Chamber Judgment para. 688. See also CDF Trial Chamber Judgment para.143.

this crime with anyone.

29803

947. We submit that previous action taken by DIS-157 to release the first 45 suspected Kamajors (with support from the investigative team), as well as the 'paroling' of the 65 from Luawa Chiefdom shows that those involved in the events- other than Sam Bockarie- did not take action or demonstrate the requisite intent such that the arrestees should be killed.

2. *Instigating*

948. Gbao did not urge, encourage or prompt Sam Bockarie, the MPs in Kailahun Town, or anyone else involved in killing these men. To the contrary, he was simply investigating the 65 suspects, which can hardly be equated with instigating.

3. *Ordering*

949. There is no evidence that Gbao ordered, or even had the capacity to order, the death of the Kamajors. According to the CDF case, to order someone requires "a person in a position of authority [to] order a person in a subordinate position to commit an offense".¹²⁸²

950. Through witnesses TF1-366 and TF1-168, the Prosecution may attempt to seek conviction by placing him into the chain linking Bockarie's (or, according to TF1-366, Sesay's) order to kill the Kamajors with the MPs.

951. However, TF1-366 lied throughout his testimony, as explained above. Failing to place Sam Bockarie in Kailahun Town on the day the Kamajors were killed suggests that he was not there. The remainder of his testimony cannot be considered credible.

952. TF1-168's uncorroborated, hearsay-based account containing naked, empty allegations against Gbao as a superior in Kailahun Town should not suffice to convict him of being in the chain of Bockarie's order to kill the Kamajors. We submit that this witness, besides incorrectly noting that Gbao was overall MP commander, made a cynical attempt to "prove his value" to the Prosecution. Back in 2003, when TFI-168 did not know Augustine Gbao was one of the Accused, he hardly mentioned Gbao's name and made no reference *at all* to Gbao in connection with the Kamajor killings. For these reasons and the reasons listed above regarding the overall credibility of the witness, TFI-168's testimony should be disregarded.

¹²⁸² CDF Trial Judgement, Para. 225; AFRC Trial Judgement, para.772 (other citations omitted).
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

953. Defence witnesses, especially DIS-157, made clear that the MPs were issued with a **direct order** to kill the 65.¹²⁸³

4. *Committing*

954. Augustine Gbao did not kill the Kamajors and there is no evidence presented under this mode of liability. Nor is there any evidence that he omitted to act in any way to keep the suspected Kamajors from being killed. In fact, he did everything within his limited power to investigate the witnesses properly, but Bockarie was not interested.

5. *Aiding and Abetting*

955. Gbao took no tangible steps to assist, encourage or lend moral support to Sam Bockarie or anyone else in Kailahun Town regarding the death of the suspected Kamajors. Evidence adduced shows that Gbao actively worked with the investigative team to release the first group of 45, and paroled the other 65 before Bockarie came to kill them.

956. Even though the Third Accused denies that Gbao was at the scene of either shooting (as alleged by several Prosecution witnesses) mere presence at the scene of a crime does not normally constitute aiding and abetting.¹²⁸⁴ Although denied, should the Court find that Gbao was present, we submit that mere presence is insufficient to sustain a conviction on the basis of an aider or abettor beyond reasonable doubt.

C. **Joint Criminal Enterprise**

957. Please refer above for a discussion on Gbao's involvement in the alleged JCE.

958. As stated above, there is no evidence that Augustine Gbao acted in concert with other alleged members of the JCE nor is there evidence of any action undertaken by him with the aim to further a common purpose, plan or design to commit criminal acts. There is no JCE to which was the Third Accused was a member; thus, he cannot be found criminally responsible for the crimes charged under counts 3-5 under this mode of responsibility.

959. Should the Trial Chamber find that there was a JCE, the Third Accused submits that there is

¹²⁸³ DIS-157, Transcript 24 January 2008, p.86; *also see* Transcript 24 January 2008, p.87.

¹²⁸⁴ CDF Appeals Judgement para. 102.

no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

960. If Court finds that the alleged crimes took place, it is submitted that they cannot be found to have taken place within the JCE or as a reasonable consequence of the JCE.

961. In the absence of such evidence, we submit that Augustine Gbao should not be held responsible for the crimes alleged under Counts 3-5.

D. Article 6(3) Liability

962. Augustine Gbao cannot not be held responsible as a superior in Kailahun Town. From the beginning of the case, the Prosecution has sought to implicate him in the killing of the Kamajors because he, in their submission, was the highest ranking officer in Kailahun Town. However, he was not the most senior officer in Kailahun Town. When asked by Prosecution counsel in cross-examination, DAG-080 stated “no, no, no, he was not the highest ranking officer. We were having the area commander there. The area commander was the highest ranking officer”.¹²⁸⁵

963. DIS-157 likewise made patently clear that he was superior to Gbao and that he was based in Kailahun Town. No one else issued orders, as described above, similar to DIS-157 during this time. Significantly, this was NOT challenged by the Prosecution.

964. Thus, we submit that Augustine Gbao did not enjoy seniority over all RUF in Kailahun Town. Even if the Trial Chamber were to find otherwise, we submit that one’s position in authority-without factual indications such as the power to issue orders or punish- cannot be sufficient to support a finding that an Accused is criminally responsible under the doctrine of command responsibility.¹²⁸⁶ Effective control needs to be established beyond reasonable doubt.¹²⁸⁷

965. Besides the blind statement that Augustine Gbao was the most senior man in Kailahun at the time of the killings, there is no evidence that he had authority over anyone involved in the killings nor is there evidence that he had effective control over any of them.

¹²⁸⁵ DAG-080, Transcript, 9 June 2008, p.35.

¹²⁸⁶ CDF Trial Judgment, para. 238. *See also Celibici Appeals Judgement*, para. 197, *Kayishema and Ruzindana Appeals Judgement*, para. 294. *Kunarac Trial Judgement*, paras 396-397.

¹²⁸⁷ CDF Trial Judgment, par. 238.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

966. Augustine Gbao was investigating whether the suspected Kamajors posed a security threat to the citizens of Kailahun. This was hardly criminal and his mere presence in the town should not convict him of any crime under the statute.

967. General arguments applicable to every Count regarding command responsibility may be found in the relevant sections above.

Killing at the Court Barri in Kailahun Town

968. TF1-108 alleged that Gbao was present when four civilians were killed in Kailahun Town. The credibility of witness TF1-108 is covered in great detail above. Due to repeated lies during his testimony and lying about the rape and murder of his wife, his uncorroborated allegations should be entirely disregarded.

969. Even if these allegations are considered, his evidence requires corroboration,¹²⁸⁸ as his cynical lies under oath (he was crying when discussing the rape of his wife) cast scepticism on the rest of his testimony.

Death of TF1-108's Sibling

970. TF1-108 also alleged that one of his siblings died on a forced labour march ordered by Augustine Gbao.¹²⁸⁹ For the same reasons as above, TF1-108 lied throughout his testimony, and further consideration of his claim is unnecessary.

971. Should the Court decide to consider the allegation, Gbao should not be held responsible for the alleged death of his "sibling". Even if Gbao's actions actually took place, he did not have the requisite intent to kill the sibling of TF1-108, as Gbao only allegedly ordered that manpower be provided to assist with the transfer of ammunition.

Other Allegations under Counts 3-5

xx. If proven beyond reasonable doubt, Augustine Gbao should not be found criminally responsible for any other crimes alleged under these counts in the Indictment. We submit that there is no other evidence of his personal involvement in any matter; in addition, it has not been

1288 CDF Trial Judgement, para. 283.

1289 TF1-108, Transcript 8 March 2006, p.29.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29807

established that physical perpetrators of alleged crimes were subordinates of Augustine Gbao, nor is there is any evidence that he exercised effective control over them. In the absence of such evidence, Gbao cannot be held responsible under article 6(3). Further reasons supporting this position can be found above.

xx. Likewise, the Third Accused submits that he did not participate . However, if the Court finds that the , the nexus between

I. Introduction

972. There was a paucity of evidence adduced in the trial that alleging Gbao committed any crimes of sexual violence. The Prosecution presented one allegation made by TF1-117 that Gbao raped a Lebanese woman in Makeni in 1998 around the time of the alleged Operation Pay Yourself. This witness has been thoroughly discredited above for reasons that need not be repeated here.¹²⁹⁰

973. In its Rule 98 decision, the Trial Chamber ruled, however, that the evidence of the alleged beating of TF1-113, even though not pled as such during the Prosecution's case,¹²⁹¹ could be considered under counts 6 to 9 of the Indictment.¹²⁹²

974. This section will discuss TF1-113's claim that she was beaten and whether it may raise criminal culpability in the Third Accused under Counts 6-9 of the Indictment. Regarding allegations of forced marriage under count 8 of the Indictment will be discussed separately in the following section.

II. Testimony Relating to Counts 6-9

975. TF1-113 testified around the time of the military coup in Freetown she was on her way to Bunumbu with her children¹²⁹³ in order to buy food.¹²⁹⁴ She testified that Augustine Gbao's bodyguards met them on the way¹²⁹⁵ and one allegedly named Morie told her that they were going on a mission at the border, and asked her child to go with them.¹²⁹⁶

976. TF1-113 refused and she and Morie allegedly quarrelled.¹²⁹⁷ Afterwards she was put into custody with the MPs in Kailahun Town for the night.¹²⁹⁸ The following morning TF1-113 was brought outside by some soldiers, where she claimed to see Gbao who asked his bodyguards what

¹²⁹⁰ *Supra*, paras 346-399.

¹²⁹¹ During the Rule 98 proceedings, the Prosecution stated that "there was also evidence given by TF1-113 of Gbao's role in ordering the beating of a woman in Kailahun. Not, that's not a count which was pled, with respect, to Kailahun District, but that is information before the Court". Transcript 16 October 2004, p.100.

¹²⁹² Transcript of 25 October 2006, p.25. It held "TF1-113 testified about being arrested, being stripped naked in front of other people and beaten upon the order of accused Gbao in Kailahun Town."

¹²⁹³ Note that during cross examination the witness explained that she was with three children, but that they were not her own. Transcript of 3 March 2006, TF1-113, p.31.

¹²⁹⁴ TF1-113, Transcript, 2 March 2006, p.66.

¹²⁹⁵ *Id.*

¹²⁹⁶ *Id.* at p.67.

¹²⁹⁷ *Id.* at p.67.

¹²⁹⁸ *Id.* at p.68.

happened. Gbao then told the bodyguards to beat her up. She claimed she was stripped naked - only her chemise was left - and beaten up.¹²⁹⁹ She was then brought to her cell, where she spent the day until the evening when her brothers came and assisted her release.¹³⁰⁰

977. TF1-113's evidence concerning this incident was mentioned during the cross-examination by the First Accused. Counsel for Sesay referred to proofing notes dated of November 2005.¹³⁰¹ There she stated "Gbao's bodyguard wanted my son Ben to join them. I refused to let Ben go and later I was told to report to Gbao."¹³⁰²

978. When asked as to whether she had a son called Ben, she said he was not her child, but that he had been going with her to Bunumbu. TF1-113 said, Ben was the child that Gbao's bodyguards had asked for.¹³⁰³

979. Under cross-examination by counsel for the Third Accused, the witness denied suggestion that Gbao never had a bodyguard called Morie.¹³⁰⁴ She stated that she did not know any of Gbao's bodyguards named Sheku or Gassimu.¹³⁰⁵

980. Defence counsel asked the witness about the time she spent in the MP Office in Kailahun.¹³⁰⁶ TF1-113's evidence was ambiguous at that point: she maintained that "[t]hey beat me. They beat me up and in the morning he brought me to their formation where the soldiers were and Morie explained completely".¹³⁰⁷ The witness added that she was beaten with sticks.¹³⁰⁸

981. TF1-113 explained that when she spent the night at the MPs' office she was locked up in a cell.¹³⁰⁹ When asked about the names of the MPs who were there, the witness stated that she did not know (a familiar refrain with TF1-113, even though her husband was an MP in Kailahun Town).¹³¹⁰

III. Credibility of Prosecution Testimony

¹²⁹⁹ *Id.*

¹³⁰⁰ *Id.*

¹³⁰¹ *Id.*, Transcript 3 March 2006, p.31.

¹³⁰² *Id.*

¹³⁰³ *Id.*

¹³⁰⁴ *Id.*, Transcript 7 March 2006, p.33.

¹³⁰⁵ *Id.* at p.33.

¹³⁰⁶ *Id.* at p.34.

¹³⁰⁷ *Id.* at p.34.

¹³⁰⁸ *Id.* at p.36.

¹³⁰⁹ *Id.* at p.35.

¹³¹⁰ *Id.* at p.35.

982. TF1-113 testified in relation to several counts in the Indictment against Augustine Gbao (as well as other Accused). During cross-examination, as stated above, she admitted she had lied under oath to the Court. She must have lied regarding the killing of the Kamajors in either the AFRC or RUF trial (or both), was evasive in answering questions that did not directly relate to the three Accused (particularly Gbao and Sesay), and may have testified with an ulterior motive [REDACTED]. These reasons are detailed in paragraphs listed above and should qualify, we submit, to dismissal of her evidence in its entirety.¹³¹¹

983. If her testimony is accepted by the Court, we submit that it must be corroborated by other witnesses, pursuant to the holding in the CDF case where it was stated that “[c]orroboration, although not required in law, was deemed necessary where the Chamber found that internal inconsistencies and contradictions with other evidence demonstrated a poor, selective, or tainted recollection of events”.¹³¹²

984. Should the Court require corroboration, TF1-113 is the only witness who testified to Augustine Gbao giving the order to beat her, and thus her allegation should not be considered. If the Court finds that the testimony of a single witness on a material fact does not require corroboration,¹³¹³ we submit that such evidence must be examined with particular care before attaching any weight to it.¹³¹⁴ the evidence has to be viewed with caution.¹³¹⁵

IV. Legal Submissions on Counts 6-9 on Behalf of the Third Accused

A. Preliminary Matters

985. The Prosecution never argued that this claim constituted sexual violence. In its rule 98 Decision, the Trial Chamber included the evidence of TF1-113's beating under Counts 6 to 9 "Sexual Violence".¹³¹⁶

¹³¹¹ *Supra* paras. 462 *et seq.*

¹³¹² CDF Trial Judgement, para. 283.

¹³¹³ CDF Trial Judgement, Para.265. AFRC Trial Judgement, para. 109. *See also Prosecutor v. Aleksovski*, Case No. IT-95-14/1-A, Judgement, Appeals Chamber, 24 March 2000, para.62 ('Aleksovski Appeals Judgement'); Celibici Trial Judgement, para. 594; Kupreskic Appeals Judgement, para.33; Kajelijeli Trial Judgement, para.42.

¹³¹⁴ CDF Trial Judgement Para. 265; AFRC Trial Judgement para. 109.

¹³¹⁵ *Prosecutor v. Kamara, Brima and Kanu*, Case No. SCSL-04-16-A, Judgement, Appeals Chamber, 22 February 2008, para. 129 ('AFRC Appeals Judgement'). *See also Akayesu Trial Judgement*, para. 135; Kajelijeli Trial Judgement, para. 43.

¹³¹⁶ Transcript of 25 October 2006, p.25. It held "TF1-113 testified about being arrested, being stripped naked in front of other people and beaten upon the order of accused Gbao in Kailahun Town.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

986. In the RUF Indictment, counts 6 to 9 are charged under the heading "Sexual Violence".¹³¹⁷ Count 6 charges the RUF Accused with "Rape as a Crime Against Humanity". Count 7 charges them with "Sexual Slavery and Any Other Form of Sexual Violence", while Count 8 contains the crime of "Other Inhumane Act, a Crime Against Humanity". In addition or in the alternative the Prosecution charges the Accused with "Outrages Upon Personal Dignity, a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II" under count 9.

987. TF1-113 did not provide any evidence that meets the legal requirements of the crime of rape, as charged in count 6 of the RUF Indictment.¹³¹⁸

988. With regards to count 7, the Appeals Chamber found that, in the AFRC Case - where the counts were formulated identically to the RUF Indictment (Count 7) - pleading sexual slavery and sexual violence together, violated the rule against duplicity.¹³¹⁹ On 29 April 2008 the Prosecution filed a notice¹³²⁰ that count 7 should be read to allege the crime of sexual slavery. It added that the charge of "other forms of sexual violence" in count 7 should not be considered.¹³²¹

989. None of the evidence of TF1-113 is even remotely related to the constitutive elements of the crime of sexual slavery, which include the exercise of the right of ownership over the person as well as causing the person to engage in one or more acts of a sexual nature.

990. After a first preliminary assessment, only counts 8 and 9 are left for the Trial Chamber to assess the evidence of TF1-113. It is submitted that the evidence of TF1-113 does not allow for a finding of guilt under any of them, as will be explained below.

B. Submissions Under Count 8: Other Inhumane Acts as a Crime against Humanity¹³²²

991. The elements of the crime include:¹³²³

1. Any act or omission which inflicts great suffering, or serious injury to body or to mental or physical health;

¹³¹⁷ RUF Indictment, paras. 54 to 60.

¹³¹⁸ Transcript of 25 October 2006, p.21-22.

¹³¹⁹ AFRC Appeals Judgement, para. 103.

¹³²⁰ *Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-1105, Notice Re Count 7 of the Indictment, 29 April 2008.

("Prosecution's Notice on Count 7")

¹³²¹ Prosecution's Notice on Count 7, para.7.

¹³²² Transcript of 25 October 2006, p.22-23.

¹³²³ AFRC Appeals Judgement, para.198.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

2. Any act or omission which is sufficiently similar in gravity to the acts referred to in Article 2.a to Article 2.h of the Statute; and
3. The perpetrator was aware of the factual circumstances that established the character of the gravity of the act.

992. The crime of Other Inhumane Acts is a residual category for serious acts which are not otherwise enumerated in Article 2 of the Statute, but which nevertheless require proof of the same general requirements.¹³²⁴ This means that the crime alleged under Inhumane Acts must involve conduct not otherwise subsumed by the other crimes mentioned in article 2 of the statute.¹³²⁵

1. Preliminary Remarks

993. Count 8 was not contained in the original RUF Indictment. On 9 February 2004, the Prosecution requested leave of the Trial Chamber to amend the indictment,¹³²⁶ requesting "the addition of a new charge of Crimes Against Humanity - Other Inhumane Act (Forced Marriage) as a new count in the Consolidated Indictment".¹³²⁷ In this filing, the arguments of the Prosecution concerning count 8 only discuss forced marriage.¹³²⁸ At paragraph 12 it even mentions "a new charge of forced marriage".¹³²⁹ Furthermore, the additions requested to be included in the indictment to reflect the new count only relate to forced marriage.¹³³⁰ During oral arguments on the matter both the Parties and the Judges referred to Count 8 as "a new charge of forced marriage".¹³³¹

994. The Trial Chamber granted leave to the Prosecution. The decision addressed the proposed additional count as being restricted to charges of forced marriages.¹³³² In other words, the Trial

¹³²⁴CDF Trial Judgement, para. 149. AFRC Trial Judgement, para.703. See also AFRC Appeals Judgement, paras. 183 and following. See also Kordic and Cerkez Appeals Judgement, para.117; Galic Trial Judgement, para.152.

¹³²⁵AFRC Trial Judgement, para.704. The AFRC Case the Trial Chamber found that, because the crime of forced marriage was not independent of the crime of sexual slavery.

¹³²⁶*Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-007, Request for Leave to Amend the Indictment, 9 February 2004.

¹³²⁷*Ibid.*, para. 4.

¹³²⁸*Ibid.*, paras. 10 and 11.

¹³²⁹*Ibid.*, para. 12.

¹³³⁰*Ibid.*, para.5.

¹³³¹Transcript of 3 March 2004, p.4.

¹³³²*Prosecutor v. Sesay et al.*, Doc. No. SCSL-04-15-T-108, Decision on Prosecution Request for Leave to Amend the Indictment, 6 May 2004, para.36 "36. The Prosecution in its submissions in this case explains that the purpose of this motion to amend the indictment is to enable it to add to it, "a new charge" of crimes against humanity - Other Inhumane Act (forced marriages), as a new count in the Consolidated Indictment.". See also para. 6 "in order to add one more and new count of forced marriage on the already consolidated indictment.", para. 49 "In the present motion, the Prosecution is seeking our leave to amend the already existing consolidated indictment on which the proceedings are now based, in order to add one count, and one count only, based on Forced Marriage" and para. 50 "Our immediate reflection on this issue that we have raised is that the count related to forced marriage which the prosecution is seeking our leave to add to the consolidated indictment [...]".

Chamber addressed the proposed additional count as charging forced marriage, and focused its legal reasoning on this crime. The possibility of other crimes being charged within count 8 was not addressed.

995. We submit the Prosecution should be precluded from arguing that claims unrelated to forced marriages can now be considered under this count. In the event it does so, it is submitted that the Trial Chamber disregard the submission. However in the event that the Trial Chamber does not agree with the above submissions, the Third Accused will consider the allegations of TF1-113 first under count 8.

996. In order to qualify as an inhumane act, the first element requires that act inflict great suffering, or serious injury to body or to mental or physical health. The Third Accused cannot deny that the evidence of TF1-113, if found to be credible and reliable (we strongly suggest the contrary), suggests she may have been caused serious physical and mental suffering. However the Third Accused submits that the act alleged is not similar in gravity to the other acts charged as crimes against humanity.

1. The Act or Omission is Sufficiently Similar in Gravity to the Acts referred to in Article 2 the Statute

997. Article 2 of the Statute of the Special Court for Sierra Leone lists the following - in addition to inhumane acts - as crimes against humanity: murder; extermination; enslavement; deportation; imprisonment; torture; rape, sexual slavery, enforced prostitution, forced pregnancy and any other form of sexual violence; persecution on political, racial, ethnic or religious grounds.

998. Whether an act qualifies as inhumane needs to be assessed on a case by case basis. In order to assess the seriousness of an act or omission, consideration must be given to all the factual circumstances of the case which may include the nature of the act or omission, the context in which it occurred, the personal circumstances including the age, gender and health of the victim, and the physical, mental and moral effects of the act or omission on the victim.¹³³³ While there is no requirement that the suffering imposed by the act have long term effects on the victim, the fact that an act has had long term effects may be relevant to the determination of the seriousness of the act.¹³³⁴

¹³³³ CDF Trial Judgement, para. 151. Reference to *Galic* Trial Judgement, para. 153; *Vasiljevic* Trial Judgement, para. 234. See also AFRC Trial Judgement, para.726 (Physical Violence).

¹³³⁴ *Vasiljevic* Trial Judgement, para.235. See also *Kunarac* Trial Judgment, par 501; *Krnjelac* Trial Judgment, par *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T

999. The act or omission must have a direct and seriously damaging, though not necessarily long-term, effect on the victim.¹³³⁵ Once again, without diminishing the acts that TF1-113 complained of, it is submitted that they do not meet the legal threshold of gravity that is the characteristic of Inhumane Acts.

1000. The AFRC case was the only case before the Special Court – besides the RUF Case - where Inhumane Acts were charged under the heading of sexual violence. In order to find that the crime of forced marriage met the requirements of Other Inhumane Acts, the Trial Chamber found that "victims of forced marriage endured physical injury by being subjected to **repeated acts of rape and sexual violence, forced labour, corporal punishment, and deprivation of liberty.** Many were **psychologically traumatised** by being forced to watch the killing or mutilation of close family members, before becoming "wives" to those who committed these atrocities and from being labelled rebel "wives" which resulted in them being ostracised from their communities. In cases where they became pregnant from the forced marriage, both they and their children suffered **long-term social stigmatisation.**"¹³³⁶ The cumulative effect of the findings of the Trial Chamber relating to forced marriage - rape and sexual violence, while in the same time suffering corporal punishment and psychological trauma - are not of comparison with the nature of TF1-113's allegations.

1001. In the case law of the other criminal tribunals, examples of Inhumane Acts are of a wide-ranging criminal acts. They include forcible transfer,¹³³⁷ sexual and physical violence perpetrated upon dead human bodies,¹³³⁸ forced undressing of women and marching them in public,¹³³⁹ forcing women to perform exercises naked,¹³⁴⁰ and forced disappearance, beatings, torture, sexual violence, humiliation, harassment, psychological abuse, and confinement in inhumane conditions.¹³⁴¹ Serious physical injury has also be found to be a inhumane act.¹³⁴²

144.

1335AFRC Trial Judgement, para.699. Quoting *Kunarac* Trial Judgement, para. 501; *Krnojelac* Trial Judgement, para. 144.

1336AFRC Appeals Judgement, para.199.

1337 AFRC Appeals Judgement, para. 184, listing *Stakić* Appeal Judgment, para. 317; *Blagojević* Trial Judgment, para. 629; *Krstić* Trial Judgment, para. 523. See also *Blagojevic* Trial Judgement, paras. 629-630; *Brdjanin* Trial Judgement, para.544;

1338AFRC Appeals Judgement, para. 184, listing *Kajelijeli* Trial Judgment, para. 936; *Niyitegeka* Trial Judgment, para. 465.

1339 AFRC Appeals Judgement, para. 184, listing *Akayesu* Trial Judgment, para. 697.

1340 AFRC Appeals Judgement, para. 184, listing *Ibid* at para. 697.

1341 AFRC Appeals Judgement, para. 184, listing *Kvočka* Trial Judgment, paras 206-209.

1342AFRC Appeals Judgement, para. 184, listing *Naletilić* Trial Judgment, para. 271; *Vasiljević* Trial Judgment, para. 239; *Blaškić* Trial Judgment, para. 239; *Tadić* Trial Judgment, paras 730, 737, 744.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1002. Examples of inhumane acts of a sexual nature include: the forced undressing of woman in public after making her sit in the mud;¹³⁴³ the forced undressing and public marching of a woman naked;¹³⁴⁴ the forced undressing of a woman and her two nieces, and the forcing of the women to perform exercises naked in public.¹³⁴⁵ Again, the Third Accused submits that the mere fact that TF1-113 was undressed and left with her "chemise" only does not qualify as being of a sexual nature.

1003. In the *Tadic* case, beating was part of the elements found to be an inhumane act.¹³⁴⁶ However the evidence was radically different and consequently more substantial than TF1-113's allegation. In that case, the evidence was that two of the six victims of beating died as a result. By comparison, the beating did not concern one person but six.¹³⁴⁷ The beating was taking place routinely (the victims were prisoners).¹³⁴⁸ The level of gravity was illustrated by the fact that two of the victims died following the beating,¹³⁴⁹ some fainted¹³⁵⁰ and others suffered from several serious physical injuries such as head fracture or a broken jaw.¹³⁵¹ Sexual violence and sexual mutilation also took place.¹³⁵²

1004. Similarly in the *Kvočka* case, the Trial Chamber found that inhumane acts took place in view of the evidence of serious bodily harm through beatings, torture, sexual violence, humiliation, harassment, psychological abuses, and confinement in inhumane conditions.¹³⁵³

1005. The Gbao defence has been unable to find any case where a single and isolated incident of beating - even in the circumstances under which TF1-113 alleges she was beaten - has been found to qualify as an inhumane act. It is submitted that this provides strong support for our submission that the present evidence does not meet the threshold for an Inhumane Act.

1006. In view of the case law, we submit the evidence of TF1-113 cannot be said to be equal to the gravity of rape, sexual slavery, forced pregnancy, or beating to death.

¹³⁴³Akayesu Trial Judgement, para.697.

¹³⁴⁴Akayesu Trial Judgement, para.697.

¹³⁴⁵Akayesu Trial Judgement, para.697.

¹³⁴⁶Tadic Trial Judgement, para. 730.

¹³⁴⁷Tadic Trial Judgement, para. 198.

¹³⁴⁸Tadic Trial Judgement, para. 202.

¹³⁴⁹Tadic Trial Judgement, para. 205.

¹³⁵⁰Tadic Trial Judgement, paras. 200 and 201.

¹³⁵¹Tadic Trial Judgement, paras. 200 and 201.

¹³⁵²Tadic Trial Judgement, para. 206.

¹³⁵³Kvočka Trial Judgement, para.209.

3. *Perpetrator was Aware of the Factual Circumstances that Established the Character of the Gravity of the Act*

1007. In order to demonstrate that an Accused had the requisite *Mens Rea* to be found guilty of the crime of Inhumane Act, it must be established that the perpetrator had the intent to inflict serious physical suffering, or serious injury to body or to mental or physical health, or to conduct a serious attack on human dignity.¹³⁵⁴ This includes situations where the perpetrator knew that his acts or omissions would more likely than not cause serious physical suffering, or serious injury to body or to mental or physical health, or constituted a serious attack on human dignity and nevertheless accepted that risk.¹³⁵⁵

1008. There is nothing in the evidence of TF1-113 to show that, even if Augustine Gbao ordered her to be arrested and beaten, he had any intent or knowledge that she would be undressed and beaten in public. In the absence of evidence that Augustine Gbao specifically ordered her to be undressed and beaten in public, together with the fact that the witness did not testify that he was present when the beating took place, we submit there is no evidence that Gbao intended to cause serious physical suffering, serious injury to body or to mental or physical health, or to cause a serious attack on TF1-113's dignity. Similarly, there is nothing in the evidence that shows that Augustine Gbao knew that his act or omissions would cause such suffering and yet nevertheless took that risk.

1009. TF1-113 did not testify that it was Augustine Gbao who gave the order for her to be stripped naked. Similarly, she did not mention whether or not Augustine Gbao was present when she was beaten. No inference can be drawn from the state of her evidence to the contrary. The evidence of TF1-113 is therefore limited to Augustine Gbao giving the order to his bodyguards for her to be arrested and beaten.

1010. We do not deny that the witness may have suffered in the war. However, we submit that Gbao never ordered his bodyguards - who in any case were not children - to beat her.

1011. The Third Accused denies that such event happened. Several elements of TF1-113's

¹³⁵⁴AFRC Trial Judgement, para.700. Quoting *Vasiljević* Trial Judgement, para. 236; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 56; *Kayishema* Trial Judgement, para. 153.

¹³⁵⁵AFRC Trial Judgement, para.700. Quoting *Vasiljević* Trial Judgement, para. 236; *Prosecutor v. Zlatko Aleksovski*, Case No. IT-95-14/1-T, Judgement, 25 June 1999 ("*Aleksovski* Trial Judgement"), para. 56; *Kayishema* Trial Judgement, para. 153.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

evidence simply do not fit with his personality: First, he did not use SBUs as bodyguards. Second, he was not involved with the G5 and not involved in food finding missions. Third, there is no evidence of Augustine Gbao exercising or ordering violence to be done to anyone. Several witnesses from Kailahun testified on this.

II. Modes of Responsibility

1012. According to TF1-113, Augustine Gbao ordered her arrest and beating. We re-emphasise that TF1-113 did not provide any evidence that he ordered her to be undressed or to be beaten in public.

1013. Should the Trial Chamber find that the evidence of TF1-113 meets the legal requirements to be considered an inhumane act, it is submitted that Augustine Gbao should not be held responsible for it individually under article 6(1) or as a superior under article 6(3).

1014. While he does not necessarily deny that TF1-113 was beaten, the Third Accused categorically denies having any involvement in it.

Planning

1015. There is no evidence of the existence of a plan of Augustine Gbao to arrest, undress and beat TF1-113.

Instigating

1016. There is no evidence to suggest Augustine Gbao be found guilty of urging, encouraging or prompting another to commit the offence of inhumane act. Once again, while there is evidence of his ordering TF1-113 to be arrested and beaten, there is none that he played any part in her undressing and beating in public, nor can it be deduced from the circumstances.

1017. In the absence of direct or indirect evidence that Augustine Gbao in any way urged, encouraged or prompted his bodyguards to undress and beat TF1-113 in public, the causal relationship between the instigation and the perpetration of the crime has not been demonstrated. As a result Augustine Gbao cannot be found to have instigated the crime of inhumane act.

Ordering

1018. In the absence of evidence that Augustine Gbao ordered TF1-113 to be undressed or to be

beaten in public - two of the constitutive elements of the crime of inhumane act, Augustine Gbao cannot be held responsible for ordering the same.

Committing

1019. There is no evidence that Augustine Gbao personally committed the alleged crime.

Aiding and Abetting

1020. In order to be found guilty of aiding and abetting a crime it must be shown that the Accused's act or omission had the effect of rendering practical assistance, encouragement or moral support, which had a substantial effect of the perpetration of a certain crime.¹³⁵⁶

1021. The evidence does not suggest that Gbao's acts had such effect; even if he had given the order for her to be arrested and beaten - which the Third Accused denies - this only cannot be sufficient to constitute aiding and abetting the act of undressing TF1-113 and of beating her in public.

1022. In any event, there is no evidence nor can it be deduced that Augustine Gbao knew that his act would lead to the undressing of TF1-113 and beating her in public, nor can it be found that he was aware of the substantial likelihood that his acts would assist the commission of a crime.

Joint Criminal Enterprise

1023. There is no evidence of the existence of a plan, design or purpose between Gbao and the other alleged participants in the Joint Criminal Enterprise. To the contrary, the evidence points to Gbao being an "outsider" within the RUF, not taking part in any crime and to him being harassed and beaten by the high command of the RUF.¹³⁵⁷

Superior Responsibility

1024. It is submitted that the mere fact of mentioning that Gbao's bodyguards were the perpetrators, and that he ordered them, is not in itself sufficient to establish that Augustine Gbao had effective control over them.

1025. In any event, TF1-113 failed to explain how she knew that that the perpetrators of the

¹³⁵⁶ CDF Trial Chamber Judgment Para. 228.

¹³⁵⁷ For more details see paragraphs 596-658 above (Joint Criminal Enterprise).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

crimes were Gbao's subordinates. She did not provide any evidence on their relationship other than stating that she saw them together; nor did she provide evidence that could be used by the Trial Chamber to determine that Augustine Gbao had effective control over the boys who beat her.

C. Count 9: Outrages Upon Personal Dignity, as a Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II¹³⁵⁸

1026. In addition or in the alternative, the Prosecution also alleged that Augustine Gbao was guilty of outrage upon personal dignity.

1027. The elements of the crime of Outrages Upon Personal Dignity are as follow:¹³⁵⁹

1. The Accused humiliated, degraded or otherwise violated the dignity of one or more persons;
2. The severity of the humiliation, degradation or other violation was of such a degree as to be generally recognised as an outrage upon personal dignity;
3. The Accused intended to humiliate, degrade or otherwise violate the dignity of the person or acted in the reasonable knowledge that this was likely to occur;
4. The Accused knew, or had reason to know, that the person was not taking a direct part in the hostilities.

A. The Accused Humiliated, Degraded or Otherwise Violated the Dignity of One or More Persons

1028. While the act that TF1-113 suffered from surely caused her suffering, discomfort and humiliation¹³⁶⁰ it is our submission that the seriousness of her particular humiliation does not qualify to be considered as an international crime of outrage upon personal dignity. International Tribunals are created to try a specific type of crimes, of a certain level of seriousness.

B. The Severity of the Humiliation, Degradation or Other Violation was of Such a Degree as to be Generally Recognised as an Outrage upon Personal Dignity

1029. The second element of the crime implies that, in order to qualify as an outrage upon personal dignity a humiliation, degradation or violation has to be of a similar degree of severity as the other acts constituting outrage upon personal dignity.

¹³⁵⁸Not alleged in the CDF Indictment.

¹³⁵⁹Transcript of 25 October 2006, p.23. *See also* AFRC Trial Judgement, para.716.

¹³⁶⁰For the level of humiliation *See Prosecutor v. Aleksovski*, Case No. IT-95-14/1 (Trial Chamber), June 25, 1999, para. 56-57; *Kunarac, Kovac and Vukovic*, (Appeals Chamber), June 12, 2002, para. 162; *Kunarac, Kovac and Vukovic*, (Trial Chamber), February 22, 2001, para. 501;

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1030. The Statute of the Court¹³⁶¹ includes humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault as outrage upon personal dignity. Other examples sexual acts meeting the severity requirement include rape,¹³⁶² sexual slavery, (which may encompass rape and enslavement), and forced public nudity.¹³⁶³ Examples of non sexual acts found to be outrage upon personal dignity include: using detainees as human shields or trench-diggers,¹³⁶⁴ [I]nappropriate conditions of confinement,” “perform[ing] subservient acts,” being “forced to relieve bodily functions in their clothing,” and “endur[ing] the constant fear of being subjected to physical, mental, or sexual violence”.¹³⁶⁵

1031. The acts that TF1-113 suffered do not come close to the level of humiliation suffered by a victim of rape, or of a woman taken as a sex slave. Once again, the Third Accused understands that the category of outrage upon personal dignity should not be too restricted, in view of its residual effect and the non exhaustive character of the acts listed as such. However, the fact that a certain level of gravity needs to be present is part of the constitutive elements of the crime, in the Third Accused's submissions, in order to still restrict it to certain act of a certain nature, which constitute a violation of the fundamental rights of a human being. The present case - while being serious - does not meet this requirement.

C. The Accused Intended to Humiliate, Degrade or Otherwise Violate the Dignity of the Person or Acted in the Reasonable Knowledge that This was Likely to Occur

1032. The perpetrator must have acted **deliberately** or deliberately omitted to act but deliberation alone is insufficient. While the perpetrator need not have had the specific intent to humiliate or degrade the victim, **he must have been able to perceive this to be the foreseeable and reasonable consequence of his actions.**¹³⁶⁶

1033. In view of the submission that the allegations of TF1-113 do not meet the level of seriousness required to be considered an outrage upon personal dignity, it cannot be suggested that the Accused had such an intent nor is it established that he has been able to perceive the outcome of

¹³⁶¹Statute of the Special Court for Sierra Leone, article 3(e).

¹³⁶²AFRC Trial Judgement, para. 718. See also *Akayesu* Trial Judgement, para. 597.

¹³⁶³AFRC Trial Judgement, para. 719. See also *Furund'ija* Trial Chamber Judgement, para. 272; *Kunarac* Trial Chamber Judgement, paras 766-774.

¹³⁶⁴*Aleksovski*, (Trial Chamber), June 25, 1999, para. 229.

¹³⁶⁵*Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 173.

¹³⁶⁶*Aleksovski*, (Trial Chamber), June 25, 1999, para. 56.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

his action as outraging personal dignity.

1034. In addition, there is nothing in TF1-113's evidence to suggest that, even if Augustine Gbao ordered her to be arrested and beaten, he had any intent or knowledge that she would be undressed and beaten in public. In the absence of evidence that he specifically ordered her to be undressed or that Gbao was ever present when the beating took place, or that he intended to cause humiliation, degradation or violation of TF1-113's dignity, we submit that there is no evidence that Gbao knew that his act or omissions would lead to such an event whilst nevertheless accepting the risk.

D. The Accused Knew, or Had Reason to Know, that the Person was Not Taking a Direct Part in the Hostilities

1035. Once again, there is no evidence on this matter nor can it be deduced from the circumstances.

II. Article 6(1) Liability

1036. According to TF1-113's evidence, Gbao ordered her arrest and beating. The Third Accused re-emphasises that TF1-113 did not provide any evidence that he ordered her to be undressed or to be beaten in public.

1037. Should the Trial Chamber find that the evidence of TF1-113 meets the legal requirements to be considered an outrage upon personal dignity, it is submitted that Augustine Gbao cannot be held responsible for it individually under article 6(1) or as a superior under article 6(3).

1038. While he does not deny that TF1-113 was beaten, the Third Accused categorically denies having any involvement with her beating. It should be noted that TF1-113's evidence is based upon her erroneous allegation that Gbao was the G5 commander in Kailahun. In addition, Augustine Gbao did not have the power to order anyone.

1. Planning

1039. There is no evidence of the existence of a plan of Augustine Gbao to arrest, undress and beat TF1-113.

2. Instigating

1040. There is no evidence to suggest that Gbao urged, encouraged or prompted another to commit the offence of outrage upon personal dignity. Once again, while there is evidence of Augustine Gbao ordering TF1-113 to be arrested and beaten, there is no evidence that he played any part in her undressing and beating in public, nor can it be deduced from the circumstances.

