SPECIAL COURT FOR SIERRA LEONE

TRIAL CHAMBER I

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

Registrar: Mr. Herman Von Hebel

Date filed: 10 September 2008

THE PROSECUTOR **against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL -2004-15-T

PUBLIC

MORRIS KALLON FINAL TRIAL BRIEF

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PART I: INTRODUCTORY AND PRE-TRIAL ISSUES

1) INTRODUCTION

1. The war in Sierra Leone from 1991-2002 was one of the most brutal in African history. The war spanned an 11 year period and nearly every corner of the country played host to and felt the effects of the hostilities that ensued during that time. Out of that brutality was born a clear imperative to prosecute and secure convictions and, thereby, to achieve a sense of justice by apportioning blame to those perceived to be most responsible.

2. From its inception the Prosecution case against Mr Kallon has been conducted in order to provide the on-looking world with judicial condemnation of the RUF movement and, in so doing, to unjustly apportion blame to Mr Kallon for the tragic events that unfolded during the war in Sierra Leone, regardless of, and in clear contradiction with, the evidence and the reality unequivocally depicted therein.

3. The Prosecutor indicted Foday Sankoh, Sam Bockarie and the three indictees in this trial, as members of the RUF, in pursuit of its perceived mandate. Sankoh and Bockarie died before the commencement of their trials. Many others, such as Superman, Rambo and Rocky, died before the indictments were drawn up. Therefore, the only remaining judicial forum for discussion of the criminal responsibility of the RUF movement is this trial and, thus, it came to be known as the "RUF" trial.

4. However, the RUF is not on trial. Sesay, Kallon and Gbao are on trial. By virtue of Rule 82(A), although tried jointly, they are afforded the same rights as if they were being tried separately. In this case, the issue before the Chamber is the individual criminal responsibility of Mr Kallon, not the collective responsibility of the RUF or the individual criminal responsibility of anyone else who may have escaped prosecution through pre-deceasing trial or by any other means. The matters which now fall for determination concern the evidence, as it relates to the accused and to the Indictment.

5. The evidence shows that Mr Kallon was, in fact, a low level commander, attaining the rank of Major and with little actual authority, until about December 1998.[1] The Indictment charges that most of the crimes pleaded were committed prior to that time. Furthermore, the

[1] See, eg, Prosecution witness TFI 071, Transcript 26 January 2005, p. 24 lines 10-11, who testified that Mr Kallon as Major in March 1998; Prosecution witness TFI 078, Transcript 26 October 2004, p. 1 line 27, who testified that the Second Acused was Major in 1998; Prosecution witness TFI 045, Transcript 25 November 2005, p. 4 lines 2-4, who testified that the Second Accused was Major in October 1997; DMK 161, Transcript 22 April 2008, p. 18-19; DMK 087, Transcript 24 April 2008, p. 101; DMK 072, Transcript 2 May 2008, p. 37.

evidence shows how Mr Kallon took measures to prevent criminality, at times risking his own life, how he was instrumental in the implementation of disarmament and the Lome Peace Accords and how he relentlessly adhered to the RUF ideology, which had at its heart the protection and service of civilians.

6. However, undeterred by the clear evidence on record which speaks to the contrary, the Prosecution has sought to engineer and mould a case against Mr Kallon which portrays him as a high level commander, so as to bring him within the personal jurisdiction of the Special Court, falsely discharge its prosecutorial mandate, in the absence of those genuinely responsible, and to attribute to him criminal responsibility for the acts of RUF units, according to a misconceived theory of command responsibility, and even AFRC units, through the fictitious mode of liability termed "joint criminal enterprise".

7. The founding members of the RUF were excluded political activists who reacted to their rustication and marginalisation at the hands of the APC by forming a movement for political change. Notwithstanding the opportunist side-shows which may have grown up around it, it is clear that the RUF was a coherent movement with a clear political project and that the Prosecution theory of an apolitical gang of mindless thugs must be dismissed from the outset. The RUF was clearly distinct from the AFRC.

8. The case against the accused must be set out clearly and precisely, as provided in Rule 47(C) and as a facet of the guarantees laid down in Article 17(2), the right to a fair trial, and Article 17(4)(a), according to which the accused is afforded the right to be informed promptly and in detail of the nature and cause of the charges against him. Devoid of particulars and specificity, characterised by sweeping generality and attempting to open and maintain an avenue to every possible form of prosecution, the Indictment is clearly in breach of those guarantees. It attempts to aver all possible modes liability in respect of each and every count. It alleges crimes "at all times relevant to the Indictment" and "throughout the Republic of Sierra Leone", at times with no further guidance as to what form the Prosecution case will take. The Accused was not informed pre-trial of the case against him and, to date, is still left guessing as to its precise nature. The many defects from which the Indictment suffers are demonstrated later on in this part.

9. To the extent that it is valid, which is disputed, the evidence led must support the paragraphs of the Indictment, in order to form the basis of any finding of criminal responsibility against the Accused. The Prosecution has led rafts of evidence outside the scope of the Indictment. In tacit recognition of this and in an attempt to remedy it, the

Prosecutor sought to amend the Indictment, after some 19 months of Prosecution evidence.[2] The Chamber denied the motion holding that to do so, at that stage, would be a violation of the fair trial rights of the Accused. Furthermore, having pled crimes in Koinadugu and Bombali Districts, the Prosecution has all but conceded its case, having agreed that Mr Kallon was neither physically present nor a commander there at the times relevant to the Indictment. In addition, at the Rule 98 stage the Prosecution conceded that no evidence had been led of criminal conduct in several of the locations pleaded in the Indictment. Aside from these formal accessions, the theory of the Prosecution case has altered and moulded according to the evidence as it has emerged, which is reflected in the lines of cross-examination and the evidence it has attempted to elicit. The irresistible inference is that the Prosecution did not know its case before it went to trial.

10. In addition, the Prosecution relies on witnesses whose credibility has been undermined on cross-examination. Many of the Prosecution witnesses made unprompted allegations of sweeping generality, with the clear intention of falsely incriminating the three accused. The Chamber has heard lengthy cross-examinations impeaching witnesses by introducing example after example of prior inconsistent statement. Prosecution witnesses have contradicted each other on vital details material to the Prosecution case, of which it is reasonably expected that they would have a reliable knowledge. Much of the evidence is hearsay or lacking in details. In such cases the evidence is not corroborated, such that would have provided opportunity to the defence team to respond comprehensively and to the Chamber to verify whether or not the evidence is supportive of the crimes alleged in the Indictment. Furthermore, the Chamber has heard how many of the Prosecution witnesses had incentives to falsely incriminate the three indictees, harbouring personal vendetta or because of the provision of extravagant financial incentives by the Prosecution. Further issues, such as the false identification of Mr Kallon surround the Prosecution case thus casting further doubt over the reliability of the evidence. On consideration of the totality of the case against Mr Kallon, it is reasonably concluded that the Prosecution, acting in dereliction of its duties to the Chamber, conducted nothing more than the most perfunctory of investigations into the credibility of its witnesses and the veracity of the allegations made by them.

11. Notwithstanding that, all the allegations levied against Mr Kallon have been refuted by robust evidence from witnesses who testified on behalf of the accused; from a former ECOMOG commander, civilians and Kamajors, *inter alia*. The arguments in refutation

[2] *P v. Sesay et al.*, SCSL-04-15-T-488, Prosecution Application for Leave to Amend the Indictment, 20 Feb. 06.

presented, *infra*, also find healthy assistance from Prosecution witnesses. The overwhelming picture painted by the evidence, when considered in its totality, is that Mr Kallon is innocent of all crimes charged.

12. At the end of the Brief, with the assistance of an analysis of the applicable law, it is demonstrated that the Accused cannot be convicted of any of the counts charged in the Indictment, inasmuch as one or more of the essential elements of each of the counts have not been proven beyond all reasonable doubt.

13. With all the evidence in, the task now before the Chamber is to consider whether the Prosecution has proved beyond all reasonable doubt the specific crimes charged in the Indictment. The answer to this inquiry lies in careful and systematic analysis of the evidence admitted in this trial, the Indictment and the relationship between the two. Findings of criminal responsibility may only be entered when the Chamber is satisfied that the Prosecution has led sufficient reliable evidence which, notwithstanding evidence in refutation, has removed all reasonable doubt that the Accused, Morris Kallon, is individually criminally responsible for the crimes charged in the Indictment. Should the Chamber reach any other finding, it is bound to acquit.

14. According to the presumption of innocence Mr Kallon was not under any obligation to prove his innocence. Notwithstanding that, he has made a comprehensive answer to each and every one of the allegations levelled against him. Moreover, he has gone beyond that and provided the Chamber with an explanation, depicted through reliable evidence, of his true role during the war in Sierra Leone. In this regard, and every other, Mr Kallon has sought to assist the Chamber in arriving at a determination of the truth and he continues to do so.

15. As earlier stated Mr Kallon was committed to the ideology of the RUF which he fervently believed, if implemented, could provide a panacea for the problems afflicting his rich but poverty stricken country. Unfortunately, along the way, he was disappointed to realise that some within the movement faltered and failed to live up to the basic tenets of this ideology. In the result, Sierra Leonians, both RUF members and some civilians, which the revolution professed to save and serve, suffered. A very principled defender of his people in general and civilians in particular, Mr Kallon even without the cloth of authority and at the risk to life and limb, stood up for them. His sole inspiration in doing so was his belief in the RUF ideology, his sense of justice and fair play and his faith in his religion and his God. Hence his invocation of "Bilai Karim" to punish when he found them molesting civilians. The popularity of that slogan, that led the Prosecutor to confound it with his name or alias, attests

unmistakably to the constancy with which he swore by the Holy Prophet "Bilai Karim", to help him in taking the risk to pre-empt and/or punish; even though he held no command position from which he could invoke *de facto* and/or *dejure* authority.

16. Mr Kallon's courage and sense of fair play and love for civilians and social justice endeared him to all and sundry. Reason why his pool of witnesses came from varied backgrounds and social and professional status.

17. Among these witnesses, we had senior commanders and officers of UNAMSIL who felt compelled to come to testify to put in perspective the truth about the Morris Kallon whose endearing contributions gave meaning to their mandate and made the peace process a reality. They felt that their efforts and the UNAMSIL mandate would have been futile if they did not come to tell the honourable court and the people of Sierra Leone that the allegations against Mr Kallon pleaded in the indictment are not only false but do great disservice to future peace-keeping operations in that it deters others like Mr Kallon in co-operating in making similar missions succeed.

18. To this category of witnesses, it is ironic that in "dancing with the devil," the Prosecutor by indicting Mr Kallon on the spurious and false allegations contained in the Indictment, has done a disservice to international justice and the process of peace and reconciliation in Sierra Leone that he was mandated to enforce.

19. Another category of witnesses who testified in this case, are civilians. The court has had the occasion to see and hear them testify. It is essentially for the protection of this category of people that this institution was set up.

20. The court has heard heart touching evidence of the efforts Mr Kallon deployed to protect and help civilians during very difficult moments. Even civilians called by the Prosecution spoke about the limitations or lack of authority of Mr Kallon because he was neither a favourite of Foday Sankoh, Sam Bockarie or Superman. In Kono or the Northen Jungle he was surrounded by Liberian commanders and thus reduced to merely struggling to survive in some times very hostile environments. When he thought he had been conferred a scintilla of authority, like in Makeni after the signing of the Lome peace accord, he found himself living in Magburaka while the Army Head Quarter, with several commanders reporting directly to Foday Sankoh, were wielding real authority from the head quarter command. But then within the limited authority he managed to safeguard, he evinced every effort in saving and serving the civilian population of his beloved county. Mr Kallon indeed

made civilian humankind and them alone the centre of his preoccupation. And he did so admirably well.

21. The last category of witness the court has heard from, were insider witnesses. These are, in the main, the category of persons Mr Kallon convinced to lay down arms and embrace the virtues of peace. The court has had the opportunity to see and hear them. Unlike the Prosecution witnesses whom the Prosecutor himself from the outset confessed and equated to "dancing with the devil" most of whom had incentives to lie and incriminate Mr Kallon for his role in co-operating with the disarmament process, these former combatants sole motivation was to tell the truth so that an innocent man that Mr Kallon is does not suffer an injustice.

22. Mr Kallon was arrested on 3 March 2003, some 5 years 4 months ago.

23. Ever since his arrest and incarceration, Sierra Leone has changed radically in the right direction; a result of the peace and reconciliation Mr Kallon and the good people of this country worked tirelessly with the valiant men and women of UNAMSIL to bring about. For the blessings of that peace and reconciliation to be complete, it is in the interest of justice and fundamental fairness that Mr Kallon rejoins his country men and women to contribute in the consolidation of that peace and nation building.

24. It is towards these goals that we respectfully submit this brief on behalf of Mr Kallon.

2) THE LAW OF THE SPECIAL COURT

25. Unlike the ICTY and ICTR, the Special Court is a treaty-based court established as a result of the Agreement between the United Nations and Sierra Leone.[3] Article 1(2) of that Agreement explicitly states that the "Special Court shall function in accordance with the Statute of the Special Court", which was annexed to the Agreement. The Statute is therefore the principal document of reference and authority on all matters relating to the Special Court.

26. In accordance with the Statute, the jurisprudence of the Appeals Chamber has a binding effect on the Chambers below it. Furthermore, in recognising the "special relationship"[4] between the Special Court and the two *ad hoc* Tribunals, the Statute also dictates that the Appeals Chamber shall be "guided"[5] by the decisions of the Appeals Chambers of the ICTY and ICTR. That being said, this Court has emphasised the fact that it is

[3] Agreement Between the United Nations and the Government of Sierra Leone on the Establishment of the Special Court for Sierra Leone, signed on 16 January 2002.
[4] *Brima* Decision, at para 22.
[5] Art. 20(3) of the Statute.

"not bound by"[6] such decisions as the special relationship "is not due to a statutory imperative predicated upon a binding relationship".[7] At most, the decisions of the Appeals Chamber of the ICTY and ICTR have a persuasive effect upon the conclusions of the Special Court.

27. Whilst the Special Court is also bound to apply relevant principles of customary international law, the prohibition on retroactive criminal legislation and prosecution means that the Special Court is limited to those principles of customary international law that are found to be in existence at the time of alleged commission of the indicted crimes.

28. When addressing the interpretation and application of the laws of Sierra Leone as detailed in Article 5 of the Statute, the Special Court shall be guided by the decisions of the Supreme Court of Sierra Leone.[8] Furthermore, by virtue of Article 8 of the Statute, the jurisdiction of the Special Court runs concurrently with that of the national courts of Sierra Leone[9], although the Special Court does have primacy over domestic prosecutions.[10] Unlike the ICTY and ICTR however, the Special Court has no jurisdiction to assert primacy over national courts of third States.

29. As a matter of general international law, the Special Court is also able to base its decisions on recognised sources of law that are consistent with Article 38 of the Statute of the International Court of Justice.

3) JURISDICTIONAL ISSUES

a) PERSONAL JURISDICTION

i) The Prosecution Have Failed to Establish that Mr Kallon is Within the Category of *"Persons Who Bear the Greatest Responsibility"*

30. For the Special Court to have personal jurisdiction over Morris Kallon, the Prosecution has to prove that he falls within that category of persons contemplated in Security Council Resolution 1315, 4 October 2000[11] and Article 1(1) of the Statute.

31. Under Article 1(1), the Special Court has jurisdiction to prosecute persons who bear the greatest responsibility for the commission of crimes against humanity, war crimes and

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[6] *Brima* Decision on Defence Preliminary Motion, at para 22; quoting Art. 20(3) of the Statute.
[7] *Id* at para 22
[8] Art. 20(3) of the Statute.
[9] Art. 8(1) of the Statute.
[10] Art. 8(2) of the Statute.
[11] S/RES/1315 (2000), ("Resolution 1315"), at para 3.

other serious violations of international humanitarian law, as well as crimes under relevant Sierra Leonean law within the territory of Sierra Leone.

32. In his report to the Security Council the Secretary-General of the UN explained that Resolution 1315 recommended that the personal jurisdiction of the Special Court should extend to those "who bear the greatest responsibility for the commission of the crimes" which is understood as a limitation to the number of accused by reference to their "command authority and the gravity and scale of the crimes". He proposed that the general term "persons most responsible should be used". Paragraph 29 states that "most responsible denotes both a leadership or authority position of the accused, and a sense of the gravity and seriousness or massive scale of the crime".

33. The Defence acknowledges and agrees with the position taken by Hon Justice Itoe in his Separate Concurring Opinion in the *CDF* case in which he held that the "who bears the greatest responsibility" as it appears in the Statute and the agreement is not an element of any of the crimes under the statute that the Prosecutor has to prove to secure a conviction.[12] That being the case, the question of "who bears the greatest responsibility" becomes a personal jurisdictional prerequisite that must be proved by the Prosecutor as a matter of law and fact. The Prosecutor can only discharge this burden, firstly, by pleading material facts which, if found to be true, would establish the aforementioned personal jurisdictional element and, secondly, by proving the material facts beyond a reasonable doubt. It is submitted that the Prosecution has failed in *both* elements of this duty.

34. Rather the Prosecution's own evidence established that Morris Kallon was not among the category of individuals most responsible for the alleged crimes committed within the territory of Sierra Leone on the basis of both his "leadership or authority position" pleaded in the indictment and has not been shown to have contributed substantially in those alleged positions to any of the egregious crimes pleaded in the Indictment.

ii) <u>The Prosecution of Mr Kallon is in Breach of Terms of the Lome Peace Accord</u>

35. The Second Accused, at the inception of the trial, raised objections to the Special Court exercising personal jurisdiction over him because of the amnesty granted by the Lome Peace Accord.[13] The motion was denied. The Defence submits that by rejecting the amnesty

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[12] *P v. Norman et al.*, SCSL-04-14-T-617, Decision on Motions of Issuance of Subpoena to President Kabbah, 13 June 06, at para 86 and 87.

[13] *P v. Kallon*, SCSL-03-07-PT-041, Preliminary Motion Based on Lack of Jurisdiction/Abuse of Process: *The Prosecutor against Issa Hassan Sesay, Morris Kallon and Augustine Gbao*

clause of the Lome Peace Accord, the Prosecutor favoured a selective application of the Lome Peace Accord in a manner prejudicial to the Second Accused.

36. In that regard, the Defence reiterates the objections raised by the Second Accused at the inception of this case and urges the Trial Chamber to reconsider its decision on the Defence motion.

37. Whilst the Representative of the Secretary-General appended a reservation clause to the Lome Peace Accord. However, the government of Sierra Leone did not. For that purpose, it is respectfully submitted that the amnesty clause binds the government of Sierra Leone and the detention and prosecution of the Second Accused, arising out the events covered by the terms of the Lome Peace Accord, is unlawful.

b) SUBJECT MATTER JURISDICTION

i) Distinction Between Common Article 3 and Protocol II

(1) Defining The Law

38. The Statute empowers the Special Court with the authority to "prosecute persons who committed or ordered the commission of serious violations" of Common Article 3 and Protocol II, from November 30, 1996, under Articles 3 and 4. Common Article 3 and Protocol II are only applicable during times of "armed conflict".[14] In addition, they are separate bodies of law, containing different legal prohibitions and elaborate distinct criteria for when armed violence constitutes armed conflict. This distinction determines which body of law, if any, will apply to a given episode of conflict. Situations of internal armed *violence* short of armed conflict are regulated by international human rights law; whereas situations of armed conflict are characterised by international human rights law, international humanitarian law and international criminal law. With respect to international humanitarian law, the Geneva Conventions of 1949 (I-IV) and Protocol II provide different standards for determining when there is armed conflict and consequently when the conventions apply.

39. According to the Inter-American Commission on Human Rights in the *Abella* Case, which is one of few authoritative interpretations of when Common Article 3 is applicable to armed violence, armed conflict is, "low intensity and open armed confrontations between

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Amnesty Provided by Lome Accord, 16 June 03.

[14] Rule 98 Oral Decision, Transcript 25 October 2006, p. 15 lines 3–7, as to Article 3 and p. 16 lines 1–4, as to Article 4.

relatively organized armed forces or groups that take place in the territory of a state."[15] For the purposes of Common Article 3, armed conflict applies to all parties at conflict and involves "armed civil strife between government armed forces and organized armed insurgents" and "governs situations where two or more armed factions" battle "without the intervention of government forces where, for example, the established government has dissolved or is too weak to intervene".[16] Common Article 3 does not require the involvement of a state actor.

40. Protocol II was ratified by Sierra Leone in October 1986 and sets out a higher threshold that legally controls all internal conflict after this period. For purposes of application of Protocol II, armed conflict must be: (i) at a high level of intensity; (ii) between armed forces of a state and dissident armed forces or other armed groups; and (iii) conducted under responsible command of armed groups that exercise control over enough territory to carry out sustained and concerted military operations not excluding hit-and-run type operations.[17]

41. Thus, the distinction between the two bodies of law is clear- Protocol II regulates high intensity conflicts between an armed group and a state actor, whereas Common Article 3 regulates conflicts of a lower intensity between "armed organized groups" and there is no requirement that a state-actor be involved. For example, Common Article 3 applies to conflicts which ensue a military *coup* wherein the government is weakened and hostilities arise between two non-governmental factions, such as the occurrence in Sierra Leone, on 25 May 1997. Whereas Protool II, with a higher threshold for applicability, does not apply in such situations.

(2) Failure to Plead the Nature of the Armed Conflict

(a) Common Article 3 and Protocol II Distinction

(i) Introduction

42. The Second Accused is charged with the commission of offences in contravention of Article 3 of the Statute under Counts 1, 2, 5, 9, 10, 14, 17 and 18 and in contravention of Article 4, under Counts 12 and 15.

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[15] The *Abella* Case, at para 152.
[16] The *Abella* Case, at para 152.
[17] See Protocol II, Art. 1; see also ICRC Commentary, Part 1: Scope of this Protocol, at pg 1347, ("...Protocol [II] only applies to conflicts of a certain degree of intensity and does not have exactly the same field of application as Common Article 3...").

43. The list of conduct prohibited under Article 3 of the Statute is regulated by Common Article 3 or Protocol II and, in some cases, both.[18] However, the Indictment charges all the counts under Article 3 of the Statute as violations of both Common Article 3 and Protocol II. In this regard, it is submitted that the Indictment suffers from two categories of defects: (i) it charges conduct as a violation of both Common Article 3 and Protocol II where the proscribed conduct is only expressly prohibited by Protocol II and (ii) it charges conduct which is a violation of Common Article 3 and Protocol II without specifying which of the two distinct bodies of law it is relying upon.

44. In respect of the second category of impugned pleadings, the Indictment alleges that "[a]t all times relevant to [the] Indictment, a state of armed conflict existed within Sierra Leone."[19] The Indictment fails to explicitly draw a distinction between serious violations of international humanitarian law under Common Article 3 and Protocol II. It fails to even acknowledge let-alone apply the thresholds in Common Article 3 and Protocol II to determine, first, whether armed violence is armed conflict and, second, to categorise any armed conflict as Common Article 3 or Protocol II conflict for purposes of applying international humanitarian law. Instead it improperly and unintelligibly fuses doctrine from Common Article 3 and Protocol II together, which provide divergent protections, even though they elaborate different thresholds for when armed violence becomes armed conflict. Only after the legal basis is identified can a determination be made as to whether Sierra Leone was at armed conflict "at all times" relevant to this Indictment. Until this determination is made it is not legally possible to apportion individual criminal responsibility under international humanitarian law.

(ii) Counts 1, 2 and 14

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[18] Protocol II prohibits the following acts: (1) Violence to the life, health and physical or mental well-being of persons, in particular murder as well as cruel treatment such as torture, mutilation or any form of corporal punishment; (2) Collective punishment; (3) Taking of hostages; (4) Acts of Terrorism; (5) Outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution, sexual slavery, sexual violence and any form of indecent assault; (6) Slavery and the slave trade in all their forms; (7) Pillage; (8) Sentencing or Execution Without Due Process; (9) Using, Conscripting or Enlisting Children in Armed Conflict; and (10) Threats to commit any of the foregoing acts. Common Article 3 prohibits the following acts: (1) Violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture; (2) Taking of hostages; (3) Outrages upon personal dignity, in particular humiliating and degrading treatment; (4) The passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples; and (5) Attacking objects or persons using the distinct emblems of the Geneva Conventions.

[19] At para 5.

45. Acts of terrorism, collective punishments and pillage, charged in Counts 1, 2 and 14, respectively, are legally based in Protocol II, they are not specifically prohibited by Common Article 3, yet the Indictment charges them as violations of both. In this way the Indictment contains incorrect statements of the law, creating confusion as to the nature of the legal prohibition being charged and, it is submitted, the Indictment is defective in this regard.

(iii)Counts 5, 10 and 17

46. Counts 5, 10 and 17 charge the Accused with violence to life, health and physical or mental well-being of persons. This is prohibited by both Common Article 3 and Protocol II. Counts 10 charges the offence with particularity to mutilation. This is prohibited by Protocol II not Common Article 3, yet the Indictment charges it as a violation of both. Thus, Count 10 is defective in this regard. Counts 5 and 17 charge the offence with particularity to murder. This is prohibited by both, yet the Indictment fails to specify which body of law it is invoking and, thus, which type of armed conflict, be it Common Article 3 or Protocol II, the Prosecution alleges existed at the time of the conduct in question. It is submitted that this is defective. In addition, the element of the offence common to Counts 5, 10 and 17, namely, violence to life, health and physical or mental well-being of persons, is prohibited by both Common Article 3 and Protocol II and, for the reasons enunciated above, the said counts are defectively pleaded.

(iv)Counts 9 and 18

47. Counts 9 and 18 charge the Accused with outrages upon personal dignity and taking of hostages, respectively. The Indictment correctly pleads that these are violations of both Common Article 3 and Protocol II. However, the Indictment fails to specify the body of law under which it is charging the offence and, therefore, what type of armed conflict it alleges existed at the time. It is submitted that the Indictment is defective in that regard.

(b) Failure to Plead the Nature of the Conflict

48. Violations of Common Article 3 of the Geneva Conventions and Article 4 of Protocol II committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International

Tribunals.[20] Thus, the nature of the armed conflict that allegedly existed at the time of an indictment is a material fact which must be pleaded and proven.

49. Notwithstanding the fact that the distinction between an armed conflict of an international character and one of an internal character in respect of Common Article 3, has, through the jurisprudential evolution of the *ad hoc* tribunals, become less material than the strict interpretation of the Geneva Convention would suggest, it is still a material fact which must be pleaded in the Indictment. In respect of Protocol II, the existence of an internal armed conflict remains a material element which must be both pleaded and proven.[21]

50. At paragraph 5 of the Indictment, the Prosecution plead as follows: "At all times relevant to this Indictment, a state of armed conflict existed within the state of Sierra Leone." Thus, it omits to plead the character of the armed conflict as required according to the law described above. However, the Pre-Trial Brief makes allegations consistent with the existence of an *international* armed conflict:

a. "By the *end of 1996, CDF forces* controlled almost the entire southern and eastern provinces of Sierra Leone, with the exception of Kailahun."[22]

b. "Under one of the key provisions of the Abidjan Peace Accord [signed on 30 November 1996] President Kabbah was required to terminate the Sierra Leonean government's contract with *Executive Outcomes by January 1997*."[23]

c. "*During late 1996 and early 1997*, tensions *between the SLA and the CDF* heightened and saw several incidents of armed confrontation."[24]

d. "*In July 1997, Charles Taylor*... established relations with the Junta regime in Freetown and assisted the AFRC/RUF with shipments of weapons and other supplies during the embargo. Taylor, with assistance from the *President of Burkina Faso, Blaise Compaore,* facilitated a large air shipment of weapons and ammunitions to the AFRC/RUF regime *in late 1997*."[25]

e. "*During the AFRC rule, Nigerian forces* continued to hold the international airport at Lungi under an old defence agreement. These forces later became part of the wider *ECOMOG forces* that on 12 February 1998 launched an offensive and drove the AFRC/ RUF regime out of Freetown in what became known as the "Intervention""[26]

f. "Pursuant to UN Security Council Resolution 1270 [*UNAMSIL*]...was *established in*

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[20] Resolution 1315, at para 14.
[21] The Manual of the Law of Armed Conflicts, UK Ministry of Defence, (Oxford University Press, 2004), Chapter 15, pg 380-384, paras.15.1- 15.3.1.
[22] Pre-Trial Brief, at para 35.
[23] *Id.*, at para 36.
[24] *Id.*, at para 38.
[25] *Id.*, at para 43.
[26] *Id.*, at para 45.

October 1999, initially with some 6,000 troops, empowered under Chapter Seven of the UN Charter to "ensure the security of movement of its personnel and, within its capabilities and areas of deployment, to afford protection to civilians under immediate threat of violence""[27]

g. "*In August 1999*, for one week, a disgruntled faction of the AFRC/RUF based in Occra Hills, known as "the Westside boys", took hostage forty-two members of a *UN delegation* composed of ECOMOG soldiers".[28]

51. The Defence submits that the Prosecution has in fact pleaded, through frequent and implicit reference in the Indictment and Pre-Trial Brief, a conflict of an international nature. To this extent, the defence submits, that the Prosecution has pleaded a case which precludes liability under Protocol II. In light of the foregoing, the Defence respectfully urges the Trial Chamber to acquit the accused for all crimes charged under Protocol II, namely, Counts 1, 2, 5, 9, 10 and 14.

c) PLEA TO THE INDICTMENT

i) Procedural History

52. On 7 March 2003, a 17 count initial indictment, (the "Initial Indictment")[29], was filed against Morris Kallon by the Prosecutor and confirmed by Judge Bankole Thompson. On the 15 March 2003, the Second Accused made an initial appearance before Judge Benjamin Mutanga Itoe and pleaded not guilty on all counts.

53. On 5 February 2004 the Prosecutor filed the consolidated indictment and on 9 February 2004, an Amended Indictment was filed against Issa Hassan Sesay, Morris Kallon and Augustine Gbao.

54. On 21 April 2004 The Trial Chamber delivered its "Decision on Motion For Quashing of Consolidated Indictment" in which it denied Kallon's Motion and noted at paragraph 20 that the specificity to the bills of particulars ordered in respect of motions filed by Santigie Borbor Kanu pursuant to the Chamber Decision dated 13 October 2003 and Issa Sesay dated 19 November 2003 did not contain new charges against the Accused and so did not prejudice the Accused Morris Kallon who it held stood to gain from the said specificity. The Chamber also held that "The Accused Morris Kallon, it has to be noted, did not file any preliminary motion in respect of defects in the form of the original indictment against him"

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[27] *Id.*, at para 53.
[28] *Id.*
[29] *P v Kallon*, SCSL-03-07-I, Indictment, (for the purposes of this section, "the Initial Indictment").

55. On 13 May 2004 the Prosecutor filed the Amended Consolidated Indictment.[30] On 17 May 2004 the Accused was invited to enter a plea on Count 8 of the said indictment only. The Accused declined, arguing his right to plea to the entire indictment, as amended, on the grounds that substantial amendments had been made with respect to, *inter alia,* the parties, modes of liability, timeframes and crime bases which, it is submitted, are "readily characterised as new charges" and to which the Accused was entitled to enter a new plea.

56. The Chamber rejected the argument of the Accused and entered a plea of not guilty, *propio motu,* in respect of Count 8. The disclosure of supporting materials to the Accused, as required by the aforementioned rules, was never made. Consequently, the Accused was never afforded his right to bring preliminary challenges in respect of the indictment with which he currently stands charged as provided by Rule 50.[31]

57. On 1 October 2004, Morris Kallon filed "Motion on Issues of Urgent Concern to the Accused Morris Kallon" in which he asserted his right to be arraigned on the consolidated indictment pursuant to Rule 47 of the Rules. The Prosecution responded on 8 October and the Kallon Defence issued a reply on 11 October. On 9 December the Chamber delivered a majority decision on the motion on issues of urgent concern to the 2nd Accused.

58. On 18 March 2005, the Hon.Justice Benjamin Mutanga Itoe delivered a dissenting opinion on the Chamber Majority decision of 9th December 2004 on the motion on issues of urgent concern to the accused Morris Kallon filed on 9th April 2004 in which he held in paragraph 51 that "The applicant be rearraigned on all the counts of the amended consolidated indictment" and that the Prosecution applies under Rule 51 to withdraw the initial individual indictment as well as the consolidated indictment against the accused.

59. The Prosecutor filed the Corrected Amended Consolidated Indictment on 2 August 2007.

ii) Regime of Rules Governing Pleading

60. Rule 61 provides that the "Judge shall read or have the indictment read to the accused in a language that he speaks and satisfy himself that the accused understands the indictment", upon which the accused shall "enter a plea of guilty or not guilty on each count."

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[30] *P v. Sesay et al.,* SCSL-04-15-T-122, Amended Consolidated Indictment, ("the Amended Consolidated Indictment").

[31] Note the dissenting opinion by Justice Itoe which states that "[t]he applicant be rearraigned on all the counts of the amended consolidated indictment," *P v. Sesay et al.,* SCSL-04-15-T, Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision of the 9th of December, 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon, 18 March 05, at para 51.

61. Rule 50 provides that, in the event that an amended indictment is approved, a "further appearance" be held "as soon as practicable to enable the accused to enter a plea on the new charges."[32]

62. Rule 5 states that "where an objection on the ground of non-compliance with the Rules or Regulations is raised by a party at the earliest opportunity, the Trial Chamber or the Designated Judge may grant relief if the non-compliance has caused material prejudice to the objecting party."

63. In *Rwamakuba*, the Trial Chamber of the ICTR held that "the violations for which relief could be ordered under Rule 5 cannot be limited to violations by 'parties' to the proceedings as this would defeat the purpose of the Rule which seeks to provide relief for non-compliance with the Tribunal's Rules and Regulations. The Chamber cannot accept that the Tribunal could escape liability for non-compliance with the Rules or Regulations because the non-compliance was by an organ or a person or authority who was not a 'party' to the proceedings. Consequently, the Chamber finds that Rule 5 must grant protection against any breach of the rules and regulations and that the party against whom relief may be ordered includes the Tribunal itself."[33]

64. The aforementioned rules embody the fundamental principle that an accused be given the right to confront his indictment. As the arraignment and entry of plea is the formal process whereby the Accused confronts the indictment and is provided with notice of the charges against him, it is essential to the fair administration of justice.[34] The Trial Chamber in a decision in the *CDF* case stated that an accused could suffer material prejudice if he is not personally served with an amended indictment and "does not have the opportunity of a further appearance in order to enter a plea on the material changes to the indictment."[35] If an amended indictment includes new charges, the Accused must be given an opportunity to make an appearance and enter a plea, pursuant to Rule 50(B).[36] Where an indictment is amended by the "inclusion of further material facts without amending the counts or charges alleged against the Accused, some of those material facts could readily be characterised as new charges" to

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[32] Rule 50(B)(i) of the Rules.

[33] *P. v. Rwamakuba,* ICTR-98-44C-T, Decision on Appropriate Remedy, 31 Jan. 07, at para 37.

[34] *P v. Norman et al*, SCSL-04-14-T, Dissenting Opinion of Hon. Juge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, On the Motion filed by the Third Accused, Allieu Kondewa for Service of Consolidated Indictment and a Further Appearance, 13 Dec. 04.

[35] *P v. Fofana*, SCSL-2004-14-AR73, Decision on Amendment of Consolidated Indictment, 16 May 05, at para 7.

[36] *P v. Fofana*, SCSL-2004-14-AR73, Decision on Amendment of Consolidated Indictment, 16 May 05, at para 72.

which pleas must be entered.[37] Justice Itoe has stressed, in a dissenting opinion, the importance of the indictment and arraignment process as well as the importance of the accused having an opportunity to enter a plea to each and every charge against him.[38] Judge Itoe also stated that if a trial proceeds without an arraignment and individual pleas taken on each count of the operative indictment and the accused is convicted, this conviction can be set aside on appellate review- in essence, declared a nullity.[39]

65. The Supreme Court of the United States has announced a similar, general rule that "a plea to the indictment is necessary before the trial can be properly commenced, and that, unless this fact appears affirmatively from the record, the judgment cannot be sustained."[40] For "[u]ntil the defendant has pleaded to the indictment, there is no issue to be submitted to the jury, and the omission to plead is fatal to the judgment, even after verdict. This rule applies as well to cases of misdemeanor as to cases of felony."[41] Affirming the rule announced in *Crain*, the Third Circuit, in invalidating a conviction predicated upon improper pleas, stated that although the defendants "may [in fact] be guilty, and may deserve the full punishment imposed upon them by the sentence of the trial court . . .it were better that they should escape altogether than that this court should sustain a judgment of conviction of a crime where the record clearly shows that the trial was not valid."[42]

66. Some courts have indicated that a conviction will not be vacated for lack of formal arraignment proceedings unless possible prejudice is shown.[43] However, United States jurisprudence also concurs that "[i]t is fundamental error for a court to enter a judgment of conviction against a defendant who has not been charged, tried or found guilty of the crime

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[37] *P v. Zigiranyirazo,* ICTR-2001-73-PT, Decision on Defence Urgent Motion to Exclude Some Parts of the Prosecution Pre-Trial Brief, 30 Sept. 05, at para 1; quoting *P v. Muvunyi*, ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005, 12 May 05, at para 19.

[38] *P v. Norman et al*, SCSL-04-14-T, Dissenting Opinion of Hon. Juge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, On the Motion filed by the Third Accused, Allieu Kondewa for Service of Consolidated Indictment and a Further Appearance, 13 Dec. 04, at para 45.

[39] *P v. Norman et al*, SCSL-04-14-T, Dissenting Opinion of Hon. Juge Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision Supported by Hon. Judge Bankole Thompson's Separate but Concurring Opinion, On the Motion filed by the Third Accused, Allieu Kondewa for Service of Consolidated Indictment and a Further Appearance, 13 Dec. 04, at para 54.

[40] *Crain v. U.S.*, 162 U.S. 625 (U.S. 1896).

[41] *Shelp v. U.S.*, 81 F. 694, (9th Cir. 1897).

[42] *Rulovitch v. U.S.*, 286 F. 315, 320, (3d Cir. 1923), cert denied, 43 Sup.Ct. 434.

[43] *United States v. Grote,* 632 F.2d 387, 389 (5th Cir.1980), *cert. denied,* 454 U.S. 819, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981).

recited in the judgment."[44] Indeed, a "a court cannot permit a defendant to be tried on charges that are not made in the indictment against him."[45]

67. Some U.S. states have very strict standards and require that "after a defendant has entered his plea to a criminal charge, the state cannot amend the affidavit or indictment as to matters of substance."[46] The United States Constitution also provides criminal defendants procedural protections based on the amendment of indictments.[47]

68. In an Arizona case, the court reiterated the following test to determine whether prejudice has resulted from an amended indictment: "we consider whether a trial court's granting a motion to amend violated either of two rights every defendant has the right to "notice of the charges against [the defendant] with an ample opportunity to prepare to defend against them' and the right to double jeopardy protection from a subsequent prosecution on the original charge."[48]

iii) Amendment of the Initial Indictment

69. As a preliminary issue, the second accused Morris Kallon submits that he pleaded to the initial indictment but not to the subsequent indictments and its amendments. To this extent, he is in agreement with the partially dissenting opinion dated the 18 March 2005 by Hon. Justice Benjamin Mutanga Itoe.

70. In Annex A, the extent of the amendments introduced by the Amended Consolidated Indictment are detailed for the Chamber's inspection. They introduced new alleged, *inter alia,* members of the joint criminal enterprise, crime bases and timeframes. The jurisprudence decribed above makes it clear that the concept of new charges, within the meaning of Rule 50 is not confined to a new count *per se.* Rather it includes the introduction of new material

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[44] *United States v. Diaz*, 190 F.3d 1247, 1252 (11th Cir. 1999).

[45] *Stirone v. United States* , 361 US 212, 217 (U.S. 1960).

[46] *Dennis v. State*, 230 Ind. 210, (Ind. 1952); *see also State ex rel. Kaufman v. Gould* , 229 Ind. 288 (Ind. 1951).