1041. In the absence of direct or indirect evidence that Augustine Gbao in any way urged, encouraged or prompted his bodyguards to undress and beat TF1-113 in public, the causal relationship between the instigation and the perpetration of the crime has not been demonstrated. As a result Augustine Gbao cannot be found to have instigated the crime of inhumane act.

3. *Ordering*

1042. In the absence of evidence that Augustine Gbao ordered TF1-113 to be undressed or to be beaten in public - two of the constitutive elements of the outrage upon personal dignity - it cannot be said that Augustine Gbao ordered the crime of inhumane act.

4. *Committing*

1043. There is no evidence that Augustine Gbao personally committed outrage upon personal dignity.

5. *Aiding and Abetting*

1044. In order to be found guilty of aiding and abetting a crime it must be shown that the Accused's act or omission had the effect of rendering practical assistance, encouragement or moral support, which has a substantial effect of the perpetration of a certain crime.¹³⁶⁷

1045. The state of the evidence does not show that Augustine Gbao's acts had such effect; Even admitting that he gave the order for her to be arrested and beaten - which the Third Accused denies - this only cannot be sufficient to constitute aiding and abetting the act of undressing TF1-113 and of beating her in public.

1046. In any event, there is no evidence nor can it be deduced that Augustine Gbao knew that his acts would assist in the commission of the crime of undressing TF1-113 and beating her in public, nor can it be found that he was aware of the substantial likelihood that his acts would assist the commission of a crime.

¹³⁶⁷ CDF Trial Chamber Judgment Para. 228.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

6. *Joint Criminal Enterprise*

1047. There is no evidence of the existence of a plan, design or purpose between Augustine Gbao and the other alleged participants in the Joint Criminal Enterprise. To the contrary the evidence points to Augustine Gbao being an "outsider" within the RUF, not taking part in any crime and to Augustine Gbao being harassed and beaten by the high command of the RUF.¹³⁶⁸

III. Article 6(3) Liability

1048. It is submitted that the mere fact of mentioning that the perpetrators were Augustine Gbao's bodyguards, and that he ordered them, is not in itself sufficient to establish that Augustine Gbao had effective control over them.

1049. TF1-113 failed to explain how she knew that that the perpetrators of the crimes were subordinates of Augustine Gbao. She did not provide any evidence on their relationship excepting stating that she saw them together nor did she provide evidence that could be used by the Trial Chamber to determine that Augustine Gbao had effective control over the boys who beat her.

¹³⁶⁸For more details see paragraphs 596-658 above (Joint Criminal Enterprise).
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

I. Introduction

1050. Augustine Gbao has been charged with four counts relating to sexual violence. In the Indictment, the prosecution alleged “widespread sexual violence committed against civilian women and girls, including brutal rapes and forced marriage”.

1051. The Appeals Decision in the AFRC case considered forced marriage under ‘other inhumane acts’ and not sexual slavery, contrary to what the AFRC Trial Chamber had held.¹³⁶⁹ Consequently, allegations made against Gbao will be considered under Count 8.

II. Defence Evidence

A. Gbao Defence Witnesses

1052. DAG-080 did not testify at length about whether Gbao forced women to marry him. But he did say that Gbao:

“was not somebody who was too -- he was not too mannish. He was only having one wife, that's Hawa, and he was always with his family. So when I heard that he was indicted, it was a surprise to me, that he was not the right somebody to have indicted, because all those charges against him he did not commit. He did not commit. So was not the type of somebody, actually.

1053. Later during cross-examination the witness testified that “I know of Mr Augustine Gbao having only one wife, by the name of Hawa”.¹³⁷⁰

B. Sesay Defence Witnesses

1054. DIS-069 also knew that Gbao was married to one woman named Hawa.¹³⁷¹ The witness agreed that they were married in 1997. He never heard that Gbao was forcing women to marry.¹³⁷²

1055. According to DIS-214, the G5 and local military commanders were responsible for approving a consensual marriage request made by an RUF combatant.¹³⁷³ This position was supported by DIS-164.¹³⁷⁴

¹³⁶⁹ AFRC Appeals Chamber Judgment, para.202.

¹³⁷⁰ DAG-080, 9 June 2008, p.55.

¹³⁷¹ DIS-069, 23 October 2007, p.57.

¹³⁷² *Id.* at p.58

¹³⁷³ DIS-214, Transcript 17 January 2008, pp.15-16.

¹³⁷⁴ DIS-164, Transcript, 29 January 2008, p.66-67, 95.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1056. Throughout Kailahun District, there were rules on taking a woman as your wife. For example, DIS-214 testified that certain conditions needed to be met before one could marry a woman. He stated that “[i]f you wanted a woman's hand in marriage, you will go to the parents; you discuss with them and propose that you want their daughter's hand in marriage.¹³⁷⁵ If they accept, they would be married.”¹³⁷⁶ These conventions were underpinned by a strict prohibition against rape, which was regularly enforced.¹³⁷⁷

1057. Witness DIS-174 said much the same. He stated that when a soldier wants a woman “you can go to the G5. You arrange. If the woman accept[s] your love then...you will be taking care of that woman. It was not even married”.¹³⁷⁸

1058. DIS-191 confirmed that rules against forcefully taking a woman as your wife were enforced efficiently. [REDACTED]. In her position, she often received complaints from women about certain wrongdoings committed in their households,¹³⁷⁹ but she claimed that the rules generally worked successfully.

1059. DIS-164 also addressed the issue of forced marriage and wholly agreed that women were able to choose who they wanted to marry. He stated that “if a woman loves a man, be it a civilian, you, the man and the woman, will come out and meet the zoo bush commander. The zoo bush commander will take you to the town commander, and the town commander will in turn forward you to the G5. Then you will have to sign a paper that the woman is in love with you and the woman will accept that she is in love with you. So that no other person will disturb you.”¹³⁸⁰

II. Credibility of Prosecution Witnesses

A. TF1-371

1060. The witness testified that Gbao had a wife named Hawa. Gbao introduced her to him as his wife.¹³⁸¹ He was asked in great detail about the alleged practices of abducting women from the frontlines, and indeed implicated others in taking wives. He failed to mention Gbao in this regard.

¹³⁷⁵DIS-214, Transcript 18 January 2008, p.39.

¹³⁷⁶DIS-214, Transcript 18 January 2008, p.39.

¹³⁷⁷DIS-214, Transcript, 18 January 2008, p.40.

¹³⁷⁸DIS-174, Transcript, 21 January 2008, p.106.

¹³⁷⁹DIS-191, Transcript 18 January 2008, pp.88-89; *see also* Transcript 21 January 2008, p.23.

¹³⁸⁰DIS-164, Transcript 29 January 2008, p.62.

¹³⁸¹TF1-371, Transcript 1 August 2006, p.157.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

B. TF1-366

1061. TF1-366 provided a hearsay account of Gbao allegedly forcing women to marry him. Similar to other areas in his testimony, TF1-366 repeatedly misled the court, exaggerated and lied in his evidence. Leaving aside the fact that his allegations do not satisfy the requisite elements to prove a forced marriage, we submit his entire testimony is without credibility and should be disregarded.

1. Witness Provided Time Periods Where Gbao Forced Women to Marry him Outside the Indictment Period

1062. During his evidence in chief, TF1-366 stated that Gbao had wives at the following times:

“Q. When did you see Augustine Gbao with a wife or wives?

A. I saw him in 2000, 2001, 2002. We came to Kailahun in '92. I saw him in Kailahun in '92, up to '96”.¹³⁸²

1063. Not only was this a characteristically confusing chronological presentation by TFI-366, some of these dates are outside the indictment period and thus cannot be considered. It is unclear whether the alleged wives that Gbao took were taken in 1992 up to 1996, 2000, 2001, or 2002. The Prosecution should have clarified this testimony for it to become worthy of consideration by the Chamber. The Prosecution’s failure to do so raises the issue of whether the Court would even have jurisdiction to consider the allegations made.

2. Witness Repeatedly Impeaches his Own Testimony

1064. The witness amply testified that he saw Gbao with wives in Magburaka, Makali, Masingbi, Mendebuema, Makeni, and Kailahun.¹³⁸³ He stated that Gbao had many wives: “[h]e had one in the house. The peripheral ones were many...[they were the] concubines whom he fell in love with in the area”.¹³⁸⁴

1065. During cross-examination, when challenged to provide the name of the woman that Gbao forced to be with him in Magburaka, he stated:

“Q. Mr Witness, you told us that Augustine Gbao had a wife in Magburaka....I just want to hear the name of the wife that you say he had in Magburaka.

A. **I never saw [him] with a wife in Magburaka.** I used to see him coming with a wife from Makeni to Magburaka”.¹³⁸⁵

¹³⁸² TF1-366, Transcript 8 November 2005, p.75.

¹³⁸³ TF1-366, Transcript 8 November 2005, p.75

¹³⁸⁴ *Id.*

¹³⁸⁵ TF1-366, Transcript 17 November 2005, p.103.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29827

1066. Regarding the alleged forced wife in Makali, the witness was asked:

“What was the name of the wife that you say Augustine Gbao had in Makali?”

A. I do not know the name of his wife in Makali. I never mentioned a wife's name in Makali.

Q. You did tell us last week - well, on 8th November, to be precise - you did tell us, Mr Witness, that Mr Gbao had a wife in Makali; but that's not right, is that what you are saying?

A. I didn't say that. In fact, Augustine Gbao had not much contact in those areas.¹³⁸⁶

1067. Regarding Masingbi, the witness was asked:

“Q. Mr Witness, Masingbi, did Augustine Gbao have a wife in Masingbi?”

A. No, he was not having a wife in Masingbi”.¹³⁸⁷

1068. Regarding the wife in Mendebuema, Counsel for the Third Accused challenged the witness's knowledge, as had not yet by that time become a member of the RUF and would have had no knowledge of whether the wife was forced to be with Gbao or not. Instead, he just *assumed* she was captured:

“Q. Well, you can't possibly say whether or not she was a captive, can you, before your time?”

A. They were all captured. Those guys didn't bring women in this country. She was captured”.

1069. Finally, the witness was unable to name the real wife of Augustine Gbao in Kailahun Town, Hawa.¹³⁸⁸ He insisted that there was just one person who had a wife named Hawa but that was a man named Kangaroo.¹³⁸⁹ We would suggest TFI-366 as was so often the case was either obfuscating or didn't know the answer to the question.

1070. Counsel for Gbao ended the topic by asking the witness why, having listed six towns where Gbao had wives in evidence in chief, he then dramatically changed his account during cross-examination. His response was predictable: “[t]hat was not the way I said it. I never mentioned six towns”.¹³⁹⁰ The transcript suggests otherwise.

1071. The only evidence that the witness appeared to maintain in cross-examination (as he had

¹³⁸⁶ *Id.* at 17 November 2005, pp.103-04.

¹³⁸⁷ *Id.* at p.105.

¹³⁸⁸ *Id.* at p.102.

¹³⁸⁹ *Id.* at p.102.

¹³⁹⁰ *Id.* at p.105.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

abandoned or lied about the other locations where Gbao allegedly had forced wives) was that Gbao had a forced wife in Makeni named Kadi. However, he stated that Gbao captured her “[d]uring that time we captured Makeni”.¹³⁹¹ The reality is of course that Gbao was living in Kailahun Town at that time and was not part of any attack on the area.

1072. Finally, Counsel asked the witness “[o]n 8th November [the date TF1-366 testified in chief] you stated that you saw Gbao with a wife in Magburaka, Makeni, and Masingbi. Today you have told us you have no knowledge of wives of Gbao in these places”. The witness answered “[s]ometimes yes, sometimes no.’ Unsure of what this exactly means, we submit his evidence as a whole is hardly the type to prove beyond reasonable doubt that Gbao had forced wives and to take it or any part of it as supporting the Prosecution’s already vague case against Gbao on this issue would be an affront to justice.

1073. The significant contradictions- on almost every piece of evidence he gave regarding Gbao’s forced wives- show that the witness could not have been telling the truth. His testimony should be entirely disregarded.

C. TF1-108

1074. The testimony by this witness is discussed above. However, we submit that it should not be considered by the Court, as his repeated lies and inconsistencies prove him to lack credibility.

IV. Legal Submissions Regarding Count 8 on Behalf of the Third Accused

1075. The crime of forced marriage is unique to the Special Court for Sierra Leone. It was not argued in the CDF case, but was part of the AFRC case. The most similar jurisprudence relates to sexual slavery; however, the Appeals Chamber in the AFRC decision found that forced marriage was distinct from sexual slavery¹³⁹² and that forced marriage was not predominantly a sexual crime.¹³⁹³

1076. It described forced marriage as “a situation in which the perpetrator, through his words or conduct, or those of someone whose actions he is responsible, compels a person by force, threat of

¹³⁹¹ TF1-366, Transcript 8 November 2005, p.76.
¹³⁹² AFRC Appeals Chamber Judgment, para.195.
¹³⁹³ AFRC Appeals Chamber Judgment, para.190.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

force or coercion to serve as conjugal partner.¹³⁹⁴ It also held that forced marriage intends to impose a forced conjugal association upon the victims.¹³⁹⁵

A. Elements

1077. In order to find that forced marriage took place, it appears that the Appellate Chamber considered the following factors:

1. The perpetrator intended to force a conjugal relationship upon the victims; and
2. The perpetrator was aware that their conduct would cause serious suffering or physical, mental or psychological injury to the victim.¹³⁹⁶

1078. The Appeals Chamber also defined conjugal partner in a forced marriage as involving a relationship of exclusivity between the 'husband' and 'wife' which could lead to disciplinary consequences for breach of this exclusive arrangement.¹³⁹⁷

1079. Other factors to take into consideration include whether the woman was abducted,¹³⁹⁸ detained,¹³⁹⁹ used for sexual purposes¹⁴⁰⁰ or for housework. Also considered is the atmosphere of violence in which victims were abducted,¹⁴⁰¹ the vulnerability of the women/girls,¹⁴⁰² and the effect of the perpetrator's conduct on the physical, moral and psychological health of the victims.¹⁴⁰³

IV. Submissions on Count 8 on Behalf of Third Accused

A. Individual Responsibility under Article 6(1)

1080. There is no evidence that Augustine Gbao planned, instigated, ordered, committed or otherwise aided and abetted in forcing women to marry RUF fighters. Allegations, credible or not, related to the capture of women and subsequent forcing them to become wives of RUF soldiers were largely restricted to the frontline. Gbao was never on the frontlines.

¹³⁹⁴ AFRC Appeals Chamber Judgment, para. 196.

¹³⁹⁵ *Id.* at para.190.

¹³⁹⁶ *Id.* at para.201.

¹³⁹⁷ *Id.* at para.195.

¹³⁹⁸ *Id.* at para.194.

¹³⁹⁹ *Id.* at para.194.

¹⁴⁰⁰ *Id.* at para.194.

¹⁴⁰¹ *Id.* at para.200.

¹⁴⁰² *Id.*

¹⁴⁰³ *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1081. Gbao did not take any women against their will. Only two witnesses—TF1-108 and TF1-366—testified that Gbao had forced wives. Both wholly lack credibility in their testimony, as was detailed above. TF1-366 constantly shifted and adjusted his testimony, offered no dates as to when the crimes were committed, and continued to blame others for his inconsistencies. Conversely, DAG-080, a highly credible witness testifying on behalf of Augustine Gbao, unequivocally testified that Gbao had one wife-Hawa.

1082. In the alternative, if the Court considers TF1-366's testimony it would not suffice to prove the elements needed to demonstrate forced marriage. From the beginning there are problems, as the witness does not identify when these marriages took place. 1992? 1996? 2000? 2001? 2002?

1083. Further, TF1-366's evidence provides no indication that Gbao ordered a woman to stay with him against her will. According to the witness, his alleged wife in Makeni was “grumbling”. This does not satisfy the factors necessary to prove an unwilling relationship. Even the most contented wife will find something to grumble about, we suggest.

1084. The same pertains to TF1-108, as he could not give names of the alleged forced wives and adjusted his testimony in cross-examination.

B. Joint Criminal Enterprise

1085. Gbao's individual criminal responsibility under JCE is discussed in the paragraphs above.

1086. Forced marriages are not within the alleged common purpose of the JCE—taking control of Sierra Leone. Likewise, it is not a reasonable or foreseeable consequence of the alleged JCE.

1086. As stated above, there is no evidence of that Gbao acted in concert with other members of the Joint Criminal Enterprise nor is there evidence that any action undertaken by him with the aim to further a common purpose, plan or design to commit criminal acts. As there is no Joint Criminal Enterprise to which the Third Accused was a member, the Third Accused cannot be found criminally responsible for the crime under this mode of responsibility.

1087. Should the Trial Chamber find that there was a Joint Criminal Enterprise, the Third Accused submits that there is no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

1088. Given the absence of evidence that Augustine Gbao was involved in the crime, was involved in the crime—there is no basis upon which he may properly be convicted.

C. Superior Responsibility under Article 6(3)

1089. The allegations by TF1-366 and TF1-108 do not relate to Gbao's potential superior responsibility. However, we expect that the Prosecution will allege in their final brief that many women were taken as 'wives' against their will. Gbao was not mentioned at all in relation to these claims. In general, Gbao held no superior responsibility under Article 6(3) to any combatant. Arguments in support of this position are detailed in the submissions on article 6(3) above.

1090. Augustine Gbao cannot be found responsible as a superior under Article 6(3): there is no indicia of a superior-subordinate relationship between him and the perpetrators of the alleged crime. Nowhere can evidence be found that he had any authority over them or that he gave orders to them, nor is there evidence of him having the material ability to affect any of their actions.

1091. In the same way, evidence is lacking as to whether and how Augustine Gbao knew or had reasons to know that the crime alleged would be or was committed. In view of the fact that Gbao was at the rear, and that he did not usually receive reports, it has not been established that he had the necessary knowledge to be found responsible for the crimes of his alleged subordinates.

1092. The Prosecution failed to adduce evidence to establish beyond reasonable doubt that Augustine Gbao had the material ability to prevent or punish his alleged subordinates. In the absence of evidence that he had the power to issue orders or to take any disciplinary action, or that he had any other power of sanction, Gbao cannot be held responsible as a superior for failing to prevent or punish the commission of crimes by his subordinates.

I. Introduction

A. RUF Indictment

1093. Counts 10 and 11 allege widespread physical violence, including mutilations, were committed against civilians during the Indictment period. The allegations of physical violence included Kono District, Kenema District, Koinadugu District, Bombali District (between about 1 May 1998 and 30 November 1998), Freetown and the Western Area and Port Loko District. At the Rule 98 stage, several towns/villages were dismissed under this count because the Prosecution failed to adduce evidence for those locations.¹⁴⁰⁴

B. Submissions on Behalf of the Third Accused

1094. There was no evidence in the case adduced pertaining to Augustine Gbao relating to these counts in the Indictment. As is well-known, the Third Accused was located in Kailahun District throughout most of the war, which is not a locality pleaded in the Indictment.

1095. Therefore, there is no evidence to support a claim that Gbao should be individually criminally responsible for planning, instigating, ordering, committing or otherwise aiding and abetting in the commission of any crimes under these counts.

1086. As stated above, there is no evidence of that Gbao acted in concert with other members of the alleged Joint Criminal Enterprise nor is there evidence that any action undertaken by him with the aim to further a common purpose, plan or design to commit criminal acts. Gbao's individual criminal responsibility under JCE is discussed in paragraphs above. There is no Joint Criminal Enterprise to which the Third Accused was a member, and thus he cannot be found criminally responsible for the crime under this mode of responsibility.

1087. Should the Trial Chamber find that there was a Joint Criminal Enterprise, the Third Accused submits that there is no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

1404 Transcript, 25 October 2006, p.27.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1088. In the absence of evidence that Augustine Gbao was involved in the crime. In the absence that Gbao was involved in the crime, there is no basis upon which he can be properly convicted under this mode of liability.

C. Superior Responsibility under Article 6(3)

1099. Gbao had no superior responsibility under Article 6(3) over RUF fighters and units. General arguments to support this position are detailed above. Arguments in support of this position are detailed in the submissions on article 6(3) above.

1100. There is no superior-subordinate relationship between Gbao and any perpetrators of the alleged crime under counts 10-11. Nowhere can evidence be found that he had any authority over them or that he gave orders to them, nor is there evidence of him having the material ability to affect any of their actions.

1101. In the same way, evidence is lacking as to whether, and how Augustine Gbao knew or had reasons to know that the crime alleged would be or was committed. In view of the fact that Augustine Gbao was not part of the RUF's military apparatus, was living in Kailahun District (where there are no crimes of physical violence alleged), was always at the rear with limited access to a radio, and receiving few reports, it is not established that he had the necessary knowledge to be found responsible for the crimes of alleged subordinates.

1102. The Prosecution failed to adduce evidence that establishes beyond reasonable doubt that Augustine Gbao had the material ability to prevent or punish the physical perpetrators of the alleged crimes. In the absence of evidence that Augustine Gbao had the power to issue orders or to take any disciplinary action, or that he had any other power of sanction, it cannot be said that Augustine Gbao is responsible as a superior for failing to prevent or punish the commission of crimes by his subordinate.

I. Defence Evidence

A. Introduction

1103. At no stage during the war was Augustine Gbao a combatant within the RUF. He never controlled, advised, or assisted the fighting forces; neither was he involved in any operational activity from 1991-2000. The only group over which Gbao had any modicum of control over was the IDU; however, even that power was diluted by area and battalion commanders, who exercised authority over IDU agents in the field.

1104. As IDU Commander, Gbao did not visit the frontlines. There has been testimony from Prosecution, Sesay and Gbao defence witnesses supporting this. Gbao's time was spent in the safety zones, primarily Kailahun Town and Makeni, from 1996 to 2000.

1105. Thus, whilst acknowledging that the scope of the charges under count 12 is broader than the allegations of using children to actively fight for the RUF, preliminary indications support our contention that Augustine Gbao did not use or enlist child soldiers.

1106. In their testimony, defence witnesses strongly supported the Third Accused's position that the Prosecution's case against Gbao should be rejected in its entirety. A summary of their evidence, along with the impeached testimony from Prosecution witnesses, follows.

A. Augustine Gbao did Not Use Child Soldiers

1107. Augustine Gbao did not use child soldiers or enlist them for the RUF during the war.¹⁴⁰⁵ Those who knew him testified unequivocally that Gbao used no child soldiers and played no role in enlisting children, as alleged by the Prosecution. By example, DAG-110 stated he worked in and around Kailahun and saw Gbao regularly but never with child soldiers.¹⁴⁰⁶ DAG-080 testified that Gbao did not use child soldiers.¹⁴⁰⁷ DAG-111, who lived with Gbao in Kailahun Town and Makeni, never saw Gbao with child soldiers and DAG-101 stated the same.¹⁴⁰⁸

1108. DIS-069 and DIS-157, both witnesses for the Sesay defence, also rejected the allegation that

¹⁴⁰⁵ DAG-048, Transcript 3 June 2008, p.98; Transcript, 9 June 2008, p.56.

¹⁴⁰⁶ DAG-110, Transcript 2 June 2008, p.107.

¹⁴⁰⁷ DAG-080, Transcript 6 June 2008, p.90.

¹⁴⁰⁸ DAG-101, Transcript 9 June 2008, pp. 120-121.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Gbao used child soldiers.¹⁴⁰⁹ DIS-069 testified that Gbao was never seen with child soldiers in Buedu during the entire duration of the war.¹⁴¹⁰ DIS-149, who lived 10 feet (6 metres) from Gbao in Giema never saw him with child soldiers between 1994-96.¹⁴¹¹

1109. Issa Sesay also rejected the allegation that Gbao used or enlisted child soldiers. In answer to whether Gbao was ever seen with child combatants during the war, he stated “I cannot deny that he did not have children in his house because his wife was a native of Kailahun and she had kids in her house. But to say he had SBUs that had guns, no, I did not see it like that”.¹⁴¹²

1110. Issa Sesay also stated that “each commander had family members that they were staying with, but I did not know that Augustine Gbao had kids that would go to the battlefield to fight the war. Because even him, Augustine Gbao, did not go to the battle front. He was not a fighter”.¹⁴¹³

1111. In relation to the allegation that Gbao had child soldiers in Buedu, Issa Sesay clarified: “Augustine Gbao was not in Buedu in '98. I believe that he only went to Buedu when Sam Bockarie ordered him in December, when I had left Kailahun. But from that time until December, around the 12th, 13th, when I left Buedu, to January '98, Gbao was not in Buedu. He was in Kailahun”.¹⁴¹⁴

1112. Even TF1-371, a highly important prosecution former RUF insider witness, failed to mention that Gbao used or enlisted child soldiers altogether, while cataloguing a list of others notable RUF commanders in his testimony.¹⁴¹⁵

1. Gbao's Bodyguards, While Rarely Used, were Older Men

1113. As stated above, Gbao did not fight for the RUF nor did he visit the frontlines. Because he was in safety zones, Gbao rarely needed bodyguards. DIS-188 stated that “he goes around at times, he alone, or at times with one security with him, always saying that: I always guarantee my security. I'm not doing anybody bad. So I don't think anybody will have any bad feeling against me”¹⁴¹⁶ According to DAG-048, he would use various IDU agents as bodyguards but only when “he wants

¹⁴⁰⁹DIS-069, Transcript 23 October 2007, p.80; *also see* DIS-157, Transcript 25 January 2008, p.72.

¹⁴¹⁰DIS-069, Transcript 23 October 2007, p.80.

¹⁴¹¹ DIS-149, Transcript 6 November 2007, pp.9-10.

¹⁴¹² Issa Sesay, RUF Transcript 1 June 2007, p.34.

¹⁴¹³ Issa Sesay, RUF Transcript 1 June 2007, p.34.

¹⁴¹⁴ Issa Sesay, Transcript 1 June 2007, p.33.

¹⁴¹⁵TF1-371, Transcript 21 July 2006, p.63

¹⁴¹⁶DIS-188, Transcript 1 November 2007, p.88-89.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

to make a move".¹⁴¹⁷ These agents were 20 or older.¹⁴¹⁸ DAG-080 testified that Gbao only used bodyguards at the early stage of the war.¹⁴¹⁹ DAG-101 stated that Gbao had four bodyguards assigned to him, all over 21, but that he normally walked alone.¹⁴²⁰ DAG-110 testified that Gbao sometimes used bodyguards (a minority of the time), all of whom were over the age of 21.¹⁴²¹

B. Gbao Had no Role, if there were any, in Recruiting or Enlisting Child Soldiers

1114. DIS-297 [REDACTED] Her testimony, as well as her demeanour while testifying, lent itself to credibility. Among the many assertions she made countering Prosecution charges, she casts serious doubt on the allegation made by TF1-113 that the RUF in Kailahun Town was sending nine and ten year-olds to Bunumbu for training.¹⁴²²

1115. DIS-078 was asked "[d]uring the period end of 1996 to the year 2000, are you aware of any recruitment of children as RUF soldiers?" He answered: "[n]o child was able to go to the base". He also testified that there was no recruitment of child soldiers.¹⁴²³

1116. In Makeni, Gbao went out of his way to persuade some in the RUF to return their ex child-combatants to the ICC.¹⁴²⁴ This, we submit, is hardly the behaviour of an RUF commander who was active in the recruitment and promotion of the use of child soldiers.

1117. In the same vein, Lt-Col Ngondi, stated that Gbao was very helpful with NGO operations in Makeni in 2000. He confirmed the operations of CARITAS had been authorised by Gbao.¹⁴²⁵ According to TF1-174, the authorisation was given without the knowledge or consent of Gbao's colleagues and superiors.¹⁴²⁶ Again, this runs counter to evidence suggesting that Gbao somehow supported the enlistment of child soldiers.

C. Augustine Gbao did not Approve of the Use of Child Soldiers

1118. It was admitted during the Gbao defence case that some RUF soldiers used child soldiers during the war. We submit that a great deal of evidence was led showing that Augustine Gbao,

¹⁴¹⁷DAG-048, Transcript 3 June 2008, p.99(lines 1-2).

¹⁴¹⁸DAG-048, Transcript 3 June 2008, p.99(lines 3-12).

¹⁴¹⁹ DAG-080, Transcript 6 June 2008, pp.90-91.

¹⁴²⁰ DAG-101, Transcript 9 June 2008, p.118.

¹⁴²¹DAG-110, Transcript 2 June 2008, p.88, 89.

¹⁴²²DIS-297, Transcript 31 January 2008, pp.84, 94.

¹⁴²³DIS-078, Transcript 16 October 2007, p.87.

¹⁴²⁴TF1-174, Transcript 28 March 2006, p.102.

¹⁴²⁵Leonard Ngondi, Transcript 31 March 2006, p.18

¹⁴²⁶TF1-174, Transcript 28 March 2006, p.71.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

however, was opposed to the use of children for this purpose. DAG-048 testified that he was against [the use of anyone below the age of 15 or 16 in the war] greatly”.¹⁴²⁷ According to DAG-080 “it was wrong to use child combatants, and in Makeni in fact he [Gbao] collected them, carried them to the St Francis Secondary school, where they were given some sort of education”.¹⁴²⁸

1119. DAG-101-a witness who we submit was of great integrity- made Gbao's position on the issue absolutely clear. She testified that Gbao “was not to happy about [the use of child soldiers]. He was strongly against that and was even telling these boys who were having these child combatants but they never adhered to him”.¹⁴²⁹

1. Gbao Took Tangible Steps to Address the Use of Child Soldiers by Some RUF

1120. Sometime after Gbao arrived in Makeni, civilians came from surrounding villages and back to their homes. The second day after returning, the CDF and RUF joined together. According to DAG-047, who was a former CDF, “Mr Gbao...advised Nelson Bangura [head of the CDF faction within the RUF in Makeni] that if he had any child combatants in his CDF, he will not accept them, he said because he does not—he does not approve of any child combatants”.¹⁴³⁰

1121. Also in Makeni, DAG-018 (a civilian unknown to Gbao) testified that “Pa Koroma said he had little boys and there was one man had come to Makeni whom he described as Gbao, a short man with beards. That he had ensured that an announcement shall be made in town that all those child soldiers should come to a meeting. When those child soldiers went on that meeting, they remove all the guns from them”.¹⁴³¹ He stated that “[f]rom that day, I did not see a little boy with a gun anymore”.¹⁴³²

1122. A Prosecution witness to events in Makeni in 2000, TFI-174, conceded that Gbao had been instrumental in allowing the ICC to operate, and that approximately two weeks before the alleged “Lunsar push” he had facilitated the repatriation of almost 100 ICC boys with their families.¹⁴³³ It should not be forgotten that Gbao had already jeopardised his own position by secretly providing written authorisation for the ICC to open without the consent of RUF commanders in Makeni.¹⁴³⁴ a

¹⁴²⁷ DAG-048, Transcript 3 June 2008, p.99(lines 13-16).

¹⁴²⁸ DAG-080, Transcript 6 June 2008, p.90.

¹⁴²⁹ DAG-101, Transcript 9 June 2008, p.122.

¹⁴³⁰ DAG-047, Transcript 17 June 2008, p.10.

¹⁴³¹ DAG-018, Transcript 16 June 2008, p.23.

¹⁴³² DAG-018, Transcript 16 June 2008, p.24.

¹⁴³³ TFI-174, Transcript 28 March 2006, p.91.

¹⁴³⁴ *Id.* at p.71.

matter which we submit should be taken most seriously by the trial chamber in evaluating Gbao's true contribution-right or wrong-to events that had taken place in that town since his arrival in 1999.

II. Credibility of Prosecution Witnesses

1123. It is of course true that several Prosecution witnesses testified that Gbao used child soldiers. However, as detailed below, their testimony taken overall reflected an inaccurate recollection of events, was most likely fabricated, or failed to satisfy the basic standard to sustain a conviction for Gbao's use of child soldiers. And taken at its highest we submit that the Prosecution case went no further than intimating that Gbao sent children to RUF bases for training.

1. TF1-174

1124. TF1-174 falsely alleged that Augustine Gbao forced boys from the ICC to go and fight UN peacekeepers in Lunsar on 3 or 4 May 2000. Not only was his recall of this alleged incident shaky, he made material changes during his testimony in an attempt to 'save' his credibility, which had the adverse effect.

1125. While the above-mentioned event is highly relevant to Count 12, it relates also to Counts 15-18. Consequently, a detailed analysis on TF1-174's evidence is found in paragraphs below and needn't be repeated here.

2. Joseph Mendy

1126. This witness testified in his examination-in chief that he saw Gbao with child soldiers. But Joseph Mendy largely retracted this testimony under cross-examination. The witness, therefore, either completely forgot his experience in Sierra Leone, exaggerated his testimony, or was not telling the truth.

1127. The witness also testified about certain events relating to Counts 15-18 below. Serious concerns about the accuracy of the testimony he gave are detailed in paragraphs below.

1128. Whilst Joseph Mendy stated that he saw child soldiers with Gbao in Makeni, of particular interest was the following account which we suggest placed Gbao's experience into a fairer light:

"I saw him [Gbao] talking to them. That is on the highway from Makeni, going to Magburaka -- towards Magburaka. They were on foot. I do not know actually what he

was telling them, because I was on board the vehicle".¹⁴³⁵

1129. In the second reference the witness made to Gbao and child soldiers, he appeared to become a little more vague, stating simply that "I saw him on more than one occasion" with them.¹⁴³⁶

1130. In his third reference to seeing Augustine Gbao with child soldiers he minimised yet further: stating that he saw Gbao with two or three children.¹⁴³⁷ He then refined the situation *vis a vis* Gbao yet further again, stating that "sometimes other adults used to be present".¹⁴³⁸ He concluded that he thought these boys were younger than 15.¹⁴³⁹

1131. Under cross-examination, it was as if Mendy had become a different witness. He started by conceding that his recollection of his time in Makeni was very vague¹⁴⁴⁰ and that he knew "very little" about the Third Accused.¹⁴⁴¹ He also admitted that, during his entire stay in Makeni, he only saw "a few" small boys that were armed.¹⁴⁴²

1132. In relation to allegations made against Gbao—that he saw him with child soldiers on several occasions, sometimes with other adults—Counsel for the Third Accused began by asking Mendy about the total number of times the witness had actually seen Augustine Gbao. Mendy testified that he saw Gbao many times, but only remembered four occasions distinctly—once in Gbao's office, once at the task force office in Makeni,¹⁴⁴³ once on the highway in Makeni going towards Magburaka, and once at the Makump DDR camp on 17 April 2000. Discussion of the latter event is covered in Counts 15-18 below, and bears no legal relevance to Count 12.

1133. The witness testified that one of his duties in Makeni was to perform security assessments of the area. He went on security patrols, which required him to drive throughout the Makeni area in performance of his duties. Because others were involved in the same activity performing this same assessment Mendy admitted to having only driven through Makeni four times during his deployment in Sierra Leone.

¹⁴³⁵ Joseph Mendy, Transcript 26 June 2006, p.89.

¹⁴³⁶*Id.* at p.89

¹⁴³⁷*Id.* at p.90. The witness ambiguously stated that he saw more than 2 or 3 children with Gbao.

¹⁴³⁸*Id.* at p.90.

¹⁴³⁹*Id.* at p.92.

¹⁴⁴⁰*Id.* at 28 June 2006, p.70.

¹⁴⁴¹*Id.* at 28 June 2006, p.40.

¹⁴⁴²*Id.* at p.71.

¹⁴⁴³*Id.* at 29 June 2006, pp.22-24.

1134. It was during these security patrols that Mendy allegedly saw Gbao talking to child soldiers. In responding to questions about the “SBs” he saw whilst on patrol duties, the witness conceded that all he recalled was seeing a solitary “small boy” carrying a weapon on his first patrol.¹⁴⁴⁴ Of crucial significance to the case relating to child soldiers generally, and to Gbao in particular, was the fact that Mendy also conceded he could not remember if he ever saw any other small boys on the three subsequent patrols that he made.¹⁴⁴⁵

1136. It was during one of these four security patrols that the witness allegedly saw Gbao with these armed small boys.¹⁴⁴⁶ By logical deduction, it would have to be the first patrol that Mendy saw Gbao with this one small boy. There is no other way to understand the evidence.

a. Discussion

1137. One is immediately alerted to Mendy’s retraction of evidence adduced during the Prosecution’s examination. Firstly, he did not see Gbao with child soldiers on “more than one occasion” as he had alleged in his examination in chief. Neither did he see Gbao with “two or three children” that were armed. These are direct inconsistencies within his own testimony that cast doubt on the reliability of his evidence.

1138. Even if the trial chamber were to accept Mendy’s evidence that he saw Augustine Gbao with one small boy who was armed, there was no accompanying explanation that might have assisted the Court in discerning Gbao’s true intentions for speaking to this boy. All the witness could say was that he “did not even stop to know what was happening there. *I only saw him standing with them discussing. I don’t know what they were discussing*”.¹⁴⁴⁷ Quite what probative value the Prosecution may wish to attach to this is difficult to imagine.

1139. Whilst the Court will naturally not wish to speculate, it was perhaps (given his known antipathy to the use of child soldiers as evidenced by several defence witnesses) just as likely that Gbao was encouraging the boy to drop the gun and go to school as anything else, although one cannot rule out the possibility that he may have been asking after the boy’s mother or for some cigarettes.

¹⁴⁴⁴*Id.* at p.72.

¹⁴⁴⁵*Id.* at pp.72, 73.

¹⁴⁴⁶*Id.* at 29 June 2006, p.25.

¹⁴⁴⁷*Id.* at 29 June 2006, p.18-19 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1140. That Gbao was speaking to a boy on the highway who was armed cannot and does not amount to an inference, let alone proof that Gbao was using or accepting the use of child soldiers. Furthermore we suggest this alleged incident should be seen in light of the undisputed fact that around that time Gbao had been co-operating with the ICC, facilitating the return of ex-child soldiers to their homes, that he had also informed Nelson Bangura of the CDF that use of child soldiers would not be tolerated¹⁴⁴⁸, and had otherwise shown himself to be opposed to the use of child soldiers.

1141. Another example of Mendy's "vague" memory was his patchy recall of RUF members. He stated that he only remembered four people: the three Accused and a man named Colonel Jimmy. We submit that this was, to put it politely, an unrealistic assertion.¹⁴⁴⁹ For Mendy not to have known at least one of the 12 other Colonels in the RUF that were dealing directly with the MILOBS is, we submit, unlikely to be the case.¹⁴⁵⁰

1142. Finally, under cross-examination, the witness initially stated that he himself never spoke to the boy he saw carrying a weapon.¹⁴⁵¹ Minutes after, he stated that he actually did speak with "SBs".¹⁴⁵² His explanation was vague, confusing and unconvincing. It is worth noting to demonstrate that he 'improved' his answer when challenged by counsel for the Third Accused.

3. TF1-036

1143. This witness testified that Gbao had child soldiers, but offered no detail whatsoever. We submit that this evidence is of no value: similar sweeping allegations, entirely lacking in specificity and therefore impossible for the Defence to meet had been a recurrent theme with certain Prosecution witnesses during their case. We trust the chamber will not be further troubled by this claim.

4. TFI-141

1144. TFI-141 stated Gbao had securities in Kailahun Town:

"Q. Did you see anyone else with Colonel Gbao when you saw him in Kailahun Town?"

¹⁴⁴⁸ DAG-047, Transcript 17 June 2008, p.10.

¹⁴⁴⁹*Id.* at 28 June 2006, p.34.

¹⁴⁵⁰*Id.* at pp.36-38.

¹⁴⁵¹*Id.* at 28 June 2006, p.31.

¹⁴⁵²*Id.* at p.32.

A. Well, yes, he had his security. Mostly when he would be walking around he would be walking around with his security.

Q. How old were the securities that you saw with Colonel Gbao?

A. Well, most -- the one that was close to him, he had two small boys, then he had some other bigger men. They themselves were security to him. Then I used to see two small boys by him, one on the left and the other one by his right. Every morning they will be at the muster parade".¹⁴⁵³

1145. When asked about the age of the securities, he testified:

"Q. How old were these two boys that you saw with Colonel Gbao?

A. Well, I don't know their exact age, but I knew that they were older than I was at that time.

Q. Can you say how much older they were than you?

A. Well, even from their volume, they were taller than I was and they were more -- they had more volume than I had".¹⁴⁵⁴

1146. The witness never provided an actual age estimate of Gbao's alleged securities in his testimony. Only that he believed they were older than him. Even if this testimony were deemed credible we submit it is not worthy of further consideration in the absence of evidence in support of this crucial information. As such, it should not be considered further.

5. TF1-314

1147. The testimony of this witness is profoundly unreliable. A comprehensive discussion of her testimony is discussed in paragraphs 428, *et seq.*

6. TF1-366

1148. As has been argued elsewhere in these submissions (see, *inter alia*, paragraphs regarding the killing of the alleged Kamajors, UNAMSIL, forced labour and forced marriage for example) this witness lied throughout most of his evidence. His performance in relation to the issue of child soldiers was no better. The following excerpt shows TF1-366 was both exaggerated and irrational in his spiteful determination to implicate Gbao on yet another count:

"Q. Where did Gbao have SBUs?

A. Kailahun and Makeni, Magburaka and Kono. There I saw SBUs with him.

Q. When did you see SBUs with Gbao?

A. What?

Q. When did you see SBUs with Gbao?

A. 2000 and 1990, '96 and 1991, up to '92.

Q. How old were these SBUs you saw with Gbao?

¹⁴⁵³TF1-141, Transcript 12 April 2005, p.21.

¹⁴⁵⁴*Id.* (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

A. Well, their ages I can't say because they were so many".¹⁴⁵⁵

1149. Happily for the defence TFI-366 boldly contradicted himself under cross-examination, stating :

"Augustine Gbao didn't go to Kono. He was not with us in Kono. It was later that he came to Makeni. He was not in Kono".¹⁴⁵⁶

1150. Such was the quality of TFI-366's integrity as a witness.

1151. He was then asked- *seven times*- about *when* he saw Gbao in Makeni. He was typically evasive in response and succeeded in his determination not to give an answer.¹⁴⁵⁷

1152. TFI-366's evidence should be entirely disregarded. Even if this evidence were deemed worthy of consideration, TFI-366 did not testify as to the age of Gbao's alleged child soldiers and cannot, we submit, be seen as probative on the issue.

7. TF1-113

1153. TF1-113 testified in relation to several counts in the Indictment against Augustine Gbao (as well as other Accused). During cross-examination, as stated above, the witness admitted that she had lied under oath to the Court, lied regarding the killing of the Kamajors in the AFRC or RUF trial (she testified in both), was evasive regarding questions that did not directly relate to implicating the three Accused (particularly Gbao), and may have had an ulterior motive to testify [REDACTED]. These reasons are detailed in paragraphs 462 *et seq.*, as well as in her testimony regarding the killing of the suspected Kamajors and should qualify, we submit, to dismissal of her evidence in its entirety.

III. Legal Submissions Relating to Count 12 in the Indictment

A. Elements to Prove that Augustine Gbao Enlisted or Used Child Soldiers

1154. The Prosecution must satisfy, beyond reasonable doubt, the following elements relating to the enlistment of child soldiers:

1. One or more persons were enlisted, either voluntarily or compulsorily, into an armed force or group by the Accused;

¹⁴⁵⁵TF1-366, Transcript 8 November 2005, p.70 (emphasis added).

¹⁴⁵⁶*Id.*, Transcript 17 November 2005, p.84.

¹⁴⁵⁷*Id.* at pp. 97-98.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29844

2. Such person or persons were under the age of 15 years;
3. The Accused knew or had reason to know that such person or persons were under the age of 15 years; and
4. The Accused intended to enlist the said persons into the armed force or group.¹⁴⁵⁸

1155. To demonstrate that the Third Accused used children as child soldiers, the Prosecution must prove beyond reasonable doubt that:

1. One or more persons were used by the Accused to actively participate in hostilities;
2. Such person or persons were under the age of 15 years;
3. The Accused knew or had reason to know that such person or persons were under the age of 15 years; and
4. The Accused intended to use the said persons to actively participate in hostilities.

1156. Elements 2-4 are nearly identical and will be considered jointly below.

B. Enlisting or Using Persons into an Armed Force by the Accused

1157. Enlistment includes “any conduct accepting the child as part of a militia. Such conduct would include making him participate in military operations”.¹⁴⁵⁹ The term ‘enlistment’ could encompass both “voluntary enlistment and forced enlistment into armed forces or groups”.¹⁴⁶⁰ There must be a nexus between actions of the Accused and the child joining the armed group.¹⁴⁶¹

1158. “The term ‘using children to participate actively in hostilities’ covers both direct participation in combat and also active participation in military activities linked to combat such as spying, sabotage or using children in a direct support function such as acting in bearer to take supplies to the frontline, or activities at the frontline...”¹⁴⁶²

1159. The CDF Trial Chamber also stated what would not satisfy this element: “[i]t would not cover activities clearly unrelated to the hostilities such as food deliveries to an airbase or the use of domestic staff in an officer’s accommodation”.¹⁴⁶³

1458 CDF Trial Chamber Judgment, para. 195.

1459 CDF Appeals Chamber Judgment para. 144

1460 CDF Trial Chamber Judgment para.192.

1461 CDF Appeals Chamber Judgment, para. 141.

1462 CDF Trial Chamber Judgment Para. 193. Quoting Report of the Preparatory Committee on the Establishment of an International Criminal Court, A/CONF.183/2/ Add.1, 14 April 1998, p. 21, fn 12.

1463 CDF Trial Chamber Judgment Para. 193. quoting *ibid.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1. *Knowledge of the Use or Enlistment of Child Soldiers is By Itself Insufficient*

1160. The CDF Chamber found that “[p]roof of knowledge alone is insufficient to establish the individual criminal responsibility of an Accused, and the Chamber is unable to conclude that Fofana’s presence alone at this or other such meetings has either a condoning or encouraging effect upon the commission of any crimes by his subordinates relating to the enlistment or use of child soldiers”.¹⁴⁶⁴

1161. Thus, Gbao's knowledge of the use or enlistment of child soldiers is insufficient to sustain a conviction against him. Further, there is no evidence that Gbao was ever party to any discussion with other RUF about its policy towards the use or enlistment of child soldiers into the rebel group. However, we suggest that the CDF case is still instructive by clarifying the requisite threshold necessary to attribute responsibility under any mode of liability in the Indictment.

2. *Presence of Child Soldiers in Gbao's Location Should not By Itself Convict Gbao*

1162. Even if the Chamber finds that there were child soldiers in Kailahun Town or Makeni, or an other area where Gbao was residing, we submit that this would not generally of itself be sufficient to demonstrate Gbao’s responsibility, either as an individual or superior, for this count in the Indictment. In the CDF case, the Chamber stated that “the presence of Fofana at Base Zero where child soldiers were also seen is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts under any of the modes of liability charged in the Indictment”.¹⁴⁶⁵

3. *Organisational Use of Child Soldiers in RUF by Itself Should Not Convict Augustine Gbao on Count 12*

1163. Even if the Court Finds that the RUF as an organisation used child soldiers, or members of the RUF used child soldiers, that should not be sufficient to sustain a conviction against Gbao of using child soldiers. In considering the culpability of the CDF Accused, the Court stated that “[t]he trial record contains ample evidence that the CDF as an organisation was involved in the recruitment of children under the age of 15 to an armed group, and used them to participate actively in hostilities, however this does not demonstrate beyond a reasonable doubt that Fofana was personally involved in such crimes”.¹⁴⁶⁶

1464 CDF Trial Chamber Judgement, para.966.

1465 CDF Trial Chamber Judgement, para. 961.

1466 CDF Trial Chamber Judgement, para. 962.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1164. The same reasoning should apply in this case. Leaving aside whether the RUF as an organisation used or enlisted child soldiers, several Gbao defence witnesses agreed with the Prosecution that child soldiers were used by certain RUF commanders. However, as demonstrated above, Gbao did not; and he was opposed to such practice. This position is further illustrated by Gbao's unilateral action of authorising, without permission, the opening of the ICC in Makeni in 2000, his facilitating the transfer of former child soldiers from CARITAS to their home province, and his prohibition on child soldiers in Makeni around 1999.

1165. This—and other actions—indicates that should the Chamber find that the RUF supported the use of child soldiers, Gbao was not a willing participant. Were it not for his status as a lower-ranking officer in the RUF, perhaps he could have had more effect in manifesting his intentions.

C. Proving That the Children Were Younger than 15

1166. The CDF case held that even if evidence were adduced that a combatant person *appeared* to be younger than 15, it may still not be sufficient to demonstrate the individual was in fact a child soldier. In one example, the tribunal found itself satisfied only after it had received a certificate that proving the soldier in question was aged below 15 at the relevant time.¹⁴⁶⁷

1167. Another example from the CDF case was illustrated by the testimony of TF2-140. He had stated, *inter alia*, that he saw a Kamajor commander being guarded by four small boys. The witness estimated that the boys were younger than he was. *Even though* the court accepted the credibility of the witness, “there is room for doubt that the boys were actually younger than 15”.¹⁴⁶⁸ Therefore, even if it was conceivable that the boys were younger, proof beyond reasonable doubt were found not to have been necessarily satisfied.

III. Submissions on Count 12 on Behalf of the Third Accused

1168. Count 12 of the RUF Indictment charges Augustine Gbao with 'Conscripting or Enlisting Children under the Age of 15 years into Armed Forces or Groups or Using them to Participate Actively in Hostilities' as a serious violation of international humanitarian law.

1169. In their supplemental pre-trial brief, the Prosecution relies upon the following allegations to demonstrate that Gbao was involved in conscripting children:

1. His position as a senior RUF Commander in the AFRC/RUF subordinate only to the RUF

¹⁴⁶⁷ CDF Trial Chamber Judgement, paras. 970-971.

¹⁴⁶⁸ *Id.* at paras. 964, 965.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29847

Battle Field Commander, the leader of RUF and the leader of AFRC;

2. The fact that he was the head of the Internal Defence Unit (IDU) based in Kailahun, where children as young as ten or eleven years of age were trained with guns in Bunumubu;
3. The fact that he was the commander at Lion Base;
4. His presence during attacks where child soldiers were used;
5. The fact that he was involved in negotiations about the release of child soldiers;
6. The fact that after the release of child soldiers he searched with his soldiers for them and that he ordered to kill the Caritas staff involved in their release; and
7. Any matters arising from the evidence disclosed showing specific participation in the joint criminal enterprise.

A. Remarks on Prosecution Indictment and Pre-Trial Brief

1170. These allegations are denied. Typically, the Prosecution did not attempt to support the majority of them during their case with any evidence whatsoever. We take them in order below.

1171. First, as has been shown throughout these submissions, Gbao was clearly not subordinate only to the leaders of the RUF and AFRC.

1172. Secondly, to suggest that by virtue of being IDU Commander in Kailahun (District) Augustine Gbao can be held responsible on some basis for the RUF's supposed training of child soldiers at Bunumbu simply does not bear scrutiny. It has surely been established that Gbao was not a combatant, rarely used bodyguards, and remained behind the front lines at all times. The Prosecution failed to specify their case against Gbao on this issue at any stage during their case.

1173. Dealing with the remaining original Prosecution allegations listed in the paragraph above, we submit firstly that Gbao did not take part in any military attack during the entire war. Any allegation to the contrary against Gbao in this regard has been thoroughly discredited. Secondly, we would suggest that being involved in negotiations regarding the release of child soldiers is hardly a criminal act, and, thirdly, while ordering the death of CARITAS staff is indeed criminal, there was, again, no evidence adduced in support of this allegation.

B. Factual Findings in the AFRC and CDF Trial Chamber Judgements

1174. Reviewing the factual findings in the AFRC and CDF trials will assist, we submit, in putting the allegations against Gbao into perspective. In the AFRC trial, the Accused were found guilty of
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

count 12 (child soldiers). Brima was held responsible for planning the commission of conscription of children under the age of 15 into an armed group or using them to participate actively in hostilities in Bombali District and the Western Area.¹⁴⁶⁹ With respect to Kanu, the Trial Chamber found him responsible for planning the commission of conscription of children under the age of 15 into the armed group or using them to participate actively in hostilities in Bombali District and the Western Area.¹⁴⁷⁰

1175. The Chamber reached its conclusions by considering the following evidence:

1. The Accused "Gullit" and "Five Five" were in charge of a training camp where children were trained;¹⁴⁷¹
2. One witness alleged he was captured after commanders - including "Five Five" and "Gullit" - attacked his village, after which
3. He was forced to carry food for the troops by his captors,¹⁴⁷² whereafter
4. He was forced to undertake military training.¹⁴⁷³
5. It further considered that Gullit ordered civilians who had children between the age of 10 and 12 to provide them with military training;¹⁴⁷⁴
6. That Gullit refused to release children (although the witness did not explain whether children were abducted or used for military purposes).¹⁴⁷⁵
7. The Chamber also found that during the attack on Karina in Bombali District, Brima ordered the distribution of children captured among the commanders;¹⁴⁷⁶
8. It held that upon completion of civilian military training at Camp Rosos, the trainees were addressed by both Kanu and Brima.
9. Brima then ordered that the boys should be distributed to the various companies;¹⁴⁷⁷
10. The Accused Kanu was in charge of the forced military training of civilians at Camp Rosos where those forced to undergo training included children below the age of 15 years old.¹⁴⁷⁸

1176. There was evidence that Brima was both the overall commander of both the AFRC troops

¹⁴⁶⁹AFRC Trial Judgement, para. 1836.

¹⁴⁷⁰AFRC Trial Judgement, para. 2097.

¹⁴⁷¹AFRC Trial Judgement, para. 1254.

¹⁴⁷²AFRC Trial Judgement, para. 1256.

¹⁴⁷³AFRC Trial Judgement, para. 1256.

¹⁴⁷⁴AFRC Trial Judgement, para. 1272.

¹⁴⁷⁵AFRC Trial Judgement, para. 1273.

¹⁴⁷⁶AFRC Trial Judgement, para. 1830.

¹⁴⁷⁷AFRC Trial Judgement, para. 1830.

¹⁴⁷⁸AFRC Trial Judgement, para. 2093.

that moved from Mansofinia, Koinadugu District to Camp Rosos, Bombali District and of the AFRC troops that later invaded Freetown on 6 January 1999. As the overall commander, Brima was substantially involved in planning the various operations in these Districts.¹⁴⁷⁹ On a number of occasions Brima publicly addressed the troops and advocated criminal conduct.¹⁴⁸⁰ In addition, the Trial Chamber found that Kamara was overall commander in Kono District after the departure of Johnny Paul Koroma. In his position as overall commander, he was aware that civilians were abducted and subjected to enslavement [incl. child soldiers] in that district.¹⁴⁸¹ Furthermore, the Trial Chamber found that the Accused Kanu was Chief of Staff and commander in charge of abducted civilians in Bombali District and the Western Area.¹⁴⁸²

1177. The Trial Chamber also found that Kanu continued in his positions as Chief of Staff and commander in charge of civilians in Freetown and the Western Area. The Trial Chamber further found that Kanu had approximately ten child combatants in his charge in Benguema following the retreat from Freetown.¹⁴⁸³ With regard to the general evidence of Child soldiers, the Trial Chamber held that "given his authority, the Accused (Brima) was in a position to shut down this system of exploitation entirely, to deter the excesses committed by his troops, and to alleviate the plight of the victims". On the evidence adduced the Trial Chamber finds that he failed to do so.¹⁴⁸⁴

I. Evidence Not Taken Into Account in AFRC and CDF Case

1178. Not all the evidence was found to be sufficient to sustain a conviction in these cases. Three former child soldiers testified which the AFRC Trial Chamber felt were unreliable. One of them provided evidence of events which did not take place at the time and/or locations alleged in the Indictment.¹⁴⁸⁵ As to the second witness, her evidence relating to military training and on the attack she took part in failed to provide a link—direct or indirect—to the Accused.¹⁴⁸⁶ Finally, in relation to the third witness the Trial Chamber held that the Prosecution failed to provide evidence linking the Accused to the location where the Witness alleged he was in 1998-1999.¹⁴⁸⁷

1179. The Trial Chamber also considered the evidence of other witnesses, against whom crimes

¹⁴⁷⁹AFRC Trial Judgement, para. 1828.

¹⁴⁸⁰AFRC Trial Judgement, para. 1829.

¹⁴⁸¹AFRC Trial Judgement, para.1972.

¹⁴⁸²AFRC Trial Judgement, para.2091.

¹⁴⁸³AFRC Trial Judgement, para. 2094.

¹⁴⁸⁴AFRC Trial Judgement, para. 1832.

¹⁴⁸⁵AFRC Trial Judgement, para. 1259.

¹⁴⁸⁶AFRC Trial Judgement, para. 1260.

¹⁴⁸⁷AFRC Trial Judgement, para. 1261.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

were committed by child soldiers, or who described the abductions and use of child soldiers by the AFRC.¹⁴⁸⁸ One of them testified that "Five five" had five to ten child combatants with him.¹⁴⁸⁹ However as the witness' identification of 'Brigadier Five-Five' was vague, the Trial Chamber did not rely on it in making its findings on Kanu's liability for this crime.¹⁴⁹⁰

1180. In the CDF Case, the evidence in relation to child soldiers was as follows; There was testimony that one witness was initiated when he was 14 year old, the fees being paid to Kondewa;¹⁴⁹¹ the same witness acted as part of the security team at Fofana's house. While there, he met Fofana and Norman;¹⁴⁹² the witness went with Norman to Freetown;¹⁴⁹³ another witness (child) was at Base Zero and saw Norman there;¹⁴⁹⁴ he was also present at a meeting given by Norman,¹⁴⁹⁵ and Kondewa's boys gave drugs to one witness (child) at Base Zero.¹⁴⁹⁶ Further, in 1999, TF2-021 was initiated into the Avondo Society, a group of Kamajors led by Kondewa. After the initiation TF2-021 received a certificate bearing his photograph, to prove that he was one of Kondewa's Kamajors. TF2-021 was thirteen years old at this time.¹⁴⁹⁷

1181. There was also evidence that initiators, including Kondewa, used child soldiers as body guards at Base Zero;¹⁴⁹⁸ that in January 1998, Norman spoke at a meeting at Base Zero where he complained that the child combatants were outperforming the adult fighters. Children were present at this meeting.¹⁴⁹⁹

1182. Notwithstanding this evidence the Trial Chamber did not find Fofana criminally responsible for these allegations. It did find Kondewa guilty of enlistment but the Appeals Chamber overruled the finding, stating that the child was already enlisted by the time Kondewa initiated him.

A. Individual Responsibility under Article 6(1)

1. Planning

1183. Gbao did not take any active steps to plan to use or enlist child soldiers.

¹⁴⁸⁸AFRC Trial Judgement, para. 1262.

¹⁴⁸⁹AFRC Trial Judgement, para. 1263.

¹⁴⁹⁰AFRC Trial Judgement, para. 1263.

¹⁴⁹¹CDF Trial Judgement, para. 668.

¹⁴⁹²CDF Trial Judgement, para. 672.

¹⁴⁹³CDF Trial Judgement, para. 673.

¹⁴⁹⁴CDF Trial Judgement, para.677.

¹⁴⁹⁵CDF Trial Judgement, para.680.

¹⁴⁹⁶CDF Trial Judgement, para.681.

¹⁴⁹⁷CDF Trial Judgement, para.682.

¹⁴⁹⁸CDF Trial Judgement, para.688.

¹⁴⁹⁹CDF Trial Judgement, para.689.

1184. The Accused must also have acted with an intent to plan to use or enlist child soldiers to be found individually responsible for this count in the indictment. Even if the Chamber finds that the *actus reus* requirement of the charge is satisfied, we submit the *mens rea* is not. As stated above, Gbao was opposed to the use of child soldiers, as was accepted implicitly by various Prosecution witnesses (several witnesses testified to his usefulness in Makeni with the opening of CARITAS) and those of the defence, who explicitly noted his opposition to the use of child soldiers in the war. The defence witnesses who testified were, we submit, highly credible on this (and other) matters.

2. Instigating

1185. No evidence was adduced tending to suggest that Gbao urged or encouraged anyone to enlist or use child soldiers in any capacity.

1186. Should the Chamber find that child soldiers were present in any of the locations where Gbao lived during the Indictment period, it is important to note that Gbao's presence would not be enough to demonstrate beyond reasonable doubt that he encouraged anyone to use child soldiers.¹⁵⁰⁰

3. Ordering

1187. There is no evidence in this case to suggest that Gbao ordered anyone to enlist or use child soldiers.

4. Committing

1188. Gbao and Sesay defence witnesses made clear that Gbao did not use or enlist child soldiers in this war. In actuality, Gbao was opposed to the use of child soldiers by certain RUF.

1189. The Prosecution may submit that because witnesses saw Gbao walking with children in Kailahun Town or Makeni or that he saw children in his house, he must have used children in the war effort. This is we submit is not sustainable and more evidence should have been provided to suggest, let alone prove, that Gbao used child soldiers in a manner prohibited under the statute.

1190. It was commonly known throughout RUF-controlled areas that the war had left many orphans or displaced children. These children needed to be cared for. As a result some of these children took refuge with members of the RUF.¹⁵⁰¹ This, we suggest, was more symptomatic of a

¹⁵⁰⁰CDF Trial Chamber Judgement, para. 960.
¹⁵⁰¹DIS-069, Transcript 22 October 2007, p.34.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

traditional sense of community than of a sinister and malevolent plan to induct them as child combatants. We submit that, consistent with his reputation as a caring individual Gbao took in teenagers such as DAG-111 out of a sense of humanity. Unless it can be shown beyond reasonable doubt that these people were armed and working for Augustine Gbao in a manner prohibited under the statute, we suggest this was hardly evidence of Gbao using child soldiers.

1191. For the reasons listed above, the Gbao-and Sesay- defence witnesses have presented credible evidence that suggests Gbao did not and would not personally tolerate the use of child soldiers in any capacity. Considering the testimony from Prosecution witnesses, and the concomitant lack of credibility or fulfilment of the elements of the crime, the Prosecution have failed to prove beyond reasonable doubt that Gbao enlisted or used child soldiers at any time during the Indictment period.

5. Aiding and Abetting in the Planning, Preparation or Execution of a Crime

1192. Gbao did not offer any practical assistance to any RUF soldier who used children in a manner prohibited under the statute for the reasons listed above.

1193. It is anticipated that the Prosecution will seek to convict Gbao for the alleged screening he performed on individuals coming from the frontlines into RUF safety zones. If so, we first submit that if this occurred with any regularity, its function served a vital security purpose during a time of war when Kamajor insurgency was feared with dread amongst RUF and civilians alike. After all, this was a war where there was no clear method to identify the perceived enemy. Gbao's function served simply to protect the citizens of Kailahun District.

1194. If there was any dilatory purpose for the screening—such as sending them to bases for military training—it would need to be demonstrated beyond reasonable doubt that Gbao was a willing participant or at least aiding and abetting through this screening.

1195. It should be re-emphasised that, to be found liable for aiding and abetting in the planning, preparation or execution of a particular act, Gbao's actions must have had a “substantial effect on the perpetration of the crime”. We submit that if it was indeed the case that the RUF was sending young boys and girls to training bases for military-style training, this would have occurred whether or not Gbao screened these individuals upon their arrival to Kailahun Town.

29853

B. Joint Criminal Enterprise

1196. Gbao's individual criminal responsibility under this mode of liability is discussed in paragraphs above.

1197. As stated above, there is no evidence that Gbao acted in concert with other members of the Joint Criminal Enterprise nor is there evidence that any action undertaken by him with the aim to further a common purpose, plan or design to commit criminal acts. As there is no Joint Criminal Enterprise to which the Third Accused was a member, the Third Accused cannot be found criminally responsible for the crime under this mode of responsibility.

1198. Should the Trial Chamber find that there was a Joint Criminal Enterprise, the Third Accused submits that there is no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

1199. In the absence that Gbao was involved in the crime, there is no basis upon which he may properly be convicted under this mode of liability.,

C. Superior Responsibility under Article 6(3)

1200. Gbao held no superior responsibility under Article 6(3) over RUF fighters and units. General arguments to support this position are detailed above.

1201. Augustine Gbao cannot be found responsible as a superior under Article 6(3): there is not no indicia of a superior-subordinate relationship between him and the perpetrators of the alleged crime. Nowhere can evidence be found that he had any authority over them or that he gave orders to them, nor is there evidence of him having the material ability to affect any of their actions.

1202. In the same way, evidence is lacking as to whether and how Augustine Gbao knew or had reasons to know that the crime alleged would be or was committed. In view of the fact that Augustine Gbao was at the rear, and that he did not usually receive reports, it is not established that he had the necessary knowledge to be found responsible for the crimes of his alleged subordinates.

1203. The Prosecution failed to adduce evidence that established beyond reasonable doubt that Augustine Gbao had the material ability to prevent or punish his alleged subordinates. In the absence of evidence that Augustine Gbao had the power to issue orders or to take any disciplinary

29854

action, or that he had any other power of sanction, it cannot be said that he is responsible as a superior for failing to prevent or punish the commission of crimes by his subordinate.

I. Introduction

1204. Augustine Gbao is charged under Count 13 with Enslavement, a crime against humanity, punishable under Article 2(c) of the Statute.¹⁵⁰² It alleges that the AFRC/RUF engaged in widespread and large scale abductions of civilians and use of civilians as forced labour, which included domestic labour and use as diamond miners.

II. Prosecution Evidence

1205. The allegations of forced labour against Augustine Gbao include the supervising of civilians carrying goods,¹⁵⁰³ ordering farm work,¹⁵⁰⁴ providing civilians to the RUF for farming or for carrying properties,¹⁵⁰⁵ putting civilians together to work on a farm,¹⁵⁰⁶ supervising the Agricultural Unit,¹⁵⁰⁷ capturing civilians to farm,¹⁵⁰⁸ receipt of goods from civilians forced to work,¹⁵⁰⁹ using civilians for food finding,¹⁵¹⁰ using civilians to transport goods which would then be used to buy ammunition and¹⁵¹¹ involvement in forced mining.

1206. On 25 October 2006, when rendering its oral decision on the motion for acquittal, the Trial Chamber found that there was evidence, if believed, that was capable of supporting convictions in the following Districts: Kenema, Kono, Koinadugu, Bombali, Kailahun, Freetown and Western Area, as well as Port Loko.¹⁵¹²

III. Defence Evidence

A. Gbao Defence Witnesses

1. DAG-110

1207. [REDACTED] ¹⁵¹³ [REDACTED]

¹⁵⁰² Article 2(c) of the Statute 'Crimes Against Humanity' holds 'The Special Court shall have the power to prosecute persons who committed the following crimes as part of a widespread or systematic attack against any civilian population: [...] c. Enslavement [...].

¹⁵⁰³ TF1-371.

¹⁵⁰⁴ TF1 330.

¹⁵⁰⁵ TF1 113.

¹⁵⁰⁶ *Id.*

¹⁵⁰⁷ *Id.*

¹⁵⁰⁸ TF1 366.

¹⁵⁰⁹ TF1 330.

¹⁵¹⁰ TF1 071.

¹⁵¹¹ TF1 367.

¹⁵¹² RUF Transcripts of 25 October 2006, Rule 98 oral decision, p.31-34.

¹⁵¹³ DAG-110, Transcript 2 June 2008, p.44.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

████████████████████ Certain items were permitted for trading, while others were not, according to the witness. For example, diamonds, household materials and rice were prohibited at the trading site.¹⁵¹⁴ Most of the traders were farmers selling to the Guineans.¹⁵¹⁵ He testified that soldiers were not allowed at the trading sites,¹⁵¹⁶ although in 1993 people were traveling there under armed guard due to the threat posed by the government troops.¹⁵¹⁷ After the troops retreated, armed guards no longer went to trading site.¹⁵¹⁸

1208. The G5 and town/zobush commanders were responsible for organising farming:

“Q. The units were responsible for the cultivation—the G5 unit, the town—the zobush commanders, they were responsible to organise civilian[s] to cultivate a farm for the war, as war effort.”¹⁵¹⁹

1209. DAG-110 agreed with the following description of the trading process: “Q :Goods which were grown in the Kailahun area, coffee, what have you, cocoa, were gathered by paramount chiefs who handed them over to the S4 unit, and agricultural unit representatives would then carry it, in trucks, to the Guinea barter point, where the barter would take place. AU would bring back the bartered items, give them to the S4 who would then distribute them to combatants and civilians: Would that be about right? A. Yes, that’s right; especially the medicine”.¹⁵²⁰

1210. The witness testified that Gbao had no involvement with organising labour in Kailahun District or throughout Sierra Leone. According to him, the G5 was responsible for farming,¹⁵²¹ while the Agricultural Unit (also composed of civilians) were responsible for trading RUF produce. Overall, the G5, Agricultural Unit and the town commanders ran the community farming.¹⁵²²

1211. DAG-110 never witnessed any civilians working under gunpoint.¹⁵²³

1212. The witness discussed farming during RUF times and community farming today. Once the rice from RUF farms was harvested, it would be taken to a rice barn, where he said that anyone may access it. The only difference between rice barns in RUF farms during the war and community

¹⁵¹⁴ *Id.* at pp.46, 88

¹⁵¹⁵ DAG-110, Transcript 2 June 2008, p.44.

¹⁵¹⁶ DAG-110, Transcript 2 June 2008, p.46.

¹⁵¹⁷ DAG-110, Transcript 2 June 2008, p.117-18.

¹⁵¹⁸ DAG-110, Transcript 2 June 2008, p.117-18.

¹⁵¹⁹ DAG-110, Transcript 2 June 2008, p.90.

¹⁵²⁰ Issa Sesay, RUF Transcripts 31 May 2007, p.69.

¹⁵²¹ DAG-110, Transcript 2 June 2008, p.89; *also see* DAG-048, Transcript 3 June 2008, p.92.

¹⁵²² DAG-110, Transcript 2 June 2008, p.91.

¹⁵²³ *Id.* at p.90.

farms today is that fewer people use the rice today, as fewer strangers come into town¹⁵²⁴

1213. The rice would be set aside for wounded commandos. The witness also stated that civilians evacuated from the frontline were assisted by local individuals in Kailahun District who would bear the responsibility of ensuring the displaced person had enough to eat. Where one produced insufficient food one could access the RUF rice barn from one's own farm was not enough they would be able to access the RUF rice barn.¹⁵²⁵ This food was also used for older people unable to care for themselves.¹⁵²⁶

1214. [REDACTED]
[REDACTED] the witness never saw Gbao carrying goods to the trading site himself.¹⁵²⁷ Gbao would occasionally go to the location of the trading site, but would not go to the actual site itself—instead, he stayed 100-200 meters back. He would often be seen asking for cigarettes.¹⁵²⁸

1215. DAG-110 compared the farming in Kailahun at that time as similar to community farms today. “Community farms run[] today. The Mende man call it 'kpaa gbamei', that means farm that does not belong to anyone, and these farms are being operated today in towns in Kailahun District”.¹⁵²⁹ For example, there are six community farms in [REDACTED], where DAG-110 resides.¹⁵³⁰ He stated that these communities set up community farms to help feed strangers.¹⁵³¹

1216. The witness also testified to the mining that took place in Giema. He described the fraudulent-if not amusing- nature of its origin. The initial RUF prospector mining for diamonds in Giema was Pa Patrick. DAG-110 explained that Pa Patrick had been ‘in Pujehun suffering’ and was later taken to Giema for his own safety. When he arrived he had swollen feet and was unable to prepare food for himself. He did, however, have two diamonds of very low value. He went to DAG-110 and asked to have these two diamonds traded at the trading site. He was not allowed to do so as this was against RUF policy to trade diamonds.¹⁵³²

¹⁵²⁴ DAG-110, Transcript 2 June 2008, pp.92-93.

¹⁵²⁵ DAG_110, Transcript 2 June 2008, p.93.

¹⁵²⁶ DAG-110, Transcript 2 June 2008, p.93.

¹⁵²⁷ DAG-110, Transcript 2 June 2008, p.74.

¹⁵²⁸ DAG-110, Transcript 2 June 2008, p.46.

¹⁵²⁹ DAG-110, Transcript 2 June 2008, p.90.

¹⁵³⁰ DAG-110, Transcript 2 June 2008, p.91.

¹⁵³¹ DAG-048, Transcript 3 June 2008, p.116.

¹⁵³² DAG-110, Transcript 2 June 2008, pp.95.

1217. DAG-110 stated that Pa Patrick was given approval to begin prospecting around Giema. “He dug two big holes” DAG-110 states “ and Pa Patrick “gave the order...that the gravel should be washed...[later] he went quietly in the night and dropped one small diamond in one of the holes... [t]hen the following day they started to wash the gravel. When the gravel was washed, they found one little diamond. That diamond I spoke of. Then Giema became a diamond famous area. This Pa Patrick, whose feet were swollen, was now given food on a daily basis”.¹⁵³³

1218. Pa Patrick later repeated this trick. After the 'discovery' of this second diamond, no more diamonds were ever found in Giema.¹⁵³⁴

2. DAG-048

1219. This witness testified that the civilians worked willingly and that food was provided.¹⁵³⁵

1220. He testified that “[i]f a civilian was needed [for farming] the G5 has to be contacted and the G5, in turn, has to contact the chiefdom and these section commanders. They organise civilians for such community level, and it was not forced per se; they were doing it at their own will because, at that time, everybody has to eat. We have to do farming. If you cannot go to bush to work then definitely you are not going to eat. No money, no rice to buy, and so on”.¹⁵³⁶

1221. The witness testified that farming had to take place as a matter of survival. Due to the war conditions, people were eating “ordinary leaves. We eat bush yams, bananas that were not strong enough”.¹⁵³⁷

3. DAG-080

1222. The witness did not testify to the allegations of forced farming, but he recalled allegations of forced labour that were investigated once in Giema in 1996. He recalled that a soldier had been using some civilians to work on his farm, But that this had not been a common practice. He conceded “some renegades were doing that, and they were put under punishment”.¹⁵³⁸

B. Sesay Defence Witnesses

1533DAG-110, Transcript 2 June 2008, pp.96-97.
 1534DAG-110, Transcript 2 June 2008, p.97.
 1535DAG-048, Transcript 3 June 2008, p.115.
 1536DAG-048, Transcript 3 June 2008, p.92.
 1537DAG-048, Transcript 3 June 2008, p.93.
 1538 DAG-080, Transcript 9 June 2008, pp.35-36.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29859

1. Issa Sesay

1223. Sesay denied that Gbao had anything to do with mining at any stage and at any location during the war.¹⁵³⁹

1224. When asked about whether Gbao had any role to play regarding the organising of labour in Kailahun District, Sesay stated as follows:

“[W]hen I returned to Kailahun, late in February '98, I said I did not see Gbao organising people to transport items, loads, luggages; I did not see that. I said from May [1998] I was in Pendembu. Gbao was in Kailahun Town and Bockarie was in Buedu. From Pendembu to Buedu is 17 miles, and from Buedu to Kailahun is another 17 miles but when I was going to Kailahun Town I never saw Gbao organising civilians because the civilian population, itself, had to abandon Kailahun from April, Kailahun Town, from April '98 because of the bombardment through the jet in -- because it killed a woman and some fighters in Kailahun Town. There were very few people in Kailahun Town and some workers”.¹⁵⁴⁰

1225. When asked about allegations that Gbao was G5 commander:

“In Giema, the G5 commander who was working under me, who was the G5 commander, that was DM Brima. DM Brima. And Gbao was not a G5 commander in Kailahun Town. '97/98, Gbao was an IDU. The G5, the overall G5 in '97/98 was Prince Taylor, and the G5 who was based in Kailahun, who was the district G5 Commander, was Morie Fekai, and he was based in Kailahun Town '97, '98, '99 up to 2000, 2001. Morie Fekai. He was the district G5 commander”.¹⁵⁴¹

2. DIS-157

1226. This witness agreed with the assertion that Gbao was never a G5 and had never been responsible for selecting civilians to perform various tasks and duties throughout Kailahun Town.¹⁵⁴²

1227. He stated that from 1996 to 2000, civilians were not forced to carry loads to the trading sites and that there were RUF men (the S4) doing some of this work, as well as normal RUF soldiers. The RUF did, he said, provide security for the civilians, from which they taxed the goods traded. However, civilians were also in charge of collecting the tax.¹⁵⁴³

3. DIS-078

1539 Issa Sesay, RUF Transcripts 31 May 2007, p.31.

1540 Issa Sesay, RUF Transcripts 31 May 2007, p.55.

1541 Issa Sesay, RUF Transcript 31 May 2007, p.58.

1542 DIS-157, Transcript 25 January 2008, p. 83.

1543 DIS-157, 25 January 2008, pp.32-34.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29860

1228. The witness was asked:

“Q. Did Augustine Gbao ever have anything to do with the distribution of food?

A: I did not see that”.¹⁵⁴⁴

1229. Next, he was asked a question about the IDU in general:

“Q. Was it the IDU's job to tell civilians what to do in relation to labour?

A: It was not the job of the IDU”.¹⁵⁴⁵

1230. DIS-078 indicated that Gbao would not be giving orders to Morie Fekai, who was a member of the G5, and therefore could not have overseen the civilian labour in Kailahun. In response to the question

“[Q]..if somebody was to suggest that it was Augustine Gbao who would tell Morie Fekai, who would then tell the civilians what to do and where to work, if someone was to suggest that, what would you have to say?” ,he responded

“A. I cannot believe that type of person, because Morie Fekai was a G5”.¹⁵⁴⁶

1231. DIS-078 also testified thus:

“A[w]e were in slavery in 1991 to 1992...In '96, '97 and '98 there was no slavery again.

Q. What about 1999?

A: There was no slavery. At that time we are now buying cocoa...

Q. ..[w]hile the Gios were in Kailahun District there was slavery, but when the RUF were in control in Kailahun, there was no slavery; is that what you're saying?

A: Yes, that is what I want to explain that to you today; that there was no slavery there at all. Yes, we fought the war but there was no slavery. There was no slavery at all”.¹⁵⁴⁷

4. DIS-069

1232. The witness stated that Gbao had “[n]o control over ammunition, arms, foodstuffs, or movement of civilians as it related to working on RUF farms.”¹⁵⁴⁸

1233. Gbao was not member of G5, according to the witness, the unit that had primary responsibility for overseeing civilians when they arrived from the frontlines.¹⁵⁴⁹

1234. DIS-069 provided earlier corroboration to the account later provided by DAG-110 when he testified that civilians would, in fact, take goods to the trading post on their own.¹⁵⁵⁰

¹⁵⁴⁴ DIS-078, Transcript 16 October 2007, p.99.

¹⁵⁴⁵ *Id.* at p.98.

¹⁵⁴⁶ DIS-078, Transcript 16 October 2007, p.98.

¹⁵⁴⁷ *Id.* at p.96-97..

¹⁵⁴⁸ DIS-069, Transcript 23 October 2007, p. 74.

¹⁵⁴⁹ DIS-069 Transcript 23 October 2007, pp.62-63.

¹⁵⁵⁰ DIS-069, Transcript 22 October 2007, p. 16,17.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29861

5. DIS-302

1235. Contrary to allegations made by the Prosecution, this witness testified that the G5 were responsible for-and actually did- help civilians find accommodation when they arrived in RUF liberated areas.¹⁵⁵¹

6. DIS-187

1236. This man discussed community farming and testified not only that during wartime were people fed while they were working¹⁵⁵² and given additional provisions such as salt and maggi but they were also given yields from the overall harvest.¹⁵⁵³

7. DIS-128

1237. This witness simply recalled that the G5 handled matters relating to civilians.¹⁵⁵⁴

8. DIS-074

1238. The witness succinctly stated that “[w]e were not forced to work. We did it willingly so that we would have food to eat”.¹⁵⁵⁵

9. DIS-080

1239. This witness testified about community farms in Kailahun District. He was asked whether community farms existed in Kailahun:

“Q: [d]o you know if there is a community farm in other towns or sections today?...

A: Those other towns around us, they too, are doing that same work”.¹⁵⁵⁶

1240. If a civilian was unwilling to work on these community farms, he would have to pay a penalty.¹⁵⁵⁷

10. DIS-177

1241. The witness testified merely that the G5 was responsible for organising civilians to work on community farms.¹⁵⁵⁸

¹⁵⁵¹DIS-302, Transcript 27 June 2007, p.65.