[47] *See generally Ex parte Bain*, 121 US 1, (U.S. 1887), *Stirone v. United States*, 361 US 212 (U.S. 1960). The U.S. 5th Circuit Court of Appeals described constitutional protections afforded criminal defendants under the Presentment Clause in *U.S. v. Dixon*, 273 F.3d 636, 639 (5th Cir. 2001), when it stated the following: "'The Fifth Amendment guarantees that a criminal defendant will be tried only on charges alleged in a grand jury indictment.' *United States v. Arlen*, 947 F.2d 139, 144 (5th Cir. 1991). Thus, 'only the grand jury may amend an indictment once it has been issued.' *United States v. Daniels*, 252 F.3d 411, 413 (5th Cir. 2001). _A jury instruction constructively amends an indictment 'if it permits the jury 'to convict the defendant upon a factual basis that effectively modifies an essential element of the crime charged.' *Id.*, at 413-14 (quoting *United States v. Chandler*, 858 F.2d 254, 257 (5th Cir. 1988)). An indictment is constructively amended in violation of the Fifth Amendment if the jury is permitted to convict the defendant on 'an alternative basis permitted by the statute but not charged in the indictment.' *United States v. Robles-Vertiz*, 155 F.3d 725, 728 (5th Cir. 1988)." A constructive amendment has been held to be "prejudicial per se and grounds for reversal of a conviction." *United States v. Fisher*, 3 F.3d 456, 463 (1st Cir. 1993).

[48] *State v. Johnson*, 198 Ariz. 245, ¶8 (Ariz. App. Div. 2, 2000).

facts. The amendments described therein pervade all counts in the Indictment. Therefore, under Rule 50, the Accused should have been permitted to enter a plea in relation to each and every charge in the Amended Consolidated Indictment. He was denied that right. Consequently, it is submitted that the Indictment with which the Accused currently stands charged in invalid.

4) THE INDICTMENT

a) PRELIMINARY ISSUES

i) Introduction

71. Notwithstanding the jurisdictional objections to the Indictment discussed, *supra*, it is demonstrated, *infra*, that (i) the case against the accused has been defectively pleaded and that the Indictment should be dismissed, in whole or in part; (ii) that, those defects notwithstanding, evidence has been led outside the scope of the Indictment and, as such, cannot be said to support crimes charged against the Accused; and (iii) that the Prosecution has sought to incriminate the Accused with allegations, the material facts of which have not been adequately disclosed to the Accused. The issues described herein have been the subject of much preliminary and interlocutory controversy. In addressing the relevant motions, the Chamber has indicated that the issues are now ripe for litigation, falling at the stage of final submissions.

72. The Indictment suffers from a range of technical flaws. In its pleading of different counts, modes of liability and factual allegations it is in clear breach of established principles governing the framing of indictments.

73. In addition, the Indictment is characterised by vagueness and imprecision. Its lack of precision is aptly demonstrated by the failure to distinguish between the three indictees in any way, (other than the introductory paragraphs and paragraphs 24-28, detailing alleged command positions), notwithstanding the different geographical locations they occupied at different times, their differing relationships with the main actors in the conflict and, above all, the different roles they played, as clearly depicted by the evidence. The Indictment draws no distinction between the substantive allegations made against them throughout Counts 1-18. In this and many other regards the pleading of the case against the Accused is fatally inadequate in terms of the precision required to inform the Accused of the case which he must answer.

74. The cumulative effect of the many defects from which the Indictment suffers as well as the relationship between the Indictment and the evidence, or lack thereof, has resulted in irreparable prejudice to the Accused in the preparation of his defence as he has never known with any certainty the parameters of the case to which he must answer.

ii) Timing of Objections

75. On 7 February 2008, Mr Kallon filed a motion on challenges to the form of the indictment, in which many of the objections described in this section were raised.[49] On 6 March 2008, the Chamber dismissed the motion on procedural grounds, without addressing the merits, finding that "in these circumstances it may be appropriate for the Trial Chamber to address objections to the form of the Indictment at the end of the case".[50]

76. On 14 March 2008, the Kallon Defence filed a motion seeking the exclusion, in part, of the evidence of 23 Prosecution witnesses.[51] The Chamber rendered its decision on 26 June 2008, dismissing the motion and finding, *inter alia*, that the evidence which is admissible is distinct from evidence which may prove beyond a reasonable doubt the averments in an indictment,[52] as to certain categories of evidence and, as to others, that the issues raised were more accurately characterised as challenges to the form of the indictment, thus, reserved to final submissions.[53]

77. The Kallon Defence notes the repeated reliance of the Prosecution on the Chambers' stated position to the effect that "it would be more appropriate...to address any objections to the form of the Indictment at the end of the case".[54] As such, the Prosecution has invited the objections raised hereunder, falling at the stage of final submissions and, therefore, suffers no prejudice from the timing thereof.

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[49] *P. v. Sesay et al.*, SCSL-04-15-T-970, Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 7 Feb. 08.

[50] *P v. Sesay et al.*, SCSL-04-15-T-1033, Decision on Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 6 March 08, at pg 2.

[51] *P v. Sesay et al.*,SCSL-04-15-T-1057, Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 14 March 08.

[52] *P.v. Sesay et al.*, SCSL-15-04-T-1186, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 08, at para 16.

[53] *Id.*, at para 18.

[54] *P v. Sesay et al.*, SCSL-04-15-T-990, Prosecution Response to Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 15 Feb. 08, at para 17; and *P. v. Sesay et al.*,SCSL-04-15-T-1066, Prosecution Response With Confidential Annex A to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 31 March 08, at para 1 and 6.

78. Issues of defective pleading are ripe for consideration at the stage of final submissions. Trial judgments from both the Special Court and the *ad hoc* tribunals have struck out elements of indictments, found to be defective, and declined to make findings as to criminal responsibility. Trial Chamber II held that, although preliminary motions are the "primary instrument through which alleged defects should be raised" a Trial Chamber is afforded opportunity to review "whether shortcomings in the form of the Indictment have actually resulted in prejudice to the rights of the Accused" at the stage of final judgment.[55] In so doing, it cited the duty of the Trial Chamber, edicted in Rule 26*bis* to "ensure that a trial is fair and expeditious and that proceedings before the Special Court are conducted...with full respect for the rights of the accused".[56]

79. Inadequate notice can result in convictions on the merits being reversed at trial stage[57] as well as convictions being overturned on appeal.[58]

80. In light of the foregoing, it is submitted that issues of defective pleading pertain to fundamental fair trial rights and that they should be given due consideration at the stage of final submissions.

b) PLEADING STANDARDS: DUE PROCESS AND ADEQUATE NOTICE OF CHARGES

81. A trial is rendered unfair where a defendant lacked sufficient pre-trial notice of the crimes alleged against him. The Statute recognises the importance of sufficient pre-trial notice by requiring, in Article 17(4), that the accused be informed "promptly" and in "detail" of the nature of the charges against him.[59] As such, this Chamber has previously recognised in the *CDF* Case that the issue of the sufficiency of the charges is not merely a pleading issue, but ultimately an issue of due process and fair trial rights:

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[55] *AFRC* Trial Judgment, at para 24.

[56] *Id.*

[57] *AFRC* Trial Judgment, at para 47, ("If insufficient notice has violated the accused's right to a fair trial, no conviction may result."); citing *Kvocka* Appeal Judgment, at para 33; see also *Kupreskic* Appeal Judgment, at para 114.

[58] *Kordic* Appeal Judgment, at para 142; see also *Kupreskic* Appeal Judgment, at para 114; *Blaskic* Appeal Judgment, at para 239 ("The Appeals Chamber recognizes, as it did in the *Kupreskic* Appeal Judgement, that in certain circumstances, an indictment which fails to plead with sufficient detail an essential aspect of the Prosecution case, may result in the reversal of a conviction.");

[59] The Rules similarly require adequate notice. Specifically, Rule 47(C) provides: "[t]he Indictment shall contain, and be sufficient if it contains, the name and particulars of the suspect, a statement of each specific offence of which the named suspect is charged and a short description of the particulars of the offence." [Emphasis added]

> "[T]he requirements of due process demand adherence, within the limits of reasonable practicability, to the regime of rules governing the framing of indictments."[60] [Emphasis added]

82. It is settled law that in discharging the pleading requirements *all material facts underpinning the charges must be pleaded.*

c) CHALLENGES TO THE FORM OF THE INDICTMENT

83. It is submitted that the following categories of allegations in the Indictment are defectively pleaded and should be dismissed:

a. categories of factual allegations which are defective for vagueness and/or over breadth;
b. the case of physical and personal perpetration against the accused;
c. all modes of liability in respect of all counts which are defectively pleaded for lack of specificity;
d. charges of crimes against humanity which are defectively pleaded for failure to specify whether the underlying attack against the civilian population was "widespread" or "systematic";
e. charges of war crimes which are defective for failure to coherently plead the existence of an "armed conflict";
f. Counts 1, 7 and 8 in their entirety and Count 9 in part, which are pleaded in breach of the principle of *nullum crimen sine lege*, rule against duplicity, rule against redundancy of counts and lack of specificity, respectively.

i) <u>Vagueness and Over Breadth of All Material Facts</u>

84. A "specific, precise, clear and unambiguous indictment [is] as an essential prerequisite for a fair and expeditious trial."[61] The indictment, as the only accusatory instrument, bears the burden of providing an accused with notice of the legal and factual allegations made against him.[62] The Prosecution, in preparing the indictment, must avoid imprecision and vagueness

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[60] *Kondewa* Decision on Defence Preliminary Motion, at para 6; quoting *Sesay* Decision on Defence Preliminary Motion, at para 6; AFRC Judgment, at para 44, ("[c]onvicting an accused for personal perpetration of a crime without giving adequate notice could seriously questions [sic] the fairness of the proceedings.").

[61] *P v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04.

[62] See *P v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04.

when describing the conduct of the accused; and the indictment must "particularise the material facts of the alleged criminal conduct of the accused that . . . goes to the accused's role in the alleged crime" so that the accused may have sufficient notice of the case against him to prepare an adequate defence.[63] An indictment is not sufficient if it pleads only in general terms, and should include particulars.[64]

85. Trial Chamber I held that: "the indictment must plead with sufficient specificity or particularity the facts underpinning the specific crimes" so that the accused may "adequately and effectively prepare his defence."[65]

86. Similar positions have also been articulated by the Appeals Chamber of the ICTY and the ICTR. Thus, for example, in *Kupreskic et al.*, the Appeals Chamber recognised that the "vagueness of the Amended Indictment . . . constitutes neither a minor defect nor a technical imperfection," but amounted to a "fundamental defect" that "seriously infringed" the defendants' "right to prepare their defence," thereby rendering the trial "unfair."[66] Similarly, the Appeals Chamber in *Simic* recognized that: "any accused before the International Tribunal has a fundamental right to a fair trial, and Chambers are obliged to ensure that this right is not violated."[67]

87. Furthermore, where an Indictment alleges overbroad categories of physical perpetrators or victims, lengthy timeframes or wide-ranging geographical areas in an attempt to keep open avenues of prosecution which may materialise during ongoing investigations, in lieu of stating its case with specificity, it will be defective for over breadth. The Prosecution

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[63] *P v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04; see also *Kupreskic* Appeal Judgment, at para 98.

[64] *Id.*

[65] *Brima* Decision on Defence Preliminary Motion, at para 22; quoting *Sesay* Decision on Defence Preliminary Motion, at para 6, ("Thus for example, the indictment "must plead with sufficient specificity or particularity the facts underpinning the specific crimes.").

[66] *Kupreskic* Appeal Judgment, at para 122.

[67] See *Simic* Appeal Judgment, 28 Nov. 06, at para 71 and 74 (finding that the "trial was rendered unfair" by inclusion of joint criminal enterprise charges not properly pled); see also *Krnojelac* Appeal Judgment, at para 117 ("It would contravene the rights of the defence if the Trial Chamber, seized of a valid shifting indictment where the Prosecution has not stated the theory or theories it considered most likely to establish the accused's responsibility within accepted time-limits, chose a theory not expressly pleaded by the Prosecution."); *Krnojelac* Appeal Judgment, at para 130 and 139 (suggesting that inadequate pleading and notice also violates the defendant's right "to have adequate time and facilities for the preparation of his defence."); *Kupreskic* Appeal Judgement, at para 100 ("the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial."); *Cyangugu* Appeal Judgment, at para 28 ("where the failure to give sufficient notice of the legal and factual reasons for the charges against the accused has violated the right to a fair trial, no conviction may result"); *P v. Nahimana, et al.*, ICTR-99-52-A, Decision On The Prosecutor's Motion To Pursue The Oral Request For The Appeals Chamber To Disregard Certain Arguments Made By Counsel For Appellant Barayagwiza At The Appeals Hearing On 17 January 2007, 5 March 07, at para 15 ("the issue of the sufficiency of the Indictment . . directly impacts upon [defendant's] due process right . . . 'to be informed promptly and in detail [. . .] of the nature and cause of the charge against him.")

may not elect simply to "omit material aspects of its main allegations in the indictment with the aim of moulding the case against [the] accused in the course of the trial depending on how evidence unfolds," and an indictment that fails to provide sufficient detail is defective.[68]

88. Material facts that must be charged in the indictment include all "legal prerequisites to the application of the offences charged,"[69] "the nature of the alleged criminal conduct charged,"[70] as well as "the proximity of the accused to the relevant events."[71] Essentially, the Accused must be made aware of the "legal ingredients of the offence charged."[72]

89. Furthermore, the Indictment fails in large part to set out with precision the dates, locations, victims or means of commission with respect to the crimes alleged. Most importantly, it fails to connect the Accused with the alleged perpetrators of these crimes or provide any guidance as to the proximity of the Accused to the events described therein. Therefore, throughout the paragraphs pleaded in support of Counts 1-18 the Defence submits that the Indictment is defective for vagueness and over breadth and that the paragraphs enumerated below should be dismissed.

(1) Derogation From the Rules: "Narrow" Exception Crimes of 'Large Scale'

90. In the *AFRC* Appeal Judgment, the Appeals Chamber held that there exists a "narrow" exception for allegations of crimes of a 'large scale', where naming every single victim or physical perpetarator may be impracticable, such that the imperative of setting out the particulars of each crime with precision may be reduced. In this regard, the Defence makes the following observations and submissions. First, this "narrow exception" represents a derogation from the Rules and, as such, should be applied in exceptional circumstances only. The Chamber should be mindful to prevent the Prosecution from transforming the exception into the rule, in breach of the Accused's right to a fair trial. Second, this mitigation from the imperative of informing the accused with particularity of the nature of the charges against him allows for a *lower degree* of specificity, it does not give licence for an indictment which is devoid of specificity, as in the present case. Third, this exception was intended to accommodate allegations of, for example, mass murder, where ascertaining the names of each

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[68] *P v. Nchamihigo*, ICTR-2001-63-R50, Decision on Defence Motion on Defects in the Form of the Indictment, 27 Sept. 06, at para 3.
[69] *AFRC* Judgement, 20 June 07, at para 65.
[70] *P v. Stanisic*, IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 05, at para 5.
[71] *Id; see also P v. Brima et al*, SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 04, at para 29-33.
[72] *Kupreskic* Trial Judgement, at para 725.

alleged victim would be either impossible or would exhaust the investigative resources of the Prosecution.[73] Allegations of single incidences of shootings, for example, committed by an accused personally cannot have been in the contemplation of the Appeals Chamber at the time that it articulated this exception. Reasoning to the contrary would transform the exception into the rule.[74] Fourth, it is submitted that in this context the "scale of the crimes" does not refer to the number of allegations which the Prosecution has levelled. Indeed, where the Defence is charged to respond to a large volume of allegations, the need to particularise the allegations is all the more important in order to safeguard the rights of the accused. Rather it refers to the scale of the alleged crime in terms of numbers of victims or physical perpetrators. Fifth, even in charges alleging massive crimes, to the extent that the material facts, such as the identities of victims are known, they must be pleaded.[75] Additionally, if they are not known, that should similarly be pleaded.[76]

(2) Identities of Victims

91. If the Prosecution is in a position to name victims, they should do so, as such information is essential to the preparation of the defence case.[77] The Indictment does not identify a single victim individually. Neither does it state that the identities of the victims are unknown, as is required even where crimes of a 'large scale' are pleaded. Instead it identifies the victim, or categories of victims as, *inter alia*: "the civilian population"[78]; "an unknown number of civilians"[79]; "several hundred civilians."[80] The specificity with respect to victims does not go beyond that.

(3) Locations

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[73] See *AFRC* Trial Judgment, at para 36; quoting *Kupreskic* Appeal Judgment, at para 89-90.
[74] Indeed the Appeals Chamber of the ICTY explained that the lower threshold is provided for cases where the number of victims runs into hundreds, in the following terms: "where the Prosecution alleges that an accused participated in an attack, as a member of an execution squad, in the killing of hundreds of men. The nature of such a case would not demand that each and every victim be identified in the indictment", the *Kupreskic* Appeal Judgment, at para 89 and 90.
[75] See *P v. Stanisic*, IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 05, at para 25.
[76] *Id.*
[77] See *Kurpreskic* Appeal Judgement, 23 Oct. 01, at para 89-90; see also *AFRC* Trial Judgment, at para 36.
[78] See, eg, the Indictment, at para 44.
[79] See, eg, the Indictment, at para 46.
[80] See, eg, the Indictment, at para 48.

92. Locations of alleged crimes must be specifically pleaded in the indictment. The use of words such as "including" or "including but not limited to"[81] cannot be used as a safety net for the Prosecution to hide behind, in the event that a new allegation emerges during its case. A finding to the contrary would violate the principle that a "specific, precise, clear and unambiguous indictment [is] an essential prerequisite for a fair and expeditious trial."[82] In the *AFRC* Trial Judgment, Trial Chamber II recognised that "findings of guilt" may not be made "in respect of . . . locations not mentioned in the indictment."[83] Furthermore it held that "the jurisprudence of international criminal tribunals makes it clear that an accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an indictment is exhaustive, regardless of the inclusion of words such as 'including', which may imply that other unidentified crimes in other locations are being charged as well."[84] The Trial Chamber found that even with "offences of a continuous nature," such as sexual slavery, enslavement or use of child soldiers, "the Prosecution should have pleaded the three continuous crimes with more particularity."[85] These findings were undisturbed on appeal.

93. In addition, the Defence notes that, in deciding the Defence Rule 98 motions, the Chamber made an evaluation as to the existence of evidence on the record, in respect of each and every location specifically pleaded in the Indictment. In so doing notice was given to the Defence teams as to which of the locations pleaded in the Indictment they were required to respond to, in the interests of expediency and fairness[86] and also, in effect, advising the parties that a strict interpretation would be adopted in the final determination of the issues charged in the Indictment.

94. Alleged locations of crimes pleaded in the Indictment include, *inter alia*: "throughout the Republic of Sierra Leone"[87] and "various locations in the [d]istrict."[88] Notably, paragraph 44 of the Indictment fails to include any location at all. At best the locations alleged are towns or villages. Words or phrases such as "including"[89], "such as"[90] and "including, but not

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[81] See, eg, Counts 1-11, 13, 14, and 15-18 of the Indictment.
[82] *P v. Zigiranyirazo*, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04.
[83] *AFRC* Judgment, at para 37; *see also* para 38 (the Trial Chamber "will not make any findings on crimes perpetrated in locations not specifically pleaded in the Indictment.").
[84] *Id.* at para 37.
[85] *Id.*, at para 40. Note that the AFRC Trial Chamber did not rule as to the pleadings regarding the "continuous crimes" because no objections were made as to them, *AFRC* Judgment, at para 41.
[86] See Rule 98 Oral Decision, Transcript 25 October 2006; see also Annexes where the information is transcribed for ease of reference.
[87] See, eg, the Indictment, at para 68.
[88] See, eg, the Indictment, at para 58, referring to Kailahun District.
[89] See, eg, the Indictment, at para 80.
[90] See, eg, the Indictment, at para 81.

limited to"[91] are used in many paragraphs of the Indictment which serve to amplify the vagueness and over breadth of the allegations.

95. In contemplation of an indictment, identical in every material respect to the Indictment, Trial Chamber II found that even with "offences of a continuous nature," such as sexual slavery, enslavement or use of child soldiers, "the Prosecution should have pleaded the three continuous crimes with more particularity."[92] The Trial Chamber did not intervene citing the failure of the Defence to lodge a specific objection to the pleading, *inter alia*.

(4) Timeframes

96. A timeframe for an allegation is a material fact and, as such, must be pleaded in the indictment. Indeed, in *Gacumbitsi* the Appeals Chamber of the ICTR held that a failure to plead the timeframe for alleged crimes with specificity can constitute a defect and therefore grounds for prejudice.[93]

97. The Indictment is vague with respect to timeframes for the alleged events. In many cases, windows of several months or even longer are pleaded for crimes that may have lasted only a matter of moments. Notably, paragraph 68 alleges the conscription of child soldiers and paragraph 74 alleges forced labour in Kailahun District "[a]t all times relevant to this Indictment."[94] Trial Chamber II found that such pleading, even in relation to crimes of a "continuous" nature, is defective.

(5) Identities of Physical Perpetrators

98. A properly pleaded indictment must specify the identity of the perpetrators of charged crimes. Even where the specific incident alleged is of a 'large-scale,'[95] the Indictment should specify the names of those known perpetrators[96] and where the identities are not known, that should be similarly pleaded. Furthermore, "the proximity of the accused to the relevant events" must also be pleaded.[97]

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[91] See, eg, the Indictment, at para 83.
[92] *Id.*, at para 40. Note that the AFRC Trial Chamber did not rule as to the pleadings regarding the "continuous crimes" because no objections were made as to them, *AFRC* Judgment, at para 41.
[93] *Gacumbitsi* Appeal Judgement, 7 July 06, at para 14.
[94] The Indictment, at para 68.
[95] The Defence reiterates that such a derogation cannot be used to transform the exception into the rule.
[96] *P v Gatete*, ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 04, at paras. 12-13.
[97] See *Brima* Decision on Defence Preliminary Motion, at para 29-33; see also *P v. Nchamihigo*, ICTR-2001-63-R50, Decision on Defence Motion on Defects in the Form of the Indictment, 27 Sept. 06, at para 6 ("the

99. Where it is the Prosecution's case that the accused physically and personally perpetrated the alleged act, as much of the Prosecution evidence does, this must be pleaded with specificity, as well as the acts of his alleged co-perpetrators, subordinates, or accomplices.[98]

100. Where the Accused is prosecuted according to a theory of command responsibility, or any other theory of liability under Article 6(1), the identities of the alleged subordinates, as well as the proximity of the accused to the alleged acts must be pleaded with specificity.[99]

101. The Indictment purports to plead all forms of liability in respect of each and every count. The defective nature of this sort of pleading is demonstrated, *infra*. However, whereas it is impossible to know which of the modes of liability will be charged with respect to each allegation, it is submitted that *none* of the aforementioned material facts are pleaded with the specificity required to allow the accused sufficient notice of the case with which he is charged. In this regard, the Indictment is both vague and overbroad.

102. The Indictment pleads with generic application "members of the AFRC/RUF"[100] as the physical perpetrators of the crimes alleged therein. Mr Kallon's name is entirely absent from allegations of specific crimes in the Indictment, in relation to either crimes physically committed by him or, in the case of command responsibility, his physical proximity with the crimes alleged and his relationship to the perpetrators of those crimes.

103. As discussed in the Decision and Order on Prosecution Motions for Joinder, the AFRC and RUF were "two distinct and separate entities *ab initio*."[101] Accordingly, participation in, and culpability for, crimes alleged in the Indictment are likely to differ between members of the two groups: crimes committed by one group should not necessarily imply culpability of individuals in the other group absent more specific facts indicating such involvement. In light of that, it is submitted that the Indictment is defective for pleading the perpetrators of crimes as members of the "AFRC/RUF", without differentiating between the two.

(6) Conclusion

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mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set out in the indictment.")

[98] *P v Karemera et al*, No. ICTR-98-44-PT, Decision on Defects in the Form of the Indictment 5 Aug. 05, at para. 19

[99] These specific requirements are discussed in more detail in relation to the pleading of theories of responsibility, *infra*.

[100] See, eg, the Indictment, at para 44; see, *supra*, as to why, absent further details, alleging crimes against the AFRC and RUF as the collective perpetrator breaches the pleading requirements.

[101] *Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu*, SCSL-2003-07-PT, Decision and Order on Prosecution Motions for Joinder, 27 Jan. 04, at para 23.

104. It is submitted that the Indictment is defective in its pleading of all material facts for vagueness and overbreadth. It is submitted that the Chamber cannot permit convictions on the basis of an Indictment which seeks to maintain avenues of prosecution capable of accommodating evidence as it became available in the course of ongoing investigations and, as such, is in clear breach of the Accused's right to be informed with precision of the nature of the case with which he stands charged and the corresponding duty on the Prosecution to know its case before going to trial. The defects demonstrated, *supra*, pervade all the allegations pleaded in support of Count 1 to 18 in the Indictment. Therefore, it is submitted that the Indictment is defective in its entirety and should be dismissed.

ii) The Case of Physical and Personal Perpetration

105. Allegations that an accused is guilty of physical and personal perpetration of criminal conduct must be set clearly and unambiguously *in the indictment.*[102] As such, there is no provision for 'curing' an indictment which is defective in this regard through disclosure in the Pre-Trial Brief, Supplemental Pre-Trial Brief or any other materials.

106. Moreover, the material facts underpinning such allegations must be pleaded with a particularly high-degree of specificity. In its judgment in the *AFRC* Case, the Appeals Chamber held that:

> "Where direct participation is alleged in an indictment, we opine that the Prosecution's obligation to provide particulars in an indictment must be adhered to fully."[103]

107. In the *AFRC* Trial Judgment, Trial Chamber II explained that allegations of physical perpetration give rise to a particularly exigent need for clarity in pleading, as follows:

> "[w]here it is alleged that an accused personally carried out the underlying criminal acts in question, the Prosecution is required to set out 'with the greatest precision' the identity of the victims, the means by which the acts were committed and the time and place of the events.'"[104]

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[102] *Ntakirutimana* Appeal Judgment, at para 38, ("[u]nder Kupreskic criminal acts that were physically perpetrated by the accused personally must be set forth in the indictment."); see also *P v. Bagosora et al.*, ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 06, at para 5, ("[a]llegations of physical perpetration of a criminal act by an accused must appear in an indictment").

[103] *AFRC* Appeals Judgment, at para 38; see also the *Ntabakuze* Decision at para 33, ("The Appeals Chamber agrees with the Appellant that material facts which concern the personal actions of the accused have to be clearly and specifically pleaded in the indictment"); citing *Kupreškić* Appeal Judgment, at para 89; see also *Krnojelac* Appeal Judgment, at para 132; *Niyitegeka* Appeal Judgment, at para 193; *Ntakirutimana* Appeal Judgment, at para 32; *Kvočka* Appeal Judgment, at para 28; *Naletilić* Appeal Judgment, at para 24; *Cyangugu* Appeal Judgment, para 23; *Gacumbitsi* Appeal Judgment, para 49.

[104] *AFRC* Trial Judgment, at para 31, citing *Blaskic* Appeal Judgment, at para 213, referring to *P. v. Tadic*, IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov. 95, at para 11-13.

108. The Appeals Chamber has held that with regard to the "widespread nature and sheer scale of...alleged crimes" there is a "narrow exception" where it is "unnecessary and impracticable to require a high degree of specificity".[105] The discussion on this exception in relation to "vagueness and over breadth" is equally applicable here.[106]

109. The Indictment does not plead a case of physical and personal perpetration, clearly and unambiguously, against the Accused. Notwithstanding, the Prosecution has led evidence seeking to establish that Mr Kallon physically and personally perpetrated crimes. The Prosecution contends that notice was given in the Indictment of a case of physical perpetration through the mere addition of the word "committing" in paragraph 38 of the Indictment and, "repeated in all counts" and that the pleading obligations are thereby discharged.[107] The Defence makes the following responses.

110. First, to the extent that a legal basis exists for prosecuting on a theory of joint criminal enterprise,[108] it is incorporated as a form of "committing". The Indictment purports to charge the accused on a theory of joint criminal enterprise in respect of all counts alleged therein. Therefore, the mere inclusion of the word "committing" does not necessarily imply personal and physical perpetration. The Indictment does not make it clear whether the Accused is indicted pursuant to joint criminal enterprise, physical perpetration or both, and the resultant effect is ambiguity.[109]

111. Second, the material facts underpinning a purported case of physical perpetration are entirely absent from the Indictment. The identification of the material facts that should have been pleaded in relation to each of the allegations of physical perpetration against the Accused follows in submissions on the evidence, *infra*.

112. Therefore, it is submitted that the Prosecution case alleging that Mr Kallon physically perpetrated crimes is defective and should be dismissed.

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[105] *AFRC* Appeals Judgment, at para 41.

[106] *Supra.*

[107] *P v. Sesay et al.*, SCSL-04-15-1066, Prosecution Response With Confidential Annex A to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 31 March 08, at para 27.

[108] This is disputed in "Part 4: Joint Criminal Enterprise".

[109] *Kordic* Appeal Judgment, 17 Dec. 04, at para 129, ("[t]he nature of the alleged responsibility should be unambiguous in an indictment"); see also *Kvocka,* Appeal Judgment, 28 Feb. 05, at para 29, ("[i]f an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous"); and *Krnojelac* Appeal Judgment, 17 Sept. 03, ("when the Prosecution charges the 'commission' of one of the crimes under the Statute within the meaning of Article 7(1) [individual responsibility], it must specify whether the term is to be understood as meaning physical commission by the accused or participation in a joint criminal enterprise, or both.").

iii) Theories of Responsibility

113. The Prosecution's basis for alleging responsibility against Mr Kallon appears to take three forms: (i) allegations of a JCE, a form of individual responsibility under Article 6(1) of the Statute; (ii) other allegations of individual responsibility also under Article 6(1); and (iii) allegations of command responsibility under Article 6(3). According to the jurisprudence, a properly constituted indictment must plead all the material facts underpinning each legal element of each of the theories of liability; as part of that obligation, it must plead the *mens rea* required to fulfil each mode of liability; and it must clearly separate the acts relied upon for each mode.[110]

114. The Indictment is fatally defective in all of the above regards. It alleges all forms of participation in respect of each and every count. The material facts underpinning each form of liability are entirely absent. The *mens rea* elements are not pleaded anywhere, as if the offences alleged were strict liability. As such, it is submitted that the Indictment is defective and that all modes of liability be dismissed accordingly.

(1) Indictment is Defective to the Extent That it Alleges All Forms of Liability Concurrently

115. The ICTR has held that when charging modes of participation under Article 6(1) and Article (3) concurrently the Prosecution should "support both types of responsibility by specific factual allegations referring precisely to the respective type of responsibility".[111]

116. The Indictment charges Mr Kallon with all forms of liability in respect of each and every count in the Indictment, without specifically pleading the material facts which will be used to support each mode of liability. It follows that no differentiation is made in the Indictment between the material facts that will be used to underpin each of the modes of liability. On this basis, the Indictment is defective in its entirety and should be dismissed.

(2) Joint Criminal Enterprise is Defectively Pleaded

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[110] *P v. Delalic*, Decision on Motion by the Accused Delic based on Defects in the Form of the Indictment, 15 November 1996, at para 18; *P v. Nahimana, et al.*, 17 November 1998; *P v. Blaskic*, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form therefore, 4 April 1997; and *P v. Kronjelac*, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb. 00.

[111] *P v. Zigiranyirazho*, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, Zigiranyirazo, 15 July 04, at para 47.

117. It is demonstrated in the discussion on "Joint Criminal Enterprise", *infra*, that JCE is defectively pleaded and should be dismissed as a mode of liability in its entirety.

(3) All Other Forms of Individual Responsibility are Defectively Pleaded

118. Article 6(1) provides for prosecution under several different modes of liability. As such, when alleging individual responsibility as a mode of liability the particular form of participation under Article 6(1) of the Statute must be pleaded in relation to each incident under each count.[112] Thus, in *Kordic et al.* the Appeals Chamber of the ICTY held:

> "The nature of the alleged responsibility of an accused should be unambiguous in an indictment."[113]

119. The Appeals Chamber in *Blaskic* held:

> "The Prosecution should have pleaded the particular forms of participation under Article 6(1) with respect to each incident under each count."

120. Therefore, merely quoting the provisions of Article 6(1) renders an indictment defective. According to the Appeals Chamber in *Krnojelac*:

> "Since Article 7(1)[114] allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial."[115] [Emphasis added]

121. Furthermore, an indictment should clearly specify and distinguish between the material acts giving rise to individual responsibility under Article 6(1) and the material facts giving rise to command responsibility under Article 6(3). The Appeals Chamber of the ICTR held as such:

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[112] *Blaskic* Appeal Judgment, at para 226; see also *Simic* Appeal Judgment, 28 Nov. 06, at para 21 ("The practice of both the [ICTY] and the ICTR requires that the Prosecution plead the specific mode or modes of liability for which the accused is being charged."); *Kordic* Appeal Judgment, 17 Dec. 04, at para 129 ("[T]he alleged mode of liability of the accused in a crime pursuant to Article 7(1) of the Statute should be clearly laid out in an indictment."); *Gacumbitsi* Appeal Judgment, 7 July 06, at para 161 ("An indictment that fails to 'indicate in relation to each individual count precisely and expressly the particular nature of the responsibility alleged' may be ambiguous and could be found defective.")

[113] *Kordic* Appeal Judgment, at para 129; *Blaskic* Appeal Judgment, at para 215.

[114] 'Individual responsibility' and 'command responsibility' are under Articles 6(1) and 6(3) respectively of the Statute of the ICTR and the Special Court, but under Articles 7(1) and 7(3) respectively of the ICTY Statute.

[115] *Krnojelac* Appeal Judgment, at para 138; see also *Kvocka* Appeal Judgment, at para 29, ("If an indictment merely quotes the provisions of Article 7(1) without specifying which mode or modes of responsibility are being pleaded, then the charges against the accused may be ambiguous"); *Kordic* Appeal Judgment, at para 129 ("'[t]he practice by the Prosecution of merely quoting the provisions of Article 7(1) in the indictment is likely to cause ambiguity. . . ."); *Krnojelac* Appeal Judgment, at para 134.

> "Where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, the Prosecution is required to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question."[116]

122. The Appeals Chamber has also clearly explained that if all modes of responsibility are intended, the Prosecution must plead the material facts supporting each. In *Kvocka* the Appeals Chamber held:

> "When the Prosecution is intending to rely on all modes of responsibility in Article 7(1), then the material facts relevant to each of those modes must be pleaded in the indictment. Otherwise, the indictment will be defective either because it pleads modes of responsibility which do not form part of the Prosecution's case, or because the Prosecution has failed to plead material facts for the modes of responsibility it is alleging."[117] [Emphasis added]

Consequently, it held that the indictment in question was defective:

> "Although the Indictment relies on all modes of individual criminal responsibility found in Article 7(1) of the Statute, the Prosecution has failed to plead the material facts necessary to support each of these modes. For example, despite pleading ordering as a mode of responsibility, the Indictment does not include any material facts which allege that any Accused ordered the commission of any particular crime on any occasion. Thus, the Appeals Chamber finds that in pleading modes of responsibility for which no corresponding material facts are pleaded, the Indictment is vague and is therefore defective."[118]

123. A properly pleaded indictment will also allege that an accused had the state of mind required to constitute each count in the indictment. The Appeals Chamber in *Blaskic* held that:

> "(i) either the specific state of mind itself should be pleaded as a material fact . . .; or (ii) the evidentiary facts from which the state of mind is to be inferred. . . . "[119]

124. Cursorily tracking the statutory language, paragraph 38 of the Indictment asserts all forms of individual responsibility possible under Article 6(1) of the Statute, against all defendants, regarding all crimes, with no details as to any. Thereafter follows the phrase, generically reproduced in respect of each and every count:

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[116] *Ntabakuze* Decision, at para 27; see also *Cyangugu* Appeal Judgment, at para 25; *Blaskic* Appeal Judgment, at para 213, ("where it is alleged that the accused planned, instigated, ordered, or aided and abetted in the planning, preparation or execution of the alleged crimes, then the Prosecution is required to identify the 'particular acts' or 'the particular course of conduct' on the part of the accused which forms the basis for the charges in question."); *Kupreskic* Appeal Judgment, at para 95, ("The Amended Indictment in no way particularises what form th[e] alleged participation took"; thus, it "fails to fulfil the fundamental purpose of providing the accused with a description of the charges against him with sufficient particularity to enable him to mount his defence.").

[117] *Kvocka,* Appeal Judgment, at para 29; see also *Simic*, Appeal Judgment, at para 21.

[118] *Ibid.*, at para 41

[119] *Blaskic* Appeal Judgment, at para 219.

> "pursuant to Article 6.1, and, or alternatively, Article 6.3 of the Statute, [the Accused] are individually criminally responsible for the crimes alleged below"[120]

125. The Prosecution fails to specify in each Count whether Mr Kallon "planned, instigated, ordered committed *or* in whose planning, preparations or execution each Accused otherwise aided and abetted, *or* which crimes were within a joint criminal enterprise in which each Accused participated *or* were a reasonably foreseeable consequence of the JCE in which each Accused participated".[121] Nor does it indicate, under each Count, which mode of liability is attributable to each defendant.

126. The material facts that were intended to substantiate each form of liability are entirely absent from the Indictment. The requisite state of mind for Article 6(1) liability has not been pleaded. Furthermore, the pleading of material facts from which the state of mind for each of the forms of participation - planning, instigating, ordering, committing and aiding and abetting- may be inferred are entirely absent from the Indictment.

127. Mindful of the foregoing, it is submitted that the Indictment is defective in the following respects:

a. it does not plead the particular form(s) of individual responsibility under each count;

b. it does not indicate which mode of liability, under each count, is attributable to each defendant;

c. it does not particularise the material facts underpinning each form of liability under each count; and

d. it does not plead a *mens rea* in relation to any of the modes of participation under Article 6(1).

128. To the extent that the jurisprudence allows the Indictment to be 'cured', which is disputed, the Prosecution has failed to do so. Whilst the Supplemental Pre-Trial Brief distinguishes the acts underpinning Article 6(3) responsibility from those underpinning Article 6(1) responsibility, it fails to distinguish the different material facts underpinning each of the modes of liability under Article 6(1). Furthermore, whilst the Supplemental Pre-Trial clarifies the modes of liability charged under each count, it simply confirms that each and every mode of liability is charged under each Count, in the alternative. In light of the fact that the material facts underpinning each of the modes of participation are not distinguished, this form of pleading fails to put the accused on notice of the precise nature of the case with which

[120] See Indictment, at para 44, 53, 60, 67, 68, 76, 82, 83.
[121] See the Indictment, at para 38.

he stands charged, and is overbroad in that respect. Furthermore, the Supplemental Pre-Trial Brief fails to plead a *mens rea.*

129. Therefore, it is submitted that the pleading of Article 6(1) responsibility is defective and should be dismissed in its entirety.

(4) Command Responsibility is Defectively Pleaded

130. The Appeals Chamber in *Blaskic* sets forth the standard for pleading command responsibility:

> "In accordance with the jurisprudence of the International Tribunal, the Appeals Chamber considers that in a case where superior criminal responsibility . . . is alleged, the material facts which must be pleaded in the indictment are:
>
> "(a) (i) that the accused is the superior of (ii) subordinates sufficiently identified, (iii) over whom he had effective control – in the sense of a material ability to prevent or punish criminal conduct – and (iv) for whose acts he is alleged to be responsible;
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> "(b) the conduct of the accused by which he may be found to (i) have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates, and (ii) the related conduct of those others for whom he is alleged to be responsible. The facts relevant to the acts of those others for whose acts the accused is alleged to be responsible as a superior, although the Prosecution remains obliged to give all the particulars which it is able to give, will usually be stated with less precision, because the detail of those acts are often unknown, and because the acts themselves are often not very much in issue; and
>
> "(c) the conduct of the accused by which he may be found to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who committed them."[122] [Footnotes omitted]

131. Conversely, the Appeals Chamber categorically "denounces" the practice whereby "the Prosecution simply invokes Article 6(3) of the Statute without providing the Accused with all the material facts underpinning the charges under that Article." The Appeals Chamber in *Ntagerura* held as follows:

> "The Appeals Chamber recognizes that, prior to the presentation of all the evidence, the Prosecution cannot determine with certainty which of the charges brought against an accused will be proven. Cumulative charging is therefore allowed. However, this does not relieve the Prosecution of its obligation to state all material facts underpinning each of the charges if it intends to plead several forms of responsibility, cumulatively or alternatively. In the instant case, the Prosecution simply invokes article 6(3) of the Statute without providing the Accused with all the material facts underpinning the charges under that Article. The Prosecution seems to consider mere mention of Article 6(3) to be the key to a conviction under this Article. The Appeals Chamber cannot but denounce this approach. It reaffirms that if the Prosecution intends to charge a superior

[122] *Blaskic* Appeal Judgment, at para 218; see also *Cyangugu* Appeal Judgment, at para 152.