¹⁵⁵²DIS-187, Transcript 26 November 2007, pp.50.

¹⁵⁵³DIS-187, Transcript 26 November 2007, p. 51.

¹⁵⁵⁴DIS-128, Transcript 26 November 2007, p.109.

¹⁵⁵⁵ DIS-074, Transcript 4 October 2007, p.64.

¹⁵⁵⁶ DIS-080, Transcript 5 October 2007, p.57.

¹⁵⁵⁷ *Id.*

¹⁵⁵⁸ DIS-177, Transcript 4 October 2007, p.40.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

IV. Assessment of Prosecution Evidence

A. Denis Koker—TF1-114

1242. This witness testified about civilians working in and around Buedu. Gbao's name was not mentioned. In fact, when the Prosecution asked directly if any RUF commanders had farms and the witness did not mention Gbao's name.¹⁵⁵⁹

B. TF1-141

1243. The witness testified that he was taken to Kailahun Town for screening in order to identify suspected Kamajors. The witness alleged that the screening was done by Augustine Gbao.

1244. At first TFI-141 stated that Gbao was the G5 commander. He said “they told me he was a G5 commander”. But, in response to the question “who told you that Colonel Gbao was G5 commander?” he replied “he himself”.¹⁵⁶⁰ Seconds later, as if realising his ‘error’, the witness contradicted himself: “[t]he combatants told us that he was the G5 commander”.¹⁵⁶¹

1245. TFI-141 testified that he stayed in Kailahun Town for “some days...some time”.¹⁵⁶² During that time he allegedly saw Gbao “at the barri passing by” or “in the town”.¹⁵⁶³

1246. The witness recalled being taken to the training base early one morning:

“Q. Witness, who forced you to go to the training base?

A. Well, it was the combatants in the morning, early in the morning. We just see the combatants—we just saw the combatants at our doors, taking us one after the other. They said we should go to the training base. They brought drums and they started beating people who wanted to resist”.¹⁵⁶⁴

1247. In his testimony on page 22, the witness gave the impression that being taken to the base came as a surprise.¹⁵⁶⁵ He alleged that ‘they’ came early one morning when he had been in Kailahun for a few days.¹⁵⁶⁶ The young men and women, he said “were taken together at the base with them [the fighters at the base]”;¹⁵⁶⁷ the older men and women were taken to Buedu and would work on the

¹⁵⁵⁹ Denis Koker, Transcript 28 April 2005, p.68.

¹⁵⁶⁰ TF1-141, Transcript 12 April 2005, p.19.

¹⁵⁶¹ *Id.*

¹⁵⁶² *Id.* at p.21.

¹⁵⁶³ *Id.* at p.21.

¹⁵⁶⁴ *Id.* at p.23.

¹⁵⁶⁵ *Id.* at p.22.

¹⁵⁶⁶ *Id.* at p.22.

¹⁵⁶⁷ *Id.* at p.15.

government farm.¹⁵⁶⁸

29863

C. TF1-108

1250. TF1-108's evidence should be wholly disregarded in our submission. He lied repeatedly in his evidence, most clearly regarding the alleged rape and death of his wife by RUF fighters.

1251. If the Court finds to the contrary and that this evidence is worthy of consideration, scrutiny swiftly reveals the forced labour account to be just as lacking in merit as TFI-108's other allegations are. Discussion of these can be found above.

D. TF1-113

1252. The credibility of TF1-113 was significantly questioned in paragraphs 830 –837 above in relation to her evidence on the killing of the suspected Kamajors in Kailahun Town. She admitted to lying under oath in court as well as, *inter alia*, lying in either the AFRC or RUF trial. Thus, we firmly submit that her evidence should be disregarded.

1253. Her allegations of forced labour similarly lack credibility. She persistently characterised the Third Accused as Overall G5 commander. Instead, Gbao was of course the overall IDU commander with no responsibilities for civilian labour, as claimed by many defence witnesses. She also stated that civilians were asked by the G5 to farm and would sometimes be working at the farm for up to a week without food. While this cannot constitute the crime of forced labour and need not be addressed here, this comment can hardly be taken seriously in any event, as the claim of working for an entire week without food is obviously an exaggeration.

E. TF1-330

1. No Recollection of Gbao's Involvement on RUF Farming Until Just Before Trial

1254. Witnesses failing to name Gbao as a primary actor in alleged crimes until just before trial became a recurring theme in this case, and TF1-330 is a celebrated member of this sad group. In 2003, TF1-330's statement made reference to just a single, brief hearsay allegation that Gbao was the leader of those who investigated people in the RUF.¹⁵⁶⁹ In 2004, the witness supplemented his 2003 statement, but the additions made no mention of Gbao. When faced with these scant statements at trial, the witness, predictably, insisted that he had in fact told the prosecution

¹⁵⁶⁸ *Id.*

¹⁵⁶⁹ Exhibit 85a, p.17457; also see TF1-330, Transcript 16 March 2006, p.110.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

investigators about Gbao, but that “maybe they [the OTP] forgot” about what he had said.¹⁵⁷⁰

1255. Just before trial, as with so many other important prosecution witnesses, TFI-330’s ability to recall Gbao’s criminal acts improved dramatically. Like a bolt from the blue the witness claimed that Gbao had actually been ordering civilians to work for the RUF and that had been doing so for as long as three years.¹⁵⁷¹

1256. Again, whether the prosecution “forgot” to include a material fact or whether the witness was blatantly and cynically lying is immaterial. If the witness is found to have been lying, his evidence should naturally be disregarded. If the prosecution failed to include material facts from the witness “it is not for the Trial Chamber to search for reasons to excuse inadequacies in the Prosecution’s investigative process.”¹⁵⁷² However, whether the witness was lying or the Prosecution merely made a mistake, we submit that serious doubts have been raised as to the reliability of the witness and his damning, ‘last minute’ evidence.¹⁵⁷³

1257. On a more fundamental level we submit that such a flagrant failure to mention such a material fact until the very eve of trial defies an honest explanation. In his first statement, the witness provided a hearsay account of Gbao’s role in the RUF as a simple investigator. Two years later, with the memory further diminished by time, TFI-330 *suddenly remembered that Gbao played a significant role in his day-to-day life for three years*. TFI-330’s sudden and convenient recall simply defies scrutiny.

1258. Indeed, we suggest his evidence raised more questions than it answers. Why was Gbao not mentioned as giving orders to the G5? Does it not stand to reason that everyone should remember their superior- especially one that TFI-330 appears to resent so much? Why was there no early mention that Gbao was issuing orders to Morie Fekai? Why was Gbao’s name only mentioned as an investigator in 2003? The only reason, we submit, is clear—the witness’s 2003 statement, containing mere passing reference to Gbao was accurate. His in-court testimony was not. It was manufactured for a single purpose- to implicate Gbao.

¹⁵⁷⁰ *Id.* Transcript 16 March 2006, p.112.

¹⁵⁷¹ *Id.* at p.113.

¹⁵⁷² *Kayishema* Trial Judgement, para.78.

¹⁵⁷³ *Rutaganda* Trial Judgement, para. 227. *See also* *Rutaganda Appeals Judgement*, para.190; *Kayishema* Trial Judgement, para. 443.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1259. Counsel for the Third Accused asked a second time why TF1-330 was tardy in discussing Gbao in his previous testimony. TFI-330 feebly replied “[w]hat I am saying today in this court I have been telling them. If they did not write it down then they have forgot...”¹⁵⁷⁴ Again, we submit that whatever the reason for the inconsistent testimony may be it is not the fault of Augustine Gbao, and casts a pall of doubt on the witness’s testimony.

1260. This shadow looms larger when one considers the generic nature of TF1-330’s testimony. His inculpatory evidence largely involved inserting Gbao’s name into positions of superior control and attendance at meetings/ceremonies. None of the other typical hallmarks of familiarity or long term association with an individual are present: there are no reported discussions with Gbao, no anecdotal quips about his personality, appearance or otherwise. Rather, it is an account of his observation of Gbao merely overseeing certain work, or demanding that certain materials be sent to Kailahun- nothing more.

1261. One’s suspicion of TF1-330’s reliability grew when, under cross examination by counsel for Sesay, he appeared to revert to the implicit suggestion that Gbao was not much involved: Having mentioned the IDU commander’s involvement at some level, the witness was asked who was responsible for setting up the RUF farms:

“A. Where I was living there, it was Morie Fekai who was over us. He told us to cultivate that farm, the government farm. When there was an information, he was the one who would tell us – they would tell him to tell his people. It was Morie Fekai who was over us and he was the one who told us.

Q. Who did he tell?

A. Morie Fekai, he had his own boss. He was called Prince Taylor. In fact, it was in stages. He was the one who told us. He was working with the civilians. Whatever he tells us to do, that’s what we would do. He, Morie Fekai, where I was living. “This is what you should do for the government.”¹⁵⁷⁵

1262. Suddenly, the hierarchy reverts back to the one TFI-330 announced in 2003. Morie Fekai’s boss was Prince Taylor, not Augustine Gbao.

2. *Allegations about Gbao’s Personal Farm Not Made Until In-Court Testimony*

1263. TF1-330 made an allegation about cultivating a farm for Gbao during his testimony. He had

¹⁵⁷⁴ *Id.* Transcript 17 March 2006, p.45.

¹⁵⁷⁵ *Id.* Transcript 15 March 2006, p.21.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

failed to make any reference to this in any of his previous statements.¹⁵⁷⁶ His explanation was predictable: “[i]f they did not write it, then they forgot, but I did say it [in my previous statements]”.¹⁵⁷⁷ Again, we firmly submit this raises a more than reasonable doubt and places the onus on the witness or indeed the prosecution for explanation. None has been received. This should not be considered as a sustainable allegation against the Third Accused.

3. *Witness Unable to Remember Significant Events in the War*

1264. [REDACTED] TFI-330 was remarkably unable to remember important moments during the war. He was reluctant to testify on the conditions in Kailahun or even the Kamajors.

1265. He had only heard the Kamajors were fighting with the rebels, but did not know where.¹⁵⁷⁸ He had not heard of the event in late 1996 when approximately 200 Kailahun citizens were slaughtered by Kamajor forces at the Mendebuema crossing point.¹⁵⁷⁹ Initially, the witness testified that he preferred not to burden the court with hearsay accounts of anyone's friend or family suffering at the crossing point; eventually he stated that he had never even heard of the event itself. In an astonishing show of candour (or ignorance), TFI-330 confessed that he had never heard of the Mendebuema crossing point at all- despite the fact it is just 12 miles from where he had lived in he war.¹⁵⁸⁰

1266. The witness went further with his professed ignorance of events and locations in Kailahun District. He was asked about a Kamajor attack in Giema in November 1996 but stated he was not there at the time in an apparent recollection, after all, of the attack. He was also asked about an attack on Giema in January 1997: although only three miles from Talia, he was unwilling to testify to the event, claiming again not to wish to burden the court with hearsay.¹⁵⁸¹

1267. TFI-330 also claimed to know nothing about the atrocities committed by ECOMOG and Kamajor forces in Kenema in February 1998.¹⁵⁸²

¹⁵⁷⁶ *Id.* at Transcript 17 March 2006, p.7.

¹⁵⁷⁷ *Id.*

¹⁵⁷⁸ *Id.* at Transcript 16 March 2006, p.86.

¹⁵⁷⁹ *Id.* at p.84.

¹⁵⁸⁰ *Id.* at p.85.

¹⁵⁸¹ *Id.* at p.86.

¹⁵⁸² *Id.* at p.88.

1268. By now the witness was coming under some pressure from counsel for Gbao's cross examination. His attempts to prevaricate led to some heated exchanges and an appeal by counsel to the bench to require TFI-330 to answer questions without endless prevarication. It was at this time that the witness incredibly denied that there was ANY conflict in Kailahun District from 1998-2000.¹⁵⁸³

1269. TFI-330 was then asked if he knew any other RUF in Talia besides Morie Fekai. He claimed to know no one except Morie's relatives.¹⁵⁸⁴

4. *Witness Dishonest about Gbao's Location*

1270. The witness stated that when Gbao left Giema in 1996, "he was staying in Kailahun. Up to the time of the disarmament, that is where he stayed, in Kailahun".¹⁵⁸⁵ This is clearly untrue, as the defence and prosecution surely agree that **Gbao lived in Makeni from early 1999 until disarmament**¹⁵⁸⁶ and not in Kailahun from 1996 until 2003.

5. *Contradictions in Testimony*

1271. The witness had stated in chief: "since the beginning of 1994 unto 2001 I knew Augustine Gbao. We do meet, we greeted each other..."¹⁵⁸⁷ Just two days previously he had claimed that he knew Gbao since 1991. The witness stated that:

Q. When was it that you were aware of them coming to Sierra Leone?

A. **1991.**

Q. I think you were trying to explain to the Court something that happened when they came in 1991. Could you just take your time and try to explain that to the Court?

A. When they came, when they appointed those chiefs, they said to us that whatever somebody had was not his or hers.

Q. ...Who said that things were not his or hers?

A. **Mosquito was there and Issa Sesay and Augustine Gbao.** That was what they said. And even Pa Sankoh – Mr Sankoh who came with them".

1272. This testimony cannot be reconciled and should not be relied upon. We submit it provides a clear indication of a predilection to implicate Gbao at all costs, mentioning his name as much as possible, independent of its veracity and, by reference to his early witness statements, very late in the proceedings.

1583 *Id.* at p.89.

1584 *Id.* Transcript 14 March 2006, p.96.

1585 *Id.* Transcript 16 March 2006, p.115.

1586 And Magburaka between March/April 1999 and October 1999 following RUF infighting.

1587 Transcript 16 March 2006, p.95.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

6. *Witness Evasive Regarding TF1-108's Testimony about the Death of his Wife*

1273. As described above, TF1-108 lied about the rape and death of his wife. TF1-330 knew TF1-108 well, as both were originally from Talia,¹⁵⁸⁸ and yet he claimed to know nothing about TF1-108's wife's death. Suspicions as to TF1-330's testimony on this subject were raised by his evasive response to questions. Having said that TF1-108 lived in Giema, TF1-330's evidence continued:

“Q. He used to come and greet you in Talia?

A. It was not every day, unless those days he will have chance to go there. When he goes there he would go to my house and greet me.

Q. And would you eat together in Talia when he came to --

A. If I had food and we are able to eat together, I would bring it out then we eat together. But if I don't have food we would not eat together.

Q. ...Did you greet him throughout 1996 to 1999? I'm not suggesting every day, but through the years did you continue to greet him?

A. Whenever we meet, if he greets me I will also greet him, then we'll go about our business.

...

Q. Sorry, my fault. Are you aware of any deaths in his family from 1996 onwards?

A. **Where they were, people used to die there. But I was not there. Even where I was, people died there as well. Many.**

Q. I'm sure, people die all the time everywhere, Mr Witness. But did Fatoma Aruna ever tell you about any deaths in his family?

A. **In Giema where he was people used to die there. People used to die there.**

Q. Let me ask you this: Did Fatoma Aruna ever tell you about any deaths in his family caused by RUF combatants?

A. He did not tell me that. He did not tell me that.

Q. Thank you very much”.¹⁵⁸⁹

1274. It clearly seemed that the witness did not want to discuss TF1-108 and his false testimony. He worked hard to avoid it, but in the end had to admit that he'd been told nothing. We submit that the degree to which he tried to avoid answering the question again casts doubt on his credibility.

7. *Gbao was not the Most Senior in Kailahun Town*

1275. The witness testified that he did not know the RUF military commanders. He stated that “[i]n RUF the commanders were many but the military commanders, **I don't know them**”.¹⁵⁹⁰ In response to a challenge from counsel for the Third Accused regarding the existence of senior commanders in Kailahun Town, the witness appeared to concede that “well, maybe you know them,

¹⁵⁸⁸ *Id.* Transcript 15 March 2006, p.25.

¹⁵⁸⁹ TF1-330, 15 March 2006, pp.25-26.

¹⁵⁹⁰ Transcript 17 March 2006, p.27 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29869

but I did not”¹⁵⁹¹

8. *Gbao was not Overseeing Diamond Operations in Giema*

1276. TFI-330 attempted to attribute responsibility to Gbao regarding the unsuccessful diamond mining operation in Giema. He stated, without support or explanation, that Gbao was overseeing the operation because of his status as overall security commander.¹⁵⁹²

1277. He allegedly went to the diamond mining area in Giema twice. He concluded on his first visit that the alleged civilians who were working at the mining area were upset and had not eaten the day he visited.

1278. However, he did not testify how he acquired this information or what time of day he went to see them (leaving open the unchallengeable possibility that they had not eaten because it was before breakfast time). There is no testimony that the witness spoke to the workers and even admitted that he did not stay there long.¹⁵⁹³

1279. The second time he allegedly went to Giema he apparently saw Gbao there with many people.¹⁵⁹⁴ They were inaugurating the diamond mining operation, and there was a ceremony of sorts. This is the full extent of the testimony against Gbao regarding mining operations in Giema.

1280. We submit that, besides being detrimentally non-specific in their nature, the allegations against Gbao are rather far-fetched. After all, it defies credulity to accept that Gbao would be overseeing mining operations in Giema when he had no control over any other mining operations elsewhere in the country.

G. TF1-371

1281. In our submission, testimony from TF1-371 should be wholly disregarded, considering the repeated inconsistencies, contradictions and outright lies in his testimony. His impeachment by counsel for Gbao concerning the trafficking of arms during peacetime and his explanation about his apparent grant of immunity by the prosecution are especially troubling.

1282. On a different point, it was especially significant that from 1991 or 1992 until March 1998

¹⁵⁹¹ *Id.* at p.30.

¹⁵⁹² *Id.* Transcript 14 March 2006, pp.49-50.

¹⁵⁹³ *Id.* at p.49.

¹⁵⁹⁴ *Id.* at p.50.

TFI-371 claimed he had never seen or heard anything about Augustine Gbao. When he was asked “[w]hen you returned to Freetown in 1997 [he had been out of the country], did you hear of Augustine Gbao as a member of the RUF?”¹⁵⁹⁵ his reply (given his high rank within the RUF and proximity to the leadership from an early stage) was memorable: **“No...I really didn't bother too much about him”**.¹⁵⁹⁶

1283. Suddenly, and, we submit, not coincidentally, the witness testified that Gbao, as overall security commander, supervised the movement of civilians whilst they were carrying goods.¹⁵⁹⁷ This cut against the weight of evidence heard in the case thus far. Just as significant was that, the witness failed to provide a single concrete example of Gbao actually performing this responsibility.

1284. TFI-371 also testified that the Gbao family had a farm in Sandiaru.¹⁵⁹⁸ He alleged that civilians were forced to work at the farm. When challenged by counsel for the Gbao the witness conceded that he never went to the farm himself,¹⁵⁹⁹ and that no one had ever told him that they were working involuntarily on Gbao's farm.¹⁶⁰⁰ His allegation seemed to originate from an alleged visit to Gbao's house in 1998 when TFI-371 claimed that he met people allegedly working at Gbao's farm that day. However, there was no apparent allegation made by the workers during the meeting that they were working against their will.¹⁶⁰¹ Instead, TFI-371 recklessly stated that Gbao employed forced labour whilst failing to offer any support for his allegation.¹⁶⁰² An equally reasonable inference would have been that he was employing local Kailahun residents with a means of income or other payment in kind, but the possibility was clearly inconvenient to TFI-371, a likely candidate himself as a war crimes suspect before he was granted immunity from prosecution.

1285. Finally, the witness accepted that Gbao had a cordial relationship with the civilians in Kailahun- something that might seem unlikely if he were responsible for the enslavement of so many of their number.¹⁶⁰³

H. TF1-366

¹⁵⁹⁵ TFI-371 Transcript 1 August 2006, p.102.

¹⁵⁹⁶ *Id.*

¹⁵⁹⁷ TFI-371, Transcript 20 July 2006, p.30.

¹⁵⁹⁸ *Id.* Transcript 1 August 2006, p.157.

¹⁵⁹⁹ *Id.* at p.154.

¹⁶⁰⁰ *Id.* at p.160.

¹⁶⁰¹ *Id.* at pp.154-55..

¹⁶⁰² *Id.* at 21 July 2006, p.61.

¹⁶⁰³ *Id.* at 1 August 2006, p.159.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1286. For the reasons we cite in our submissions on counts concerning unlawful killings, sexual violence (forced marriage), child soldiers, and UNAMSIL, TF1-366 is entirely without credibility and his testimony regarding forced labour, as well as on the other counts, should be ignored without further debate. His material and repeated lies, exaggeration, self-contradictions—as well as his disdainful courtroom demeanour allow for no other conclusion.

1287. If the Court feels for some reason that consideration of TF1-366's allegations of forced labour is appropriate, we submit that therein he again failed to provide consistent, substantive evidence. Instead, he offered nothing more than a hearsay-based account that is without merit.

1288. He testified that three RUF personnel had farms where civilians were forced to work: Issa Sesay, Morris Kallon and Augustine Gbao. Counsel asked, by providing only names of the three Accused, whether he was just trying to provide answers that the Prosecution wanted to hear. This he denied, replying that “so many people had farms there”.¹⁶⁰⁴ When challenged to provide other names he was unable to give a single one who had a farm in Kailahun.¹⁶⁰⁵ It was only after counsel tried to ask another question that TFI-366 remembered another RUF with a farm.

1289. The witness stated that he personally provided workers to Augustine Gbao for his farm. However, even though he was certain that the workers were forced to go, he did not know where Gbao's farm was located.¹⁶⁰⁶ The delivery of this evidence was the very first occasion, according to counsel for the Third Accused, that TF1-366 had ever claimed he sent workers to Augustine Gbao's alleged farm.¹⁶⁰⁷

1290. TFI-366 went further: Gbao allegedly also dispatched food from Kailahun to the jungle (presumably for RUF fighters). It transpired that this presumption was recklessly based upon his notion that Gbao was the senior officer in Kailahun Town. That was never true, as the Area Commander (when in town) and Sam Kolley, the battalion commander in Kailahun Town,¹⁶⁰⁸ were both superior to Gbao. At any rate, Gbao's role had nothing to do with logistics—this was an S4 responsibility. Gbao, as is well-known, was the chief investigator. Despite that, the witness confidently claimed that dispatching food was “his number one job”.¹⁶⁰⁹ At best, this is a wild

¹⁶⁰⁴ TF1-366, 17 November 2005, p.89.

¹⁶⁰⁵ *Id.* at pp.89-90.

¹⁶⁰⁶ *Id.* at p.90

¹⁶⁰⁷ *Id.*

¹⁶⁰⁸ TF1-366, Transcript 17 November 2005, p.87.

¹⁶⁰⁹ *Id.* at p.87.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

exaggeration. At worst, it is a lie.

1291. At another point in his testimony, TFI-366 stated that “I was told by family members and others that Morris Kallon, Issa Sesay, Augustine Gbao and others forced civilians to farm for them in Kailahun.”¹⁶¹⁰ However, immediately afterwards, when challenged by counsel for Sesay, he modified that allegation to implicate only Sesay and Kallon. Admittedly, this was an informal ‘adjustment’ to his testimony, but we suggest it raises the perplexing question as to whether he intended to implicate Gbao in the first place.

1292. The witness also testified that Gbao was present when he (TFI-366) was made Minister of Mines for the RUF.¹⁶¹¹ In his 30 August 2004 statement, TFI-366 mentioned the presence of eight other RUF, not including Gbao. In fact, in para.3 he stated “Augustine Gbao was still in Kailahun with Sam Bockarie at the time”.¹⁶¹² His response to counsel’s challenge on this inconsistency was the common refrain: “[n]o, that was not what I said”. This provoked Justice Thompson’s memorable (and, we suggest quite proper) comment:

“[h]e’s virtually repudiating the records”.¹⁶¹³

1293. Finally, during an exchange relating to Gbao’s presence or not in Kono, counsel for Gbao was caused to put “not more than an hour ago you told this Court that you never saw Augustine Gbao in Kono District”.¹⁶¹⁴ The witness typically replied: “[n]o, I have not said that”.¹⁶¹⁵ Unless this section was transcribed incorrectly by the stenographer it demonstrates yet another shambolic response by an insider witness who the prosecution presents as one of truth and reliability.

G. TF1-036

1294. This witness gave evidence that actually supported the defence contention that the RUF were not forcing civilians to work. He testified:

“Q. So is it right, then, that many civilians just got on with their daily living in the villages around Buedu; they stayed at their houses and they farmed their land?”

A. Exactly. Some used to go and plough rice, some cassava, some swamps. Some were even there to take care -- those that had plantations were there taking care of their plantations, like Kailahun District.

¹⁶¹⁰ *Id.* Transcript 14 November 2005, p.95.

¹⁶¹¹ *Id.* Transcript 10 November 2005, p.10.

¹⁶¹² *Id.* Transcript 17 November 2005, p.94.

¹⁶¹³ *Id.* at p.95.

¹⁶¹⁴ *Id.* at p.84.

¹⁶¹⁵ *Id.* at p.95.

Q. And they would contribute some of their produce to the RUF and the rest they would keep to themselves.

A. Well, those that they pluck was for their own personal use. Only that the plantations were many. So they assisted the RUF to pluck for the RUF. If they want to take it to the border to buy some other items. But the ones that they plucked for themselves was for themselves”.¹⁶¹⁶

H. TF1-071

1295. This witness was either deliberately lying or recklessly indifferent to testifying truthfully when he presented his hearsay-based recollection of the UNAMSIL incident. Detail on his UNAMSIL testimony can be found below. His inaccurate recollection of the facts, far distance from the events that took place, paucity of detail and uncorroborated nature of his testimony, plus his failure to mention Gbao's name in any capacity relating to UNAMSIL until a few months before trial (after giving three prior statements to the prosecution) demonstrated that he was not testifying truthfully. We submit his willingness to make controversial allegations irreparably damaged his credibility.

1296. Either way, he makes no mention of Gbao relevant to this count. He testified about civilians being used for labour and transportation purposes¹⁶¹⁷ and stated that the Agriculture unit was responsible for organising civilians for farming.¹⁶¹⁸ It is notable that he does not mention Gbao, as he testifies that he was in charge of civilians in Kono District. This surely contradicts TF1-371's claim that Gbao was somehow involved in facilitating the movement of goods and civilians in the eastern parts of Sierra Leone. If he were indeed one of the commanders, it would likely that TF1-071 might have known him. Instead, as stated above, he hadn't ever heard of Gbao before 2000 and did not meet him until 2000-01.¹⁶¹⁹

IV. Legal Submissions Regarding Count 13 of the Indictment

A. Definition

1297. Enslavement has been defined as the “status or condition of a person over whom any or all of the powers attached to the right of ownership are exercised”.¹⁶²⁰ Forced labour is an indication of enslavement.¹⁶²¹ It has been defined as all “work or service which is exacted from any person under

¹⁶¹⁶ TF1-036, 1 August 2005, p.16 (emphasis added).

¹⁶¹⁷ TF1-071, Transcript 21 January 2005, p.39.

¹⁶¹⁸ *Id.* at p.64.

¹⁶¹⁹ TF1-071, Transcript 26 January 2005, p.62.

¹⁶²⁰ *Prosecutor v. Brima, Kamara and Kanu*, SCSL-04-16-T-425, Trial Chamber judgement, para. 742, quoting the 1926 Slavery Convention. (‘AFRC Trial Chamber judgement’).

¹⁶²¹ AFRC Trial Chamber judgement, para. 742, quoting *Kmojelac*, Trial Chamber judgement, para.359.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

the menace of any penalty for which the said person has not offered himself voluntarily”.¹⁶²²

1298. In the present case, the Prosecution charged Augustine Gbao with enslavement as a crime against humanity (it can also be punished as a war crime). This means that the Prosecution is required to show that the crime of enslavement was committed as part of a widespread or systematic attack against any civilian population.¹⁶²³

B. Elements

1299. According to the Trial Chamber in the AFRC case, the constitutive elements of forced labour as enslavement are as follows:¹⁶²⁴

1. The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty; and
2. The perpetrator intentionally exercised such powers.¹⁶²⁵

1300. In the RUF case, the Trial Chamber added that if the Accused acted in the reasonable knowledge that this was likely to occur, that could suffice to show the necessary *mens rea*.¹⁶²⁶

1301. It was held that this must be demonstrated with objective evidence, the victim’s subjective state of mind (such as having the impression that he was forced to work) being insufficient for evidential purposes.¹⁶²⁷

V. Submissions on Behalf of Third Accused

A. Under Certain Circumstances Forced or Compulsory Labour is Legal

1302. International humanitarian law sometimes allows for civilians to be required to work. The ICTY Trial Chamber in the *Simic* case recognised that not all types of forced or compulsory labour

¹⁶²² AFRC Trial Chamber judgement, para. 742. Quoting Convention concerning Forced or compulsory labour, ILO, 1 May 1932, art.2 (1). See also convention concerning the abolition of forced labour adopted 25 June 1997.

¹⁶²³ Article 2 of the Statute of the Special Court for Sierra Leone.

¹⁶²⁴ AFRC Trial Chamber judgement, para.749. See also para. 744, 747, quoting Kunarac Trial Chamber judgement para.540.

¹⁶²⁵ AFRC Trial Judgement, para. 749; *citing* Rule 98 Decision, paras 212-215; see also *Krnjelac* Trial Judgement, para. 350; Report of the Preparatory Commission for the International Criminal Court, Finalised Draft Text for the Elements of the Crimes, New-York, 13- 31 March 2000/12-30 June 2000 (“ICC Elements of the Crimes”), p. 10, noting that “[i]t is understood that such deprivation of liberty may, in some circumstances, include exacting forced labour or otherwise reducing a person to a servile status as defined in the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956.” 1450 Indictment, paras 74-79.

¹⁶²⁶ RUF Transcripts of 25 October 2006, rule 98 decision (‘Oral Decision Motion for Acquittal’), pp. 30-31.

¹⁶²⁷ *Krnjelac* Appeals Chamber judgement, para. 195.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

were *per se* unlawful under international humanitarian law.¹⁶²⁸ We submit this jurisprudence is useful guidance in our case.

1303. The *Simic* case referred to Article 51 of the Fourth Geneva Convention,¹⁶²⁹ which sets out the circumstances under which civilians may be made to work during an international armed conflict. It allows persons above 18 years of age to be subjected to compulsory labour.¹⁶³⁰ It further states that compulsory labour may be lawful only **if required for the needs of the army of occupation for maintaining public services, and for the feeding, sheltering, clothing, transportation or health, for the benefit of the population of the occupied country.** Civilians however cannot be requisitioned for such work as the construction of fortifications, trenches, or aerial bases, nor can forced labour be performed for strategic or tactical interests of the army.¹⁶³¹

1304. The Trial Chamber accepted the argument that certain types of work, even if compulsory, were permissible under international humanitarian law.¹⁶³² In that case, civilians were forced to do agricultural work in certain locations, to chop wood, **to prepare food for the army** or for the civilians, to work on the water supply system, to clean and rebuild infrastructures, or to work for state owned companies.¹⁶³³

1305. While the civilians had no real choice as to whether to work or not, these types of labour are held to be lawful *per se* under international humanitarian law, and in the absence of other

1628 *Simic* Trial Chamber judgement, para.88. See also *Prosecutor v Naletilic*, Case No. IT-98-34-T, Trial Chamber judgement, 31 March 2003, para.253.

1629 Article 51 'Enlistment, labour' reads: "The Occupying Power may not compel protected persons to serve in its armed or auxiliary forces. No pressure or propaganda which aims at securing voluntary enlistment is permitted. The Occupying Power may not compel protected persons to work unless they are over eighteen years of age, and then only on work which is necessary either for the needs of the army of occupation, or for the public utility services, or for the feeding, sheltering, clothing, transportation or health of the population of the occupied country. Protected persons may not be compelled to undertake any work which would involve them in the obligation of taking part in military operations. The Occupying Power may not compel protected persons to employ forcible means to ensure the security of the installations where they are performing compulsory labour. The work shall be carried out only in the occupied territory where the persons whose services have been requisitioned are. Every such person shall, so far as possible, be kept in his usual place of employment. Workers shall be paid a fair wage and the work shall be proportionate to their physical and intellectual capacities. The legislation in force in the occupied country concerning working conditions, and safeguards as regards, in particular, such matters as wages, hours of work, equipment, preliminary training and compensation for occupational accidents and diseases, shall be applicable to the protected persons assigned to the work referred to in this Article. In no case shall requisition of labour lead to a mobilization of workers in an organization of a military or semi-military character."

1630 *Simic* Trial Chamber judgement, 17 October 2003, para.88.

1631 *Id.*

1632 *Simic* Trial Chamber judgement, 17 October 2003, para.836.

1633 *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

aggravating circumstances, do not amount to a level of criminal responsibility. It was not established beyond reasonable doubt that the conditions under which this labour was rendered were such as to amount to cruel and inhumane treatment, or that the assignments were of sufficient gravity to constitute persecution.¹⁶³⁴

1306. If labour such as agricultural work, chopping wood or preparing food has been found lawful by the ICTY in the context of an international armed conflict (where there are many more conventional rules applicable than in the context of a non-international armed conflict), we submit these findings should be of application in the RUF case.

xx. Accordingly we submit that, pursuant to *Simic*, even if the allegations of forced labour against Augustine Gbao are accepted, they should be dismissed.

B. Gbao Played no Role in Mining

1307. There are no allegations that Gbao played any role in forcing people to mine. TF1-330 made a non-specific allegation that Gbao had some supervisory role in Giema regarding the 'fake' mining taking place; however, this hardly substantiates the claims against him. There are no other claims besides the one made by TF1-012, which is entirely without merit, as explained above.

C. Civilians Who Worked on Farms Were Given Food

1308. As was stated by nearly every defence witness, civilians in Kailahun District were given food as payment for working at various farms throughout the area. While working only for food may be an offensive concept to many people throughout the world, it is not unusual even today in areas such as Kailahun District. Issa Sesay testified that NGOs in Kailahun were still offering employment to people under the "work for food" philosophy.¹⁶³⁵ If the situation remains dire in Kailahun District today, it was far worse during the war when desperate times called for desperate measures.

1309. DAG-048 recalled that people resorted to eating leaves and unripe bananas out of desperation. One suspects that if the civilians were given an opportunity to work for food, they would take full advantage. Under the circumstances no doubt many would have been happy to do so- as many Sesay defence witnesses testified.

¹⁶³⁴ *Id.*

¹⁶³⁵ Issa Sesay, Transcript 4 May 2007, p.43.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1310. Organising farms to feed the Kailahun population should not in our submission be criminalised; neither should requesting that people work on these farms with food as payment.

D. Community Farms Exist Throughout Kailahun District Today

1311. The farms in RUF times were no different than community farms that exist today. These serve to assist a poverty-stricken population as a whole and are prevalent throughout Kailahun District today. Community farms help to ensure the welfare of persons in the community, as well as providing excess food for strangers and other unanticipated events.

1312. As DAG-110 testified, if one chooses not work on the community farm in his local area today, they are often fined”¹⁶³⁶.

III. Modes of Liability

1313. We submit that because the farming in Kailahun District was in fact legitimate under international humanitarian law pursuant to the *Simic* case in the ICTY there is no need to assess criminal responsibility. In relation to the allegations of forced mining we submit there is no probative evidence that Gbao was involved in any way, nor in the recruitment of mining labour. Neither was Gbao involved in forcing men and women to go to the training base in Bunumbu. For these reasons we submit that Count 13 should be dismissed.

1314. Additionally, we suggest that having civilians work for food does not necessarily amount to a criminal offense in international law. Considering that the civilian workers were remunerated in kind with part of the harvest, the labour in question, in actual fact, no different in character than much of the community taking place in Kailahun today.

A. Article 6(1)

1. Planning

1315. There is no evidence that any planning took place to force civilians to farm throughout the Kailahun District. Even if the Court finds that there is some evidence of planning, we submit Gbao's level of involvement can hardly be shown to reach the threshold of “substantial”. More dramatically, there is no credible evidence whatsoever that Gbao played any role in the mining, forceful or otherwise.

¹⁶³⁶DAG-110, Transcript 2 June 2008, p.91.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1316. We submit that, on the evidence, the farming taking place in Kailahun District during the war was intended to ensure that the people were adequately fed and taken care of. There was no intent to subject the civilians to any activity against their will.

2. *Instigating*

1317. For similar reasons, there is no evidence that Gbao somehow urged or encouraged others to force civilians to farm, mine or otherwise work or fight against their will.

3. *Ordering*

1318. There is likewise no credible evidence that Gbao ordered any civilian to farm, mine or otherwise work or fight for the RUF. As submitted below, he did not have such authority in the first place. If the allegations of forced labour are nevertheless proven beyond reasonable doubt, we submit that in any event Gbao did not have the authority to order anyone to undertake forced labour, and was not in control of those who could issue such orders.

4. *Committing*

1319. There are allegations that Gbao forced civilians to farm on his farm in Sandiaru. TF1-371 is one such witness. However, we submit his testimony is without merit. Should the Court nonetheless find his overall testimony meritorious, we submit that TF1-371's testimony nonetheless failed to specify whether the alleged farming in Sandiaru was forced or not. We submit that TF1-366 cannot under any realistic circumstances be considered as a credible witness in this regard.

5. *Aiding and Abetting*

1320. Gbao likewise cannot be found to have aided and abetted in the commission of enslavement. There is no evidence that he provided any practical assistance to any alleged forced farming, mining, or fighting. Additionally we submit that even if he was at the mining ceremony in Giema, it is well-established law that mere presence cannot equate with criminal responsibility.

B. Joint Criminal Enterprise

1321. Gbao's individual criminal responsibility under JCE is discussed in paragraphs above.

1322. Enslavement is not within the alleged common purpose of the JCE—taking control of Sierra Leone. Likewise, it is not a reasonable or foreseeable consequence of the alleged JCE.

1323. As stated above, there is no evidence that Gbao acted in concert with other members of the JCE nor is there evidence that any action undertaken by him with the aim to further a common purpose, plan or design to commit criminal acts. Since there is no Joint Criminal Enterprise to which the Third Accused was a member, he cannot be found criminally responsible for the crime under this mode of responsibility.

1324. Should the Trial Chamber find that there was a Joint Criminal Enterprise, the Third Accused submits that there is no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

C. Superior Responsibility under Article 6(3)

1326. The allegations under this count do not relate to Gbao's potential superior responsibility. However, we expect that the Prosecution will argue that civilians were captured and forced to farm in Kailahun District. However, since Gbao was not a combatant and not on the frontline, there is no evidence that he would be involved in the alleged capture of civilians for purposes of enslavement. Nor would he have any authority over the alleged perpetrators of the crime. The Prosecution has failed to demonstrate beyond reasonable doubt that the physical perpetrators of the crime of enslavement – those who captured and used the civilians for purposes of forced labour -were subordinate to Augustine Gbao nor did

tbswas not mentioned at all in relation to these claims. In general, Gbao held no superior responsibility under Article 6(3) to any combatant. Arguments in support of this position are detailed in the submissions on article 6(3) above.

1327. Augustine Gbao cannot be found responsible as a superior under Article 6(3): there is not even an indicia of a superior-subordinate relationship between him and the perpetrators of the alleged crime. Nowhere can evidence be found that he had any authority over them or that he gave orders to them, nor is there evidence of him having the material ability to affect any of their actions.

1328. In the same way, evidence is lacking as to whether, and how Augustine Gbao knew or had reasons to know that the crime alleged would be or was committed. In view of the fact that Augustine Gbao was at the rear, and that he did not usually receive reports, it is not established that he had the necessary knowledge to be found responsible for the crimes of his alleged subordinates.

29580

1329. The Prosecution failed to adduce evidence that establish beyond reasonable doubt that Augustine Gbao had the material ability to prevent or punish his alleged subordinates. In the absence of evidence that Augustine Gbao had the power to issue orders or to take any disciplinary action, or that he had any other power of sanction, it cannot be said that Augustine Gbao is responsible as a superior for failing to prevent or punish the commission of crimes by his subordinate.

Count 14: Pillage**I. Introduction**

1330. The RUF Indictment charges the RUF Accused with looting and burning under the crime of pillage, as a violation of common article 3.

II. Prosecution Evidence

xx. There was no evidence alleging that Gbao was personally involved in this count of the Indictment in any area of Sierra Leone.

III. Submissions on Count 14 on Behalf of the Third Accused**A. Elements**

1331. The elements of pillage are as follows:¹⁶³⁷

- (i) The Accused unlawfully appropriated the property;
- (ii) The appropriation was without the consent of the owner; and
- (iii) The Accused intended to unlawfully appropriate the property.

1332. The *mens rea* for pillage is satisfied where it is established that the Accused intended to appropriate the property by depriving the owner of it.¹⁶³⁸

B. Individual Responsibility

1333. As stated, there was no evidence adduced that Gbao personally participated in any alleged pillaging.

C. Joint Criminal Enterprise

1334. Gbao's individual criminal responsibility under this mode of liability is discussed in paragraphs above.

1335. As stated above, there is no evidence of that Gbao acted in concert with other members of the Joint Criminal Enterprise nor is there evidence that any action undertaken by him

¹⁶³⁷ CDF Trial Judgement, para. 165. *See also* AFRC Trial Judgement, para. 755.

¹⁶³⁸ CDF Trial Judgement, para. 163. *Citing Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14-/2-A, Judgement, Appeals Chamber, 17 December 2004, para. 84 (“Kordic and Cerkez Appeals Judgement”); *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98034-T, Judgement, Trial Chamber, 31 March 2003, para. 612, fn. 1498 (“Naletilic and Martinovic Trial Judgement”); Celebici Trial Judgement, para. 590.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

with the aim to further a common purpose, plan or design to commit criminal acts. Since there is no Joint Criminal Enterprise of which the Third Accused was a member, the Third Accused cannot be found criminally responsible for the crime under this mode of responsibility.

1336. Should the Trial Chamber find that there was a Joint Criminal Enterprise, the Third Accused submits that there is no evidence of him taking part in it nor is there any evidence of him acting with the intent to further such criminal enterprise.

1337. In the absence of evidence that Augustine Gbao was involved in the crime, we submit one cannot reasonably attribute guilt to the Third Accused.

C. Superior Responsibility under Article 6(3)

1338. Gbao held no superior responsibility under Article 6(3) over RUF fighters and units. General arguments to support this position are detailed in the paragraphs above.

1339. Augustine Gbao cannot be found responsible as a superior under Article 6(3): there is no indicia of a superior-subordinate relationship between him and the perpetrators of the alleged crime. Nowhere can evidence be found that he had any authority over them or that he gave orders to them, nor is there evidence of him having the material ability to affect any of their actions.

1340. In the same way, evidence is lacking as to whether and how Augustine Gbao knew or had reasons to know that the crime alleged would be or was committed. In view of the fact that Augustine Gbao was at the rear, and that he did not usually receive reports, it is not established that he had the necessary knowledge to be found responsible for the crimes of his alleged subordinates.

1341. The Prosecution failed to adduce evidence that establish beyond reasonable doubt that Augustine Gbao had the material ability to prevent or punish his alleged subordinates. In the absence of evidence that Augustine Gbao had the power to issue orders or to take any disciplinary action, or that he had any other power of sanction, it cannot be said that Augustine Gbao is responsible as a superior for failing to prevent or punish the commission of crimes by his subordinate.

Counts 15-18: Abduction and Attack on UNAMSIL Personnel**I. Introduction**

1342. Had the UNAMSIL attacks of May 2000 not taken place it is debatable whether the SCSL would ever have been instituted. The Lome Peace Accord of July 1999 purportedly embraced reconciliation on a 'no winner, no loser' basis, embodied in Article IX's 'Pardon and Amnesty' provisions. During his testimony,¹⁶³⁹ however, former President Kabbah cited the RUF's continued 'atrocities' as the decisive factor in the decision to repudiate Article IX. It may have been interesting to discover exactly what these 'atrocities' were, since none were alleged in that period within the entire Prosecution case. Notably, when counsel for Mr Gbao asked the former President how significant the events taking place around Makeni in May 2000 may have been in terms of the creation of the Court Mr Kabbah skillfully avoided the question¹⁶⁴⁰.

1343. We submit, quite simply, that the UNAMSIL attack was the event that led to the Sierra Leone governments' request to the UN for assistance in setting up the Special Court. The abductions had become a cause celebre, less perhaps in terms of humanitarian abuse than in the UN's abject failure to provide an effective peacekeeping force when it was needed. Count 15 created a new offence, an 'Other Violation of International Humanitarian Law', pursuant to Article 4b of the Statute in order, we suggest, to send a message throughout the developing world that attacks on UN personnel were not to be tolerated.

1344. We suggest the Prosecution were confronted with a political demand from the conceptual 'international community' that an example should be set. Political and media attention would be diverted from the hapless performance of some of the UN personnel involved towards the notion that such conduct must be outlawed. The Boards of Inquiry were not enough; indictments should be drawn up.

1345. We cannot assert for sure that the Prosecution took those suspected for the UNAMSIL attacks as its 'wanted list' for the RUF trial as a whole; it may be purely coincidental that the three surviving alleged prime-movers of the UNAMSIL attacks happen to be the only three RUF indictees, while other high-ranking RUF leaders, senior in the hierarchy to Mr Gbao (such as TF1-371), were regarded only as potential Prosecution witnesses.

1639 Transcript RUF trial 16th May 2008 p.68

1640 *Id.*

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1346. With respect to Mr Gbao, however, we do suggest, quite simply, that had he not been implicated by the Prosecution with the UNAMSIL attacks it would have been inconceivable that he would have been indicted at all. This is indicated not only by his true position within the command structure but also with regard to the haphazard and contradictory manner in which the Prosecution's case was presented against him on other counts in the RUF indictment. These topics are discussed in detail elsewhere in these submissions and, we submit, lend weight to our theory that Mr Gbao's place on the RUF indictment was pre-ordained. In short, his involvement in the UNAMSIL events secured his place in the trial; the Prosecution was then tasked with elevating him to the status of one 'bearing the greatest responsibility' by constructing a retrospective case against him elsewhere on the Indictment. Presentation of that case was left largely until the final stages of the trial-and even then was found to be replete with evidential gaps and contradictions, lending weight to the notion that Mr Gbao was indicted first and foremost in an attempt by the Prosecution to ensure that someone paid for the UNAMSIL attacks.

1347. Given the Prosecution's perceived emphasis on Mr Gbao's role in those events one might expect to face a persuasive prosecution case that withstands scrutiny. The reverse is true.

1348. We submit that not only did Augustine Gbao play no criminal role in the abductions or attacks on the UNAMSIL personnel, he did all he could- at risk to himself-to stop the conflict from escalating. We will show over the following pages that the evidence heard entirely exonerates Mr Gbao from any wrongdoing and that the charges should be dismissed.

1349. Two points must be emphasised at the outset. Firstly, the Prosecution presented several witnesses in an attempt to prove that Augustine Gbao had some criminal intent to abduct and/or attack UNAMSIL personnel in May 2000. However, as was argued in June 2008, one important actor in the conflict was omitted—Major Maroa Gati. Whilst witness selection is entirely a matter for the Prosecution the Defence does have a right under the Rule 68 of this Court to be informed of the existence of potentially exculpatory evidence—particularly if it tends to exonerate the Accused. Whilst we have no desire to revisit recent argument, to deny Mr Gbao sight of a statement taken before the trial was opened in 2004 until not only after the Prosecution case closed but also after the Rule 98 proceedings were heard constituted a grave abuse of process, particularly where service of such a statement may have led to dismissal of the relevant counts at the Rule 98 stage itself. The court will recall that Major Maroa's statement was attached to pleadings filed by both the Defence

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

for Mr Gbao and the Prosecution, and thus sees no point in stressing the issue further here, save for repeating our regret that the Prosecution chose to act in a manner that suggested something rather more sinister than a mere lack of due diligence.

1350. Secondly, it is important that claims made against Augustine Gbao in the Prosecution evidence should be read with strict adherence to the factual chronology of events on 1-3 May 2000. A forensic examination of the allegations against Mr Gbao will demonstrate that chronological deficiencies in Prosecution testimony suggest the witnesses—especially RUF insiders—were either not present at the events or were lying. We submit that unless the various accounts appear consistent with the actual timing of events they should be viewed with utmost scepticism.

II. Prosecution Evidence

1351. Placed under scrutiny, the prosecution evidence is, at the very least, opaque; various contradictions make unclear precisely which witnesses the Prosecution seek to rely upon to pursue convictions against Mr Gbao on the counts averred. Unfortunately, this opacity necessitates a comprehensive review of Prosecution testimony.

1352. What follows is an analysis of the Prosecution case on the UNAMSIL attacks cited in counts 15-18 with regard to Augustine Gbao. The case can be divided into the following chronological categories:

1. Before 1 May 2000 (does not specifically relate to Counts 15-18);
2. On 1 May 2000 at the Makump DDR camp- after Gbao's arrival but before the arrival of any other RUF commanders (does not specifically relates to Counts 15-18);
3. On 1 May 2000 at the Makump DDR camp following the arrival of RUF commanders until 2 May 2000 (relates to count 18) ;
4. On 2 May 2000 (relates to count 15,16 and 17); and
5. On 3 May 2000 (relates to count 18).

A. Before 1 May 2000—Introductory Discussion of the UNAMSIL Incident

1353. The UNAMSIL mission was established to assist the SL government in bringing peace, stability, reconciliation and development to Sierra Leone. The main task of its mandate was to administer the disarmament, demobilisation and reintegration of all combatants party to the conflict.¹⁶⁴¹ The UNAMSIL deployment in the Bombali District was KENBATT 5, tasked with

¹⁶⁴¹Leonard Ngondi, Transcript 28 March 2006, p.128.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

assisting in disarmament, demobilisation and reintegration programmes through the provision of secure reception centres and camps, and maintaining the security of surrendered weapons.¹⁶⁴² It consisted of three companies in and around Makeni and two companies in Magburaka, deployed from 4 January 2000.¹⁶⁴³ The primary objective of these groups, as well as UNAMSIL in general, was to render assistance to the entire peace process, not just the disarmament of the RUF.¹⁶⁴⁴

1. 17 April 2000-the Original Date of Disarmament

1354. The 17th of April 2000 was the initial date set for disarmament in Makeni.¹⁶⁴⁵ According to the Prosecution, on this day Augustine Gbao came to the DDR camp followed by a vehicle carrying armed men in order to express his opposition to disarmament on behalf of the RUF since, in his view, the Lome provisions were not being properly honoured.¹⁶⁴⁶

1355. Three witnesses testified about events on April 17th: Major (now Lieutenant Colonel) Jaganathan Ganese, Joseph Mendy and Colonel (now Brigadier) Leonard Ngondi. In our submission, neither Ganese Jaganathan or 044 are reliable witnesses for reasons that will be explained below. At any rate, Lt Colonel Ganese testified that Gbao arrived at the camp and parked on the main road between Makeni and Magburaka. From there, he said “I saw him arrive and walk[] from the main road to the tentages [the tents set up to assist in disarming the RUF ex-combatants]”. He was threatening to close down the DDR camp.¹⁶⁴⁷ Ganese stated that Gbao was very angry about the Lome Peace Accord not being fully respected. On this day, Ganese Jaganathan testified that Gbao was sober and unarmed.¹⁶⁴⁸

1356. Major Joseph Mendy also recalled in his testimony that Gbao was angry when he arrived at the DDR camp on 17 April.¹⁶⁴⁹ Gbao and Lt-Col Joe (Poraj, a British MILOB) had an argument at the centre. According to the witness, Gbao remarked that the RUF would not disarm because the government was not upholding the Lome Peace Agreement. When Lt Colonel Joseph (Poraj) and Colonel Musengeh came to talk to Gbao he said “you put these things down [presumably the tents] or we burn them. We [the various Lome stakeholders] are not in agreement with the Lome Peace

¹⁶⁴² *Id.*

¹⁶⁴³ *Id.* at p.131; *see also* Prosecution Exhibit 190, para. 1.

¹⁶⁴⁴ TF1-288, Transcript 23 March 2006, p.32.

¹⁶⁴⁵ Ganese Jaganathan, Transcript 21 June 2006, p. 29; *see* Joseph Mendy, Transcript 26 June 2006, p.84.

¹⁶⁴⁶ Joseph Mendy, Transcript, 26 June 2006, pp.85-88.

¹⁶⁴⁷ Ganese Jaganathan, Transcript 21 June 2006, p.30.

¹⁶⁴⁸ *Id.* at p.30.

¹⁶⁴⁹ Joseph Mendy, Transcript 29 June 2006, p.6-8.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Accord. We are not going to disarm. You must stop everything, all the process".¹⁶⁵⁰ The discussion between the two lasted ten minutes before Gbao departed.¹⁶⁵¹ In contrast to Major Ganase, Mendy testified that Gbao **never left the highway** on 17th April 2000.¹⁶⁵² He reiterated this point later in the cross-examination.¹⁶⁵³ Instead, he stated that he was in the camp and he heard the conversation between Gbao and Colonel Poraj, even though he was 150 meters (164 yards) away.¹⁶⁵⁴ It is submitted that this is impossible.

1357. Thirdly, Brigadier Ngondi testified that, on 17th April 2000:

"A. The RUF, instead of turning their combatants to reception centre to disarm, turned their combatants to demonstrate in the town of Makeni".¹⁶⁵⁵

1358. Sometime after this on the same day, Ngondi met with Gbao and the two discussed why the RUF was not going to disarm that day.¹⁶⁵⁶ According to the witness, Gbao complained about proper implementation of the Lome Peace Accord: that certain political positions were not being given to the RUF, there was differential treatment of the RUF and Sierra Leone Army soldiers, and that Foday Sankoh was being given proper respect.¹⁶⁵⁷

1359. However, even with his objections to the disarmament process, Gbao was continuing to actively assist UNAMSIL. Ngondi's account of his meeting with Gbao under the particular circumstances is powerful:

"A. On the 17th, and they weren't even ganged up or gathered up at the reception centre[for disarmament], which was at Makeni. There, the topmost person who I met there was Augustine Gbao. **He couldn't give me the reason why they're not going to do that [disarm].** And as usual, we had a lot of understanding and respect for one another with Augustine Gbao. We talked about it and he said **he so sensed that our reception centre should remain and since the disarmament is for long term, we should -- each party should report, give a report to their higher headquarters on what is going on in the crowd, that there was no need of having combatants demonstrating in town.**

Q. I think those combatants, or many of them, were armed during that demonstration, weren't they?

A. They were armed.

Q. **Would you agree it was Augustine Gbao, on the RUF side, who was instrumental in urging those people to disperse peacefully on the 17th?**

¹⁶⁵⁰*Id.* at pp.11,13.

¹⁶⁵¹Joseph Mendy, Transcript 26 June 2006, p.87.

¹⁶⁵²Joseph Mendy, Transcript 28 June 2006, p.78.

¹⁶⁵³*Id.* at 29 June 2006, p.8.

¹⁶⁵⁴*Id.* at 29 June 2006, p.8

¹⁶⁵⁵ Leonard Ngondi, Transcript 29 March 2006, at p.17.

¹⁶⁵⁶ *Id.* at p.18.

¹⁶⁵⁷ *Id.* at pp.18-19.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

A. Yes, yes. Yes, Gbao, I commend him for that”.¹⁶⁵⁸

2. 27th April – 1 May 2000-Disarmament of 10 RUF by MILOBS

1360. Sometime before the 27th of April 2000, MILOBs teams in Makeni were approached secretly by ex-RUF fighters who wanted to disarm.¹⁶⁵⁹ Ganese Jaganathan stated that “[t]he first two that we disarmed on 27th April 2000 actually brought their weapons wrapped in a blanket to the disarmament camp.¹⁶⁶⁰ Another eight disarmed the next day, bringing the total number to ten.¹⁶⁶¹ It should be emphasised that this was a hearsay account from Ganase who had not been on the scene but had been informed by others.¹⁶⁶²

1361. Jaganathan noted that once the RUF ex-combatants turned in their weapons the disarmament process should have proceeded as follows: “the complete process is, after disarmament, you are supposed to go for demobilisation. So when we explained to these ex-combatants now, the ten of them, they refused to go for demobilisation because they say they will come later when their local commanders advised them to go. So that was their option. So we just stopped short of disarmament only”.¹⁶⁶³ It is unclear whether this violated UN rules or not.

1362. Jaganathan continued: “on 30th April, six of the ten we had disarmed reported to the Makeni, MILOB team site, and they demanded their money. So, in this case...every weapon that is disarmed and if an ex-combatant goes through the demobilisation process, US\$300 paid in local currency is due to them...[t]hough we had already explained to them that they would only qualify for it if they go through the complete process, they said they will not want to go through the whole process until their local commanders advised them”.¹⁶⁶⁴ Eventually, after Jaganathan explained to the men that they should complete the process of demobilisation prior to payment they agreed to come the following day.¹⁶⁶⁵

1363. Jaganathan continued: “[o]n 1st May...these ten ex-combatants now reported to the disarmament camp and, subsequently, my military observers on duty there put them on the lay-out procedures, which means to say they were put on the UN truck with the peacekeepers escorting

¹⁶⁵⁸ Leonard Ngondi, Transcript 31 March 2006, p.17 (emphasis added).

¹⁶⁵⁹ Ganese Jaganathan, Transcript 20 June 2006, p.96.

¹⁶⁶⁰ Ganese Jaganathan, Transcript 20 June 2006, p.18.

¹⁶⁶¹ *Id.*

¹⁶⁶² *Id.*

¹⁶⁶³ *Id.* at p.19.

¹⁶⁶⁴ *Id.*

¹⁶⁶⁵ *Id.* at p.20.

them and led by a team of military observers to the demobilisation camp. When they had completed the demobilisation process, my observers returned to the team site”.¹⁶⁶⁶

4. *I May 2000—The RUF Receives Information about the Secret Disarming of RUF*
1364. There is little, if any, prosecution evidence from RUF insiders to explain how the RUF received news of the secret disarmament of the RUF. Jaganathan provides the clearest prosecution account. He stated “I received a call saying that a group of armed RUF combatants, about 30 to 40 of them...led by Colonel Augustine Gbao, were proceeding towards the demobilisation camp, and this information was reported to me by Major Phil Ashby, who was still manning the disarmament camp”.¹⁶⁶⁷ Shortly thereafter, Jaganathan proceeded to the DDR camp and met Gbao.¹⁶⁶⁸

1365. It is likely that the only method for Gbao and the UN to communicate was in person, thus explaining his trip to the DDR camp. Radio contact, for example, between Gbao and Ngondi was not possible.¹⁶⁶⁹

B. Gbao's Arrival at the Makump DDR camp on 1 May 2000

i. UN Witnesses

a. *Ganese Jaganathan*

1366. Ganese Jaganathan arrived at the Makump DDR camp and recognised Gbao (he had met Gbao on three previous occasions). He states that Gbao was not carrying a weapon at the camp. Neither did he give an order to any RUF at any time at the camp.¹⁶⁷⁰ At the time Jaganathan arrived Gbao was allegedly accompanied by some 30-40 armed RUF combatants, however.¹⁶⁷¹

1367. Jaganathan stated that “when I arrived at the demobilisation camp, I noticed that camp was surrounded by RUF combatants, armed RUF combatants, and Colonel Gbao was standing along the main road facing the demobilisation camp. He was shirtless, holding a liquor—almost empty liquor bottle in his left hand, and with bloodshot eyes and *I pushed him—*”.¹⁶⁷² Jaganathan told his driver “to drop me where Colonel Gbao was standing [outside the Makump DDR camp], and I told him [the driver] to drive into the demobilisation camp. I approached Colonel Gbao and asked him what

¹⁶⁶⁶*Id.*

¹⁶⁶⁷Ganese Jaganathan, Transcript 20 June 2006, p.20.

¹⁶⁶⁸*Id.* at pp.20-21.

¹⁶⁶⁹Leonard Ngondi, Transcript 30 March 2006, p.59.

¹⁶⁷⁰Ganese Jaganathan, Transcript 21 June 2006, p. 14.

¹⁶⁷¹ Ganese Jaganathan Transcript 20 June 2006 p22

¹⁶⁷²Ganese Jaganathan, Transcript 20 June 2006, p.21.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

was the problem.” Jaganathan continued “I asked him, and when I inquired what his problems were, he then told me, 'Give me back my five men and their weapons, otherwise I will not move an inch from here'.”¹⁶⁷³ Jaganathan also stated that Gbao was extremely drunk when the witness saw him in front of the UN disarmament camp.¹⁶⁷⁴

1368. While Jaganathan was talking to Gbao about the disarmament of RUF ex-combatants, Major Bosco Odhiambo (another KENBATT soldier) was driving towards the camp in the direction of Makeni. Jaganathan recalled “when he noticed me standing and talking to Colonel Gbao, he approached me and asked me what the problem was. So, again, I told him about Colonel Gbao's demands and then he tried to talk to him. His efforts were also futile, and eventually he [Odhiambo] told him that he will go back and call his commanding officer [presumably Ngondi]¹⁶⁷⁵ to come back and try and dissolve this problem, and he asked [Jaganathan] to stand back until his commanding officer arrived”.¹⁶⁷⁶ The witness continued, stating that “when Major Bosco left, I knew that my efforts were going nowhere. I excused myself from Colonel Gbao and walked towards my colleague, who was waiting at the demobilisation camp”.¹⁶⁷⁷ The witness also confirmed that Major Salahuddin—who was subsequently allegedly beaten by another RUF commander who later arrived on the scene—was not with him when he spoke with Gbao. He was inside the demobilisation camp with the UNAMSIL garrison.¹⁶⁷⁸

1369. Jaganathan claimed that a *pink* Mercedes arrived shortly thereafter with shots being fired by one of its occupants; following the ensuing struggle inside the camp he was abducted by other named RUF commanders. According to this witness, Gbao never entered the camp.¹⁶⁷⁹ When Jaganathan met Morris Kallon, who was allegedly inside the Makump DDR camp, Gbao was not present. Indeed, after further clarification from Mr Justice Boutet, Jaganathan categorically stated that the ‘chaos’, during which the shots were fired, occurred inside the camp—Gbao remaining outside the camp gates on the road at all times.¹⁶⁸⁰ He also categorically stated that Gbao did not fire any shots; nor did he issue any orders.¹⁶⁸¹ However, Gbao was allegedly nearby when Jaganathan

¹⁶⁷³Ganese Jaganathan, Transcript 21 June 2006, p.18.

¹⁶⁷⁴Ganese Jaganathan, Transcript 21 June 2006, p.17.

¹⁶⁷⁵For example, in his testimony, Major Ganase states that Major Odhiambo of the KENBATT unit was calling Ngondi, but he never came. 21 June 2006, Transcript p.14.

¹⁶⁷⁶Ganese Jaganathan, Transcript 20 June 2006, p.23.

¹⁶⁷⁷Ganese Jaganathan, Transcript 20 June 2006, p.23.

¹⁶⁷⁸Ganese Jaganathan, Transcript 20 June 2006, p.22.

¹⁶⁷⁹ Ganese Jaganathan Transcript 21 June 2006 p15

¹⁶⁸⁰ Ganese Jaganathan Transcript 21 June 2006 p22-23

¹⁶⁸¹ Ganese Jaganathan Transcript 21 June 2006 p14

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

was taken to the pink Mercedes and was armed.¹⁶⁸² Jaganathan stated that while he was being abducted, he attempted to explain to Gbao why he was there, but that Gbao suddenly ‘sobered’, ‘just froze’ and stood there “statue-like”.¹⁶⁸³ Crucially he conceded that although Gbao was apparently now holding an AK-47¹⁶⁸⁴ he nevertheless was powerless in his attempt to intervene; any intervention would have been powerless anyway ‘because of the hierarchy of the RUF’.¹⁶⁸⁵

b. Brigadier Leonard Ngondi

1370. Colonel Ngondi, was also aware of the confrontation at the Makump DDR camp, as he was stationed in Makeni at the time.¹⁶⁸⁶ Although his account is entirely hearsay, when Ngondi heard about RUF soldiers outside the DDR camp, he told Major Maroa (another UN peacekeeper) to go to the camp with an additional platoon and talk with Gbao.¹⁶⁸⁷ Once Maroa arrived at the DDR camp (UN) he radioed Ngondi to say that Gbao wanted back the ten combatants and ten rifles that they felt had been seized by UNAMSIL. According to Ngondi, Major Maroa had said that Gbao was very wild.¹⁶⁸⁸ Ngondi was unaware at the time that Gbao had gone to the UN headquarters to attempt to discuss the matter with him. However, he stated that even if Gbao had arrived his securities were unlikely to have allowed him into the Headquarters.

1371. Ngondi stated that Kallon later arrived from Makeni at the DDR camp to join Gbao. Whilst he was speaking to Major Maroa, Maroa stated-crucially- that “there is firing coming from Makeni direction and it was [RUF commander] coming, firing from the window of his car...[o]n arrival he told me Kallon was teasing and they thought Gbao was wild, but Kallon—*Gbao was now trying to cool down Kallon*”.¹⁶⁸⁹ Kallon then allegedly grabbed a MILOBS officer at gunpoint and pulled him into his vehicle and drove away with the officer in it.¹⁶⁹⁰ Ngondi stated the vehicle left containing its usual occupants: these did not include Gbao.

c. Joseph Mendy

1372. Joseph Mendy was able to give a hearsay account of the events at the camp. According to a conversation he allegedly had later that day with Major ‘Marro’ (clearly a reference to meeting

¹⁶⁸²Ganese Jaganathan, Transcript 21 June 2006, p.23-24.

¹⁶⁸³Ganese Jaganathan, Transcript 20 June 2006, p.26

¹⁶⁸⁴ *Id.*

¹⁶⁸⁵ Ganese Jaganathan, Transcript 21 June 2006 p.25

¹⁶⁸⁶ Leonard Ngondi, Transcript 28 March 2006, p.132.

¹⁶⁸⁷ Leonard Ngondi, Transcript 30 March 2006, p.120.

¹⁶⁸⁸ Leonard Ngondi, Transcript 29 March 2006, p.28.

¹⁶⁸⁹ *Id.* at p.29; *also see Id.* at 31 March 2006, p.27 where the witness agreed that Gbao was trying to pacify Kallon.

¹⁶⁹⁰ Leonard Ngondi, Transcript 29 March 2006, p.29.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Major Maroa after they had both been abducted into RUF custody), Marro had said that Gbao and Kallon had been at the camp; but that Kallon had been the first to fire on UNAMSIL. There was no reference to any violence, threats of violence by Gbao or to Gbao carrying a weapon. Further conversation had been prevented “because of the situation...where we were”¹⁶⁹¹ Furthermore, the witness stated that Jaganathan had told him that Gbao had saved his life by having him taken to Teko Barracks.¹⁶⁹²

1373. The remaining UNAMSIL witness, TF1-288, did not testify as to the events at Makump DDR camp on 1st May 2000. Indeed, only Jaganathan was able to give a first hand account. Clearly Major Maroa would, if called, have been able to shed more light on what exactly Gbao did at the scene, but for reasons best known to the prosecution he was not required to support their case—despite being abducted himself on the Makump-Makeni road just minutes after Jaganathan was taken.

ii. Testimony of RUF Insiders and Others

a. *TF1-041*

1374. TF1-041 did not testify to any personal knowledge of Gbao's actions at the DDR camp, but he did provide an account of what happened there that addresses some of the events that occurred on 1 May.¹⁶⁹³ He testified that sometime before fighting broke out between the RUF and UN he went to the camp (on a day in early May) with Morris Kallon. Kallon was upset at that time about the condition of the camp, judging it unsuitable for RUF ex-combatants.¹⁶⁹⁴ Joseph Mendy noted in his testimony that this visit took place on 28 April.¹⁶⁹⁵

1375. TF1-041 testified that the ‘next day’ (29 April? 1 May? 2 May?—it is not entirely clear) he went to Makeni. Upon arriving at Independence Square, located in the centre of Makeni, he alleged that he found Gbao exhorting fighters to assemble and follow him to the DDR camp.¹⁶⁹⁶ According to the witness, Gbao was shirtless and wielding a gun. Since the Makump DDR camp was the only camp near Makeni and the main source of conflict in this case, we submit the witness was probably referring to the same location. TF1-041 then stated that Gbao was trying to enlist men to go to the camp, screaming that the UN “had released some Zambians and that they were coming to fight

1691 Joseph Mendy Transcript 27 June 2006 p12
 169252 Joseph Mendy Transcript 29 June 2006 p28
 1693TF1-041, Transcript 10 July 2006, pp. 69-70.
 1694*Id.* TF1-041, Transcript 10 July 2006, pp. 69-70.
 1695Joseph Mendy, Transcript 27 June 2006, p.8.
 1696TF1-041, Transcript 10 July 2006, p.71.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

against us because Tejan Kabbah—they were making Banana Island”.¹⁶⁹⁷ He then allegedly arrested an anonymous “observer”- which presumably meant a MILOB- at the Square in front of the fighters.¹⁶⁹⁸ This ‘arrest’ was not corroborated elsewhere in the prosecution’s case, nor was it discussed in any report.

b. TFI-071: The “Lunsar” Version

1376. This witness offers what counsel for the Third Accused characterises as the “Lunsar version” of events to 1st May. According to the witness’s hearsay account, when Gbao and Kallon noticed that certain combatants were secretly disarming without giving notice to the RUF leadership, they went to the Magburaka and *Lunsar* UNAMSIL peacekeeper camps demanding the weapons that some RUF fighters had secretly surrendered to the peacekeepers.¹⁶⁹⁹ Gbao then had a bitter argument with the peacekeepers, which ended in military confrontation. Then, according to this witness, “Augustine Gbao ordered the securities to open arms at the peacekeepers in order to retrieve the weapons [in Lunsar]”.¹⁷⁰⁰ He continued “[w]hen Augustine Gbao gave order to his securities to open arms against the peacekeepers, the fighting extended to the—extended, so at that point Augustine Gbao only sent a communication to Morris Kallon at Magburaka informing him that the peacekeepers have attacked their positions, so they were at serious fighting...[w]hile Lunsar was at the same time fighting, Magburaka also, with Morris Kallon's order, the securities to also carry on the same attack at Magburaka where the peacekeepers were”.¹⁷⁰¹ There is no mention of the Makump DDR Camp.

c. TFI-366

1377. TFI-366 stated that Morris Kallon arrested the UN people at Makump.¹⁷⁰² Most of his testimony related to events that took place after the initial incident at the Makump DDR camp.

C. Gbao's Alleged Actions After Arrival at the Makump DDR Camp and before 3rd May 2000

1. UN Witnesses

1378. There are no allegations by Jaganathan, Ngondi, Joseph Mendy or TFI-288 that Gbao took part in any fighting between the RUF and UN at the Makump DDR Camp, in Makeni, in

¹⁶⁹⁷*Id.*

¹⁶⁹⁸*Id.*

¹⁶⁹⁹TFI-071, Transcript 24 January 2005, p.7.

¹⁷⁰⁰TFI-071, Transcript 24 January 2005, pp.12-13.

¹⁷⁰¹TFI-071, Transcript 25 January 2005, p.12.

¹⁷⁰²TFI-366, Transcript 18 November 2005, p.14.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Magburaka, on the Lunsar-Makeni highway, or anywhere else. This is consistent with Gbao's asserted role as a security commander within the RUF rather than a fighter. One should emphasise there are also no allegations that he was involved in planning the attacks on the Makump or Magburaka camps, nor the capture and detention of the several hundred Zambian peacekeepers.

1379. In relation to the alleged detention of UN and MILOB soldiers, Jaganathan stated that he did not see Gbao holding anyone "captive" at Teko Barracks in Makeni or elsewhere.¹⁷⁰³ This is significant, as he was the first MILOB to be captured and had met Gbao on at least three occasions in the past (including just hours before at the Makump DDR camp).¹⁷⁰⁴ Strangely, Joseph Mendy contradicts Jaganathan on this point, stating that Jaganathan told him that Gbao "secured" his detention.¹⁷⁰⁵ This was clearly not possible, as Jaganathan himself *never* mentioned Gbao after the incident at the Makump DDR camp on 1 May 2000. Elsewhere, no other UN or MILOB captured by the RUF testified that Gbao facilitated, oversaw or otherwise participated in their detention. In fact, Mendy never saw Gbao again after 17th April.¹⁷⁰⁶ This, again, accords with Gbao's asserted role as an RUF security official rather than a combatant .

1380. There is but scant mention of Mr Gbao after the initial incident at the Makump DDR camp, especially from testimony elicited from UN witnesses. However, Gbao is mentioned by UN witnesses on two other occasions. First, Jaganathan testified that he arrived at Teko Barracks with Major Maroa and some of his men after the incident at the Makump DDR camp.

a. The Alleged Abduction of KENBATT Officer Major Maroa

1. Ganese Jaganathan

1381. Ganese Jaganathan stated that, after being taken from the DDR camp in Makump, he arrived in a small village near the DDR camp (likely Makump) with Morris Kallon and some of his men. Gbao was not present. Shortly after leaving the car he noticed several vehicles passed by. One of these vehicles was a UN vehicle driven by one Major Maroa.¹⁷⁰⁷ The witness stated that Maroa and four Kenyan KENBATT officers from the vehicle were then arrested by Kallon.¹⁷⁰⁸ He stated that "they [including Major Maroa] joined me under the tree, and now there were already five of us being harassed by General Kallon. And all of a sudden he, General Kallon, asked me to sit in the

¹⁷⁰³Ganese Jaganathan, Transcript 21 June 2006, p.37.

¹⁷⁰⁴*Id.* at p.29.

¹⁷⁰⁵Joseph Mendy, Transcript 27 June 2006, p.11.

¹⁷⁰⁶Joseph Mendy, Transcript 29 June 2006, p.24.

¹⁷⁰⁷Ganese Jaganathan, Transcript 20 June 2006, p.30

¹⁷⁰⁸Ganese Jaganathan, Transcript 20 June 2006, p.30.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Mercedes again, leaving behind the four peacekeepers with a few escorts to look after them".¹⁷⁰⁹ Gbao is not mentioned as one of the 'escorts' that stayed behind to 'look after' Major Maroa.

1382. Ganese Jaganathan testified that, after getting back into the Mercedes, he was taken to Teko Barracks in Makeni. Regarding Major Maroa, he stated "[w]hilst I was still at the communication centre [in Teko Barracks where Kallon was calling 'red alert' after the confrontation with the UN at the Makump DDR camp and reporting an attack on RUF men by UN Peacekeepers], Major Maroa and the three soldiers came with the Land Rover, escorted by Colonel Augustine Gbao, and I noticed that Major Maroa was bleeding from his mouth and the other three soldiers were limping. And I also noticed Colonel Gbao opening the boot of his car and taking out three rifles".¹⁷¹⁰ This appears strange given that Jaganathan had not mentioned Gbao arriving to 'look after' Maroa at the village.

ii. RUF Insider Witnesses

a. TF1-366

1383. The RUF insider TF1-366 gave a totally different account about the UNAMSIL incident. He claimed to have met Morris Kallon and Gbao at Magburaka Junction,¹⁷¹¹ Though it is not clear on which day this meeting takes place. At the junction, the witness stated that Issa Sesay, Morris Kallon, and Augustine Gbao came to a collective decision that the RUF should "attack them [UNAMSIL] and kill them and capture some".¹⁷¹² The three agreed separate deployments with Issa Sesay leading the attack in Magburaka at the Arab College, Gbao at the Makump DDR camp, and Kallon at the Lunsar highway (joined by Komba Gbundema, Bai Bureh, and Dawe).¹⁷¹³ The chronology is placed somewhat into context (in our submission proving that TF1-366 could not have been present during the attacks) by the witness's comment "[i]t was Kallon who started the attack [at the Lunsar-Makeni highway]. We fought [the UN] all day".¹⁷¹⁴

1384. TF1-366 further stated that Gbao actually fought at the camp near Makump, killing a UN soldier¹⁷¹⁵ (whilst admitting later in cross examination Gbao did not kill anybody).¹⁷¹⁶ After the fighting the RUF combatants brought back people they had captured to Teko Barracks. The witness

¹⁷⁰⁹*Id.*

¹⁷¹⁰Ganese Jaganathan, Transcript 20 June 2006, p.31.

¹⁷¹¹TF1-366, Transcript 10 November 2005, p.36.

¹⁷¹²*Id.*

¹⁷¹³*Id.* at 37.

¹⁷¹⁴*Id.*

¹⁷¹⁵TF1-366, Transcript 15 November 2005, p.49.

¹⁷¹⁶ *Id.* at 18 November 2005, p.22.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

stated that “[t]hey were bringing them from the Lunsar highway and from where Augustine Gbao had attacked, and Makeni Town itself”.¹⁷¹⁷ He stated that there were more than 500.¹⁷¹⁸

1385. The witness stated that the three Accused became concerned after the UNAMSIL troops had been captured, saying “[i]f we don't come to Freetown and get Pa Sankoh out (of prison) we would [get] arrested”.¹⁷¹⁹ Superman, Black Guard Ray, and Gibril Massaquoi allegedly joined the meeting; they decided to march to Freetown in an effort to release Sankoh.¹⁷²⁰

1386. Shortly after the abductions on 3rd May, Sesay allegedly told TFI-366 that the UN soldiers should be brought to Charles Taylor.¹⁷²¹ Strangely, he does not refer to the UN personnel being sent to Kono.

b. TFI-360

1387. TFI-360 stated that the entire conflict began because some RUF ex-combatants had gone to the Makump DDR camp because they wanted food.¹⁷²² He then stated “[s]o the other day, we received an information in the office in Makeni” (the witness was a radio operator for the RUF).¹⁷²³ This apparently took place on a date unknown after the Makump DDR camp had been established. He continued “Augustine Gbao said that RUF ex-combatants were taken to an unknown location by the UN;”¹⁷²⁴ Gbao had forwarded this matter to the UN commander, who explained that the RUF had gone to the camp merely to ask for food.¹⁷²⁵

1388. The witness then said: “So the other day again, Mr Kallon—Morrison Kallon came from Magburaka and came to those people [presumably the UN at the Makump DDR camp] and told them...that the place they were building it was not building for hogs but for human beings...[a]nd that they should take time as to how they were building the place.”¹⁷²⁶ Allegedly, Mr Kallon also stated that if they were not careful he would launch an attack on the place in 72 hours.¹⁷²⁷

¹⁷¹⁷TFI-366, Transcript 10 November 2005, pp.43-44.

¹⁷¹⁸*Id.* at p.44.

¹⁷¹⁹*Id.* at p. 45.

¹⁷²⁰*Id.*

¹⁷²¹*Id.*

¹⁷²² TFI-360, Transcript 22 July 2005, p.3.

¹⁷²³See eg. TFI-360, Transcript 22 July 2005, p.4.

¹⁷²⁴*Id.* at p.4.

¹⁷²⁵*Id.*

¹⁷²⁶*Id.* at pp.4-5.

¹⁷²⁷ *Id.* at p.5

1389. He continued “[s]o the other day, Mr Kallon and Gbao went to the camp” together. After a short period of time, civilians who were working at the camp came running and said that they were firing at the place.¹⁷²⁸

1390. While claiming to know what had happened during the confrontation between the UN and RUF, TFI-360 said that he could not remember specific dates.¹⁷²⁹

1391. He then recalled a meeting in a house held by Sesay, Kallon and Gbao. This was surprising because in previous statements he had told Prosecution investigators he was in Kono and, while monitoring the radio, overheard a radio message from Morris Kallon to Sankoh about what had happened.¹⁷³⁰ Sesay had allegedly come to Makeni on the evening of the fight (presumably, 2 or 3 May 2000). The witness testified to messages being received in the Makeni radio room, including a one from Lunsar warning that the UN were on their way to Makeni; there were many, and they were coming with tanks.¹⁷³¹

1392. TFI-360 stated that at that time there were many soldiers outside in the street. Allegedly Kallon went outside and told the men that the UN were coming from Freetown with “handcuffs [and] that they will come and arrest all of [RUF] and take [them] to Banana Island”. As a result, Kallon said that “we” were going to send Komba Gbundema to stop their progress to Makeni and arrest the UN troops. The troops in Makeni were allegedly ready to support this attempt to stop the UN.¹⁷³²

c. TFI-174

1393. TFI-174’s evidence bore no relation to anything said by anyone else on the UNAMSIL issue which we submit causes some concern as to his true motive for testifying. Apparently he had “heard” that Augustine Gbao told the RUF personnel who were disarmed by UNAMSIL to capture any UNAMSIL soldiers they met on their way back to Makeni.¹⁷³³ TFI-174 failed to name the “junior commander” who had told him about this. The witness further alleged “there was fighting at *Magburaka* camp...eleven RUF had gone to disarm and the high command, including Augustine

¹⁷²⁸ *Id.* at pp.5-6.