> . . . pursuant to Article 6(3) of the Statute, it must plead the material facts underpinning the charges in the indictment, and that failure to do so may be remedied only if the missing material facts are provided in a clear, consistent and timely manner."[123] [Emphasis added]

132. In a case analogous to the present case, it was held that "[g]eneral reference to Article 6(3) of the Statute and to the fact that people 'under his direct command' participated in crimes is not sufficient to find that [the accused] Imanishimwe was given clear and consistent information regarding the case he had to meet under Article 6(3) of the Statute."[124]

133. Statements of sweeping generality are applied throughout the Indictment. The paragraphs of factual allegations purportedly underpinning each of the counts allege crimes committed by "members of the AFRC/RUF", or minor variations thereof. These allegations are premised on the Prosecution's theory of the command structure of the Junta forces, described earlier on in the Indictment.[125] However, even when all relevant paragraphs of the Indictment and Pre-Trial Briefs are read conjunctively, the alleged perpetrators of crimes are never described as anything more specific than "members of the AFRC/RUF." [126]

134. Paragraphs 24 to 28 plead alleged positions of responsibility but do not link those positions to specific allegations made further on in the Indictment. This fails to put the Accused on notice of the facts with which the Prosecution intends to establish the superior-subordinate relationship in respect of each Count, as required under *Blaskic*. In particular, paragraph 25 alleges that Mr Kallon held the position of "Deputy Area Commander ...[b]etween about May 1996 and April 1998." This alleged position cannot be linked to specific allegations owing to, *inter alia*, a failure to plead the area which he was allegedly commanding.

135. The Indictment is also defective by reference to the second limb of the *Blaskic* test.[127] The Indictment makes mention only of crimes allegedly committed by members of the "AFRC/RUF".[128] What these documents singularly lack, however, is a discussion of where the Accused was during these crimes—for example, whether he was allegedly leading the forces or in contact with others who led the forces, and similar material facts. Thus, there are

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[123] *Cyangugu* Appeal Judgment, at para 158; see also *Blaskic* Appeal Judgment, at para 228, ("the mere reproduction in the Second Amended Indictment of the text of Article 7(3) in each count or group of counts, without any further details, gives rise to ambiguity as to the exact nature and cause of the Prosecution's allegations against the Appellant.").

[124] *Cyangugu* Appeal Judgment, at para 157.

[125] The Indictment, para 24-28

[126] Therefore, the first limb of the *Blaskic* test is not satisfied. See Annex C, at para 24, quoting *Blaskic* Appeal Judgment, at para 218(a).

[127] *Blaskic* Appeal Judgment, at para 218(b).

[128] See, eg, Prosecution's Pre-Trial Brief, at para 67-143 (discussing attacks in various districts of Sierra Leone).

no facts that show "the conduct of the accused by which he may be found to . . . have known or had reason to know that the crimes were about to be committed or had been committed by his subordinates" as is required by *Blaskic*.

136. Moreover, if the Prosecution intended that the knowledge of the Accused was to be inferred, then the material facts from which such inference was supposedly to be drawn should have been pleaded. These particulars are entirely absent from the Indictment.

137. The Indictment is also defective according to the third limb of the *Blaskic* test. It is submitted that the all-encompassing statement "[e]ach Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof"[129] does not adequately discharge the pleading requirements on the Prosecution in this respect. No more information is pleaded in the Indictment on this issue.

138. Therefore it is submitted that the pleading of superior responsibility is defective and that it should be dismissed in respect of all counts.

iv) Counts or Parts of Counts Which Must be Dismissed

(1) Count 1—"Acts of Terrorism" — is not a Cognisable Crime

139. It is submitted that Count 1 should be dismissed for the following reasons: (i) offences involving terrorism were not recognised by law at the time of the commission of the alleged conduct; (ii) the description of the offence charged under Count 1 is not clearly set out; and (iii) the jurisprudence defining related offences does not define with precision the contours of the offence charged in Count 1.

140. The principle of *nullem crimen sine lege* was explained in the *Vasiljevic* Trial Chamber Judgment:

> "From the perspective of the *nullum crimen sine lege* principle, it would be wholly unacceptable for a Trial Chamber to convict an accused person on the basis of a prohibition which, taking into account the specificity of customary international law and allowing for the gradual clarification of the rules of criminal law, is either insufficiently precise to determine conduct and distinguish the criminal from the permissible, or was not sufficiently accessible at the relevant time. A criminal conviction should indeed never be based upon a norm which an accused could not reasonably have been aware of

[129] The Indictment, at para 39.

> at the time of the acts, and this norm must make it sufficiently clear what act or omission could engage his criminal responsibility."[130] [Emphasis added]

141. Due to a concern about whether there was a crime under customary international law of "spreading terror among the civilian population," Judge Nieto-Navia entered a dissenting opinion in the *Galic* Trial Chamber Judgment. She explained:

> "I respectfully dissent from this conclusion because I do not believe that such an offence falls within the jurisdiction of the Tribunal. . . . In his Report to the Security Council regarding the establishment of the Tribunal, the Secretary-General explained that 'the application of the [criminal law] principle of nullum crimen sine lege requires that the international tribunal should apply rules which are beyond any doubt part of customary law.' The Secretary-General's Report therefore lays out the principle that the Tribunal cannot create new criminal offences, but may only consider crimes already well-established in international humanitarian law. Such a conclusion accords with the imperative that 'under no circumstances may a court create new criminal offences after the act charged against an accused either by giving a definition to a crime which had none so far, thereby rendering it prosecutable or punishable, or by criminalizing an act which had not until the present time been regarded as criminal."[131] [Footnotes omitted]

142. She further noted that "such an offence has never been considered before by this Tribunal,"[132] and there was no showing that "this offence must have attracted individual criminal responsibility under international customary law for acts committed at the time of the Indictment Period."[133] Consequently she concluded that "the offence of inflicting terror on a civilian population does not fall within the jurisdiction of this Trial Chamber."[134]

143. At least one other judge has expressed concern that there is no "comprehensive definition of terror . . . known to customary international law." In his separate opinion Judge Shahabudeen noted that as to the definition of "terror":

> "[t]he international community is divided on important aspects of the question, with the result that there is neither the required *opinio juris* nor state practice to support the view that customary international law knows of a comprehensive definition. The developing state of the law gives reason for caution."[135]

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[130] *Vasiljevi* Trial Judgment, at para 193; see also *Galic* Trial Judgment, at para 93, ("The principle (known as *nullum crimen sine lege*) is meant to prevent the prosecution and punishment of a person for acts which were reasonably, and with knowledge of the laws in force, believed by that person not to be criminal at the time of their commission. In practice this means 'that penal statutes must be *strictly construed*' . . . and '*the benefit of the doubt should be given to the subject.* . . .') (footnotes omitted) (emphasis added); International Covenant on Civil and Political Rights, Article 15 ("No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed.").

[131] *Galic* Trial Judgment, Separate and Partially Dissenting Opinion of Judge Nieto-Navia, at para 108-109.

[132] *Id.* at para 112.

[133] *Id.* at para 113.

[134] *Id.*

[135] *Galic* Appeal Judgment, Separate Opinion of Judge Shahabuddeen, at para 3.

144. In particular, he cited the various ineffective attempts made to define the crime of terrorism. [136] Accordingly, first, there is no comprehensive agreement of the definition of "terrorism".

145. Second, the Indictment creates confusion as to the actual offence being charged in Count 1 because it appears to charge both "terrorising the civilians population"[137] and "acts of terrorism".

146. Third, the crime adjudicated in *Galic*, fully articulated, was "acts of violence wilfully directed at a civilian population or against individual civilians causing death or serious injury to body or health of individual civilians, with the primary purpose of spreading terror among the civilian population." The only other adjudication is the recent *AFRC* Trial Judgment.[138] While the *AFRC* Trial Judgment cites various cases that state that "the infliction of terror...has been adjudicated,"[139] in fact, as clearly explained in the *Galic* Trial Chamber decision, these cases examine the use of "terror" as a component of other crimes.[140] Therefore, to the extent that it finds that offence to be part of customary international law, *Galic* does not lend definition to the crimes charged in Count 1.

147. In light of the foregoing, and noting in particular the concession by Judge Shahabuddeen, mentioned *supra*, that there may be a "core crime" but that there is no "comprehensive definition of terror . . . known to customary international law", it is submitted that the contours of the offence charged in Count 1 are not sufficiently defined to satisfy the principle of *nullum crimen sine lege*. Accordingly, Count 1 should be dismissed.

(2) Count 7—"Sexual Slavery and Any Other Form of Sexual Violence" "—is Duplicitous

148. In consideration of an indictment, in every material respect identical to the Indictment, Trial Chamber II dismissed as duplicitous Count 7 of the indictment, charging "sexual slavery and any other form of sexual violence".[141] On 22 February 2008, the Appeals Chamber rendered judgment in the same case, upholding the Trial Chamber finding that Count 7 was

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[136] *Ibid,* at para 2. See Trahan J., "Terrorism Conventions: Existing Gaps and Different Approaches," 8 New Eng. J of Int'l & Comp. L. 215 (2002).
[137] See the Indictment, the heading immediately preceding para 44.
[138] *AFRC* Judgment, at para 660-671.
[139] *Id.*, at para 665.
[140] See *Galic* Trial Judgment, at para 114 (explaining that in *Celebici*, creating an "atmosphere of terror" was viewed as torture or inhumane treatment, or torture or cruel treatment; in *Blaskic* an "atmosphere of terror" was examined as inhumane treatment and cruel treatment; and in *Krstic*, "terrorizing" civilians was examined as a form of persecution).
[141] *AFRC* Trial Judgment, at para 95.

duplicitous[142] and thus found that a range of remedies were available to the Trial Chamber as follows:

> "the Appeals Chamber considers that the remedies available to the Chamber included:
> (i) quashing the count;
> (ii) ordering that the Indictment be amended;
> (iii) directing the Prosecution to elect to proceed on the basis of one of the two offences in the duplicitous count;
> (iv) upon review of the entire case, determining which of the two offences in the count the Appellant had defended fully, having regard to the manner in which the defence case had been conducted; and
> (v) refusing to consider evidence of one of the two charges so as to eliminate the duplicity of Count 7."[143]

149. On 29 April 2008, the Prosecution filed a "Notice Re Count 7 of the Indictment", in which it conceded the duplicity of Count 7 in the Indictment[144] and purported to elect to drop the charge of "any other form of sexual violence".[145]

150. The Kallon Defence objects to the Prosecution notice on three grounds. First, having reviewed the available remedies, the Appeals Chamber found that:

> "In the instant case, from the evidence accepted by the Trial Chamber and the findings it had made, it should have chosen the option to proceed on the basis that the offence of sexual slavery had properly been charged in Count 7, return the appropriate verdict on that Count in respect of the crime of sexual slavery and struck out the charge of "any other form of sexual violence."

151. Thus, the Appeals Chamber held that the remedy appearing fourth on the list was the proper remedy in that case. The Prosecution purports to invoke the third remedy on the list. Both remedies involve a segregation of the duplicitous charges and an election to drop one charge and to maintain the other. However, the fourth remedy differs materially from the third remedy in the basis on which the election should be made. In relation to the fourth remedy, the Trial Chamber is bound to maintain the count which the accused "had defended fully", so as to defend the fair trial rights of the accused. Whereas, in relation to the third remedy, no inquiry into the conduct of the defence case is required. It is submitted that the Notice purports to circumvent that inquiry by the Trial Chamber, which safeguards the rights of the

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[142] *AFRC* Appeal Judgment, at para 103, (footnotes omitted).
[143] *Id.*, at para 108.
[144] *P v. Sesay et al.*, SCSL-04-15-T-1105, Notice Re Count 7 of the Indictment, 29 April 08, ("the Notice"), at para 5; referring to *P v. Sesay et al.*, SCSL-04-15-I, Corrected Amended Consolidated Indictment, ("the Indictment").
[145] The Notice, at para 6 and 7.

accused. To that extent, the Notice goes against the unambiguously stated recommendation of the Appeals Chamber.

152. Second, the Prosecution is attempting to remedy a defect in the Indictment. The Chamber has previously held that issues of defective pleading are to be reserved for closing argument.[146] More than once, the Prosecution sought rely on the stated position of the Chamber in this regard.

153. Third, the Defence suffered prejudice by the late timing of the Notice. It is submitted that the Notice represents a concession by the Prosecution that the Indictment is defective. The Notice purports to remedy that defect a matter of weeks before the close of the case, which started nearly four years ago. It is submitted that this does not serve to remedy the prejudice caused to the Defence by proceeding for the vast majority of the case on the basis of a defective indictment.

154. Therefore, it is submitted that the Prosecution's attempt to elect to drop "any other form of sexual violence" was misplaced. In accordance with the Appeals Chamber finding, it is submitted that the power of election lies solely with the Trial Chamber and that it should make that election only after a comprehensive review of the evidence, and a determination of which of the elements of the duplicitous counts the defence has defended fully.

155. Notwithstanding, the Indictment is defective owing to the duplicity of Count 7 and the trial has proceeded according to an Indictment defective in this regard. It is submitted that this should be taken into account when assessing the prejudice caused to the Accused by the cumulative effect of the totality of the defects from which the Indictment suffers.

(3) Count 9—"Outrages Upon Personal Dignity as a Form of Sexual Violence"

156. Count 9 charges the Accused with outrages upon personal dignity, under Article 3(e) of the Statute additionally or in the alternative to Counts 6, 7 and 8. In consideration of the AFRC Indictment, identical in every material respect to the Indictment, Trial Chamber II found that "outrages upon personal dignity" were based upon allegations of (a) rape, which

[146] See *P v. Sesay et al.*,SCSL-04-15-T-944, Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment, 17 Jan. 08; and *P v. Sesay et al.*,SCSL-04-15-T-1033, Decision on Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 6 March 08.

could be an outrage upon personal dignity;[147] (b) "sexual slavery," which also could be "considered an outrage upon personal dignity";[148] as well as (c) "any other form of sexual violence", which was not defined with sufficient precision.[149] It found as follows:

> "The Indictment fails to provide any particulars as to the specific form of sexual violence alleged. One of the fundamental rights guaranteed to an accused under Article 17(4)(a) of the Statute is the right to be informed 'of the nature and cause of the charge against him'. An Indictment is defective if it does not state the material facts underpinning the charges with enough detail to enable an accused to prepare his or her defence. In the present case, given the broad scope of the offence of 'any other form of sexual violence', it was essential for the Indictment to clearly identify the specific offence or offences which the Accused are required to answer. The Trial Chamber finds that the indictment is defective in this respect because it fails to plead material facts with sufficient specificity."[150]

157. Accordingly, Trial Chamber II dismissed "any other form of sexual violence" as a basis for charges of "outrages upon personal dignity". The finding was undisturbed on appeal. It is submitted that allegations of any "other form of sexual violence"[151] cannot be used to substantiate Count 9 and that Count 9 be dismissed, in part, accordingly.

v) <u>"Widespread" or "Systematic" Attacks</u>

158. An essential condition precedent to conviction under Article 2, crimes against humanity, is that the crime in question was committed as part of a "widespread" or, alternatively, "systematic" regime.[152] For the purposes of crimes against humanity a "widespread" attack is one that is directed at a multiplicity of victims whereas a "systematic" attack is one carried out pursuant to a preconceived policy or plan.[153] Therefore, the prosecution of each type of attack has different requirements and takes a different form and so, it follows, does the defence thereto. The attack is the event in which the enumerated crimes must form part.[154] Therefore, it does not suffice to charge a widespread and/or

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[147] *AFRC* Trial Judgment, at para 718.
[148] *AFRC* Trial Judgment, at para 719.
[149] *AFRC* Trial Judgment, at para 720.
[150] *AFRC* Trial Judgment, at para 721.
[151] See the Indictment, at para 56, (alleging "other forms of sexual violence" in Koinadugu District); at para 57, (alleging "other forms of sexual violence" in Bombali District); at para 59, (alleging "other forms of sexual violence" in Freetown and the Western Area); and at para 60, alleging "other forms of sexual violence" in Port Loko District).
[152] See Art. 2 of the Statute. See also objections raised to this form of pleading at by counsel for Kallon at Rule 98 submissions, (T. 16/10/06/, pg 37, line 17-20).
[153] *Kayishema* Trial Judgment, at para 123.
[154] *Id.*, para 122.

systematic attack at all times relevant to the Indictment, especially as the Indictment covers a four year period and the entire territory of Sierra Leone.

159. In its "General Allegations", the Indictment alleges "[t]hat all acts and omissions charged herein as Crimes Against Humanity were committed as party of a widespread *or* systematic attack directed against the civilian population."[155] This is the first and only time that the Indictment invokes the specific and unambiguous language of the chapeau elements of crimes against humanity.

160. Thereafter, in relation to specific counts charging crimes against humanity, the Indictment is silent as to which form of attack the Prosecution is alleging that the specific criminal conduct formed part. The only time that the relevant language invoked is specific and unambiguous is in relation to "Looting and Burning" and counts involving UNAMSIL in the Supplemental Pre-Trial Brief, where "widespread" attacks are alleged.[156]

161. Crimes against humanity are charged in Counts 3-5, 6-9, 10-11, 13 and 15-18 of the Indictment. The form of attack is not specifically pleaded in the Indictment in relation to any of the Counts. Therefore, it is submitted that the aforementioned Counts should be dismissed. In the event that the Chamber finds this defect 'cured' by disclosure in the Supplemental Pre-Trial Brief, it is submitted that Counts 3-11 be dismissed.

vi) Existence of an "Armed Conflict"

162. It has been demonstrated that the existence of an "armed conflict" is defectively pleaded for failure to distinguish between Comon Article 3 and Protocol II.[157]

d) ADEQUACY OF NOTICE

163. To the extent, if any, that the Chamber finds the Indictment to be valid, the Prosecution has led evidence outside the scope of the Indictment. Additionally, it has sought to incriminate the Accused with allegations, the material facts of which the Accused was not adequately informed. Laying the foundations for the submissions that follow in that regard, in the discussion of the evidence, an analysis of the requisite relationship between an Indictment and the evidence follows hereafter. The Defence recalls that the burden of proof is on the

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[155] The Indictment, at para 17.
[156] See, eg, the Supplemental Pre-Trial Brief, at para 529, 538, 546, 562 and 570.
[157] *Supra.*

Prosecution to prove beyond a reasonable doubt the guilt of the accused and, as such, that the conduct alleged supports the case charged in the Indictment.

i) Evidence Led Outside the Scope of the Indictment

164. The indictment is the only accusatory instrument provided for in the Rules. It lists, exhaustively, the charges against the Accused and the parameters thereof. This Chamber made known its view on the state of the law in the area by emphasising the importance of pleading the case against the Accused *in the Indictment.* It is clear that where discrepancies lie between the Indictment and the Pre-Trial Brief, the Indictment will prevail:

> "This court will not look at the [pre-trial briefs]..., it will look at the charge and the evidence which has been adduced not necessarily what has been stated in the trial briefs. The trial briefs are just statements which come from the parties, and, if they are not proven, I'm afraid the court will not go by them."[158] [Emphasis added]

165. In order for evidence to be probative of a count in the Indictment, it must allege criminal conduct at a location and within a timeframe specifically pleaded *in the Indictment.*

166. Evidence of criminal conduct in locations not specifically pleaded cannot be said to support the Indictment because locations must be specifically and exhaustively pleaded therein. The Defence recalls the findings of Trial Chamber II in the *AFRC* Case, where it held that "an accused is entitled to know the case against him and is entitled to assume that any list of alleged acts contained in an indictment is exhaustive, regardless of the inclusion of words such as 'including', which may imply that other unidentified crimes in other locations are being charged as well."[159]

167. In addition, evidence that criminal conduct occurred outside of the relevant timeframe pleaded in the Indictment also cannot be said to support charges against the Accused.

168. In both cases, the onus is on the Prosecution to prove beyond a reasonable doubt the guilt of the accused and, as such, that the conduct alleged supports the case charged in the Indictment. Where the evidence is vague as to the locations and/or date of the alleged criminal conduct, the Prosecution has failed to discharge the burden of proof.