¹⁷²⁹ TFI-360, Transcript 26 July 2005, p.82.

¹⁷³⁰ Transcript 26 July 2005, p.102.

¹⁷³¹ *Id.* at p.8.

¹⁷³² TFI-360, Transcript 22 July 2005, p.8.

¹⁷³³ TFI-174, Transcript 21 March 2006, p.61.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Gbao, he told us, did not want this to happen and therefore the fight started”.¹⁷³⁴ He also curiously stated “by the evening of the 29th [of April 2000]...the shooting came to Makeni, and that night there was rampant shooting all over again in Makeni”.¹⁷³⁵ Apparently he had heard over the radio on the 29th of April that fighting had broken out between the RUF and UNAMSIL throughout the Makeni area over disarmament.¹⁷³⁶

d. TF1-361

1395. This witness discussed certain events of the UNAMSIL incident; however, he was in Kambia at the time,¹⁷³⁷ and said more than once that he did not know much about what had happened. He stated “I cannot say much about it [what incited the UNAMSIL incident] because I don't know much about it”,¹⁷³⁸ and that “I was not on the scene, so I cannot say much about it”.¹⁷³⁹ Indeed, in cross-examination, he accepted that he had never mentioned the events in his witness statement.¹⁷⁴⁰

e. TF1-117: The “Sesay” Version

1396. This witness (whose wholesale lack of credibility is discussed elsewhere in these submissions) testified that Kallon and Gbao went to CARITAS where TF1-117 was living at the time. Allegedly, they told the boys there that they would be be locked up if they remained at St Francis’ school.¹⁷⁴¹ Gbao took out a pistol and the boys scattered from the camp.¹⁷⁴² Allegedly, Gbao, pistol in hand, then told the boss of St Francis that he did not want to see *any* boy there again. Later they went to the task force office [presumably in Makeni town centre].

1397. From the task force office, the witness testified that “we took our arms and took combats and then we started looting the Kenyan people and we started attacking their camps where they were”.¹⁷⁴³ TF1-117 stated that the camps were located in Mabanta, Mankneh and Makump.¹⁷⁴⁴

¹⁷³⁴ *Id.* at p.62 (emphasis added).

¹⁷³⁵ *Id.*

¹⁷³⁶ *Id.* at p.60.

¹⁷³⁷ TF1-361, Transcript 19 July 2005, p.84.

¹⁷³⁸ *Id.* at p.82.

¹⁷³⁹ *Id.* at p.83.

¹⁷⁴⁰ *Id.* at p.82, where the witness notes that “even in my statement [to the Prosecution] I did not put it in my statement”.

¹⁷⁴¹ TF1-117, Transcript 30 June 2006, p.24.

¹⁷⁴² *Id.* at p.25.

¹⁷⁴³ *Id.* at pp.25-26.

¹⁷⁴⁴ *Id.* at p.26.

1398. The witness stated that Issa Sesay and Augustine Gbao led the fighting at Makump camp and destroyed it.¹⁷⁴⁵ A few minutes later, he then testified that Gbao had gone to St Francis' school before attacking the Makump camp.¹⁷⁴⁶ His evidence on this matter was confusing to say the least.

1399. The witness stated that a helicopter was launching attacks against his group during the attack on Mabanta and that they were firing back at it. Afterwards, he asserted that he returned to the task force office in Makeni. He claimed to have seen Gibril Massaquoi, Issa Sesay, Morris Kallon, Augustine Gbao, General Bopleh and Digba present there.¹⁷⁴⁷ He further claimed that "Master"(his epithet for Issa Sesay) said that the captured peacekeepers should be taken to Kailahun.¹⁷⁴⁸

1400. At the end of examination in chief TFI-117 was asked by Prosecution counsel to identify Gbao. He agreed to do so, and promptly identified Kallon. Asked to identify Kallon he then pointed out Gbao.¹⁷⁴⁹

f. TF1-314

1401. This witness, who came under intense pressure in cross examination by all three defence counsel with regard to inconsistencies in her testimony, gave a hearsay account that both Kallon and Gbao had called a meeting to attack UNAMSIL; she claimed to know this because a boy from her house told her he had attended.¹⁷⁵⁰ According to those who had set up the ambush, Kallon and Gbao were not there when the it took place.¹⁷⁵¹ TF1-314 claimed that after the events (there was no specificity as to time) she saw both Kallon and Gbao in UNAMSIL vehicles,¹⁷⁵² but came under intense scrutiny in cross examination by counsel for Gbao when her previous statements were put to her in which as recently as three weeks ago she had stated takeout on paper that the meeting had been called by Superman and Gbao, rather than Kallon.¹⁷⁵³

i. TF1-263

1402. This witness described events at occurred Waterworks (outside Magburaka) around the 1st of

¹⁷⁴⁵*Id.* at p.29.

¹⁷⁴⁶*Id.* at p.31.

¹⁷⁴⁷*Id.* at p.32.

¹⁷⁴⁸*Id.* at p.33.

¹⁷⁴⁹*Id.* at pp.51-52.

¹⁷⁵⁰ TF1-314 Transcript 2 November 2005 p47

¹⁷⁵¹ TF1-314 Transcript 2 November 2005 p48

¹⁷⁵² *Id.* 3 November 2005 p36

¹⁷⁵³ *Id.* p16-18

May 2000. He stated that General Issa and his bodyguards attacked a UNAMSIL peacekeepers camp as he was hiding behind a mango tree watching all that happened. Eventually, Issa arrested the men and put them in trucks and took them to Teko Barracks, where he saw them again later. He also allegedly saw RUF commanders planning to take away the peacekeepers (presumably to Kono).¹⁷⁵⁴

1403. TF1-263 failed to mention Gbao's name during his evidence. As a general observation his evidence bore no relation to that given by anyone else and appeared to be entirely unreliable, once again bringing a witness's true motive for testifying into question.

D. Gbao's Alleged Actions After 3 May 2000

1404. There is no mention of Gbao at the checkpoint or at Moria village as alleged by TF1-288.¹⁷⁵⁵ There is mention of Gbao being present when TF1-288 was taken to Makeni to discuss the situation with who was alleged to be Issa Sesay,¹⁷⁵⁶ and no mention of Gbao being present when TF1-288 or the other Zambian troops were taken to Koidu and Yengema.¹⁷⁵⁷ There is no mention of Gbao at Monica Pearson's house during the holding of UN witnesses in Koidu¹⁷⁵⁸ or of him being present when the Zambian and Kenyan troops were taken from Sierra Leone to Liberia.¹⁷⁵⁹ There is no mention of Gbao being present when Colonel Mendy was injured on the truck traversing from Makeni to Kono, and no mention of Gbao having any involvement in the encirclement and confrontation with the UN-Indian contingent in Kailahun.¹⁷⁶⁰ We submit these observations are rather telling when one recalls the prosecution case is that Gbao was responsible for the events of 1st to 3rd of May, and the prolonged detention of UNAMSIL personnel afterwards.

II. Defence Evidence

A. Prior to Gbao's arrival at Makump DDR camp 1 May 2000

1. DAG-111

1405. According to DAG-111, Augustine Gbao was sent to Makeni in 1999. Soon after his arrival, he was forced to flee to Magburaka amidst the RUF infighting.¹⁷⁶¹ DAG-111 testified that when Gbao was able to return to Makeni (in late 1999) the UNAMSIL peacekeepers were not yet in

¹⁷⁵⁴See generally TF1-263, Transcript 7 April 2005, pp.38-41.

¹⁷⁵⁵TF1-288, Transcript, 22.3.06, pp.15-20

¹⁷⁵⁶TF1-288, Transcript 22 March 2006, p.23.

¹⁷⁵⁷TF1-288, Transcript, 22 March 2006, p.46.

¹⁷⁵⁸TF1-288, Transcript 22 March 2006, p.27.

¹⁷⁵⁹TF1-288, Transcript, 22 March 2006, p.47.

¹⁷⁶⁰Ganese Jaganathan, Transcript 20 June 2006, pp.54-55.

¹⁷⁶¹ DAG-111, Transcript 17 June 2008, p.54.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

situ.¹⁷⁶² When they did arrive, they were deployed in Makkinneh, Magburaka (at the Arabic college), and the Makump DDR camp.¹⁷⁶³ [REDACTED]

[REDACTED]¹⁷⁶⁴ Gbao could also be seen socialising with UNAMSIL personnel at various locations throughout Makeni town, such as the well known Bar Flamingo.¹⁷⁶⁵ According to DAG-111, Gbao was “never vexed even one time” with these individuals.¹⁷⁶⁶

1406. DAG-111 stated that Ishmael Kamara was the RUF commander at their base in Makump.¹⁷⁶⁷ On the morning of 1st May 2000 Kamara visited Gbao at his house in Teko Barracks.¹⁷⁶⁸ According to DAG-111, “[h]e told [Gbao] that some of his men had been disarmed at Makump DDR camp”.¹⁷⁶⁹ “[A]fter Ishmael Kamara had explained, [by] that time Colonel Kailondo was there. He became angry”. Gbao told Kailondo that he was going to investigate the matter”.¹⁷⁷⁰ Kailondo was in the mood for a fight, according to the witness, but Gbao tried to talk him out of fighting and set out to find Ngondi in an effort to find out what had happened himself.

1407. DAG-111 continued: “[A]fter he talked to Kai [Kailondo], [Gbao] asked me to enter the vehicle—to start the vehicle in order to drop him at Makeni together with Ishmael and one of Ishmael's boys...[s]o from there I drove him to Makinneh and we reached at the gate...the UNAMSIL gate at Makinneh”.¹⁷⁷¹ Kamara’s bodyguard was armed, but his weapon was deliberately placed out of harm’s way in the boot of the car.¹⁷⁷² There was no reference to Kamara or Gbao being armed themselves.

1408. The men arrived at UNAMSIL’s local HQ in Makinneh. Gbao approached the UNAMSIL guards at the gate and asked to see Leonard Ngondi. He was informed that Ngondi was not there, so he told DAG-111 to drive to the Makump DDR camp. The car still contained Ishmail and his bodyguard as well as Gbao and DAG-111.¹⁷⁷³

¹⁷⁶² DAG-111, Transcript 17 June 2008, p.58.

¹⁷⁶³ DAG-111, Transcript 17 June 2008, p.58-59.

¹⁷⁶⁴ DAG-111, Transcript 17 June 2008, p.62.

¹⁷⁶⁵ DAG-111, Transcript 17 June 2008, pp.62-63.

¹⁷⁶⁶ DAG-111, Transcript 17 June 2008, p.63.

¹⁷⁶⁷ DAG-111, Transcript 17 June 2008, pp.64-65.

¹⁷⁶⁸ DAG-111, Transcript 17 June 2008, p.66.

¹⁷⁶⁹ DAG-111, Transcript 17 June 2008, p.66.

¹⁷⁷⁰ DAG-111, Transcript 17 June 2008, p.67.

¹⁷⁷¹ DAG-111, Transcript 17 June 2008, p.68.

¹⁷⁷² DAG-111, Transcript 17 June 2008, pp.68-69.

¹⁷⁷³ DAG-111, Transcript 17 June 2008, pp.68-70.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

B. Gbao's Arrival at the Makump DDR camp on 1 May 2000

1. DAG-111

1409. When the car arrived at the Makump camp the occupants alighted and Gbao angrily “walked towards the gate. Then the security, the Kenyan soldiers, came out...Augustine Gbao said that a man went and told me that some of our men had been disarmed and that I came with the man, and he called upon Ishmael...to explain what he told [Gbao] at Teko Barracks”.¹⁷⁷⁴ Neither Gbao, Ishmael, the bodyguard or DAG-111 entered inside the camp perimeter at any time during the incident that followed.¹⁷⁷⁵ This, as was pointed out above, is supported in the Prosecution's testimony.

1410. Gbao asked the UNAMSIL personnel present whether the allegation made by Ishmael Kamara was correct.¹⁷⁷⁶ “After that, one of the men said that it was true that the men were disarmed, but he said that he [KENBATT] was not the one that did the disarmament. It was the MILOBS that did the disarmament”.¹⁷⁷⁷ After further discussion during which the situation appeared to relax, Gbao sent DAG-111 and Ishmael Kamara back to Kailondo in Makeni to confirm he had matters under control.¹⁷⁷⁸

1411. DAG-111 promptly drove Gbao's beaten up little Toyota back to Makeni with Ishmael and his bodyguard to pass on Gbao's message that “it was true that they [ex-RUF combatants] were disarmed but they were not the Kenyans. The MILOBS disarmed these men so tell Kai [Kailondo] not to worry again as long as we've got the truth we'll be able to settle the matter. Let them don't bother to go there again”.¹⁷⁷⁹ DAG-111 found Kailondo at his house at Teko Barracks.¹⁷⁸⁰ Having given Kailondo the message the three men left, DAG-111 driving into Makeni to refuel Gbao's car.¹⁷⁸¹

1412. DAG-111 asserted that Gbao had no authority over Kailondo, nor did he have any authority over military commanders in Makeni, including *inter alia*, Colonel Kallon, Morris Kallon,

¹⁷⁷⁴ DAG-111, Transcript 17 June 2008, pp.71-72.

¹⁷⁷⁵ DAG-111, Transcript 17 June 2008, p.77.

¹⁷⁷⁶ DAG-111, Transcript 17 June 2008, p.74.

¹⁷⁷⁷ DAG-111, Transcript 17 June 2008, p.74.

¹⁷⁷⁸ DAG-111, Transcript 17 June 2008, p.75.

¹⁷⁷⁹ DAG-111, Transcript 17 June 2008, p.76.

¹⁷⁸⁰ DAG-111, Transcript 17 June 2008, p.87.

¹⁷⁸¹ DAG-111, Transcript 17 June 2008, pp.86-87.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

and Komba Gbundema.¹⁷⁸²

1413. On the way back to Makump DDR camp, DAG-111 observed “one UN Land Rover and one of Kailondo's Land Rovers. Some of Kailondo's boys trying to disarm some of the Kenyan soldiers”.¹⁷⁸³ He overtook the Land Rovers without stopping. Shortly after he arrived back at the Makump DDR camp, where the mood between Gbao and the UNAMSIL peacekeepers was clearly relaxed.¹⁷⁸⁴

1414. Gbao asked about the meeting between Ishmael and Kailondo. DAG-111 told Gbao about the conflict on the road between some of Kailondo's boys and UNAMSIL.¹⁷⁸⁵ Gbao returned to discuss matters with the Kenyan men. A short while later another vehicle approached the DDR camp.¹⁷⁸⁶ When it arrived DAG-111 identified it as a Land Rover; he estimated that more than ten armed men led by CO Kailondo immediately alighted from it.¹⁷⁸⁷

1415. Kailondo was brandishing an AK-47. He immediately approached Gbao and the others at the scene.¹⁷⁸⁸ He was clearly angry, demanding the release of the RUF. He shot into the air. Gbao then implored Kailondo not to do anything untoward.¹⁷⁸⁹

1416. A “dark green” saloon car arrived shortly thereafter.¹⁷⁹⁰ The witness recalled “There were about seven men in the vehicle—some were sitting inside, some outside, some on the bonnet and some sat on the back boot”.¹⁷⁹¹ He could see an RUF commander inside the vehicle, accompanied by other combatants.¹⁷⁹² He continued: “When they had alighted, they came close to CO Kailondo and they joined the group...So, after that, Augustine Gbao had been trying to talk to them so as not to do anything and that they should be patient”.¹⁷⁹³ Within moments another Land Rover arrived: by that time “the men were so many in the place...up to 50”.¹⁷⁹⁴ “They were the security that were in Makeni town, the soldiers that were there...some were CO Kailondo's boys, but

1782 DAG-111, Transcript 17 June 2008, pp.85-86.
 1783 DAG-111, Transcript 17 June 2008, p.89.
 1784 DAG-111, Transcript 17 June 2008, pp.90-91.
 1785 DAG-111, Transcript 17 June 2008, p.94.
 1786 DAG-111, Transcript 17 June 2008, p.95.
 1787 DAG-111, Transcript 17 June 2008, p.96.
 1788 DAG-111, Transcript 17 June 2008, p.96.
 1789 DAG-111, Transcript 17 June 2008, pp.97-98.
 1790 DAG-111, Transcript 17 June 2008, pp.99-100.
 1791 DAG-111, Transcript 17 June 2008, p.100.
 1792 DAG-111, Transcript 17 June 2008, p.100.
 1793 DAG-111, Transcript 17 June 2008, p.134.
 1794 DAG-111, Transcript 17 June 2008, p.134.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29604

I did not know all of them”.¹⁷⁹⁵

1417. “One of them fired into the air”. DAG-111 continued:¹⁷⁹⁶ “The second man had been traveling in the saloon car that came...[he] was the one who fired the second shot”.¹⁷⁹⁷ Gbao “was still trying to talk to them. He said they should be patient and no to do anything”.¹⁷⁹⁸ “When the second shot had been fired, when [Gbao] turned, he did not see the Kenyans. He found that they had gone inside. He did not have any way to go and talk with them any more so, after that, he himself, a little bit later...became afraid”.¹⁷⁹⁹

1418. By that time, “[DAG-111] had already gone to the vehicle, close to the vehicle. There [Gbao] went close to me. He said: ‘Well, if this is the situation I will go’.”¹⁸⁰⁰ Gbao did not fire any shots.¹⁸⁰¹ Gbao and DAG-111 got back into their Toyota and left.¹⁸⁰² DAG-111 asserted that he did not remember anything in particular happening on the road from Makump DDR camp and Makeni.¹⁸⁰³

C. Gbao's Actions After Arrival at the Makump DDR camp on 1 May 2000 and before 3 May 2000

i. DAG-111

1419. On the evening of 1st May DAG-111 and Augustine Gbao were at the roundabout in Makeni. Local people were talking about what had happened at the Makump DDR camp.¹⁸⁰⁴ Gbao explained to them that “there was a little misunderstanding there...but it was the other commanders who did not want to take orders...they were the ones that had caused this problem”.¹⁸⁰⁵

1420. Having left the roundabout at about 11pm, DAG-111 spent the night as usual at Gbao’s house with Gbao and his family.¹⁸⁰⁶

¹⁷⁹⁵ DAG-111, Transcript 17 June 2008, pp.134-35.

¹⁷⁹⁶ DAG-111, Transcript 17 June 2008, p.135.

¹⁷⁹⁷ DAG-111, Transcript 17 June 2008, p.135.

¹⁷⁹⁸ DAG-111, Transcript 17 June 2008, p.136.

¹⁷⁹⁹ DAG-111, Transcript 17 June 2008, pp.136-37.

¹⁸⁰⁰ DAG-111, Transcript 17 June 2008, p.137.

¹⁸⁰¹ DAG-111, Transcript 19 June 2008, p.30.

¹⁸⁰² DAG-111, Transcript 17 June 2008, p.137.

¹⁸⁰³ DAG-111, Transcript 17 June 2008, p.138.

¹⁸⁰⁴ DAG-111, Transcript 17 June 2008, p.139.

¹⁸⁰⁵ DAG-111, Transcript 17 June 2008, p.140.

¹⁸⁰⁶ DAG-111, Transcript 19 June 2008, p.3.

1421. Next morning, the 2nd May, Gbao told his wife, Hawa, who had heard rumours about what happened at the DDR camp “[i]t was Kailondo that went and misbehaved in that place [the DDR camp] yesterday. I was trying to settle the matter but they came and obstructed so I wasn't able to do anything again”.¹⁸⁰⁷

1422. The witness left the house with Gbao later that morning. They went into Makeni so Gbao could play draughts. No UNAMSIL soldiers could apparently be seen. DAG-111 could recall nothing else of significance that day.¹⁸⁰⁸ He stated “[w]hen we left the house it's where I used to play draughts that I went to drop him. Most of his friends were other civilians, elderly civilians; that was where they used to meet, so I went to drop him there. He spent most of the day there”.¹⁸⁰⁹

D. Gbao's Actions After 3 May 2000

i. DAG-111

1423. DAG-111 recalled being at the roundabout with Gbao on the evening of 3rd May where people were again discussing current events. Again, Gbao was talking to civilians.¹⁸¹⁰ At this time, according to the witness, the Zambian UN troops arrived from the Lunsar-Makeni highway. They “met us there at the roundabout. They met Mr Gbao discussing with other civilians...So they just called me to go and take the vehicle to Kono”.¹⁸¹¹

1424. The witness then left for Kono. “It was one commander that asked me to go and take one vehicle to Kono”.¹⁸¹² DAG-111 was asked to drive a ‘big truck’.¹⁸¹³ Significantly, Gbao was not part of the convoy: in fact, he did not even know that DAG-111 [REDACTED] had gone.¹⁸¹⁴ DAG-111 stated “[t]he only thing when I came from Kono, he was angry with me. He asked me where have I been. He was looking for me all this while”.¹⁸¹⁵ DAG-111 returned about four days later.¹⁸¹⁶

1425. In a memorably spontaneous response to cross examination DAG-111 said “When I came back, I came with one of the Land Rovers that we went with...as I was turning around the

¹⁸⁰⁷ DAG-111, Transcript 19 June 2008, p.5.

¹⁸⁰⁸ DAG-111, Transcript 19 June 2008, pp.5-6.

¹⁸⁰⁹ DAG-111, Transcript 19 June 2008, p.35.

¹⁸¹⁰ DAG-111, Transcript 19 June 2008, p.6.

¹⁸¹¹ DAG-111, Transcript 19 June 2008, p.36.

¹⁸¹² DAG-111, Transcript 19 June 2008, p.6.

¹⁸¹³ DAG-111, Transcript 19 June 2008, p.7.

¹⁸¹⁴ DAG-111, Transcript 19 June 2008, p.7.

¹⁸¹⁵ DAG-111, Transcript 19 June 2008, pp.36-37.

¹⁸¹⁶ DAG-111, Transcript 19 June 2008, p.8.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

roundabout, I saw Mr Gbao sitting there. He saw me in the Land Rover and then said, 'Where have you been all this while, I've been looking for you'. Then I said 'Issa [Sesay] called me and asked me to take a truck to Kono for him, so that is where we have been'.¹⁸¹⁷

2. *DAG-047*

1426. According to DAG-047, a former hospital administrator who had been a CDF volunteer before being persuaded to join the RUF as a clerical assistant, Gbao expressed regret at the incident that had led to the abduction of UN personnel. He stated "I heard Mr Gbao discussing with some other officers. I heard him saying that it was not necessary for them to have arrested the peacekeepers. I heard him saying that it was—it would have been better for them to have waited and see the outcome of the Lome Peace Accord and see what the stakeholders could do. I just overheard him".¹⁸¹⁸ He recalled that this conversation took place on either 2nd or 3rd May.¹⁸¹⁹

E. Gbao and Disarmament

1427. Contrary to the Prosecution's theory Gbao was, in fact, in full support of RUF disarmament. According to DAG-080 he was "preaching about disarmament" in Makeni in mid-2000. He was "talking to soldiers to see [the] reason why they should disarm".¹⁸²⁰ DAG-047 observed that Gbao was working hard to promote disarmament, "to get them ready for disarmament at any time".¹⁸²¹ The Sesay defence witness General Opande had previously testified to the same effect.

III. Assessment of Prosecution Testimony

1428. In our submission, an abundance Prosecution testimony on the conflict between the RUF and UNAMSIL is inherently unreliable. All too often witnesses either suffered a dramatic loss of memory as to material facts or lied cynically to the chamber. In our submission their false allegations fatally compromise the Prosecution's case against Augustine Gbao on charges 15-18 in the Indictment. This is no cheap assertion: the following analysis will, in our submission, unassailably demonstrate the abject failings of the Prosecution case on this matter.

1429. For how can the case be sustained when so many of the Prosecution's witnesses contradict

¹⁸¹⁷ DAG-111, Transcript 19 June 2008, p.37.

¹⁸¹⁸ DAG-047, Transcript 17 June 2008, pp.5-6.

¹⁸¹⁹ DAG-047, Transcript 17 June 2008, p.6.

¹⁸²⁰ DAG-080, Transcript 6 June 2008, p. 89.

¹⁸²¹ DAG-047, Transcript 17 June 2008, p.8.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

one another so dramatically? There are those who say Gbao attacked the peacekeepers; and those who say he did not. One asserted that he attacked the peacekeepers in Lunsar; others say he attacked them in Makump. TF1-360 asserted that no UNAMSIL abductions took place in Makump or Magburaka; others say they did. Some mention Gbao playing a central role in the planning of UNAMSIL; others completely omit his name. There is plenty more, as will be illustrated below, leading to the only sure and certain conclusion one can safely draw from the UNAMSIL evidence: this is not a case that bears scrutiny.

A. Inconsistencies and Complications with Testimony Provided by Prosecution Witnesses

1. UN Witnesses

a. Ganese Jaganathan

1430. Contrary to Jaganathan's peculiar assertion, there was no pink Mercedes at the Makump DDR camp. DAG-111 stated it was a "dark green saloon car" that arrived carrying a gun-wielding commander accompanied by several RUF combatants.¹⁸²² While the events of 1 May 2000 and afterwards were no doubt traumatic for Jaganathan, one can only speculate why he recalls the colour as pink. Perhaps the stress of the situation that caused him to recall certain details imprecisely. One cannot be sure.

1431. Other aspects of Jaganathan's testimony—such as that Gbao arrived at the DDR camp with 30-40 combatants and that he was found holding a weapon at the camp, or that he had anything to do with the arrest of Major Maroa— is detailed below.

b. Joseph Mendy

1432. Joseph Mendy did not see Gbao after 17th April 2000,¹⁸²³ yet he testified that Gbao "secured" the detention of Ganase.¹⁸²⁴ Had this been true one would have assumed that Major Ganase, who knew who Gbao was, would have mentioned this in his testimony. He did not. In fact, he specifically stated that he **did** not see Gbao holding anyone "hostage" at Teko Barracks in Makeni or anywhere else.¹⁸²⁵ It is unclear why Mendy purported to recall this event so clearly when it was so obviously untrue, especially given Jaganathan's detailed account of how he was "secured" and who was responsible for it.

¹⁸²² DAG-111, Transcript 17 June 2008, pp.99-100.

¹⁸²³ Joseph Mendy, Transcript 29 June 2006, p.24.

¹⁸²⁴ Joseph Mendy, Transcript 27 June 2006, p.11.

¹⁸²⁵ Ganese Jaganathan, Transcript 21 June 2006, p.37.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1433. Between Jaganathan and Mendy, This is but one of a multitude of inconsistencies relating to the same set of events. For example, Jaganathan testified that he was abducted around 15:00 (3pm) on 1 May 2000. He testified that the third, fourth and fifth persons arrested were Major Maroa and two other KENBATT officers who had been abducted in or around Makinneh on the same day shortly after Jaganathan was abducted himself. The sixth and seventh arrestees were Joseph Mendy, another MILOB, and Major Gjellestad, who were abducted around 18:30 (6:30pm) on the same day. Major Odhiambo and three other soldiers were arrested early on 2nd May, bringing the total to 11. Finally, the nine further KENBATT officers who were abducted were picked up in Matotoka on the way to Kono, making 20.

1434. Mendy's chronological account was quite different. He recalled that he arrived at Teko Barracks and asked for Ganase and Salahuddin. He arrived after Maroa and the three Kenyans, but when he speaks of meeting Ganase, he makes no mention of any other UN personnel at the camp.¹⁸²⁶ He specifically recalled that he was there with "*Major Knut, Major Ganase*".¹⁸²⁷ In contrast, Jaganathan specifically recalled in examination in chief that when Mendy and Gjellestad arrived he was with Major Maroa and the other three men.¹⁸²⁸

1435. Mendy continues "[n]o sooner other Kenyan soldiers also came in, they were also held captive...17 in number".¹⁸²⁹ Yet Jaganathan stated that they did not come until the next day. Jaganathan had testified that at this juncture Mendy and Gjellestad had made the total number of abductees 7; he also claimed that there were never more than 11 abductees at Teko Barracks. Mendy further states that at dawn on 3rd May three "Zambian soldiers" boarded a vehicle which carried them to Kono.¹⁸³⁰ The reality is, however, that the Zambians were not arrested by the RUF until during 3rd May, as detailed above.

1436. It would be unreasonable to expect a witness to have precise power of recall of a traumatic event that took place 8 years ago. Equally, however, we submit that it is unreasonable and unrealistic to treat evidence so rent by inconsistencies and discrepancies as capable of supporting a case beyond reasonable doubt. We submit that the evidence of both witnesses has been rendered so unreliable that it would be dangerous to rely on it-and disingenuous in the extreme to rely on

¹⁸²⁶ Joseph Mendy, Transcript 27 June 2006, pp.10-11.

¹⁸²⁷ *Id.* at p.11.

¹⁸²⁸ Ganese Jaganathan, Transcript 20 June 2006, p.32.

¹⁸²⁹ Joseph Mendy, Transcript 27 June 2006, p.11.

¹⁸³⁰ *Id.* at p.22.

selected 'highlights'.

2. *RUF Insider and Other Testimony*

a. TF1-174

1437. TF1-174's recall of material facts is similarly shaky. Inter alia, he alleged that:

- i. Tension between the RUF and UNAMSIL arose due to conflict at the *Magburaka* camp;¹⁸³¹
- ii. Conflict broke out between the two factions on 29 April 2000;¹⁸³²
- iii. Shooting was rampant throughout Makeni on 29 April;¹⁸³³ and
- iv. UNAMSIL abducted in Makoth were taken to *Burkina Faso*.¹⁸³⁴

1438. Beyond these discrepancies, TF1-174 makes the false allegation that Augustine Gbao and Colonel Dugba forced boys from the ICC to go and fight in Lunsar. Not only was his recall of this alleged incident faulty, he told lies in an attempt to 'save' his credibility.

1439. This event allegedly occurred after the witness left Makeni on 6 May to go to Freetown where he intended to report to his superiors on what had been taking place in Makeni. He claimed that he returned to Makeni on 14th May and that he left again on the 19th.¹⁸³⁵ The witness noticed there were drastically fewer boys in the Interim Care Centre ('ICC') [REDACTED]. He alleged that Augustine Gbao and Colonel Dugbe had taken them from the ICC and had forced them to go and fight in Lunsar.¹⁸³⁶ In a previous witness statement he noted that he had received a report about this.¹⁸³⁷ If TFI-174 is to be believed, Gbao and Dugbe must have forced these boys (whose ages were unclear but must have varied) to fight sometime between the 14th and the 19th May. Even if these dates are not exactly right (a lot of time has passed) must have been during the time that TF1-174 was in Freetown. Otherwise, his testimony that when he arrived back in Makeni on the 14th and the camp was emptied of a majority of its students would not make sense.

1440. However, having made this serious allegation, TFI-174 dramatically changed his evidence in cross-examination wherein he stated that he saw Dugbe and Gbao "pushing children" to go into combat around the first week in May, as opposed to between the 14th and 19th.¹⁸³⁸ Later during

¹⁸³¹ TF1-174, Transcript 21 March 2006, p.60.

¹⁸³² *Id.*

¹⁸³³ *Id.* at p.62.

¹⁸³⁴ *Id.*, Transcript 21 March 2006, p.64.

¹⁸³⁵ TF1-174, Transcript 21 March 2006, p.66.

¹⁸³⁶ *Id.* at pp.66-67.

¹⁸³⁷ *Id.* at p.95.

¹⁸³⁸ *Id.* at 28 March 2006, p.76.

cross-examination he re-confirmed that on the date he returned to Makeni there were many children missing.¹⁸³⁹ He followed that assertion by stating that not only did he receive a report about Gbao and Dugba “pushing” boys in the direction of Lunsar-he actually *saw them doing it*. If that were true, then this event can only have taken place on 14th May or afterwards rather than during the first week of the month.¹⁸⁴⁰

1441. We submit that this account is entirely false. Rather than around the middle of the month TF1-288 stated that the fighting at Lunsar between UN troops and the RUF took place shortly after he went to the roadblock (where he was subsequently arrested) on *3 May 2000*.¹⁸⁴¹ This suggests that fighting started on the evening of 3 May or the next day.

1442. In light of such confusion TF1-174's testimony can only be viewed with the upmost scepticism. Although several years had passed between the events of May 2000 and TF1-174's oral testimony it is clear that he wilfully changed his evidence in a manner that had nothing to do with mere passage of time. Sarcasm aside, no matter how many years have intervened, one could surely be expected to comfortably distinguish between actually seeing Gbao pushing young boys into a truck to take them into battle and simply hearing a report about it.

1443. We submit that the fact that a witness so blatantly contradicted himself on an issue as critical as this cannot not be ignored. Although the CDF and AFRC cases did not directly address the issue of assessment of credibility where a witness contradicts his own evidence, the ICTY has held that “in cases of repeated contradictions *within* a witness's testimony, the Trial Chamber has disregarded his or her evidence *unless it is sufficiently corroborated*.”¹⁸⁴²

1444. We submit there is no corroboration on the allegation that Gbao was pushing young boys into a truck and that further consideration of the matter unnecessary.

1445. The trial chamber may reject the totality of a witness's evidence if should it find the inconsistencies are material. The Appeal Chamber in the ICTR case of *Akayesu* case held that inconsistencies may be capable of raising doubt in relation to the particular piece of evidence in

¹⁸³⁹ *Id.* at pp.94-95.

¹⁸⁴⁰ *Id.* at p.95.

¹⁸⁴¹ TF1-288, Transcript 22 March 2006, p.49.

¹⁸⁴² *Prosecutor v. Blagojevic*, Case No. IT-02-60-T, Judgement, Trial Chamber, 17 January 2005, para. 23; *See also Prosecutor v. Halilovic*, Case No. IT-01-48-T, Judgement, Trial Chamber, 16 November 2005, para. 17. (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

question or, *where such inconsistencies are found to be material*, to the witnesses's evidence as a whole.¹⁸⁴³ In that case, inconsistencies arising during cross examination were found to be material and the trial chamber refrained from relying on the witness's entire evidence.¹⁸⁴⁴

1446. In any event, the Third Accused vehemently denies that he played any role in forcing boys to go and fight in Lunsar. For Gbao to have done so would have been perverse since it would have been extraordinarily inconsistent with his previous conduct towards the ICC. Indeed, TFI-174 conceded that Gbao had been instrumental in allowing the ICC to operate, and that approximately two weeks before the alleged "Lunsar push" he had facilitated the repatriation of almost 100 ICC boys with their families.¹⁸⁴⁵ It should not be forgotten that Gbao had already jeopardised his own position by secretly providing written authorisation for the ICC to open without the consent of RUF commanders in Makeni.¹⁸⁴⁶ When Gbao's unilateral authorisation was discovered Gbao was angrily humiliated by RUF commanders enraged that he had acted without permission- another indication of Gbao's meek position within the RUF hierarchy.¹⁸⁴⁷

1447. TFI-174 contradicted himself again in cross-examination, albeit on a smaller matter. In evidence in chief, he recalled a complaint made to him by a boy named Mohamed Koroma. The witness said "after a day one of the boys, Mohamed Koroma, returned. He was crying. When I asked him what happened he said he will not go again because a good number of his companions were killed"¹⁸⁴⁸ In cross-examination, TFI-174 changed the boy's name to Saidu Mansaray, stating "[a]nd then during the short time of stay before we finally moved, one of these bigger boys, *Saidu Mansaray*, came back crying. We wanted to know why. He told us some of his other boys were killed and he had returned, he will fight no more".¹⁸⁴⁹

1448. We submit the cumulative effect of TFI-174's repeated inconsistencies within his testimony combined with his uncorroborated story about Gbao pushing the ICC boys to Lunsar (which we suggest was a lie) renders this witness non-credible. Consequently, his testimony should not be considered any further. At the very least, we assert that reasonable doubt has been cast upon his

¹⁸⁴³ *Prosecutor v. Akayesu*, Case No. IT-96-04-A, Judgment, Appeals Chamber, 1 June 2001, para. 142. (emphasis added).

¹⁸⁴⁴ *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-T, Judgement, Trial Chamber, 6 December 1999, para. 195. See also *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Judgement, Appeals Chamber, 26 May 2003, para.190.

¹⁸⁴⁵ TFI-174, Transcript 28 March 2006, p.99.

¹⁸⁴⁶ *Id.* at p.71.

¹⁸⁴⁷ TFI-174, Transcript 28 March 2006, p.71-72.

¹⁸⁴⁸ *Id.* at p.66.

¹⁸⁴⁹ *Id.* at 28 March 2006, p.95 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29612

testimony.

b. TF1-366

1449. We further submit that TF1-366 was clearly lying in his account of what transpired around that time in Makeni/Magburaka. It is so at odds with other prosecution witnesses' testimony that, when taken together with other his other non-credible testimony on other counts in the Indictment, his evidence should not be seriously considered against the Third Accused.

a. *Sesay, Kallon and Gbao did not meet and plan the attack*

1450. TF1-366 claims that Sesay, Kallon and Gbao held a meeting in which they arranged to attack the UN. The witness alleged that Sesay would deploy in Magburaka at the Arab College, Gbao at the Makump DDR camp, and Kallon at the Lunsar Highway (along with Komba Gbundema, Bai Bureh and Dawe). Although the plan was for Gbao to attack first, it was allegedly Kallon who started the hostilities in Lunsar. The RUF then proceeded to fight the UN all day.¹⁸⁵⁰

1451. This is wildly inaccurate testimony. The attacks were not launched on the same day. Makump was attacked on 1st May. Fighting did not take place on the Lunsar-Makeni Highway until 3 or 4 May 2000. These historical facts are not in dispute. TF1-288 testified that UN troops sent to support the Makeni UN peacekeepers did not enter the Lunsar-Makeni highway until the morning of 3 May 2000;¹⁸⁵¹ he stated fighting did not commence there until the evening of 3 May or the morning of 4 May.¹⁸⁵² By the morning of 3 May hostilities had ceased in Magburaka;¹⁸⁵³ nor was there now any fighting at the Makump DDR camp, it having been evacuated on 2 May. TFI-366's account was imaginative but his inability to accurately reflect the conflict demonstrates, once again a questionable motive on the part of yet another Prosecution witness. In any event his testimony is fatally flawed and we submit should be rejected in its entirety.

b. *Witness Claimed to be in Kono During Attacks, then Changed his Testimony*

1452. In examination in chief TFI-366 also claimed that the UN were already being arrested (including the 400 arrested by the RUF on 3rd May on the Lunsar highway) *while he and Issa Sesay were still in Kono.*¹⁸⁵⁴ This testimony is impossible to reconcile with his earlier evidence that he was

¹⁸⁵⁰TF1-366, Transcript 10 November 2005, p.35-37.

¹⁸⁵¹ TF1-288, Transcript 22 March 2006, pp.13-14.

¹⁸⁵² *Id.* at 22 March 2006, p.49.

¹⁸⁵³ Leonard Ngondi, Transcript 30 March 2006, p.5.