169. Evidence which falls outside the scope of the Indictment in this way, cannot be included by reference to the Pre-Trial Brief. Alterations to the case pleaded in the Indictment

[158] T. 29/01/08, pg 24, line 1-10, *per* Justice Itoe.
[159] *AFRC* Trial Judgment at para 37.

can only be made by way of amendment of the indictment under Rule 50.[160] In such cases there can be no possibility of 'curing'. The ICTR explained as follows:

> "'curing' is the process by which vague and general allegations in an indictment are given specificity and clarity through communications other than the indictment itself. Only material facts which can be reasonably related to existing charges may be communicated in such a manner."[161] [Emphasis added]

ii) Inadequate Notice of Material Facts

170. Thus, the determination of guilt involves an examination of the evidence and *its relationship to the Indictment only*. However, it is also the case that "evidence may be excluded, in the Chamber's discretion, if it is not relevant or if the Accused lacked sufficient notice of the material facts underlying the allegations, thereby impairing his ability to prepare his defence".[162] This, stated the Chamber, involves a prima facie showing by the Defence that the "impugned evidence contained new allegations in respect of which the Accused had not previously been put on notice, either in the Indictment, in the Prosecution Pre-Trial Brief, Supplemental Pre-Trial Brief, or in other disclosure materials."[163]

171. The Kallon defence raised an objection to the practice of introducing of evidence without first having put the Accused on notice.[164]

172. The process of looking beyond the Indictment for notice of material facts is termed 'curing' and is a much-litigated area of the law. The indictment is the only accusatory instrument provided for in the Rules.[165] As such, 'curing' clearly represents a derogation from the Rules. As already explained, there is *no* provision for 'curing' where an allegation cannot be "reasonably related" to the indictment or for an allegation of physical perpetration against an accused. Remedying such defects can only be achieved through amendment of the Indictment.

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[160] The Appeals Chamber in *Ntakirutimana* indicated that the notification, in anything other than an amended indictment, is insufficient to put an accused on notice of any material facts subsequently discovered through Prosecution investigation. It held that where the material fact is "unknown at the time of the initial indictment, the Prosecution should make efforts through further investigation and seek to amend the indictment at the earliest possible opportunity." *Ntakirutimana* Appeal Judgment, at para 125, (emphasis added).

[161] *P v Bagosora et al.*, ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outisde the Scope of the Indictment, 15 Sept. 06, at para 4.

[162] *P.v. Sesay et al.*, SCSL-15-04-T, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 08, at para 16.

[163] *Id.*, at para 14.

[164] TFI 045, Transcript 22 November 2005, p. 21 lines 15-20; p. 25, p. 26 and p. 68

[165] See Rule 47(C) of the Rules.

173. The ICTR and the ICTY hold that an indictment, defective to the extent that it omits to plead a material fact, may be cured, in *exceptional* circumstances only, through the disclosure of "timely, clear and consistent information to the accused."[166] It is submitted that the information is not "consistent", where the material fact is disclosed in a solitary document; not "timely", where the disclosure was made too late to allow the Defence to investigate properly and cross-examine *all* witnesses in relation to the material fact; and not "clear" unless the material fact is set out unambiguously.

174. In the AFRC Trial Judgment, Trial Chamber II adopted substantially the same approach to that edicted in the Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment. However, it confirmed that the mere service of witness statements will not suffice to put an accused on notice of the material facts underpinning an allegation.[167] Trial Chamber II held as follows in the AFRC Trial Judgment:

> "A Trial Chamber must consider the Prosecution's pre-trial brief, its opening statement and disclosed evidence such as witness statements or potential exhibits...However, the [ICTY] Appeals Chamber also held that mere service of witness statements by the Prosecution in discharging its disclosure obligations does not automatically provide sufficient notice to the Defence"[168]

175. This finding was undisturbed by the Appeals Chamber. Thus, where material facts have not been disclosed in the Indictment or other pre-trial disclosure materials, the Accused has not received adequate notice of such material facts.

176. The distinction between a charge and a material fact was explained as follows in the *Ntabakuze* Decision: "[t]he count or charge is the legal characterisation of the material facts which support that count or charge", whereas material facts are "the acts or omissions of the Accused that give rise to that allegation of infringement of a legal prohibition".[169] For the most part, the Indictment and pre-trial pleadings merely track the language of the

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[166] The *Ntabakuze* Decision.; quoting *Kupreškić* Appeal Judgment, para 114; see also *Cyangugu* Appeal Judgment, para 114; *Muhimana* Trial Judgment, at para 452, (given the factual and legal complexity of the crimes tried at the *ad hoc* tribunals, "few Indictments with material defects are likely to be cured by information given to the Defence outside the Indictment").

[167] See also *P v. Bagosora et al.*, ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 06, at para 6; *Simic* Appeal Judgment, at para 24, ("the mere service of witness statements or of potential exhibits by the Prosecution . . . does not . . . suffice to inform the Defence of material facts."); *Niyitegeka* Appeal Judgment, at para 197; *Ntakirutimana* Appeal Judgment, at para 27; the *Ntabakuze* Decision, at para 35; *Naletilic* Appeal Judgment, at para 27.

[168] *AFRC* Trial Judgment, at para 48.

[169] The *Ntabakuze* Decision, at para 29. The particulars of an allegation that have been held to constitute material facts are discussed in the Motion, at para 20.

jurisprudence, alleging legal elements required to find an accused person guilty of the crimes pleaded therein. Thus, the pleadings describe charges. They do not plead material facts.[170]

177. "Material facts" which must be pleaded include:

a. the "identity of the victim, the time and place of the events and the means by which the acts were committed";[171]

b. "physical perpetrators";[172]

c. "the proximity of the accused to the relevant events,"[173] where physical perpetration of a crime is not alleged against the accused; and

d. "legal prerequisites to the application of the offences charged,"[174] and "the nature of the alleged criminal conduct charged," [175] as well as of the events alleged.

178. The Appeals Chamber has held that with regard to the "widespread nature and sheer scale of...alleged crimes" there is a "narrow exception" where it is "unnecessary and impracticable to require a high degree of specificity".[176] The discussion on this exception in relation to "vagueness and over breadth" is equally applicable here.[177]

e) CUMULATIVE EFFECT: VIOLATION OF ARTICLE 17

179. The Indictment embodies a shotgun form of prosecution. The only reasonable inference is that the Prosecution did not know its case before it went to trial and, in drafting the Indictment, attempted to keep open avenues of prosecution in order to accommodate a case coming to light in the course of ongoing investigations, in the absence of a discernible, concrete case against the Accused before trial.

180. Notwithstanding the prejudice caused by each of the defects from which the Indictment suffers, individually, it is submitted that, viewed in its totality, the cumulative

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[170] For example, paragraph 38 pleads, "by their acts or omissions" without specifying what those acts or omissions are, and the opening statement alleges "widespread and systematic attacks", (see, eg, T. 05/07/04, pg 24, line 16-18), and campaigns to "terrorise the civilian population", (see, eg, T. 05/07/04, pg 39, line 32-33), without notifying the Defence of the material facts with which it intends to establish those attacks or campaigns.

[171] *AFRC* Trial Judgment, at para 65.

[172] *P. v Gatete*, ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 04, at para 12-13.

[173] *Id;* see also *P. v. Brima et al*, SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 04, at para 29-33.

[174] AFRC Judgment, at para 65.

[175] *P. v. Stanisic*, IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 05, at para 5.

[176] *AFRC* Appeals Judgment, at para 41.

[177] *Supra.*

effect of this form of pleading, has caused the deepest prejudice to the Accused in the preparation of his defence.

181. The question of whether an accused receives a fair trial is integral to an inquiry into the sufficiency of pleading.[178] It is established law that a constantly shifting Prosecution case, which moulds itself according to the evidence which is adduced, contravenes the pleading requirements in a criminal trial and is inconsistent with the fundamental rights of the accused.[179]

182. It is further submitted that, notwithstanding any potential 'curing' of the Indictment, the Accused's right to a fair trial has been compromised by the sheer volume of defects from which the Indictment suffers as well as the volume of evidence on the record which is outside the Indictment. In contemplation of this issue in the *Ntabakuze* Decision, the Appeals Chamber held as follows:

> "The Appeals Chamber agrees that when the indictment suffers from numerous defects, there may still be a risk of prejudice to the accused even if the defects are found to be cured by post-indictment submissions. In particular, the accumulation of a large number of material facts not pled in the indictment reduces the clarity and relevancy of that indictment, which may have an impact on the ability of the accused to know the case he or she has to meet for purposes of preparing an adequate defence. Further, while the addition of a few material facts may not prejudice the Defence in the preparation of its case, the addition of numerous material facts increases the risk of prejudice as the Defence may not have sufficient time and resources to investigate properly all the new material facts. Thus, where a Trial Chamber considers that a defective indictment has been subsequently cured by the Prosecution, it should further consider whether the extent of the defects in the indictment materially prejudice an accused's right to a fair trial by hindering the preparation of a proper defence."[180]

183. In the absence of clear notice as to the nature of the Prosecution case, Mr Kallon's defence team has sought to address every allegation levelled by the Prosecution, in execution of its duties of competence and diligence to the client and to the Court. In so doing, the defence team's resources have been overstretched in a manner which is clearly prejudicial to the Accused. It is the right of the Accused to be informed precisely of the nature of the case to which he must answer. Instead, the case against the Accused has metamorphosed over the

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[178] See the *Ntabakuze* Decision, at para 23; quoting *Naletilić* Appeal Judgment, para 26; see also *Kvočka* Appeal Judgment, para 33; *Cyangugu* Appeal Judgement, para 28 ; *Krnojelac* Appeal Judgment, at para 130 and 139, where the Appeals Chamber suggested in that inadequate pleading and notice also violates the defendant's right "to have adequate time and facilities for the preparation of his defence"; suggesting *Kupreskic* Appeal Judgment, at para 100, ("the goal of expediency should never be allowed to over-ride the fundamental rights of the accused to a fair trial").

[179] *Krnojelac* Appeal Judgment, at para 117.

[180] *Ntabakuze* Decision, at para 26; see also *Cyangugu* Appeal Judgment, para 114.

course of the trial to the extent that, whether on a case-by-case basis the defects are deemed to have been 'cured' or not, the Accused's right to a fair and expeditious trial has been irreparably violated.

PART II: ABUSE OF PROCESS

Prosecution Intent to Secure Conviction at All Costs

184. Throughout its case, the witnesses led in support of the Prosecution case have been demonstrated to be dramatically bereft of credibility. Whilst this fatally undermines the case against the Second Accused, it also has severe implications for the integrity of the Prosecution. Aspects of the Prosecution case, such as the repeated provision of contradictory evidence, allegations of sweeping generality and evidence which is devoid of a credible and/or rational basis is described in the evidential analysis, *infra*.

185. TFI 360 admitted that his information provided to the Court was not a reflection of the truth and affirmed the suggestion of defence counsel that "We cannot know what to believe, can we, because you can't keep the same story?".[181] TFI 117 purported to be a eye-witness to a range grave criminal conduct committed by the Second Accused, but misidentified him in Court.[182]

186. These common issues to the Prosecution case, along with the demonstrable motivations of its witnesses to falsely incriminate the accused, suggest that the Prosecution has not undertaken more than most perfunctory investigations of its witnesses. However, issues such as the provision of incentives to witnesses for testimony and their methods of preparation, whereby consistent testimony is ensured from witnesses intent on purging themselves on the stand, suggests complicity and undermines the integrity of the prosecutorial process in this case. Witnesses' repeated and dogmatic denials that they were lying, when confronted with the clearest demonstrations on the facts, does not rebut the suggestion.

187. TFI 366 confirmed that he had gone over his statement with members of the OTP 30 or 40 times, prior to testifying, and characterised the interviewing, and so called "proofing" process, as exam preparation. He suggested in the clearest terms that he studied his statements in order to ensure the consistency of his evidence.[183] TFI 141 stated: "I have met with the

[181] Transcript 26 July 2005, p.104 lines 8 - 10
[182] Transcript 30 June 2006, p. 49 line 18 – p. 52 line 12
[183] Transcript 10 November 2005, p.68 lines 7-21

Prosecution many times"[184] and that he used to "rehearse"[185] his statements, indicating that his meetings went outside the scope of the supposed "proofing" process.

188. There is clear evidence on the record of illegitimate incentives provided to Prosecution witnesses by the witness management section of the Prosecution, a wing of the office of Prosecutor whose exact remit is unclear. The incentives are a clear abuse of the powers granted under Rule 34, which is to provide "*appropriate* assistance".[186] Evidence was elicited from witnesses for the Prosecution which suggests that benefits that they received occasioned material improvement in their living conditions, which went far beyond "appropriate assistance", which translated into a clear a commitment to incriminate the Accused. TFI 366 testified that prior to his that he had been living in Freetown, at the expense of the Prosecution for over a year prior to his testimony[187] and confirmed his eagerness to continue the relationship with the OTP as follows: "Whenever they call upon me, I will be available."[188] TFI 159 testified that he received $15,101.31 from the Prosecution, in order to "resettle the family".[189] Additional records disclosed to the Defence evidence large payments to Prosecution witnesses for unspecific reasons: TFI 371 received $200 for "information on leads for potential witnesses" and TFI 151 received $2,623 for "maintenance", "clothing and luggage", "meals" and "purchase of fuel" within a period of one week.[190]

189. These payments are completely disproportionate to the official reasons proferred and they amount an abuse of the mandate of the Prosecution. Furthermore, they evince a commitment on the part of the Prosecution to secure a conviction at all costs.

Failure to State its Case

190. The Prosecution's failure to state its case amounts to a flagrant abuse of process, which has caused the clearest prejudice to the Second Accused. The vagueness and overbreadth of the Indictment and, in other respects, the volume of defects from which the Indictment, mean that the Second Accused has not been informed of the case to which he must answer. Furthermore, the Prosecution has moulded its case against the Accused throughout the trial in relation to critical aspects of the case against the Accused. The

[184] Transcript 14 April 2005 p.11 line 9
[185] Transcript 15 April 2005 p.9 lines 8-12
[186] Rule 34(A)(iii) of the Rules.
[187] Transcript 10 November 2005, p. 77 line 24 – p. 78 line 9.
[188] Transcript 10 November 2005, p. 79 lines 18-20.
[189] Transcript 7 October 2004, p. 28, lines 1-4
[190] See *P v. Sesay et al.*,SCSL-04-15-T-1161, Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses, 30 May 08, Annex B, p. B-15, p. C-3, and p.

Prosecution has abandoned its case against the Accused in Freetown, having alleged that he was there during the invasion in 1999.[191] Furthermore, at different times throughout the trial the Prosecution have sought to establish that, in Kono District, the Second Accused was overall commander,[192] deputy overall commander to Superman[193] and with an unspecified level of responsibility.[194] This is the same Prosecution that argued in the *AFRC* Case that Superman was overall commander to Kamara in Kono. Therein lies an inescapable contradiction in the prosecution of two different people in the same command position, notwithstanding their separate trials. It is submitted that the OTP's failure to state its case in relation to highly material aspects of its case have caused serious prejudice to the Accused, amounting to an abuse of process.

191. On 30 June 2008, the Prosecution informed Chambers of a grave breach of security protocol whereby files belonging to the Kallon Defence team were discovered on the Prosecution computer network.[195] As the Chamber was seized of the matter, the Kallon defence team elected not to file a contemporaneous motion. The Registrar wrote to the Kallon Defence and the Prosecution promising that the wrongly-disclosed material would be turned over to the Kallon Defence.[196] The material remains undisclosed. Considering that the Chief of Prosecutions has seized the Chamber of this matter, the Kallon Defence has confidence that the Chamber was take this into account when considering the overall integrity of these proceedings.

192. It is submitted that the foregoing, individually and collectively, constitute an abuse of process, striking at the integrity of the proceedings and, in light of that, respectfully pray that the Indictment be vacated.

PART III: SUBSTANTIVE ISSUES

1) PROSECUTION MOTION TO AMEND THE INDICTMENT

[191] Supplemental Pre-Trial Brief, at para 353(d); see also DIS218, Transcript 12 November 2007, p. 117-p.118.
[192] TFI 366, Transcript 31 July 2006, pg 135, line 8-10; and TFI 371, Transcript 8 November 2005, p. 37 lines 15-23.
[193] TFI 360, Transcript 20 July 2005, p. 15 lines 17-19; and TFI 361, Transcript 12 July 2005, p. 8 lines 23-27.
[194] TFI 071, Transcript 26 January 2005 (unredacted), pg 24, line 14-19; and George Johnson, Transcript 14 October/04, pg 55, line 14-16.
[195] Letter of 30 June 2008, from James Johnson to Trial Chamber I and the Kallon Defence team.
[196] Letter of 3 July 2008.

193. On 20 February 2006, the Prosecution made an application to extend timeframes pleaded in the Amended Consolidated Indictment[197] The proposed amendment would have extended the timeframes from 30 June 1998 to 31 January 2000[198] of crimes alleged in Kono District in respect of all the counts in the Amended Consolidated Indictment, except the category of counts denominated "sexual violence".

194. The Chamber dismissed the application.[199] In so doing, it observed a "divergence or discrepancy between the evidence adduced on highly contentious matters and the allegations as to material times in respect of such matters in the [Amended Consolidated] Indictment";[200] it recognised that the application amounted to a request for judicial reconciliation of that "divergence or discrepancy";[201] and it held that to allow the Prosecution to expand the "scope and extent of the charges" against the three accused persons would offend Article 17 of the Statute.[202] The relevant sections of the Amended Consolidated Indictment survived in the Indictment.[203] Thus, the case which the Defence is on notice that it must answer, remains unchanged. It is submitted that the Chamber has, thus, recognised evidence on the record which is outside the scope of the Indictment and that such evidence threatens the right of the Accused.

195. Furthermore, it is submitted that, although the scope of the aforementioned Prosecution application was limited to timeframes in Kono District, evidence exists on the record which represents as much of a divergence or discrepancy, in relation to other crime bases and/or other material facts, from the Prosecution case as set forth in the Indictment, as the evidence in issue before the Chamber in the aforementioned decision. It is submitted that the Chamber should adopt the same approach in every case. There is no logical or legal basis to suggest otherwise.

2) CONDITIONS PRECEDENT TO CONVICTIONS UNDER ARTICLES 2 TO 4

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[197] The operative indictment at the time.
[198] *P v. Sesay et al.*, SCSL-04-15-T-488, Prosecution Application for Leave to Amend the Indictment, 20 Feb. 06
[199] *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06.
[200] *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06, at para 37.
[201] *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06, at para 37.
[202] *P v. Sesay et al.*, SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06, at para 33.
[203] The Indictment differs from the Amended Consolidated Indictment in respect of a single word which is has bearing only upon the case against Mr Gbao

196. As discussed, *supra*, the Prosecution must establish the existence of an armed conflict in order to sustain a conviction under Article 3 of the Statute. The additional chapeau elements which the Prosecution must prove as prerequisites to a finding of guilt under Article 3 of the Statute are (i) a nexus between the alleged violation and the armed conflict; and (ii) that the victim was a person taking no direct part in the hostilities at the time of the alleged violation.[204]

197. In the Rule 98 decision, the Chamber found that the common elements of the category of offences punishable under Article 4 of the Statute, (other serious violations of international humanitarian law) were: (i) the existence of an armed conflict at the time of the alleged violation; and (ii) a nexus between the alleged violation and the armed conflict.[205] However, it is submitted that it is still necessary for the Prosecution to prove that the victim was a person taking no direct part in the hostilities at the time of the alleged violation, as with Article 3 offences, and that the Chamber's omission of this crucial condition precedent was because the categories of victims are identified as such in each of the three substantive offences enumerated in Article 4.[206] The Defence relies on the *AFRC* Trial Judgment, whose finding was undisturbed on appeal, that "[t]he crimes listed in Article 4 of the Statute possess the same chapeau requirements as those under Article 3 of the Statute".[207]

198. The Chamber has found that the elements common to the offences proscribed under Article 2, crimes against humanity are (i) an attack; (ii) the attack must be widespread and systematic; (iii) directed against a civilian population; (iv) the acts of the accused must be a part of the attack; and (v) 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.[208]

a. EXISTENCE OF AN ARMED CONFLICT

199. As already stated, the Indictment charges the Accused with the commission of offences in contravention of Article 3 of the Statute under Counts 1, 2, 5, 9, 10, 14, 17 and 18.

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[204] Rule 98 Oral Decision, Transcript 25 October 2006, p. 15 lines 3–7.
[205] Rule 98 Oral Decision, Transcript 25 October 2006, p. 16 lines 1–4.
[206] The category of victims under Art. 4(a) is "the civilian population as such or...individual civilians not taking direct part in hostilities"; under Art. 4(b) is "personnel...involved in humanitarian assistance of peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitiled to protection given to civilians or civilian objects under the international law of armed conflicts"; and under Art. 4(c) is "children...under the age of 15".
[207] At para 257.
[208] Rule 98 Oral Decision, T. 25/10/06, pg 14, line 8–16.