¹⁸⁵⁴ TF1-366, Transcript 15 November 2005, p.44

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29613

present during all that happened.

c. *Witness claims that during Fighting on 1 or 2 May Foday Sankoh was Imprisoned*
1453. TFI-366 also curiously stated that Sesay, Kallon and Gbao met after all the fighting and said that “the destruction [they] have caused, if we don't come to Freetown and get Pa Sankoh *out of jail*, we'd be arrested”.¹⁸⁵⁵ Whether TFI-366 seriously meant that the RUF commanders intended to march en masse to Freetown is unclear

1454. There is just one problem with this story—Foday Sankoh had not yet been arrested! TFI-288 stated that he had been in captivity for a week or more in Kono (having been abducted in Makoth on 3 May) before Sankoh was arrested in Freetown.¹⁸⁵⁶

d. *Witness Does not Remember Where he was Living During UNAMSIL Conflict*

1455. TFI-366 appeared confused in previous witness statements, as well as in evidence as to where he was living at the time of the UNAMSIL conflict. Originally he claimed to have been in Magburaka when the conflict broke out.¹⁸⁵⁷ However, by 2004, his witness statement (and subsequent testimony) states that he lived in Kono.¹⁸⁵⁸

1456. He then claimed to have been in a palm wine bar in Makeni when he first heard about the UNAMSIL conflict: “Augustine Gbao sent a radio message to Foday Sankoh in Freetown and Kono where Issa Sesay was based that the Kenyan and Zambian peacekeepers in Makeni were causing problems and so he had put them all under control”.¹⁸⁵⁹

1457. When he was challenged on this by counsel for Gbao he repeated a tired refrain: the witness statement had been incorrectly recorded; the OTP investigators had not heard him correctly. He repeated his stock defence “[t]hose are not my words”¹⁸⁶⁰, insisting that he had told the OTP Magburaka, not Makeni. This, however, does not make sense either because in chief he had already, of course, said he had been in *Kono*- not Magburaka nor Makeni- at that time. Shortly after that he contradicted himself again, stating it was not in fact Gbao, but “Morris Kallon who sent a message to Issa and Augustine Gbao,”¹⁸⁶¹ It should be noted at this point that, while there are several radio

¹⁸⁵⁵ TFI-366, Transcript 10 November 2005, p.45 (emphasis added).

¹⁸⁵⁶ TFI-288, Transcript 22 March 2006, pp.40-41.

¹⁸⁵⁷ See Exhibit 55b, p. 13683.

¹⁸⁵⁸ TFI-366, Transcript 15 November 2005, p.47.

¹⁸⁵⁹ *Id.* at 18 November 2005, p.7.

¹⁸⁶⁰ *Id.* at p.7.

¹⁸⁶¹ *Id.* at p.7.

messages logged in Makeni for this period, there is no record of any message being sent by Augustine Gbao.

1458. TFI-366 then laughably claimed that the IMATT comprised part of the group that had been put under control and abducted.¹⁸⁶²

1459. TFI-366's inability to provide a clear or honest response renders it more likely- in conjunction with his inconsistent testimony discussed above- that he was not aware of the events of UNAMSIL until the incident had largely concluded.

e. *Gbao did not kill any UN personnel*

1460. The Third Accused emphatically denies taking part in any attacks on UN personnel. In examination in chief, however, TF1-366 stated that Gbao killed a UN peacekeeper.¹⁸⁶³ In another apparent capitulation during the Gbao cross examination he admitted that he never saw Gbao shoot anyone; nor did he kill a UN soldier.¹⁸⁶⁴

f. *Previous Statement Claimed to be with Gbao at Makump DDR Camp*

1461. TF1-366 claimed in a previous witness statement that he had been present when Gbao went to the Makump camp.¹⁸⁶⁵ In evidence he claimed, contrarily, that he was at the Waterworks in Magburaka.

g. *Witness Claimed to See UN Helicopters Shooting at RUF in Magburaka*

1462. TF1-366 did not stop there. He claimed helicopters were firing on the ground in Magburaka, which did not occur at this stage of the conflict.¹⁸⁶⁶

h. *Witness believes that 500 people were captured at the Makump camp*

1463. His true ignorance of the events was no better illustrated by his fanciful claim "[i]t was at *Makump that they captured 500 manpower*. That was where *Komba Gbundema* was. That was where the fighting started".¹⁸⁶⁷ As stated above, he also believed that the UN were already being captured while he and Issa Sesay still were in Kono.

¹⁸⁶² TF1-366, Transcript 18 November 2005, pp.8-9.

¹⁸⁶³ TF1-366, Transcript 15 November 2005, p.49.

¹⁸⁶⁴ *Id.* at 18 November 2005, p.22.

¹⁸⁶⁵ See Exhibit 55b, pp.13683-84; *also see* TF1-366, 17.11.05, p.18.

¹⁸⁶⁶ TF1-366, Transcript 10 November 2005, p.42.

¹⁸⁶⁷ TF1-366, Transcript 18 November 2005, pp.19-20 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

i. *Witness appears at Waterworks after previously claiming to be absent*

1464. The witness claimed to be present during the hostilities at Waterworks in Magburaka. He had Earlier in his evidence he stated he had not been present and discovered what happened only after speaking to RUF fighters in the area.¹⁸⁶⁸

j. *Inconsistencies on when he left Makeni and returned to Kono*

1465. Finally, the witness claims not to know when he left Makeni for Kono after the incidents in Makeni, Makump, Magburaka and Lunsar. He was more confident in his witness statement, however, where he claimed he left two days later. This was confounded by his evidence in which TFI-366 gave the impression he was in Makeni substantially more than 2 days before returning to Kono.¹⁸⁶⁹

k. *Witness Claims that Superman, Gibril Massaquoi, Sesay, Kallon and Gbao Held a Meeting Together in May 2000*

1466. Whilst not outside the realm of possibility it is highly unlikely that, just a few months after the infighting with Superman and Gibril Massaquoi, either Sesay, Kallon or Gbao would have had anything to do with this group.

l. *In his statement, TFI-366 intimated that Gbao had no role to play in UNAMSIL*

1467. Significantly, when TFI-366 gave his witness statement he did no mention that Gbao had any military role in the UNAMSIL events, stating only that Gbao had become unpopular within the RUF because of a speech he gave afterwards. The witness claimed as he had throughout his testimony that he had in fact referred previously to Gbao's role, but that what he had said was missing from the Prosecution's investigation notes. We submit this is just another lame excuse, the like of which was heard on countless occasions during the trial, and from this witness in particular.

m. *Miscellaneous contradictions*

1468. The witness continued to prevaricate when asked a series of further questions comparing his previous statements given to the OTP to his oral testimony. The first referred to TFI-366's presence at a palm wine bar in Magburaka. Having been reminded that he told the Prosecution in 2004 that "Morris Kallon had sent for us to travel to Makeni because UNAMSIL was forcing some of the RUF to disarm",¹⁸⁷⁰ he was asked why it was that in examination in chief he had said it had in fact

¹⁸⁶⁸ TFI-366, Transcript 15 November 2006, pp.49-50.

¹⁸⁶⁹ *Id.* at p.51.

¹⁸⁷⁰ See Exhibit 55b; also see TFI-366, Transcript 18 November 2005, p.11.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

been Sesay's idea. Perversely he stubbornly repeated "I have not changed my words"¹⁸⁷¹ when he obviously had done.

1469. Under cross-examination TFI-366 agreed that Sesay had told him that UNAMSIL troops opened fire on the RUF without good reason.¹⁸⁷² Within the next minute, he changed his story and claimed that it was the RUF who had attacked UNAMSIL without reason.¹⁸⁷³ Then he claimed he had been saying the same thing since 2004, which was not true.

1470. We submit that the repeated lies told by this witness regarding UNAMSIL, his cynical prevarication during cross-examination, his multiple and significant contradictions between previous statements and in-court testimony and his repeated untruths in other areas of testimony utterly discredit TFI-366. His testimony on UNAMSIL should accordingly be disregarded in its entirety.

3. TFI-360

1471. In cross-examination, the witness had the following discussion with counsel for the Augustine Gbao:

"Q. I put it to you, Mr Witness, that your evidence in relation to what happened with the UNAMSIL peacekeepers is a tissue of lies. We cannot know what to believe, can we, because you can't keep to the same story? I'm right, aren't I, Mr Witness? That's right, isn't it?

A. Yes..."

1472. In our submission this remarkable exchange ought to completely disqualify any evidence given by this witness regarding Augustine Gbao's alleged involvement in the UNAMSIL events. Incidentally, TFI-360 went further and admitted that he is liable to making mistakes.¹⁸⁷⁴ Furthermore –and with refreshing candour- he stated in evidence "I am saying that the statements are many, sometimes I forget".¹⁸⁷⁵ This is a curious statement to make—if TFI-360 was simply relying upon the contents of a previous witness, one begins to speculate whether whilst giving evidence he was working from a pre-arranged script rather than seeking to tell the truth. Common sense dictates that truth tends to speak spontaneously for itself, obviating knowledge of the contents of a previous 'statement' tendered to the Prosecution.

¹⁸⁷¹ TFI-366, Transcript 18 November 2005, p.13.

¹⁸⁷² TFI-366, Transcript 18 November 2005, p.18.

¹⁸⁷³ *Id.*

¹⁸⁷⁴ TFI-360, Transcript 25 July 2005, p.80.

¹⁸⁷⁵ *Id.* at 26 July 2005, p.111.

29617

1473. At any rate, the witness lacks credibility: not so much because he's lying about Gbao's involvement in the UNAMSIL incident—but because his evidence lacks the sufficient detail to support his story that he was actually in Makeni at all on 1 or 2 May 2000. Given his dramatic admission cited at the top of this paragraph we submit that the chamber has no alternative but to disregard his evidence in its entirety.

1474. Should the chamber judge itself entitled to consider this testimony in full however, we submit the only safe conclusion it may draw is that the witness failed to prove that he was in Makeni during the UNAMSIL conflict and that his willingness to lie about this destroys his credibility. Most clearly, in a previous statement, the witness told the OTP that between late April and May 2000 *he was in Kono* when he heard a radio message from Morris Kallon in Makeni reporting to Foday Sankoh in Freetown that the UNAMSIL men at Makump near Magburaka had forcefully disarmed 7 RUF fighters (the witness was an RUF radio operator).¹⁸⁷⁶ This radio message was sent on 1 May 2000. During his testimony, however, the witness miraculously recalled that he was in Makeni on 1st May. When asked during cross-examination to explain this discrepancy, TFI-360 quite candidly stated “I don't have any answer to this”.¹⁸⁷⁷ Such is the abysmal quality of this hapless witness's evidence.

1475. We suggest it is more likely that TFI-360 would have been in Kono on 1st and 2nd May, since he provided such sparse detail in support of his account of what led to the conflict at the Makump DDR camp on May 1st. No other witness stated that the conflict began after former RUF combatants went to the camp for food. TFI-360 stated that Gbao did not go to the camp upon hearing of the alleged forced disarmament of RUF combatants; instead, he made a complaint to the UN commander, who explained that the ex-RUF had merely gone to the camp for food. Not a single other witness remembered anything like this.

1476. He was also alone in his foolish assertion that there were no abductions in either Makump or Magburaka.¹⁸⁷⁸ In the light of this assertion we ask: How can it possibly be suggested that TFI-360 was telling the truth about being in Makeni on 1st or 2nd May? How, we ask, can TFI-360 be taken seriously as a reliable witness of truth? We emphatically submit TFI-360 is utterly worthless as a witness of truth and must be disregarded.

¹⁸⁷⁶ See Exhibit 34, p.8104.

¹⁸⁷⁷ TFI-360, 26 July 2005, p.103.

¹⁸⁷⁸ TFI-360, Transcript 26 July 2005, p.65.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

4. TF1-361

1477. This witness stated that he was trying to find out about the events of May 2000, but that he received different statements from different people as to precisely what had happened and when.¹⁸⁷⁹ Because he appeared to know so little, we submit his testimony is of no assistance either way.

5. TF1-071

1478. According to TF1-071's hearsay account of the UNAMSIL events, Gbao went to the *Lunsar* UNAMSIL peacekeeper camp demanding the return of weapons that RUF fighters had surrendered to the UN. TFI-071 is alone in making this assertion. We submit the evidence of this witness is without value and need not trouble the chamber.

1479. Highly significant, we suggest, is that TFI-071 failed to mention Gbao's name until- coincidentally- a few months before trial. Yet, prior to that, the witness had tendered as many as three lengthy witness statements, each replete with detail—in 17 November 2002, 12 February 2003, and 13 September 2004. *None of them mentioned Gbao in any capacity.*¹⁸⁸⁰ The witness claimed that he didn't even know Gbao until 2000.¹⁸⁸¹ Yet suddenly, in 2004, the witness was able to deliver highly controversial evidence of events which, given the testimony of other prosecution witnesses-let alone those for the defence-could not possible have occurred.

1480. We submit that TFI-071's entirely hearsay-based, fabricated testimony should be discarded in its entirety.

6. TF1-117

1481. We submit that evidence from TF1-117 is utterly without foundation and should similarly be discarded in its entirety for the reasons listed above.

7. TF1-314

1482. We submit that evidence from TF1-314 is similarly without credibility and should also be discarded in its entirety for the reasons listed in paragraphs above.

8. TF1-041

¹⁸⁷⁹ TF1-361, Transcript 19 July 2005, p.83.

¹⁸⁸⁰ TF1-071, Transcript 27 January 2005, p.40-42.

¹⁸⁸¹ *Id.* at p.47.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1483. In examination in chief TF1-360 stated that Kallon emerged from a building in Makeni and announced to a crowd that Zambian UN troops were coming from Freetown with “handcuffs [and] that they will come and arrest all of [RUF] and take [them] to Banana Islands”. In response he said “we” [RUF] were going to send Komba Gbundema to stop their progress to Makeni and arrest the UN troops.¹⁸⁸²

1484. TF1-041 appears to directly contradict TF1-360, as he substitutes Kallon’s name as the protagonist in this story for Gbao. He states that Gbao was trying to enlist men to go to the disarmament camp,¹⁸⁸³ screaming that the UN “had released some Zambians and that they were coming to fight against us because Tejan Kabbah—they were making Banana Island”.¹⁸⁸⁴ According to TF1-041, Gbao had said that the UN had forcefully disarmed three RUF and that accordingly there should be no further disarmament.¹⁸⁸⁵ Allegedly over a thousand heard this speech.¹⁸⁸⁶ Before which, Gbao apparently seized somebody’s a car. Afterwards Gbao was said to have arrested an “observer” (presumably a UNAMSIL soldier).¹⁸⁸⁷

1485. On the face of it this is damning evidence. However, we submit that if one applies some common sense it is clear that one or both witnesses have, intentionally or otherwise, misled the court.

1486. Even if it were accepted that Gbao *may* have been the one speaking at Independence Square, it is clear that TF1-041's testimony is at best a gross exaggeration or, at worst, a brutal lie. We submit that careful analysis shows that had the speech been made it could not have been Gbao who made it. The witness claimed that on the day before Gbao was allegedly 'rallying the troops' at Independence Square, he (TF1-041) and Morris Kallon went to inspect the Makump DDR camp to check its suitability for the disarmament and demobilization of RUF combatants. Kallon warned the men that the camp was not suitable for the purpose before he and TF1-041 left.¹⁸⁸⁸ TF1-041 stated there was no trouble at the camp that day.

1487. Close inspection of the chronology of events demonstrates without any doubt that **it is**

¹⁸⁸² TF1-360, Transcript 22 July 2005, p.8.

¹⁸⁸³ TF1-041, Transcript 18 July 2006, p.33.

¹⁸⁸⁴ TF1-041, Transcript 10 July 2006, p.71.

¹⁸⁸⁵ TF1-041, Transcript 18 July 2006, p.23.

¹⁸⁸⁶ *Id.* at 18 July 2006, p.30.

¹⁸⁸⁷ *Id.* at 10 July 2006, pp.72-74.

¹⁸⁸⁸ *Id.* at 10 July 2006, pp.68-70.

logically impossible that Augustine Gbao made a speech in Independence Square on the day and in the manner as described by TF1-041.

1488. If Gbao had been rallying the troops at Independence Square we submit TF1-041 could only be speaking of his initial trip to the Makump camp on 1st May. It could not be 2 May or afterwards, as the witness testified that he himself went to the Makump DDR camp the day before he met Gbao at Independence Square. If he was there with one relatively high-ranking RUF (Morris Kallon) and there were no obvious problems with the secret / forceful disarmament of RUF, one can safely conclude that the day Gbao WAS allegedly speaking at Independence Square.

1489. TF1-041 claimed that Gbao warned the crowd of the impending arrival of ZAMBATT troops in order to motivate the RUF to go advance the camp. Referring again to the chronology, Colonel Ngondi TF1-365 testified that he lost contact with the Makump DDR camp during the fighting around 11:00am. UN troops arrived in Lunsar and stayed the night of 2nd-3rd May.¹⁸⁸⁹ They left for Makeni, according to TF1-288, at 7:00am on the 3rd.¹⁸⁹⁰ Jaganathan supported this: he recalled that on the night of May 2nd (after midnight, so technically 3 May) a man (allegedly Sesay) told various UN personnel that “we have *just* received reports that 1000's of UN troops are being sent towards Lunsar location” .¹⁸⁹¹

1490. This evidence brings one to a swift and clear conclusion: that it would be utterly wrong to conclude that Gbao went to Independence Square on the morning of 1st May 2000 to enlist RUF fighters to follow him to the Makump camp. Put simply, the hostilities at Makump had already ended by the time the ZANBATT were deployed from Lunsar to Makeni. If such a speech had been made on 1st May its maker could not yet have known that the ZANBATT were on their way since their deployment was ordered pursuant only to the attack on Makump-which by the time the speech was allegedly made- and according to its contents- had not yet taken place.

1491. Conversely the speech-exhorting a march to Makump- could not have been made later than May 1st, for the simple reason that Makump had already been attacked on the 1st, clearly obviating any need for further action.

1492. TF1-041 also testified about the mysterious “observer” who Gbao allegedly arrested. Who

¹⁸⁸⁹ TF1-288, Transcript 22 March 2006, p.12.

¹⁸⁹⁰ *Id.* at p.13.

¹⁸⁹¹ Ganese Jaganathan, Transcript 20 June 2006, p.40 (emphasis added).

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

was he? Was he too abducted? Why was he not presented to the court? Jaganathan and Mendy identified the “observers” that were arrested and taken to Teko Barracks, but the observer referred to by TFI-041 remains unknown. In any event, the first UN personnel to be arrested and detained in Makeni was without doubt Jaganathan.

V. Preliminary Remarks on Defence Submissions Regarding Counts 15-18

A. Joint Criminal Enterprise is not Alleged in the UNAMSIL abductions

1493. The Prosecution, in its attempt to clarify the JCE over three years after they finished their case, stated the following:

“The crimes charged in Counts 1 through 14 of the Corrected Amended Consolidated Indictment were within the joint criminal enterprise. The Accused and the other participants intended the commission of the charged crimes”.¹⁸⁹²

B. Prosecution's Indictment and Pre-Trial Brief

1494. Counts 15 charges Augustine Gbao with intentionally directing attacks against personnel involved in a peacekeeping mission (Count 15). The Indictment and both the Prosecution’s pre-trial and supplemental pre-trial brief list but a few specific allegations against Augustine Gbao under this count. They included the following:

- a. Morris Kallon and Gbao were present when UN military observers were taken hostage, mistreated and tied together, one of them being killed at Makeni Hospital.
- b. The Makeni DDR Camp was surrounded and attacked by RUF under Gbao's command;
- c. Morris Kallon and Augustine Gbao communicated the orders to attack the UN peacekeepers in Magburaka.
- d. Sesay, Augustine Gbao and Morris Kallon paid visits during the period of confinement of the UNAMSIL troops.
- e. Augustine Gbao read a charge sheet to some abducted personnel justifying the abductions.¹⁸⁹³

1495. Mr Crane’s opening statement was a triumph insofar as it was designed to make headlines rather than sense. In terms of its immature and provocative language it will no doubt find a place in international legal history. Had Mr Crane shown a little more deference to the evidence rather than to his ego he may have been taken more seriously. Instead he made a series of foolish allegations clothed in Gothic prose which his successors found impossible to substantiate. This is not the way

¹⁸⁹² *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, *Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment*, 3 August 2007, para. 7.

¹⁸⁹³ *Prosecution Pre-Trial Brief*, para. 853.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

cases should be prosecuted. When the Prosecution loses sight of its duty to impartiality and embarks on prosecution by policy rather than on evidence it is likely to make mistakes. The Prosecution have no right to make sweeping allegations where there is no evidence in their possession to support them. We submit that the allegations a to e above remain entirely unsubstantiated. We submit the Prosecution were unable to call a single witness to support them. The Prosecution had two years in which to do so and failed utterly. They cannot complain that they didn't have enough time; they cannot complain they never had the resources: compared to the resources grudgingly made available to the Defence the Prosecution had an embarrassment of riches. Back in July 2004 Mr Crane decided to allege that Gbao "attacked the UN peacekeepers and read a "charge sheet" to the captives justifying his actions. He was present at the Makeni hospital when the UN Milobs were taken and one was killed".¹⁸⁹⁴ Mr Crane should have known better. There was no such evidence. We submit that Mr Crane must have known this when he opened his case but chose to carry on regardless. We submit such conduct brings international tribunals into disrepute at a time when their very *raison d'être* is under grave scrutiny.

1496. It is rather pitiful that after a trial that has taken four years time has to be spent on revisiting cardinal rules, but the speculative guesswork that is the indictment and pre-trial brief demands this reminder: it is the Prosecution who brings the case; it is for the Prosecution to prove it. The Defendant has the right to know the allegations he is facing. He has the right to expect that the Prosecution will not overload their indictment and pre-trial brief with fiction in an attempt to cheat the defendant into some kind of plea-bargain. He has the right to expect the Prosecution will not file a pre-trial brief whilst knowing they don't yet have the evidence at their disposal to support it. Similarly he has the right to expect the Prosecution will not attempt to 'make good' entirely unsubstantiated allegations-as well as fresh ones- whilst the trial is on-going: to do so (and the examples were manifold) should have no place in these tribunals. Above all he has the right to expect that where the Prosecution do make an allegation-no matter how extreme-they will at least attempt to substantiate it in order the defendant might clear his name.

1497. So where is the testimony on Gbao's presence at the Makeni hospital? Where is the evidence that the 'Makeni' DDR camp (presumably Makump) was surrounded and attacked by the RUF *under the command of Gbao*? Where is the evidence that Gbao communicated an order to attack the UN peacekeepers in Magburaka? Where and when did Gbao allegedly visit UNAMSIL troops during their confinement? Where is the evidence of Gbao's sinister "charge sheet"?

¹⁸⁹⁴RUF Transcripts, 5 July 2004, p.48.

Excepting some outrageous testimony by TF1-366 (as detailed above) regarding an order to attack the UN in Magburaka, **there is no evidence that any of these events ever took place.**

B. The Provocative Nature of UNAMSIL Disarmament

1498. No doubt the UNAMSIL's disarmament of a few RUF combatants on 1st May 2000 was done with the best intentions even if it was performed without the consent or knowledge of the RUF leadership. However there can be little doubt that this act provoked the RUF—rightly or wrongly—and led directly to the chaos that followed. While the following commentary does not amount to a defence to the crimes alleged, there were clear and more peaceful alternatives available that, for reasons best known to UNAMSIL's leadership, it chose to ignore.

1. A Pause in RUF Disarmament Process in Makeni

1499. In April and May 2000, the RUF feared that disarmament would be enforced with or without their consent and whether the Lome Peace Accord was implemented properly or not. RUF complaints included that members of the Sierra Leone army were “not being demobilised along with other factions in the conflict,”¹⁸⁹⁵ and that promises of certain governmental posts to the RUF under the Lome Peace Accord had not yet been fulfilled.¹⁸⁹⁶

1500. As a result, the proposed 17th April date for Makeni disarmament was pushed back until there was resolution on these matters. Meanwhile, disarmament had already gone ahead in without incident.

1501. The perception that the RUF was by 1st May still not ready for disarmament in Makeni was shared amongst various UNAMSIL staff. For example, Jaganathan stated “[l]ooking at the situation in Makeni, in fact, our assessment was that they were not ready for disarmament as yet”.¹⁸⁹⁷ In his view to pursue disarmament in Makeni at this stage could well have been seen as provocative.¹⁸⁹⁸ Notwithstanding these doubts the MILOBS went forward anyway without notifying RUF leadership.¹⁸⁹⁹ To Jaganathan disarmament thus became a fait compli: “we go according to the UNAMSIL headquarters’ orders”.¹⁹⁰⁰

¹⁸⁹⁵Ganese Jaganathan, Transcript 20 June 2006, p.65

¹⁸⁹⁶Ganese Jaganathan, Transcript 20 June 2006, p.96.

¹⁸⁹⁷Ganese Jaganathan, Transcript 20 June 2006, p.63.

¹⁸⁹⁸Ganese Jaganathan, Transcript 21 June 2006, p.38.

¹⁸⁹⁹ Every UNAMSIL witness that was asked agreed that the disarmament that took place was done without knowledge or approval of the local RUF commanders.

¹⁹⁰⁰ Ganese Jaganathan, Transcript 20 June 2006, p.66.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29624

1502. Elements inside UNAMSIL foresaw that this method of disarmament might incite violence. Ngondi accordingly dispatched an extra company to Makump just before 1st May, when the first RUF ex-combatants were disarmed.

2. *Augustine Gbao was Justified in his Anger on 1 May 2000*

1503. We submit that the comments with para. 1 above might assist the Tribunal to place what happened on 1 May into context and provide some background as to Gbao's perceived anger. We submit that Augustine Gbao had legitimate cause to believe that significant parts of the Lome Peace Accord had been disregarded and that the RUF's efforts at negotiation had been for nothing.

1504. In short, we submit that Augustine Gbao felt he had cause to be angry, but that he did not express it in a disproportionate way. He and his three colleagues only went to Makump DDR camp on 1st May after first trying in vain to discuss the matter at UN Headquarters. Furthermore he was not armed; he did not enter the DDR camp, and while other armed men arrived later (on the orders of Kailondo and others), both eyewitnesses to the events of 1 May 2000 (Jaganathan and DAG-111) stated that Gbao never issued orders to anyone at the camp. Finally, when he recognised that the situation had dangerously escalated (after other RUF arrived), he attempted to calm things down at great personal risk by stepping in front of other RUF commanders to stop them from causing harm to the UN. These matters are discussed in more detail below.

C. Gbao's Relationship with UNAMSIL Before the Conflict of 1 May 2000

1505. Gbao had a positive and productive relationship with UNAMSIL up until the events of 1st May. Reference has already been made to the fact that Ngondi found Gbao "handy" in solving local.¹⁹⁰¹ Ngondi held meetings with Gbao every Monday. They had a fruitful understanding and rapport.¹⁹⁰² Partly as a result of the cooperative relationship between Gbao and UNAMSIL, Makeni had been returning to normality in February-May 2000. According to Ngondi Gbao was a significant factor in that success.¹⁹⁰³ This improvement came in the form of "the population gain[ing] confidence, particularly in Makeni and Magburaka and the business was going on in the town as far as shops opening, markets opening and the sales of goods within the market area being seen happening. The humanitarian organisations were also doing their work..."¹⁹⁰⁴

¹⁹⁰¹ Leonard Ngondi, Transcript 29 March 2006, p.15.

¹⁹⁰² *Id.* at pp.17-18.

¹⁹⁰³ *Id.* at pp.14-15.

¹⁹⁰⁴ *Id.* at 29 March 2006, p.18.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1506. Ngondi explained how Gbao was helpful in Makeni by providing some examples:

“I recall one case where World Food Programme were distributing their foods within their programme and their vehicles were seized by RUF combatants. In charge of that operation by name Julie, a French national, came to me and we just took off and went and met Gbao, explained what had happened, and he went and ensured the vehicles were released and there the operation continued. I also remember a case where Roman Catholics had their vehicle seized on its way to Kabala, and the same talked to Gbao and he organised such kind of things. So he was very helpful, and we had an understanding as far as the work was concerned with Gbao”.¹⁹⁰⁵

1507. Ngondi also discussed a problem at the CARITAS that he and Gbao resolved together:

“A: Even there was one time in Caritas that children who had been demobilised and other children from a school, they had a scuffle.

Q. They what, sorry?

A. They had a scuffle. A scuffle. All of us moved in, the RUF and even us, trying to see what it was, and there we were with Gbao, with his people. We saw then -- you know, we could talk, so there was no problem. It was the boys' issue, children's issue and the operations of Caritas continued and the RUF went back to their bases”.¹⁹⁰⁶

1508. Even on 17 April, the day the disarmament process was due to commence, Gbao was actively assisting Ngondi and UNAMSIL. On that date, the RUF were staging demonstrations throughout Makeni over their concerns about Lome's implementation. Ngondi's account of his meeting with Gbao under the particular circumstances is powerful:

“A. On the 17th, and they weren't even ganged up or gathered up at the reception centre[for disarmament], which was at Makeni. There, the topmost person who I met there was Augustine Gbao. **He couldn't give me the reason why they're not going to do that [disarm].** And as usual, we had a lot of understanding and respect for one another with Augustine Gbao. We talked about it and he said he so sensed that our reception centre should remain and **since the disarmament is for long term,** we should -- each party should report, give a report to their higher headquarters on what is going on in the crowd, **that there was no need of having combatants demonstrating in town.**

Q. I think those combatants, or many of them, were armed during that demonstration, weren't they?

A. They were armed.

Q. Would you agree it was Augustine Gbao, on the RUF side, **who was instrumental in urging those people to disperse peacefully** on the 17th?

A. Yes, yes. Yes, Gbao, I commend him for that”.¹⁹⁰⁷

1509. DAG-111, Gbao's driver in Makeni at the time, also testified to Gbao's regular meetings with UNAMSIL during this time. According to DAG-111 Gbao generally had a positive

¹⁹⁰⁵ *Id.* at pp.13-14.

¹⁹⁰⁶ *Id.* at pp.15-16.

¹⁹⁰⁷ *Id.* at p.16 (emphasis added).

relationship with the UN personnel: Gbao would socialise with UNAMSIL personnel in Makeni in well known establishments such as BarFlamingo.¹⁹⁰⁸

D. Testimony by DAG-111

1510. The Third Accused called an eyewitness to the events at Makump DDR camp on 1st May: DAG-111. His testimony has been detailed above and is referenced below. He was the only eyewitness to those events besides Jaganathan and offered a full, detailed account of Gbao's actions during this confrontation.

1511. We submit the witness had no ulterior motive for testifying. We submit that DAG-111's his demeanour, patience, conduct and character demonstrated that his testimony was honest, forthright and credible. He recalled the events in relative detail in both direct and cross-examination by the Prosecution and did not exaggerate in his evidence.

1512. There were no discrepancies in his testimony, either in evidence-in-chief or between his that and cross-examination. In these circumstances we submit that the testimony of this witness should be given the highest value in both weight and credibility.

VI. Law Relating to Count 15 in the Indictment

A. Elements of the Alleged Crime

1513. In order to demonstrate a serious violation of international humanitarian law by intentionally directing attacks against peacekeepers, the following must be demonstrated:

1. The Accused directed an attack;
2. The object of the attack was personnel, installations, material, unit or vehicle involved in a humanitarian assistance or peacekeeping mission in accordance with the UN Charter;
3. Accused intended such personnel, installations, material, unit or vehicle involved in a humanitarian assistance or peacekeeping mission to be the object of the attack;
4. That such personnel, installations, material, unit or vehicle involved in a humanitarian assistance or peacekeeping mission were entitled to the protection given to civilians or civilian population under the international law of armed conflicts; and
5. The Accused knew or had reasons to know that the personnel, installations, material... were protected.¹⁹⁰⁹

¹⁹⁰⁸ DAG-111, Transcript 17 June 2008, pp.62-63.
¹⁹⁰⁹ RUF Transcripts of 25 October 2006, p. 37-38.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1514. The elements of this alleged crime are similar to an unlawful attack on civilians.¹⁹¹⁰ Thus, the chamber's evaluation of the evidence on this count will be influenced by reference to charges of an attack on civilians.¹⁹¹¹ The only limitation to this presumptive analogy is that UN peacekeepers can hardly be said to equate with civilians: they were well-armed and given an international mandate to use these weapons if necessary.

1515. In practice, however, we submit the law should be applied in equal measure in relation to armed peacekeepers as it is to civilians, save that the threshold should be higher in order to satisfy the legal elements of an attack on UN peacekeepers than for an attack on civilians.

I. Actus reus

1516. A prohibited attack is one launched deliberately against civilian or civilian objects in the course of an armed conflict and is not justified by military necessity.¹⁹¹²

1517. An unlawful attack on the UN personnel should have caused death and/or serious bodily injuries within the UNAMSIL or have caused extensive damage to their materials or objects.¹⁹¹³ It requires the proof of a result, namely of the death of or injury to civilians, or damage to civilian objects. With respect to the scale of the damage required, the damage to UN objects should be extensive.¹⁹¹⁴

1518. Such attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that UN personnel or property was being targeted.¹⁹¹⁵

1910 See for eg. *Strugar* Trial Chamber judgement, para. 283: 'Elements of the crime of attacks on civilians or civilian objects, is, as to *actus reus*, an attack directed against a civilian population or individual civilians, or civilian objects, causing death and/or serious injury within the civilian population, or damage to the civilian objects. As regards *mens rea*, such an attack must have been conducted with the intent of making the civilian population or individual civilians, or civilian objects, the object of the attack.'

1911 In the ICTY Mladic and Karadzic have been indicted with the crime of taking hostages of UNPROFOR, the UN peacekeeping mission in the former Yugoslavia, however they are still at large so no finding has been made on the issue. The only reference to peacekeepers in the GCs is 'Traditionally accepted meaning of peacekeeping, which essentially consists of the separation of parties to a conflict along a cease-fire line and follows three important basic principles: impartiality, consent of the parties to the conflict, and minimal recourse to force.' Commentary to art. 5 AP III (2005) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the Adoption of an Additional Distinctive Emblem (Protocol III), 8 December 2005, p.52.

1912 Blaskic Trial Chamber judgment, para. 180. Cerkez and Kordic Trial Chamber Judgment, para. 328.

1913 Kordic and Cerkez Trial Chamber Judgment, paras. 326-328. See also Blaskic Trial Chamber judgment, para. 180.

1914 Strugar Trial Chamber Judgment, para. 280.

1915 Blaskic Trial Chamber judgment, para. 180.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

2. Mens rea

1519. Such attack must have been conducted intentionally in the knowledge, or when it was impossible not to know, that civilians or civilian property was being targeted not through military necessity.¹⁹¹⁶

1520. The Prosecution must show that the perpetrator was aware or should have been aware of the civilian status of the persons attacked.¹⁹¹⁷

VII. Submissions Relating to Count 15 of the Indictment

A. Individual Responsibility under Article 6(1) of the Statute

1. Planning

1521. Gbao did not plan the RUF attack on the UN at Makeni, Magburaka, Lunsar, or anywhere else, at either the preparatory or execution phase on 1st May. No evidence was adduced in the Prosecution's case to demonstrate that Gbao's trip to the Makump DDR camp was anything other than a spontaneous reaction to what to him was a provocative act.

1522. If the Prosecution is alleging that the fighting that occurred on 2nd May and beyond in Makeni, Magburaka, Lunsar and elsewhere throughout Sierra Leone was "planned" pursuant to Article 6(1), no evidence has been adduced that Gbao engaged in any planning. According to DAG-111, Gbao discussed the matter on the morning of 2nd May with his wife Hawa, blaming Kailondo for "misbehaving" before Gbao could resolve the matter (as he had many times before with the UN). After that, once the situation had escalated to one of a military nature, Gbao assumed his traditional background as he had for the past 10 years, spending the day playing draughts with civilians.

a. Actus reus

1523. The Prosecution can only seek to rely on TF1-366 to substantiate that Gbao somehow had been involved in "planning" the events of 1st or 2nd May. He stated that plans for an attack were hatched at a palm wine bar in Magburaka shortly before they occurred. For the 13 reasons listed above,¹⁹¹⁸ we submit that this witnesses' testimony was not worthy of belief. The evasiveness and dishonesty of this witness spoke for themselves.

¹⁹¹⁶Blaskic Trial Chamber judgment, para. 180.

¹⁹¹⁷Halilovic Trial Chamber Judgment, 16 November 2005, para. 36.

¹⁹¹⁸See *supra* paras.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

b. *Mens rea*

1524. In terms of the *mens rea* requirement—acting with the intent to commit a crime or with reasonable knowledge that a crime would be committed—there is no evidence (again, besides TF1-366) to support the notion that Gbao planned an attack whilst knowingly being in support of the commission any crime. He went to the camp unarmed with just three other men, the single weapon being put away out of sight in the boot of the car.

c. Conclusion

1525. Leaving the obvious lack of evidence aside, it may be helpful to step back and consider what value Gbao could conceivably have had in planning an attack on UNAMSIL. As we have repeatedly asserted, Gbao was not a combatant. How could he have productively contributed to a military planning exercise of such nature? Why would the combatant commanders value his opinion, when by then they must have had ten years bitter experience “in the trenches” gained while Gbao had been enjoying the soft life in rural Kailahun Town? We submit that it just isn’t feasible to conclude that Gbao could suddenly have become a combat strategist-especially when one considers the nature of the opposition.

2. *Instigating*

1526. As shown in the evidence above, Gbao attempted to stop, rather than “urge, encourage or prompt[]”, other RUF from committing any crime against UN personnel. The defence accepts DAG-111’s candid evidence that Gbao was angry when he first arrived at the DDR camp, But after a discussion with staff at the camp he had calmed down. Gbao asked DAG-111 and Ishmael Kamara to go back to Kailondo to tell him that the MILOBs, not KENBATT had disarmed the RUF combatants, and that Kailondo need no longer concern himself. Ignoring Gbao’s advice Kailondo made for Makump anyway-perhaps as good an indication as any of Gbao’s lack of power of command and control over combatants. Additionally we submit the fact that Gbao did all he could to prevent both Kailondo and another senior RUF commander from assaulting UNAMSIL personnel when they subsequently arrived (as recalled by DAG-111 and Ngondi’s recollection of Major Maroa’s contemporaneous radio call) would appear to gainsay any Prosecution suggestion that Gbao sent DAG-111 and Ishmael Kamara back to Kailondo to urge an immediate attack.

1527. When Kailondo and at least one other senior RUF commander arrived at the camp, Gbao did nothing to encourage an attack on UN personnel. On the contrary: he did all he could to calm down both Kailondo and another RUF commander who arrived shortly afterwards. As stated this was reliably confirmed by Ngondi and DAG-111

1528. Even if by some stretch of reasoning Gbao were found to have indirectly encouraged the RUF attack, we submit he did not demonstrate anything like the requisite mens rea to induce or prompt the commission of a crime—that being to intentionally attack the UN personnel in Sierra Leone.

1529. Additionally, such an attitude would be a seismic shift from the immediate past, when Gbao had been busily and productively working in tandem with UN personnel, not to mention the social contact he so enjoyed. We submit it would be most unlikely that he would suddenly encourage such an attack (even if he were taken seriously given his particular reputation) without imperative cause.

a. TF1-041's Allegation

1530. TF1-041 testified to the events at Independence Square, alleging inter alia that Gbao was urging RUF combatants to follow him to the DDR camp on 1st May. As submitted above this evidence lacks credibility.

3. *Issuing Orders*

1531. There is no credible evidence that Gbao issued any orders to anyone to attack UNAMSIL in any location where military confrontation between the RUF and UNAMSIL has been alleged.

4. *Committing*

1532. Gbao did not personally direct an attack on UNAMSIL personnel, installations, material, unit or vehicle when he was at the Makump DDR camp on 1 May. Although he showed anger upon arrival at Makump DDR camp he did not direct an attack or anything of the like. There is no credible evidence asserting as much.

1533. Augustine Gbao did not take part in the attacks on UNAMSIL forces in Makeni, Magburaka, Lunsar or elsewhere within Sierra Leone. Ngondi, who received detailed reports during the events in Makeni and Magburaka, agreed that nobody to his knowledge asserted that Gbao was at the Magburaka DDR camp. “The fighting at the DDR camp I didn’t hear about. The fighting at the Magburaka camp, nobody says they saw Gbao.”¹⁹¹⁹¹⁹²⁰ DAG-111 also testifies that Gbao was not involved in Magburaka.

1919

1920 Leonard Ngondi, Transcript 31 March 2006, p.28.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

5. *Aiding and Abetting*

1534. Should the chamber find that crimes were committed at the Makump DDR camp whilst Gbao was present on 1st May, Gbao should not, in our submission, be found responsible for the crimes under this mode of liability. Mere presence alone is incapable of supporting a finding of criminal responsibility as an aider or abettor.¹⁹²¹

1535. We submit that Gbao's actions-being driven unarmed to the camp after he had failed to reach Ngondi at the Makineh UNAMSIL HQ; passing a message to Kailondo that the situation was now under control; trying to cool down armed and dangerous RUF commanders upon their arrival, and remaining at all times outside the camp entrance before he fled the scene indicates Gbao cannot possibly be held to have been aiding or abetting a crime against the UN personnel.