For failure to correctly identify legal basis, it is submitted that the pleading of these counts is defective. Notwithstanding, the Defence submits that the Prosecution has failed to establish, evidentially, the existence of an armed conflict at all times relevant to the Indictment, as pleaded.[209] All of the offences charged in this category are regulated, to an extent, by Protocol II. Counts 5, 9, 10, 17 and 18 could be said to be regulated by both Common Article 3 and Protocol II. In which case, and in the absence of any clear statement in the Indictment as to the body of law upon which it relies, it is submitted that the Prosecution must prove the existence of the higher-threshold type of armed conflict. Therefore, the Prosecution must prove that a Protocol II type armed conflict existed at the time of the alleged violation.

200. It is the Defence case that the situation in Sierra Leone is not characterised as a Protocol II type armed conflict during the junta period, 25 May 1997 to March 1998, and at the time of the alleged acts pursuant to which Counts 15 to 18 are charged. Notwithstanding, the Defence maintains that the Prosecution must establish, to the satisfaction of the Chamber, that an armed conflict existed concurrently with *all* of the crimes charged, in order for it to prove its case. The Defence observes that the jurisprudence of Trial Chamber II on the matter is of no significance, as the parties reached formal agreement that "at all times relevant to the Indictment, a state of armed conflict existed throughout the territory of Sierra Leone", as reported in the *AFRC* Trial Judgment.[210] Likewise, in the *CDF* Case the Chamber took judicial notice of the fact that "'the armed conflict in Sierra Leone occurred from March 1991 until January 2002'"[211] and it was unopposed by the Defence.[212] Therefore, the question of whether an armed conflict existed at given times during the temporal jurisdiction of the Special Court is yet to be litigated as a contentious issue.

201. The Defence notes that, pursuant a Prosecution application in this case, the Chamber took judicial notice that "the conflict existed in Sierra Leone from March 1991 until January 2002".[213] It is submitted that this is legally insignificant to applicability of international humanitarian law which employs precise language in requiring the existence of an *armed* conflict as a pre-requisite to criminal liability.

202. The Defence recalls that a Protocol II type armed conflict is (i) violently intense or at a

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[209] The Indictment, at para 5.
[210] At para 249.
[211] CDF Trial Judgment, at para 696; citing *P v. Norman et al.*, SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 June 04.
[212] Only the Accused Norman responded to the Prosecution motion and he did not oppose the motion in respect of the aforementioned fact, *P v. Norman et al.*, SCSL-04-14-PT, Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence, 2 June 04, at pg 1 and para 9, respectively.
[213] *P v, Sesay et al.*, SCSL-04-15-PT-174, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence, 24 June 04, Annex I, Fact A.

high level; (ii) between armed forces of a state and dissident armed forces or other armed groups; (iii) conducted under responsible command of armed groups that exercise control over enough territory to carry out sustained and concerted military operations not excluding hit-and-run type operations.

3) ARTICLE 6(3) RESPONSIBILITY

a) LEGAL PRINCIPLES

203. The legal standard which must be met by proof beyond a reasonable doubt in order to find an accused guilty of a crime under the Statute by way of command responsibility was articulated by ICTR in *Blaskic*. It compromises a three limb test: (i) the existence of a superior-subordinate relationship of *effective* control; (ii) the accused knew, or had reason to know of his subordinates crimes; and (iii) the accused failed to take necessary measures to prevent or punish. [214]

204. The doctrine of command responsibility is a mechanism peculiar to the body of law governing armed conflict. It extends the reach of criminal liability beyond the physical perpetrator of a criminal act to the physical perpetrator's superior or commander, in times of armed conflict. The jurisprudence is clear that what is required to establish command responsibility is much more than the existence of a superior-subordinate relationship. This is because the pool potential actors, in respect of whose conduct a superior may be held criminally responsible, may be all but infinite. As was recognised by the United States Military Tribunal at Nuremberg, the President of the United States of America, as the commander-in-chief of the armed forces, cannot be "charged" with the "[c]riminal acts committed by those forces". [215]

205. Mindful of that, the existence of the superior-subordinate relationship must be accompanied by a fault element. The war-time context in which prosecutions at tribunals adjudicating International Criminal law necessarily proceed mean that the commander in

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[214] *Blaskic* Trial Judgment, at para 294; see also Statute of the ICC, Art. 28(a), which states that: "A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the [International Criminal] Court committed by forces under his or her effective control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where: (i) That military commander or person either knew or, owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and (ii) That the military commander or person 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."

[215] The German High Command Trial, at pg 76.

question makes his decisions in the heat of battle. It is submitted that International Humanitarian law does not require the commander to be able to differentiate as to whether *marginal* conduct is lawful or not, particularly in light of the *ex post facto* Statute according to which judgments at the Special Court are rendered. It is submitted that some clear dereliction of a legal duty is required.[216]

206. It is submitted that a "special personal dereliction" on the part of a superior is a necessary ingredient in finding his criminal responsibility for the acts of his subordinates. Furthermore, not every dereliction by a commander will attract criminal liability.[217] In the case of an affirmative act, that act must be directly traceable to the accused. In the case of an omission, criminal responsibility can only flow from a failure to act which amounts to criminal negligence:

> "Criminality does not attach to every individual in the chain of command from that fact alone. There must be dereliction. That can occur only where the act is directly traceable to him or where his failure properly to supervise his subordinates constitutes criminal negligence on his part. In the later case, it must be a personal act amounting to wanton immoral disregard of the action of his subordinates amounting to acquiescence. Any other interpretation of International law would go far beyond the basic principles of criminal law as known to civilized nations".[218]

i) An Accused Will Only be Responsible for the Actions of Subordinates Over Whom He Had Effective Control

207. In recognising that the "doctrine of command responsibility is ultimately predicated upon the power of the superior to control the acts of his subordinates",[219] the requirement of "effective control" was established in the *Celebici* case. As explained by Trial Chamber II, *de jure* authority is irrelevant and what counts is whether the "superior possessed the material abiliy to prevent or punish the commission of the offence".[220]

208. The Trial Chamber of the ICTY in *Celebici* warned against findings of individual criminal responsibility under Article 6(3) in cases "where the link of control is either absent or too remote".[221] The Appeals Chamber scrupulously examined the degree of control required and settled on "effective control". In so doing it rejected the Prosecution proposition

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[216] The USMT explains this requirement of "dereliction" in terms of moral obligations. See *id.*, at pg 74-75, where criminal responsibility may be grounded in a "personal breach of a moral obligation".
[217] Bassett Moore J., "A Digest on International Law, Vol. 7", at pg 187-190.
[218] The German High Command Trial, at pg 76.
[219] *Celebici* Trial Judgment, at para 377.
[220] *AFRC* Trial Judgment, at para 784.
[221] *Celebici* Trial Judgment, at para 377.

that "substantial influence" was sufficient.[222] It explained the meaning of "effective control" as follows:

> "The concept of effective control over subordinates- in the sense of a material ability to prevent or punish criminal conduct, however that control is exercised- is the threshold to be reached in establishing a superior–subordinate relationship for the purpose of Article 7(3) of Statute."[223]

209. The Appeals Chamber of the Special Court has established similar yardsticks governing command responsibility, by relying on the same or similar jurisprudence as above. According to the Appeals Chamber,[224] "a superior is one who possesses the power or authority to either prevent a subordinate's crimes or punish the subordinate after the crime has been committed. The power or authority may arise from a *de jure* or a *de facto* command relationship." It goes further to state that "whether it is *de jure* or *de facto,* the superior-subordinate relationship must be one of effective control, however short or temporary in nature. Effective control refers to the material ability to prevent or punish criminal conduct. The test of effective control is the same for both military and civilian superiors."[225] The Appeals Chamber also indicated that, "[s]ubstantial influence" or "persuasive ability" which falls short of effective control is insufficient for a finding of superior responsibility. A finding that a superior exercised effective control is a question of fact to be determined on a case-by-case basis."[226]

210. Moreover, the Defence for the second accused avers that "general influence" does not, *per se*, satisfy the legal requirements of command responsibility. In *Semanza*,[227] the Trial Chamber expressly held that: "Effective control means the material ability to prevent the commission of the offence or to punish the principal offenders. This requirement is not satisfied by a simple showing of an accused individual's general influence."

211. Besides, in *Bagilishema*,[228] the Trial Chamber held that command responsibility cannot be established with reference to "position" or "rank" alone. In particular, the Chamber stated that: "[t]he factor that determines liability is the actual possession, or non-possession, of a position of command over subordinates. Therefore, although a person's de jure position as a commander in certain circumstances may be sufficient to invoke responsibility under Article 6(3), ultimately it is the actual relationship of command (whether de jure or de facto)

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[222] *Celebici* Appeal Judgment, at 266.
[223] *Celebici* Appeal Judgment, at 256; see also *Kayishema* Trial Judgment, at para 229-331.
[224] *AFRC* Appeal Judgment, para. 257.
[225] *Id.*.
[226] *AFRC* Appeal Judgment, at para 289.
[227] *Semanza*, Trial Judgment, para 402.
[228] *Bagilishema,* Trial Judgment, para. 38.

that is required for command responsibility. The decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates."[229] It is the contention of the Defence for the Second Accused that the purported positions or ranks attributed to the second accused by the Prosecution are irrelevant if he did not exercise *de jure* or *de facto* control over troops, in the sense that position or rank is not indicative of control.

ii) The Accused Failed to Take Necessary Measures to Prevent or Punish

212. The inquiry into whether necessary measures taken should be considered in the context of an accused's actual ability to exercise prevention or punishment in respect of subordinates whose acts the accused is charged with. The ICTR in *Bagilishema* held as follows:

> "A superior must be held responsibility for failing to take only such measures that were within his or his powers. Indeed, it is the commander's degree of effective control - his or her material ability to control subordinates - which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop or punish the subordinates' crimes. Such a material ability must not be considered abstractly but must be evaluated on a case-by-case basis, considering all the circumstances."[230]

iii) The Second Accused and the Doctrine of Command Responsibility in the Context of the Sierra Leone Civil War

213. The nature of the conflict which inflicted Sierra Leone from 1991 to 2002 was such that personnel were sent to the frontline with a minimal amount of training. In such circumstances there is potential for elements of the belligerent forces to abrogate from the principles according to which operations should be conducted and, it is submitted that that potential was realised in the ranks of the RUF. Furthermore, individualistic agendas were developed among certain rogue RUF commanders. In many cases these were contradictory to the RUF ideology. Those commanders used the RUF rank and file to implement their agendas. In circumstances such as these, fixing all commanders with criminal responsibility for all subordinates is neither logical nor just. It is particularly important in this case that criminal liability is found only in respect of acts which can be traced *directly* back to the

[229] *Bagilishema,* Trial Judgment, para. 38.
[230] *Bagilishema* Trial Judgment, at para. 48. See also Statute of the ICC, Art. 28(a).

Accused or which flow *directly* from some dereliction on the part of the Accused, where so-called rogue elements of the RUF, beyond the control of the Accused, operated freely for a large part of the period which the Indictment covers. It is mindful of these considerations that the Chamber should apply the doctrine of command responsibility. Mr Kallon cannot be found guilty for acts of subordinates over whom he did not have effective control, nor in respect of such acts of which he could not have had any knowledge, nor in respect of such acts in relation to which he took the appropriate measures to prevent or punish or which acts he was powerless to prevent.

4) EVIDENTIARY ISSUES

a) RELEVANCE AND PROBATIVE VALUE

214. The practice of the Chamber; just like all other International Criminal Tribunals has been a flexible approach to the admission of evidence during trial. The guiding principle is in Rule 89 which confers on the Chamber, the power to admit all relevant evidence.[231] That flexibility is however somewhat limited by 89(B) which provides that the Chamber shall apply the "[r]ules of evidence which best favour a fair determination of the matter before it and are consonant with the spirit of the statute and the general principles of law". [232]

215. At the end of the Trial, it is incumbent on the Chamber to assess the probative value of all the evidence that has been adduced. Mere admissibility is therefore not in itself conclusive and where the probative value of the evidence is outweighed by the need to answer a fair trial, the evidence should be disregarded.[233] In evaluating probative value and weight to be attached to a piece of evidence, one of the key considerations is reliability. Although reliability is determined on a case by case basis, the Chamber will however generally look at the circumstances, under which the evidence was generated, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness and trustworthiness of the evidence.[234]

216. This Trial Chamber stated in the *CDF* Trial Judgment that in assessing the credibility and reliability of oral witness testimony, the Chamber has to consider factors such as the

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[231] Rule 89(C) of the Rules.
[232] Rule 89(B) of the Rules.
[233] *Prosecutor v Tadic*, IT-94-1, Decision on Defence Motion on Hearsay, August 5 1996, para 18 and Rule 95 generally: " Exclusion of Evidence- No evidence shall be admitted if its admission would bring the administration of Justice into serious disrepute".
[234] *See Archibald International Criminal Courts*, Practice and Procedure, 2002, pg253,9-12b

internal consistency of the witness' testimony, its consistency with the other evidence in the case, any personal interest a witness may have that may influence his motivation to tell the truth, as well as observational criteria such as the witness demeanour, conduct and character.[235]

i) Corroboration

217. Generally, there is no requirement in the *ad hoc* tribunals that every piece of evidence must be corroborated. In the *Musema* case the ICTR Appeals Chamber stated that whereas corroboration was not a requirement, considerations of credibility and probative value of a single witness's testimony are important.[236] The Appeals Chamber in that case cited the Trial Chamber decision with approval which had held that "... it may rule on the basis of a single witness testimony if, in its opinion, that testimony is relevant and credible."[237] The Chamber had further stated that:

> [....] it is proper to infer that the ability of the Chamber to rule on the basis of testimonies and other evidence is not bound by any rule of corroboration, but rather on the Chamber's own assessment of the probative value of the evidence before it.The Chamber may freely assess the relevance and credibility of all evidence presented to it. The Chamber notes that this freedom to assess evidence extends even to those testimonies which are corroborated: the corroboration of testimonies, even by many witnesses, does not establish absolutely the credibility of those testimonies.[238]

218. This Trial Chamber however stated in the *CDF* Trial Judgment that "while the testimony of a single witness on a material fact does not as a matter of law require corroboration, it has been the practice of the Chamber to examine such evidence very carefully and in light of the overall evidence adduced before placing reliance upon it."[239]

219. The Defence agrees that while Judges have wide discretion to rely on a single witness to an event, such discretion must be exercised judiciously and with the greatest of caution. In order to rely on a single witness, such witness must be of the highest reliability and his testimony of the greatest probative value. The fact that a witness is seen to give evidence honestly is not in itself sufficient to establish the reliability of that evidence. The issue is not merely whether the evidence of a witness is honest; it is also whether the evidence is

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[235] *CDF* Trial Judgment, para 256
[236] *Musema* Appeals Judgment, para 37
[237] *CDF* Trial Judgment, para 43.
[238] *Ibid*, paras, 45 to 46
[239] *CDF* Trial Judgment, para 265; *Blagojevic* Trial Judgment, para 23.

objectively reliable.[240] There should be no reasonable doubt regarding the credibility of the witness regarding any material aspect of such witness's testimony. The defence respectfully submits that to require less of any witness would be tantamount to lowering the standard of proof in criminal cases.

220. The Defence however hastens to add that corroboration *per-se* does not necessarily confer reliability. The Chamber must always subject all testimonies whether corroborated or not to a thorough scrutiny to ensure they attain the highest levels of reliability and truthfulness. In the present proceedings, the Chamber is respectfully urged to evaluate the testimonies of several of the Prosecution witnesses with abundant caution given the nature of their testimony and the status of several of them as accomplices.

221. The Prosecution testimonies are full of internal inconsistencies on fundamental issues affecting the accused's responsibility. The Prosecution's main theories also contradict each other in all material aspects.

222. For practically all the events recounted involving the Second Accused every witness provides his version which contradicts other witnesses on the same issue. Indeed, every witness has his own series of stories to tell that are *unrelated* to others or are not corroborated. Examples are TF1-360 and 366 who for instance purport to place the Second Accused in Makeni during the retreat but recount events in Makeni, in different almost contradictory terms; TFI-361 who on the other hand though together with 360 in Makeni says Kallon was never in Makeni during the retreat but in Liberia and that Kallon came to Koidu a week after the retreating forces had arrived in Koidu. Also TF1-371 who says Kallon went with JPK to Buedu from Koidu and only went back to Kono after about 2 months, while TFI-360, 361 and 366 say the Second Accused was in Kono throughout the indictment period. Also TFI-360 and 361 who say Kallon was Deputy to Superman in Kono while TFI-366 and 371 say Kallon was overall commander. Both versions are contradicted by TFI-071 who is clear Kallon was merely a senior officer and never overall commander or Deputy to Superman .Witness TFI-071 is on the other hand supported by witness George Johnson who comprehensively tabulates the command structure in Koidu after the retreat from Freetown.[241](Details of these issues are discussed in the section on credibility of prosecution witnesses)

223. The Defence respectfully urges the Chamber to adopt the position in the *CDF* Case that "corroboration, although not required in law, was deemed necessary where the Chamber

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[240] *CDF* Trial Judgment, para 257

[241] Details of these contradictions are discussed and appropriate transcript references provided throughout the Brief.

found that internal inconsistencies and contradiction with other evidence demonstrated a poor, selective, or tainted recollections of the event ... The Chamber has accepted the evidence given in this vein only where elsewhere corroborated."[242]

224. Corroboration is particularly important with regard to accomplices whose testimony is ordinarily treated with caution. In the *Ntagerura* Judgment, in analyzing the testimonies of accomplices, the Chamber cautioned itself with regard to various witnesses and stated as follows;

> "The Chamber notes that witness LAI is an alleged accomplice of the Second accused and, as such, views his testimony with caution. Witness LAI was the sole witness to testify about this event. The Chamber has considered the totality of the evidence provided by witness LAI and has found that he lacks credibility in relation to other allegations. ---The Chamber also harbours doubts about his credibility in relation to these events. In particular, the Chamber notes the inconsistencies between his testimony and his prior statement, which were raised during cross-examination."[243]

ii) Principle of Orality vs Notice to the Accused

225. Throughout the Trial, the Chamber placed a high premium on the principle of orality. The Defence submits that this principle works perfectly well where an indictment is clear and the role of the accused is concisely and unambiguously set out. However where the Indictment and Pre-Trial Brief are far from clear regarding the conduct underlying the accused's criminal responsibility, disclosure of information through witness statements then inevitably becomes the only means (albeit deficient) through which the accused is notified of the case against him.

226. Prior witness statements therefore are an essential aspect of the process if the accused is ever to ascertain, even though inadequately, what the case against him is. In these circumstances, emphasizing the principle of orality at the expense of the need to notify the accused of the charges against him would seem to be a violation of the accused's rights under the Statute.