1536. Regarding events after 1st May, we submit there is insufficient evidence that Gbao did anything to facilitate the later military conflict between the RUF and UN.

B. Superior Responsibility under Article 6(3) of the Statute

1537. We submit that Gbao cannot be found to have held a superior relationship over any RUF combatants that took part in the military confrontation between the RUF and UNAMSIL for the reasons listed in paragraphs listed above.

VIII. Law Relating to Count 16 in the Indictment

A. Elements of the Alleged Crime

1538. In order to demonstrate a serious violation of international humanitarian law by intentionally directing attacks against peacekeepers, the following must be proved:

- a. The death of one or more persons;
- b. The death of the person(s) was caused by an act or omission of the Accused; and
- c. The Accused intended to either kill **or** to cause serious bodily harm in the reasonable knowledge that it would likely result in death.¹⁹²²

1539. The elements are the same for murder as a Crime Against Humanity and as a violation of

¹⁹²¹ AFRC Trial Chamber Judgement, para.775; *also see Kunarac* Trial Chamber judgement para.393; *Vasiljevic* Trial Chamber para. 70; *Tadic* Trial Chamber para.689; *Alekovski* Trial Chamber para.64; *Oric* Trial Chamber judgement para.283.

¹⁹²² CDF Trial Chamber Judgment. Para. 143. Same in *Vasiljevic* Trial Chamber judgment (29 November 2002) para. 205. See also in the ICTY: *Vasiljevic* Appeals Chamber Judgment, para. 120.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Article III.¹⁹²³

1. *Actus Reus*

1540. The Prosecution must prove that the victim(s) dies as a result of acts or omissions of the Accused,¹⁹²⁴ and that the conduct of the Accused was a substantial cause in the death of the victim.¹⁹²⁵

1541. While it is possible to show that a UN peacekeeper was killed through circumstantial evidence, it must be the only inference to be reasonably drawn from the acts or omissions of the actor.¹⁹²⁶

2. *Mens rea*

1542. The *mens rea* required for murder is that there be exhibited an intent to kill or cause serious bodily harm in the reasonable knowledge that it would likely result in death. Premeditation is not a *mens rea* requirement.¹⁹²⁷

1543. The awareness of a mere possibility that a crime will occur is not sufficient in the context of ordering murder.¹⁹²⁸

1544. If the Prosecution endeavours to demonstrate that proof of the state of mind of an accused can be shown by inference, that inference must be the only reasonable inference available on the evidence. The question is whether any reasonable tribunal could have found that the only reasonable inference from the evidence was that the appellant by his actions, intended to kill.¹⁹²⁹

1545. The *Vasiljevic* case importantly stated that “special attention must be paid to whether these acts are ambiguous, allowing for several reasonable inferences”.¹⁹³⁰ In the case cited below the ICTY Appeal Chamber decided that the acts of the Accused were ambiguous as to whether or not he intended the persons to be killed and held in consequence that the Trial Chamber had erred in finding that the only reasonable inference from the evidence was that the Appellant shared the intent to

¹⁹²³ CDF Trial Chamber Judgment para. 146.

¹⁹²⁴ CDF Trial Chamber Judgment. Para. 144. See also *Kvocka et. al.* Appeal Judgement, para. 540, citing *Krnojelac* Trial Judgement, paras 326-327; *Tadic* Trial Judgement, para. 240.

¹⁹²⁵ AFRC Trial Chamber Judgment, para. 689. See also *Kupresic* Trial Chamber Judgment, pra.560. See also *Brdajnin* Trial Chamber Judgment, para. 382. *Kordic and Cerkez* Trial Chamber Judgment, para. 229.

¹⁹²⁶ AFRC Trial Chamber Judgment, para. 689.

¹⁹²⁷ AFRC Trial Chamber Judgment, para. 689.

¹⁹²⁸ *Strugar* Trial Chamber Judgment, para. 235-236.

¹⁹²⁹ *Vasiljevic* Appeals Chamber judgment, para. 120.

¹⁹³⁰ *Vasiljevic* Appeals Chamber Judgment, para. 131 In this case the Appeals Chamber found that the Accused’s intent to kill could not be deduced from the circumstances. The Accused prevented the victim from fleeing, at gunpoint.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

kill.¹⁹³¹

29633

VII. Submissions Relating to Count 16 of the Indictment

A. Insufficient Evidence to Satisfy the Elements of Murder

1546. There was insufficient evidence produced to demonstrate the count of murder in the Bombali District during this time. The only evidence concerning Gbao's conduct in Bombali District that can be located in the transcripts or exhibits is that of Ngondi. Other evidence—that of TF1-366, TF1-117 and others—is entirely without merit for the reasons discussed in the section on assessment of witnesses above.

1547. Ngondi testified to the deaths of two soldiers named Yusif and Wanyama who were based at Makump DDR camp. On this topic his testimony was entirely hearsay and worryingly lacking in detail. He stated:

“Q. Can you just get over that point again, Mr Witness. It is not quite clear to me what you said.

A. I'm saying, when we lost communication, I came to learn that RUF later attacked the troops at the DDR Camp and the trigger of that attack was a blank I mean a direct shot at point blank by RUF combatants on the chest of a Kenyan soldier by name Private Yusif.

Q. Do you know what happened to Private Yusif?

A. He died. He could not survive a shot at point blank on the chest”.¹⁹³²

1548. Later, Ngondi spoke of the death of Wanyama. He stated:

“[A.] Wanyama had been shot at the hip, according to them, and could not walk and since our soldiers when they decided to withdraw from the camp, to break out, the few were left with Wanyama could not carry him and therefore they left them there, and were suspecting if he was not dead by then, he is under the hands of RUF.

Q. Did Wanyama ever turn up after this incident?

A. No, he never turned, Your Honour, up but the information that we could get was from Islamic Centre Arabic Hospital at Makeni. But he never turned up. He died later of the wounds that he had”.¹⁹³³

1549. Ngondi then discussed the casualties in Magburaka:

“Q. You had also mentioned an incident at Magburaka, at which RUF fighters fired at your men and that attack was repulsed. Did you take any casualties from that incident?

A. Yes, Your Honour, we suffered three casualties, injured casualties at Magburaka at that particular time, Your Honour.

¹⁹³¹ Vasiljevic Appeals Chamber Judgment, para. 131

¹⁹³² Leonard Ngondi, Transcript 29 March 2006, pp.42-43.

¹⁹³³ *Id.* at pp.43-44.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29634

Q. Did you do anything about your casualties at any point in time?

A. Yes, Your Honour, I requested the force headquarters to evacuate them for specialised medical treatment, Your Honour".¹⁹³⁴

1550. If we are correct and there is no more Prosecution evidence to support this charge, we submit there is insufficient evidence to prove any of the required elements of murder.

1. Failure to Satisfy the Elements of the Crime

1551. The Prosecution *prima facie* failed to plead the necessary elements of the crime of Murder. Regarding the first element, the only evidence proffered was that from Ngondi, whose account of what happened was ambiguous. We submit that reliance on mere hearsay to prove that both Yusif and Wanyama died cannot satisfy the first element. There is little detail as to what led to the shooting and as to who was specifically responsible for it. Ngondi did not even know the full names of the deceased.

1552. The Prosecution have altogether ignored the second element. They failed to offer any credible evidence that anyone died as a result of the acts or omission of the Accused Augustine Gbao.

1553. We submit that even if the Prosecution prove that peacekeepers in the Makeni axis were killed by the RUF, and even if they seek the chamber to infer that Gbao's actions on 1st May (he was not alleged to have been present at the camp on 2nd May) led to the peacekeepers' death on May 2nd there is still no evidence whatsoever that their deaths were a result of Gbao's acts or omissions.

1554. To prove *mens rea* the Prosecution must show that Gbao exhibited an intent to kill or cause serious harm in the reasonable knowledge that it would result in death. No such evidence has been offered.

B. Individual Responsibility under Article 6(1) of the Statute

1555. Gbao was not present during any fighting in Makeni or elsewhere. Ngondi supported this when he stated that nobody had ever reported that Gbao was at the Magburaka DDR camp. "[t]he fighting at the DDR camp I didn't hear about. The fighting at the Magburaka camp, nobody says they saw Gbao."

¹⁹³⁴ Leonard Ngondi, Transcript 30 March 2006, pp.2-3.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1556. For the reasons cited in DAG-111's evidence, in addition to the lack of evidence within the Prosecution case we submit Augustine Gbao cannot possibly be held responsible for planning, instigating, ordering, committing or aiding and abetting the crime of murder.

C. Superior Responsibility under Article 6(3) of the Statute

1557. It is submitted that Gbao had no command and control over any RUF fighter. The analysis of his limited power as a "superior" is set out in paragraphs above.

VIII. Law Relating to Count 17 in the Indictment

A. Elements of the Alleged Crime

1558. The elements of Count 17 are almost identical to Count 16. The difference between the two is primarily that Count 16 is pleaded as a crime against humanity, the other as a violation of Common Article III. According to the CDF Trial Chamber, the elements include:

- a. The death of one or more persons;
- b. The death of the person(s) was caused by an act or omission of the Accused; and
- c. The Accused intended to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.
- d. The status of the victim as a person not taking direct part in the hostilities is also viewed as an element.¹⁹³⁵

1559. The last element is that that cites murder as a crime against humanity.¹⁹³⁶

IX. Submission Relating to Count 17 of the Indictment

1560. Since the elements of the crime are virtually the same, so are the defences. We refer the reader to the Article 6(3) section above.

X. Law Relating to Count 18 in the Indictment

A. Elements of the Alleged Crime

1561. Count 18 alleges the abduction and holding as hostage and taking of hostages, in contravention of Common Article 3. Elements the Prosecution must satisfy to prove that Augustine Gbao should be held responsible for taking UN personnel hostage include the following:

1. The Accused seized, detained or otherwise held hostage one or more persons;
2. The Accused threatened to kill, injure or continue to detain such person(s);

¹⁹³⁵CDF Trial Chamber Judgment, Para. 147.

¹⁹³⁶CDF Trial Chamber Judgment, Para. 146.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

3. The Accused intended to compel a state or international organisation, a natural or legal person, or a group of persons to act or to refrain from acting as an explicit or implicit condition for the safety of the release of such person(s); and

4. The Accused knew or had reason to know that the person(s) were not taking direct part in hostilities.¹⁹³⁷

1562. Each element should be proven for each UN personnel held by the RUF.

A. *Actus Reus*

1563. The Prosecution must prove that the seizure and detention was unlawful.¹⁹³⁸ There must also be a threat against such person. The additional element to be proved is the issuance of a conditional threat in respect of the physical and mental well-being of civilians who are unlawfully detained. The ICRC Commentary identifies this additional element as a “threat either to prolong the hostage’s detention or to put him to death”. Such a threat must be intended as a coercive measure to achieve the fulfilment of a condition/to obtain a gain or an advantage.¹⁹³⁹

B. *Mens Rea*

1564. It must be shown that the Accused intended to use the hostage to gain some sort of advantage, as well as demonstrating that the Accused knew or had reason to know that the person was not taking direct part in hostilities.

1565. According to the *Blaskic* Appellate Chamber, there needs to be a causal nexus between the acts of the Accused and the taking of hostages.¹⁹⁴⁰ There must be sufficient evidence to conclude that the act of the Accused was done with the awareness of the substantial likelihood that hostages would be taken.¹⁹⁴¹

XI. Submissions Relating to Count 18 of the Indictment

A. Introduction

1566. This section concerns the arrest and detention of Ganese Jaganathan, Major Gati

¹⁹³⁷ RUF Transcripts of 25 October 2006, p. 38-39.

¹⁹³⁸ Cerkez and Kordic Trial Chamber Judgment, paras. 279, 280.

¹⁹³⁹ Cerkez and Kordic Trial Chamber Judgment, para. 313. This was also supported by the ICTY Appeals Chamber in its judgment in the *Blaskic* case, para. 638.

¹⁹⁴⁰ *Blaskic* Appeals Chamber Judgment, para. 644. The Appeals Chamber of the ICTY rejected the findings of the Trial Chamber that because the Accused ordered a city to be defended, he was responsible for the fact that one of his subordinates threatened to kill the detainees if the city was to be attacked, due to the absence of causal nexus between the two.

¹⁹⁴¹ *Blaskic* Appeals Chamber Judgment, Para. 646.
Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Maroa (and three of his KENBATT staff), Mendy, Major Odhiambo, and the Zambian contingent arrested at or near Makoth on the Lunsar-Makeni highway.

1. Abduction Allegations by Various UN Witnesses

a. Ganese Jaganathan

1567. Jaganathan testified that Morris Kallon was responsible for his arrest and detention. He testified that he arrived at the Makump DDR camp and spoke with Gbao, who was allegedly drunk and angry about the perceived betrayal by the UN peacekeeping staff.

b. Major Gati Maroa

1568. Major Gati Maroa, who was abducted shortly after Jaganathan, did not testify. It remains a mystery to the Third Accused why he was never called as a witness. Whilst the Gbao defence harbours its suspicions about this matter they need not be discussed here. What is clear is that the fact of Major Maroa's arrest and detention was clearly important to the Prosecution's overall evidential strategy—Ganese Jaganathan, Ngondi and Mendy all testified about Major Maroa's abduction. Jaganathan and Ngondi in particular spoke about Maroa at length, raising the possibility, we suggest, that the Prosecution were content to have these two witnesses testify vicariously 'in place' of Major Maroa.

c. Joseph Mendy

1569. Joseph Mendy testified that he encountered Morris Kallon at the RUF task force office in Makeni on 1st May to discuss the arrest of Jaganathan at the Makump DDR camp;¹⁹⁴² subsequently he and Gjellested were sent by Kallon to Teko Barracks and detained. As stated above, Joseph Mendy did not see Gbao when he was detained. Indeed, he had never seen Gbao again after 17th April 2000.¹⁹⁴³

d. Major Odhiambo

1570. According to Jaganathan, Major Odhiambo was arrested and detained by the RUF at Teko Barracks on 2nd May.¹⁹⁴⁴ Major Odhiambo did not testify and no further evidence was adduced on the matter.

e. TF1-288 and the Zambian Peacekeepers

1571. There is no evidence whatsoever that the arrest and subsequent detention of hundreds of Zambian peacekeepers involved Augustine Gbao. As stated above, TF1-288 never mentioned

¹⁹⁴² Joseph Mendy, Transcript 27 June 2006, p.89.

¹⁹⁴³ Joseph Mendy, Transcript 29 June 2006, p.24.

¹⁹⁴⁴ Ganese Jaganathan, Transcript 20 June 2006, p.33.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Gbao's name. Neither did any defence witness concerning these events. There is no mention of Gbao at the checkpoint or at the village TF1-288 referred to as Moria,¹⁹⁴⁵ no mention of Gbao being present when TF1-288 was allegedly taken to Makeni to discuss the situation with Issa Sesay,¹⁹⁴⁶ or to Gbao's presence when TF1-288 and other Zambian troops were carried to Koidu and Yengema.¹⁹⁴⁷ Likewise there is no mention of Gbao visiting Monica Pearson's house during the holding of UN witnesses in Koidu;¹⁹⁴⁸ of being present when the Zambian and Kenyan troops were taken from Sierra Leone to Liberia;¹⁹⁴⁹ when Colonel Mendy was injured on the truck travelling from Makeni to Kono or having any involvement in the encirclement and confrontation with the UN-Indian contingent in Kailahun.¹⁹⁵⁰

1572. Thus, the Third Accused submits that, in terms of his individual involvement, there are no allegations linking him to the conflict with and subsequent arrest of the Zambian UN peacekeepers. This is entirely consistent with the evidence of DAG-111, as discussed below.

B. Individual Responsibility under Article 6(1) of the Statute

1. Arrest and Detention of UNAMSIL Personnel From Makump DDR, Makeni and Magburaka

a. Planning

1573. There is no evidence to show that Gbao or any other RUF combatant participated in any way in planning to arrest and detain UN personnel from the Makump DDR camp on 1st May. Nor did anyone testify that Gbao played any role in planning the arrest of the hundreds of Zambians on May 3rd. Similarly there is no evidence that Gbao or any other RUF combatant supported or endorsed plans to take UN personnel hostage. Finally, no evidence was adduced to show that Gbao intended to take any of the UN personnel hostage.

1574. DAG-111 illustrated the spontaneous nature of Gbao's arrival at the Makump DDR camp, which we submit clearly demonstrates that no plan to arrest and detain UN personnel could have been made on the 1st of May. On that day, Ishmael Kamara, the Makump DDR commander, came to Gbao's house in Teko Barracks and explained the prevailing situation. DAG-111, Gbao, Kamara and Kamara's bodyguard quickly drove to Makinneh in order that Gbao might discuss the matter with

¹⁹⁴⁵TF1-288, Transcript, 22.3.06, pp.15-20

¹⁹⁴⁶TF1-288, Transcript 22 March 2006, p.23.

¹⁹⁴⁷TF1-288, Transcript, 22 March 2006, p.46.

¹⁹⁴⁸TF1-288, Transcript 22 March 2006, p.27.

¹⁹⁴⁹TF1-288, Transcript, 22 March 2006, p.47.

¹⁹⁵⁰Ganese Jaganathan, Transcript 20 June 2006, pp.54-55.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

Ngondi. After being denied entry at the gate, Gbao and the others went to the DDR camp.

1575. When Kailondo arrived at the DDR camp he was angry, armed and ready to fight. Any suggestion that he and Gbao had hatched a plan to arrest and detain UNAMSIL personnel is surely ruled out by the fact that Gbao implored Kailondo to desist from his aggressive behaviour.¹⁹⁵¹ Gbao's pleas went unheeded, as were his pleas to the other RUF commander who subsequently arrived.

b. Instigating

1576. We submit Gbao did not urge, encourage or prompt any of the UN personnel to be arrested, as is required before finding individual responsibility under this mode of liability. His actions at the Makump DDR camp may have been perceived as antagonistic; however, it is important to remember that Jaganathan, the other eyewitness to most events at the Makump DDR camp on 1 May, agreed that when Gbao arrived he was unarmed and did not issue orders to anyone.

1577. We submit that it cannot be said that a causal relationship exists between Gbao's actions and the perpetration of the crime, especially considering the high standard that must be satisfied. Likewise, Gbao did not intend to provoke or induce the arrest and detention of Jaganathan as a product of his actions. Jaganathan's was the first known arrest and detention of anyone in this case; we submit Gbao could not have understood that this was a common military tactic

1578. Even if Gbao's initial behaviour at the Makump camp could be seen as instigating under the statute, it is of little relevance because the principal perpetrators of the conflict at the camp—Kailondo and other RUF commanders—were not present for Gbao's display of anger and cannot therefore be taken to have been influenced by it. DAG-111 testified that by the time the other commanders arrived Gbao was calm.¹⁹⁵² Even before that, Gbao had sent DAG-111 back to Makeni to report to Kailondo discouraging him from travelling to the camp. As we aver above as soon as Kailondo et al arrived, Gbao did his best to prevent the situation from escalating.

c. Committing

1. Gbao did not Abduct Anyone

¹⁹⁵¹ DAG-111, Transcript 17 June 2008, pp.97-98.

¹⁹⁵² DAG-111, Transcript 17 June 2008, pp.91-92

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1579. Gbao did not arrest Jaganathan, Major Maroa and his three colleagues, Joseph Mendy, or Major Odhiambo (and his three colleagues). Neither was there any evidence that was he involved in the arrest and detention of the several hundred Zambian peacekeepers. Additionally, we submit that Gbao did not participate, supervise or otherwise facilitate the detention of the men at Teko Barracks. No evidence has been called in support of this either.

1580. Additionally, DAG-111 testified unequivocally- and without being impeached during cross-examination- that Gbao was not involved in any arrest of UN personnel. Indeed the witness described Gbao did all in his power to prevent escalation of the conflict at Makump as it broke out. Importantly Ngondi's account of Major Maroa's hearsay report that Gbao was trying to 'cool down Kallon'¹⁹⁵³ is similarly indicative of Gbao's actual conduct.

2. Gbao was not responsible for the detention of the UN peacekeepers

1581. We submit that Gbao had no involvement. In the detention of the other peacekeepers. Jaganathan agreed:

“Q. Did you see Augustine Gbao holding Kenyans captive?
A. No, I did not see him, Your Honour”.¹⁹⁵⁴

1582. As we concede above above, Mendy curiously stated that Jaganathan told him that Gbao “secured” his (Jaganathan's) detention.¹⁹⁵⁵ We emphatically submit that that was not possible, since Jaganathan himself *never* mentioned seeing Gbao after the incident at the Makump DDR camp on 1st May.

1583. In any event, following their conduct in cross-examination we fully expect the Prosecution will not be seeking to implicate Gbao in relation to the detention of UN personnel. In May 2008, Prosecution counsel twice put to Kallon witnesses that Sesay and Kallon were responsible for the detention of the UNAMSIL personnel, not Gbao.¹⁹⁵⁶

1584. In summary therefore we submit no credible allegations have been presented by RUF insiders, UN personnel or others that Gbao played any personal role in committing the crimes alleged in this Indictment.

¹⁹⁵³ Leonard Ngondi, 29 Mach 2006, p.29.

¹⁹⁵⁴ Ganese Jaganathan, Transcript 21 June 2006, p.37.

¹⁹⁵⁵ Joseph Mendy, Transcript 27 June 2006, p.11.

¹⁹⁵⁶ DMK-116, Transcript 9 May 2008, p.45; also see DMK-159, Transcript 12 May 2008, p.93.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

d. Ordering

1585. We submit Gbao issued no orders to anyone except DAG-111 (his driver) to leave the DDR camp. This was confirmed by Jaganathan, who stated Gbao did not issue orders to the soldiers that subsequently arrived on the scene.

1586. We once again assert Gbao's inability to issue orders to Kailondo, or any other military commanders in Makeni, including *inter alia*, Colonel Kallon, Morris Kallon, and Komba Gbundema.¹⁹⁵⁷

e. Aiding and Abetting

1. At the Makump Camp

1587. Gbao did not instigate the alleged abductions that took place. Jaganathan does not testify that Gbao provided any practical assistance, or that he otherwise helped, encouraged, advised or showed sympathy for the principal perpetrator of the crimes that took place. Jaganathan did state that as he was being taken by Kallon to the pink Mercedes he saw Gbao standing there "statue-like."¹⁹⁵⁸ Whilst we submit DAG-111 was correct in stating that Gbao was no longer at the scene at that time, even if he were we submit that Gbao's mere presence cannot amount to a finding that he was aiding and abetting those responsible for the alleged abductions.

1588. Ngondi's hearsay account of what happened supports Gbao's contention that he played no role in the abductions at Makump.

1589. Additionally DAG-111 gave credible testimony that Gbao gave no assistance to the principal perpetrators. When Kailondo and another RUF commander arrived at the Makump camp and began firing into the air, Gbao urged patience.¹⁹⁵⁹

1590. The Prosecution has not shown that Gbao could have anticipated that his acts would assist the commission of a crime. Gbao went unarmed to the camp with three other men—one eyewitness to the 'forceful' disarmament, his colleague and his driver. He was upset, but had calmed down sometime before Kailondo and other armed men arrived.

1591. Mere presence at the scene of a crime cannot constitute aiding and abetting,¹⁹⁶⁰ unless it

¹⁹⁵⁷ DAG-111, Transcript 17 June 2008, pp.85-86.

¹⁹⁵⁸ Ganese Jaganathan, Transcript 20 June 2006, p26

¹⁹⁵⁹ DAG-111, Transcript 17 June 2008, p.136.

¹⁹⁶⁰ CDF Appeals Chamber Judgement para. 102.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

provides significant legitimising or encouraging effect or the Accused's presence serves to support the principal offender.¹⁹⁶¹ The *Semanza* case in the ICTR addresses this point broadly by stating that “the nature of the accused's presence must be considered against the background of the factual circumstances,”¹⁹⁶² as mere presence does not automatically support a finding of criminal responsibility. The court also stated “the individual must know that his presence would be seen by the perpetrator of the crime as encouragement or support”.¹⁹⁶³

2. The Arrest and Detention of Major Maroa

1592. Gbao had no role to play in the arrest and detention of Major Maroa. Jaganathan testified that Gbao arrived at Teko Barracks with Major Maroa, who was bleeding and his soldiers were limping. This is not true as evidenced by DAG-111 in his testimony, who testified that, after the chaos started at the camp, Gbao and DAG-111 got into the vehicle and left.¹⁹⁶⁴

B. Superior Responsibility under Article 6(3) of the Statute

1593. According to DAG-111, Gbao had no authority over Kailondo, nor did he have any authority over military commanders in Makeni, including *inter alia*, Colonel Kallon, Morris Kallon, and Komba Gbundema.¹⁹⁶⁵

1594. Other arguments on superior responsibility is covered in paragraphs above.

¹⁹⁶¹AFRC Trial Chamber Judgement, para.775; also see *Kunarac* Trial Chamber judgement para.393; *Vasiljevic* Trial Chamber para. 70; *Tadic* Trial Chamber para.689; *Alekovski* Trial Chamber para.64; *Oric* Trial Chamber judgement para.283.

¹⁹⁶²*Semanza* Trial Chamber para.386, quoting *Kvočka*, Judgement, Trial Chamber, para. 257; *Aleksovski*, Judgement, Trial Chamber, paras. 64- 65. See, e.g., *Akayesu*, Judgement, Trial Chamber, para. 693 (authority and prior words of encouragement); *Tadic*, Judgement, Trial Chamber, para. 690 (presence and previous active role in similar acts by the same group). See also *Kajileji* Trial Chamber para.769. Quotes *Kayishema and Ruzindana*, Judgement (Appeals Chamber), para. 186; *Bagilishema*, Judgement (Trial Chamber), para. 32; *Kayishema and Ruzindana*, Judgement (Trial Chamber), para. 201.

¹⁹⁶³ *Semanza* Trial Chamber para.389, quoting *Bagilishema* Trial Chamber judgement, para.36.

¹⁹⁶⁴ DAG-111, Transcript 17 June 2008, p.137.

¹⁹⁶⁵ DAG-111, Transcript 17 June 2008, pp.85-86.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29643

I. Introduction

1595. Count 1 was alleged in paragraph 44 of the Indictment, which stated:

"44. Members of the AFRC/RUF subordinate to and/or acting in concert with ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO committed the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population. The AFRC/RUF also committed the crimes to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.

By their acts or omissions in relation to these events, ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below."

A. The Prosecution Seems to have Shifted Its Pleading Strategy on Count 1, 2 and JCE

1596. In its notice of 3 August 2007 (just after the AFRC Trial Chamber found that the JCE was defectively pleaded due to a non-criminal common purpose) the Prosecution changed the form of its pleading on JCE, this time pleading acts of terror and collective punishment as being the goal of the Joint Criminal Enterprise:

"The Accused and others agreed upon and participated in a **joint criminal enterprise to carry out a campaign of terror and collective punishments**, as charged in the Corrected Amended Consolidated Indictment, in order to pillage the resources in Sierra Leone, particularly diamonds, and to control forcibly the population and territory of Sierra Leone."¹⁹⁶⁶

1597. It is unclear why this was done, besides as an attempt to adjust the pleading of the JCE in the hope that it would not be found to have been defectively pleaded as in the AFRC case.

II. Elements of Acts of Terrorism

1598. Count 1 alleges that acts of terrorism charged in counts 3 to 14 were committed by members of the AFRC/RUF subordinate to the Accused or acting in concert with them as part of a campaign to terrorise the civilian population, and that it did terrorise it.¹⁹⁶⁷

1599. Prohibition of terror against the civilian population was part of customary international

¹⁹⁶⁶ *Prosecutor v. Sesay et al*, Doc. No. SCSL-04-15-T-812, Prosecution Notice Concerning Joint Criminal Enterprise and Defects in the Indictment, 3 August 2008, para.6.

¹⁹⁶⁷ RUF Consolidated Amended Indictment, para. 44.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

law, and gives rise to individual criminal responsibility.¹⁹⁶⁸ The crime of acts of terrorism is established through the following elements:¹⁹⁶⁹

1. Acts or threats of violence directed against persons or property; (*Actus Reus*)
2. The Accused intended to make persons or property the object of those acts and threats of violence or acted in the reasonable knowledge that this would likely occur; (*Mens Rea*); and
3. The acts or threats of violence were committed with the primary purpose of spreading terror among persons. (*Specific Intent*)

1600. We submit that unless the Prosecution adduced evidence suggesting the Accused was criminally responsible for acts that had the primary purpose for spreading terror, the Accused should not be found criminally responsible under Count 1.

1601. The CDF majority opinion made clear that “only those acts for which the Accused have been found to bear criminal responsibility under another count of the Indictment may form the basis of criminal responsibility for acts of terrorism”.¹⁹⁷⁰ Thus, we submit that unless evidence has been adduced, led to criminal responsibility for the Accused and had the primary purpose of spreading terror, it should not lead to criminal culpability for the Third Accused under Count 1.

A. Element 1: Acts or Threats of Violence Directed against Persons or Property

1602. Acts of terrorism includes both acts and threats of violence.¹⁹⁷¹ It encompasses acts directed against installations which would cause victims terror as a side-effect.¹⁹⁷² The nature of the acts or threats of violence can vary: they may include indiscriminate or disproportionate attacks or threats.

1603. It must be demonstrated that the victims of these acts of terror endure “extensive trauma and psychological damage” being caused by “attacks which were designed to keep the inhabitants in a constant state of terror.” Such extensive trauma and psychological damage form part of the acts or threats of violence.¹⁹⁷³

B. Element 2: Intent to Make Persons or Property the Object of those Acts and Threats of Violence, or Reasonable Knowledge that it Would Likely Occur

1604. The Prosecution must prove that an Accused acted intentionally or recklessly in making the

¹⁹⁶⁸ CDF Trial Judgement, para. 169. *See also* AFRC Trial Judgement, para. 666.

¹⁹⁶⁹ CDF Appeals Judgement, para. 350. *See also* CDF Trial Judgement, para. 170; AFRC Trial Judgement, para. 667.

¹⁹⁷⁰ CDF Trial Judgement, para. 843.

¹⁹⁷¹ CDF Trial Judgement, Para. 172. Referring to *Galic* Appeal Judgement, para. 102. *See also* CDF Appeals Chamber Judgement, para. 351.

¹⁹⁷² CDF Trial Judgement, para. 173.

¹⁹⁷³ AFRC Trial Judgement, para. 668. *See also* *Galic* Appeals Judgement, para. 102.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

civilian population the object of an act or threat of violence.¹⁹⁷⁴ Negligence is not enough.¹⁹⁷⁵

1605. The fact that other purposes may have co-existed simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge, provided that the intent to spread terror among the civilian population was principal among the aims.¹⁹⁷⁶

1606. In the CDF case, the majority opinion considered whether Kondewa should be held responsible for acts of terror based upon Norman's issuance of an order to harm and/or kill captured enemy combatants (and alleged collaborators) and to burn their houses. In ruling that Kondewa should not be found criminally responsible under Count 1, the Chamber ruled that Kondewa did not have the requisite knowledge to commit acts of terrorism, an essential element to demonstrate the commission of the crime.

1607. The Chamber also found that it was not the only reasonable inference that Fofana “knew or had reasons to know that his subordinates would commit criminal acts...with the primary purpose of spreading terror”.¹⁹⁷⁷ Significant in its judgement was that Norman, in instructing the order to kill enemy combatants and alleged collaborators, did not specifically instruct the men to commit acts of terror. Finally, the Court concluded that, even if acts of terror were committed with the primary purpose of spreading terror, there was insufficient evidence adduced to establish beyond a reasonable doubt that Fofana knew or had reasons to know that such acts had been committed by his subordinates. This indicates the high standard that must be met under this element.

C. Element 3: Acts or Threats of Violence were Committed with the Primary Purpose of Spreading Terror Among Persons (*specific intent*)

1608. In addition to showing that the Accused had the intent to make persons or property the object of acts of violence, the Prosecution must also provide evidence that the Accused specifically intended his acts to result in terror.¹⁹⁷⁸ In other words, and as defined in the CDF case, the spreading of extreme fear must be specifically intended.¹⁹⁷⁹ It does not need to be the only purpose of the unlawful acts or threats of violence.¹⁹⁸⁰

¹⁹⁷⁴ CDF Appeals Judgement, para. 355.

¹⁹⁷⁵ CDF Appeals Judgement, para. 355.

¹⁹⁷⁶ AFRC Trial Judgement, para. 669. *See also* Galic Appeals Judgement, para. 104.

¹⁹⁷⁷ CDF Trial Judgement, para. 7

¹⁹⁷⁸ CDF Appeals Judgement, para. 356. *See also* CDF Trial Judgement, para. 175; AFRC Trial Judgement, para. 669.

¹⁹⁷⁹ CDF Appeals Judgement, para. 356.

¹⁹⁸⁰ CDF Appeals Judgement para. 356. *See also* CDF Trial Judgement, para. 175.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

1609. For a superior to be responsible for the acts of terrorism of his subordinates, the Prosecution must prove that the Accused knew or had reasons to know that acts of terrorism were about to be committed or were committed by his subordinates with the *specific intent to spread terror*.¹⁹⁸¹

1610. The AFRC Trial Chamber held that the purpose behind an individual act of violence may not necessarily correspond with that of the campaign in which it simultaneously occurs. It follows that certain acts of violence, even when committed in the context of other acts of violence the primary purpose of which may be to terrorise the civilian population, may not have been committed in furtherance of such a campaign.¹⁹⁸² It also held that certain acts of violence were of such a nature that the primary purpose could only be reasonably inferred to be to spread terror among the civilian population regardless of the context in which they were committed.¹⁹⁸³

II. Collective Punishment

1611. Count 2 of the Indictment charges the RUF Accused with collective punishment, as a violation of Article 3 Common to the Geneva Conventions and Additional Protocol II. It states that the RUF/AFRC committed the crimes alleged in counts 3 to 14 to punish the civilian population for allegedly supporting the elected government of President Ahmed Tejan Kabbah and the factions aligned with that government, or for failing to provide sufficient support to the AFRC/RUF.¹⁹⁸⁴

A. Elements

1612. The elements of collective punishment are as follows:¹⁹⁸⁵

An indiscriminate punishment imposed collectively on persons for omissions or acts for which some or none of them may or may not have been responsible; and

The perpetrator had the specific intent to punish collectively.

B. Indiscriminate Punishment Imposed Collectively on Persons for Omissions or Acts for which Some or None of Them May or May not have been Responsible

1613. Collective punishments are punishments that are imposed indiscriminately on protected persons without establishing their individual responsibility.¹⁹⁸⁶ The crime of collective punishments is committed in response to the acts or omissions of protected persons, whether real or perceived.¹⁹⁸⁷

¹⁹⁸¹ CDF Appeals Judgement, para. 371. *See also* Blaskic Appeals Judgement, para. 484.

¹⁹⁸² AFRC Trial Judgement, para. 1445.

¹⁹⁸³ AFRC Trial Judgement, para. 1446.

¹⁹⁸⁴ RUF Indictment, para. 44.

¹⁹⁸⁵ CDF Appeals Judgement, para. 224. *See also* AFRC Trial Judgement, para. 676.

¹⁹⁸⁶ AFRC Trial Judgement, para. 680.

¹⁹⁸⁷ CDF Appeals Judgement, para. 223.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29648

It is predicated upon a perceived transgression by some persons,¹⁹⁸⁸ and this is what distinguishes it from the crime of targeting protected persons as objects of attack.¹⁹⁸⁹

1614. This crime covers an extensive range of possible 'punishments'¹⁹⁹⁰ and includes not only penal sanctions but any other kind of sanction that is imposed on persons collectively.¹⁹⁹¹

C. Specific Intent to Punish Collectively

1615. Similar to count 1, the Prosecution must demonstrate that the Accused had the specific intent to collectively punish the persons.

1616. What constitutes the *Mens Rea* of the crime is the intent to collectively punish as a response to acts or omissions of protected persons, whether real or perceived.¹⁹⁹² In the absence of evidence that for instances, attacks on protected persons were undertaken with the specific intent to punish them, then the *Mens Rea* for collective punishments has not been satisfied.¹⁹⁹³

III. Submissions

A. Gbao did not Commit Any Acts of Terrorism

1617. The totality of the evidence presented regarding Augustine Gbao, as well as defences to the charges, demonstrate that Gbao did not satisfy any of the three necessary elements to be found criminally responsible, through either Article 6(1) or 6(3). For the reasons explained at great length in the various counts charged against Gbao, he should be acquitted of all counts under all forms of liability. We submit there was simply insufficient credible evidence adduced during the trial to demonstrate Gbao committing acts of violence against anyone. Due to his lower-ranking status, it is similarly not possible to find that any of Gbao's subordinates went into the field and committed acts of terror.

1618. Beyond the physical element of the crime, evidence was not adduced that Gbao had the requisite mental state to commit acts of violence. The Third Accused submits that one can infer from the wealth of evidence presented in the case about Gbao's character that he does not have the personality of one who commits acts of terror. The case has shown, we submit, his non-violent

¹⁹⁸⁸ CDF Appeals Judgement, para. 223.

¹⁹⁸⁹ CDF Appeals Judgement, para. 223

¹⁹⁹⁰ AFRC Trial Judgement, para. 681.

¹⁹⁹¹ CDF Trial Judgement, para. 179.

¹⁹⁹² CDF Appeals Judgement, para. 223.

¹⁹⁹³ CDF Appeals Judgement, para. 230

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

nature. This strongly promotes rejection of the position that Gbao held the mental state to commit acts of terror.

1619. Finally, there has been no evidence submitted that shows Gbao capable of ordering or acceding to the commission of terrorist acts against the people of Sierra Leone. After all, in both Kailahun Town and Makeni, Gbao spent his time with civilians in RUF safety zones, far from the frontlines. He was known as a “damn bloody civilian” by some of the commanders.¹⁹⁹⁴

B. Gbao did not Collectively Punish Any Group, Including the Kamajors

1620. There is no evidence that Gbao punished the civilian population for their support of, or failure to actively resist, the combined CDF or ECOMOG forces.¹⁹⁹⁵ At all times up until 1999, Gbao was located in Kailahun District. Thus, the totality of the evidence presented in relation to Gbao, as well as defences to the charges, demonstrated that he did not satisfy any of the three necessary elements to be found criminally responsible through any mode of liability.

1621. The Third Accused anticipates that the Prosecution will argue that the killing of the 65 suspected Kamajors could potentially qualify as punishing persons indiscriminately. However, Gbao did not share the intent to kill them. In fact, several witnesses for the Sesay and Gbao defence stated that Gbao worked with DIS-157, brigade frontline commander for Kailahun District and others on the investigation to release 45 suspects before the 65 were killed. He had also released the others on bail. One can infer from these facts that Gbao lacked the specific intent to punish collectively.

Filed on Thursday 31 July 2008,

Freetown, Sierra Leone.

Counsel for Augustine Gbao,



John Cammegh



Scott Martin

¹⁹⁹⁴DAG-110, Transcript 2 June 2008, p. 83.

¹⁹⁹⁵ Indictment, para. 28.

Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

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29681

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29682

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29683

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296574

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Prosecutor v. Sesay et al., Case No. SCSL-04-15-T

29655

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29657

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29658

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3. *RUF Exhibits*

Exhibit 6.

Exhibit 7.

Exhibit 32.

Exhibit 33.

Exhibit 34.

Exhibit 42.

Exhibit 43.

Exhibit 44.

Exhibit 44.

Exhibit 49.

Exhibit 50.

Exhibit 51.

Exhibit 55B.

29659

Exhibit 55D.

Exhibit 73A.

Exhibit 73A.

Exhibit 78A.

Exhibit 78B.

Exhibit 107.

Exhibit 114.

Exhibit 115.

Exhibit 116.

Exhibit 190.

Exhibit 273.

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29661

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29662

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29663

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