227. The Defence respectfully submits that in applying the principle of orality in the evaluation of the case against the Second Accused, an appropriate balance should be struck between the statutory prosecutorial obligation to inform the accused promptly of the charges facing him and the court's preference for oral testimony before the Chamber. Where there is divergence between a witness statement and his/her oral testimony on a material aspect of the case, the Chamber is respectfully urged to disregard the witness' testimony

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[242] *CDF* Trial Judgment, para 283

[243] *Cyangugu* Trial Judgment, para 108 and 113

iii) Unexplained Inconsistencies

228. The Defence further submits that where there is an unexplained divergence; of a fundamental nature-between a witness' prior statement and his oral testimony in court, the Chamber should find the oral testimony unreliable and without probative value. In this regard the ICTY Appeals Chamber in *Kupreskic* stated:

> "The Jurisprudence of this Tribunal clearly recognizes that a Trial Chamber is at liberty to accept a witness's evidence notwithstanding inconsistent prior statement. *It is a different matter, however, where it is clear that the Trial Chamber has failed to address material discrepancies.* The Appeals Chamber accepts that, generally, the mere fact that the Trial Chamber fails to refer to a discrepancy does not necessary mean that it has not been considered. *However, in this case, the Trial Chamber clearly listed the discrepancies it took into account and it is apparent from this list of discrepancies that there were several important omissions."* [Emphasis added][244]

229. The Chamber in *Kupreskic* considered a number of instances where prior inconsistent statements rendered the testimony of a witness unreliable; for instance where a witness sought to introduce new details to support her claim;

> "Thus the significance of this discrepancy lies in the possibility that, between December 1993 and September 1998, witness H introduced into her version of events, new details supporting her claim that familiar people (i.e., her neighbours) must have been involved in the attack. This is a material inconsistency and the Trial Chamber erred in categorizing it as merely a discrepancy as to whether Witness H's father had a rifle or not."[245]

230. In another scenario the Chamber noted that;

> "... although a Trial Chamber is at liberty to accept a witness' evidence notwithstanding prior inconsistent statement, in this case the Trial Chamber erred in failing to consider material discrepancies going directly to her identification of the Defendants. She changed the circumstances surrounding her father's departure from the shelter and introduced into her account of the events new details suggesting that the assailants knew her father by name. She altered her version of events from one where she had a very limited opportunity to identify Zoran Kupreskic from a difficult angle on a single, fleeting, occasion, to one where she saw him twice and has a face-face conversation with him. She also implicated an additional member of the Kupreskic family in the attack."[246]

231. Practically all Prosecution witnesses in this case recount events in a manner materially different from their previous written statements. This will be highlighted in the detailed analyses of several Prosecution witnesses elsewhere in this brief. The most notorious of such

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[244] *Kupreskic* Appeal Judgment, para 156-157.
[245] *Kupreskic* Appeal Judgment, para 159
[246] *Kupreskic* Appeal Judgment, para 160

witnesses in the case are TFI 366 who for instance vehemently denied an elaborately recorded statement taken from him in respect of an alleged trip to Monrovia, TFI 045 who admitted he lied to Prosecution in relation to information provided in earlier statements, TFI 361 who admitted he had in an earlier statement told the prosecution he did not know much about the Second Accused and indeed he (Kallon) did not have any area of responsibility hence had no radio thus contradicting his oral testimony in which he sought to magnify Kallon's role and purported command position, witness TFI 141 who denied virtually all of his earlier witness statements because they materially contradicted his oral testimony, TFI 360 who in an earlier statement had said that during the retreat he arrived in Koidu after Sesay had left for Kailuhun but in court sought to place Sesay in Koidu holding meetings attended by the witness, George Johnson who in an earlier statement had stated his involvement in atrocities in Masiaka during the advancement to Freetown in December 1998, but in court sought to deny his presence. Others are TFI 035, 371, 071, 036, 367 and 041.The contradictions between these witnesses's statements and their oral testimonies relate not to minor issues but fundamental and material aspects of their testimonies.

iv) Witnesses who Minimise Their Own Role

232. As demonstrated in the analysis of key witnesses below, many of the 'accomplice' witnesses who testified against Kallon were not truthful regarding their roles in the events or crimes which they testified to. They characteristically seized every opportunity to invent new allegations against the accused and sought to minimize their own roles in the crimes.

233. International criminal law has identified such witnesses as deserving caution in the assessment of their testimony. The Trial Chamber in *Kupreskic* stated:

> "Given that the Trial Chamber in *Kordic* found that witness AT could not bring himself to tell the truth about his involvement in the Ahmi attack, the Appeals Chamber concludes that he is not a reliable witness for the purpose of Josipovi's appeal. Josipovi does not seek to rely on Witness AT's evidence as to the preparation and planning of the attack. Rather he attempts to rely on witness AT's statements about what happened and which individuals were present during the attack that witness AT himself was involved in, namely the (puul) house. If Witness AT was untruthful as to his own role, it follows that he is not a sufficiently reliable witness as to the involvement or non-involvement of other individuals in the attack."[247]

234. In the *Media case*, in analyzing the testimony of Serushago, the Chamber equally noted that: "In his statements, Serushago also tended to minimize his own participation in the

[247] *Kupreskic* Appeal Judgment, para 346

events recounted."[248] The Chamber thus stated that in the absence of corroboration it would not rely on Serushago's testimony.[249]

v) Accomplices

235. The SCSL Appeals Chamber has held that "in assessing the reliability of accomplice evidence, the main consideration for the Trial Chamber should be whether or not the accomplice has an ulterior motive to testify as he did."[250] The Appeals Chamber also opined that "there is no requirement that in order to qualify as an accomplice, a witness must have been charged with a specific offence."[251]

236. Similarly this Trial Chamber in the *CDF* Case noted with regards to insider witnesses that;

> " ...these are witnesses who themselves operated either within the CDF inner circle, or at a fairly high level within the overall CDF structure. The Chamber recalls particularly the evidence of Witnesses... Many of these witnesses were directly involved as key participants in the events alleged in the Indictment. With this category of witnesses, who could be considered as co-perpetrators or accomplices, a trier of fact has to exercise particular caution in examining every detail of the witnesses' testimony..." [252]

237. Other international criminal tribunals have also exercised caution in evaluating the testimony of accomplice witnesses. These are witnesses who are considered "associates in guilt, partners in crime."[253] In *Niyitegeka* the ICTR Appeals Chamber while noting that nothing in the Rules of the Tribunal prohibited the Chamber from the relying upon partners in crime[254].....however considering that accomplice witnesses may have motives or incentive to implicate the accused person before the Tribunal, a Chamber, when weighing the probative value of such testimony, is bound to carefully consider the totality of the circumstances in which it was tendered.[255] The Trial Chamber in the *Cyangugu* case had this to say in respect of such witnesses:

> "The Chamber recalls that Witnesses LAI, LAJ, and LAP are alleged accomplices of the accused and, as such, views their testimonies with caution.

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[248] Media Judgment, ICTY Case NO. IT-95-16-A, Prosecutor v Zoran Kupreki and others. Para 821, 6th sentence.
[249] *Media* Trial Judgment, para 824
[250] *AFRC* Appeal Judgment, para 128
[251] Id.,para. 127.
[252] *CDF* Trial Judgment, para 278
[253] Oxford English Dictionary (2nd ed) adopted in *Niyitegeka* Appeal Judgment, at para 98
[254] Rule 89(C) of the Rules
[255] *Kordic* Trial Judgment, para 629; see also *Media* Trial Judgment, para 824

> The Chamber further observes that Witnesses LAI, LAJ and LAP know each other and that they were detained together in Rwanda."[256]

238. Almost all the witnesses who gave the most incriminating testimonies against Kallon fall in the "insider" category and several if not all fit the description of "accomplice." Notable examples are TF1-366, 360, 361, 367, 045, 371, 041, 071, 036, 174, 184, 334 and 167.The Chamber is urged to treat the testimonies of these witnesses with extreme caution and where *not credibly* corroborated,disregard their testimonies.

vi) Hearsay

239. Although admissibility of hearsay is not excluded in the international tribunals, the Chamber is enjoined to scrutinize its reliability and weight at this stage of the proceedings. While hearsay evidence is not inadmissible *per se*, it is considered with caution.[257] In *Akayesu,* the Trial Chamber stated:

> The admission of a hearsay statement does not necessarily imply that it accepts it as reliable and probative. These are qualities which a Trial Chamber will freely consider at the end of Trial when weighing and evaluating the evidence as a whole, in light of the context and of the nature of the evidence itself, including the credibility and reliability of the relevant witness. [258]

240. The Trial Chamber has broad discretion to admit hearsay evidence. The weight or probative value to be afforded to hearsay evidence will usually be less than that afforded to a witness who has testified under oath and who has been cross-examined, although that will depend on the infinitely variable circumstances which surround hearsay evidence.[259] Whether the hearsay is first-hand or removed is relevant to determine the probative value of the evidence.[260]

241. The probative value of hearsay evidence is usually less than the weight given to the testimony of a witness who testified under oath and was cross-examined. [261] Hearsay evidence, by its very nature, being the declaration of someone absent from the proceedings, who cannot be cross-examined, is not susceptible of having its reliability adequately tested by

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[256] Cyangug Trial Judgment, para 131, 188, 113, 135 and 174
[257] *Media* Trial Judgment, para. 97
[258] *Akeyesu* Appeal Judgment at para 284 *et seq.*
[259] *Prosecution v Karemera*, ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of Witness XBM's, 20 Oct. 06.
[260] Proescution *v Aleksovski,* IT- 95-14/1-AR73, Decision on Prosecutor's Appeal on Admission of Evidence, 16 Feb. 99.
[261] *Kordic* Appeal Judgment, at para.787
[261] George Johnson, Transcript 20 October 2004, p. 8 lines 1-7

the Defence. Several prosecution witnesses gave hearsay and uncorroborated evidence on key issues in the trial which the Chamber is urged to disregard as a basis for a finding of guilt.

b) IDENTIFICATION OF THE SECOND ACCUSED

vii) The Law on Identification

242. In the *CDF* Case this Trial Chamber stated that;

> "it is well-accepted that identification evidence is affected by the vagaries of human perception and recollection. Its probative value depends not only upon the credibility of the witness, but also on other circumstance surrounding the identification. In assessing the reliability of identification evidence, the chamber has taken account of the circumstance in which each witness claimed to have observed the Accused, the length of that observation, the familiarity of a witness with the Accused prior to the identification and the description given by the witness of their identification of the Accused."[262]

243. The ICTY Appeals Chamber in *Kupreskic* emphasized the need for caution in evaluating contested identification evidence. It stated:

> "The Appeals Chamber notes, however, that a reasonable Trial Chamber must take into account the difficulties associated with identification evidence in a particular case and must carefully evaluate any such evidence, before accepting it as the sole basis for sustaining a conviction. Domestic criminal law systems from around the world recognize the need to exercise extreme caution before proceeding to convict an accused person based upon the identification evidence of a witness made under difficult circumstances. The principles developed in these jurisdictions acknowledge the frailties of human perceptions and the very serious risk that a miscarriage of justice might result from reliance upon even the most confident witnesses who purport to identify an accused without an adequate opportunity to verify their observations."[263]

244. *Kupreskic* also quoted with approval a High Court of Malaya case in which the Court stated that there were many cases of wrongful convictions based on mistaken eyewitness identification.

> "... evidence as to identity based on personal impressions however bona fida, is perhaps of all cases of evidence the least to be relied upon, and therefore unless supported by other facts, an unsafe basis for the verdict."[264]

245. *The Kupreskic* case further identified some of the factors that would lead to improper identification as being "... misidentification or denial of the ability to identify followed by

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[262] *CDF* Trial Judgment, para 259
[263] *Kupreskic* Appeal Judgment, para 34
[264] *Jafaar Bin Ali v PP* [1998] 4 MLJ 406; see also *Arumugam S/O Muthu Samy v PP* [1998] 3 MLJ 73, cited in *Kupreskic*.

later identification of the defendant by a witness,[265] the existence of irreconcilable witness testimonies,[266] and a witness' delayed assertion of memory regarding the defendant coupled with the "clear possibility" from the circumstances that the witness had been influenced by suggestions from others.[267]

> The Appeals Chamber in *Kupreskic* further cited with approval the Supreme Court of Austria decision in Oberster Gerichtsh of which was to the effect that "where identification of the accused depends upon a single witness, a fact finder must be extremely careful in addressing specific arguments raised by the defendant about the credibility of the witness.[268] With regards to this issue of identification evidence, the ICTY Appeals Chamber in *Kunarac* stated "... a Trial Chamber must be especially rigorous in assessing identification evidence."[269]

246. The Trial Chamber in the case did consider that identification by a witness of someone previously known to be more reliable that identification of someone previously unknown.[270]

247. During the proceedings in this case it emerged that there were many Kallons in the RUF movement. However, several of the prosecution witnesses did not sufficiently or at all identify the Second Accused as the person they were discussing.

248. Although it could well be reasonably presumed that insider witnesses were indeed testifying against the Second Accused, this presumption may not hold true of all insider witnesses and certainly not for such witnesses as TF1 361 who throughout his testimony invariably referred to "Morrison Kallon" as the person he was discussing. Several of the UNAMSIL witnesses did not firmly establish their knowledge of the accused and left a strong lingering doubt as to the exact identity of the person they were testifying against. The Defence submits that although it is for the Trial Chamber, on a case by case basis, to decide whether a witness could credibly identify an accused at a crime scene, and that a witness is not expected to know all details about the accused or to know him personally, however, a witness must show that he or she was able to recognise the accused.[271] In several instances, it was never established that the witness either knew the accused or was able to identify him.

viii) Several Kallons in the RUF

[265] Quoting the Dominican case of *Dominican VR* [1992] 186 ALR 203
[266] Quoting *People (DPP) v Manamara*, 22 March 1999 (CCA) 111/95
[267] Quoting *Rv Burke* [1966] ISCR 474
[268] Cited in *Kupreskic* at paragraph 38
[269] *Kunarac* Appeal Judgment, at para 324.
[270] *CDF* Trial Judgment, para 261
[271] *Semanza* Appeal Judgment, para 202, at footnote 411.

249. The Indictment charges the accused Morris Kallon and states that he was also known as Bilai Karim.[272] Some of the Prosecution witnesses alleged to have had a good knowledge of the Second Accused but during their testimony they were never asked to identify the Second Accused or those who were called upon to identify the Second Accused did not know him. The Prosecution failed to obtain information from several of their witnesses establishing that the person they saw was the accused person how they recognised and identified him, their prior knowledge of him, and the circumstances of their observation.

250. Given the numerous Kallons in the RUF it was incumbent upon the prosecution not to simply presume that the court would take it for granted that its witnesses were speaking about the Second Accused. It was necessary for the Prosecution witnesses to establish a credible link between the Second Accused and the events they testified about.

251. During cross-examination of Prosecution witness TF1-362, she agreed that she knew several persons with the surname Kallon.[273] Witness DMK-039 testified that she knew a Lieutenant Colonel Morris Kallon who was STF.[274] Witness DMK-161 corroborated DMK-039 that there was an STF Lieutenant called Morris Kallon.[275] Prosecution witness TF1-360 alleged that Kallon killed some one for a sheep in Kono.[276] DMK-161 testified on this incident and stated that it was Lieutenant Morris Kallon an adjutant to Superman and an STF, and not the Second Accused involved in the incident.[277] During cross-examination by the Prosecution, the witness maintained his testimony that there were two Kallons.[278]

252. Witness TF1-060 in his testimony indicated that there were three Kallons in Kailahun: Victor Kallon who was a RUF major and had a farm in Buedu, Mohammed Kallon and another Saidu Kallon.[279]

253. The Second Accused also testified that there were several Kallons on the Magburaka-Makeni axis between 1999 and 2002;[280] there was the Chief Brigade Commander Meloskie Kallon, Lieutenant-colonel Baggie Kallon, and the accused himself who had the rank of Lieutenant-Colonel.[281]

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[272] The Indictment, para. 2
[273] Transcript 25 April 2008, pp.72-74
[274] Transcript 25 April 2008, p.25 lines 9-15, p.28 lines 13-15
[275] Transcript 25 April 2008, p.25 and 28
[276] Transcript 20 July 2005, p.23 lines 11-25& p66 line 25-27
[277] Transcript 22 April 2008, p.24 lines 25-29, p.25 lines 12-28, p.26 lines 6-11
[278] Transcript 22 April 2008, p.62 lines 8-18
[279] Transcript 29 April 2008, pp.17-27
[280] Transcript 11 April 2008, p.28 lines 12-16
[281] Transcript 11 April 2008, p.28 lines 18-26

254. Some documents disclosed to the Defence by the Prosecution under Rule 68 of the Rules of Procedure and Evidence were tendered and admitted in court as Exhibit 337 and 338. Exhibit 337 established the fact that there was a Meloskie Kallon in Lunsar.[282] Exhibit 338 is a picture of the Second Accused among other people. When shown to TF1-581, the witness stated that neither one of the two Morris Kallons he was talking about was on the picture.[283] This indicates that there were actually three Morris Kallons. From the above evidence it is clear that identification of the second accused was a live issue in the Trial .

Failure To Identify the Second Accused

255. Prosecution Witness TFI-117 who testified about Second Accused with regard to the St Francis incident[284] was not able to sufficiently identify the Second Accused in Court. Indeed when asked to identify the Third Accused, he identified the Second Accused as the Third Accused.[285]

256. Witness TFI-054 stated he did not know the Kallon that he spoke about. He stated that on the day the Paramount Chief Demby was killed one Dr. Tommy, Augustine Gbao, Mike Lamin and Morris Kallon had introduced themselves to the town's people.[286] He further stated that somebody introduced himself as Morris Kallon in the five-man delegation.[287] There was no attempt by the prosecution to identify the accused as the Kallon the witness was testifying about.

257. The Second Accused did not acknowledge being called Moses Kallon as mentioned in the testimony of TF1-012.[288] Witness TFI 012 did not identify the Second Accused.

258. Defence witness DMK-087 testified that it was AS Kallon (who was also a major) who was assigned to investigate the bank robbery by Mosquito,[289] and not the Second Accused. Witness DMK-159 also testified that the RUF commander he met in Lunsar during the UNAMSIL event was Miloskie Kallon[290] and not the accused person Morris Kallon.

259. The Second Accused himself in giving his testimony stated that there were many 'Kallons' within the RUF in general and the RUF in Kono specifically.[291] He was shown a

[282] Transcript 11 April 2008, pp.29-30
[283] Transcript 11 April 2008, pp.45-47
[284] Transcript 30 June 2006 p24, lines 1-9
[285] Transcript 30 June 2006 p81, lines 11-13; p82, lines 6-7
[286] Transcript 30 November 2005,p.23 lines1-4
[287] Transcript 30 November 2005, p.50 lines 27-28
[288] Transcript 2 February 2005, p.35 lines 28-29
[289] Transcript 22 April 2008, p.113 lines 27-29
[290] Transcript 12 May 2008, p.25 lines 15-28
[291] Transcript 11 April 2008, p.22 lines 2-26, p.23 lines 6-11, lines 19-27

document in which there were many Kallons listed; which was admitted and marked as Exhibit 336.[292]

260. Despite his earlier statement that he did not know Second Accused well, witness TF1-361 did not explain his basis for the allegations he apparently made against the accused and nor was he made to establish his knowledge of the accused Second Accused.

261. Witness TF1-035 stated he was unaware that one of the members of the AFRC government based in Bo between August and December 1997 was Morris Kallon.[293] TFI-035 testified that during the period alleged in the indictment in Kenema, Kallon participated in the atrocities that took place in Kenema. Witness states that he heard the name when he was released from the cells and heard that Mosquito had appointed Kallon his deputy. Witness stated he had never seen him before. [294] In his testimony, this witness mentioned two other Kallons (Victor Kallon, Momoh Kallon); but agreed that the Morris Kallon he had talked about, he had not seen him, and did not know him. He was not asked to identify Kallon in court. [295]

262. The Kallon Defence submits that witness TF1-015 could not identify the Second Accused, given the fact that he did not know him at the time of the alleged crime and that he was only told the name of the accused after the fact. The witness testified that he was captured at Sunna Mosque, he marked the faces of the people but was told the name Morris Kallon by Rocky. [296]

263. Witness TF1-108 testified of Kallon being in Bunumbu, Pendembu and Kailahun in 1996.[297] The Kallon Defence submits that the state of the evidence is that Kallon was at Kangari Hills at that time, therefore it cannot be the same Kallon involved in forced labour allegations in Kailahun in 1996. During direct examination the witness testified that he saw Kallon and he knew that Gbao reported to Kallon, but during cross-examination, the witness stated that he did not know who Gbao reported to. [298] During his testimony the witness did not identify the accused Kallon as the Kallon he mentioned in his testimony.

264. Witness TF1-141 also testified about Kallon but did not establish any knowledge of the Second Accused and whether indeed it was the Second Accused he spoke about.

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[292] Transcript 11 April 2008, p.25
[293] Transcript 7 July 2005, p.26 lines 26-29
[294] Transcript 7 July 2005, p.27 lines 2-10
[295] Transcript 7 July 2005, p.38 line 28 – p.39 line 1
[296] Transcript 28January 2008 p.97 line 16-23
[297] Transcript 10 March 2006, p.84-85.
[298] Transcript 13 March 2006, p.10 lines 8-10, p.12 lines 16-25

265. Regarding UNAMSIL the Second Accused inculpation as being present and involved on every mode of commission alleged against him is founded on the identification by TFI-042 and 044 amongst other witnesses. Those identifications are fatally flawed and rely upon a hearsay communication by a witness who was never called.

266. The basis upon which the witness TF1-044 purported to identify the accused was as a result of a purported meeting on 28th April when the accused attended at their office stating he would dismantle tents within 72 hours apparently without a reason whilst smiling.[299] After this alleged meeting with the accused outside their offices, he did not see him again. The accused refutes this identification of him by this witness as wrong and inaccurate and there is no basis on which the identification could properly be made. It was suggested in the course of cross-examination that the identification of Kallon was made simply on the basis of alleged intelligence reports.[300] The witness could not credibly demonstrate his prior knowledge of the accused and his ability to identify him.

267. Witness TF1 288, who testified on the abduction of the Zambians at Makuth, was not able to demonstrate his knowledge of the 2nd accused as the person who abducted him. He did not identify the accused in Court.

268. Witness TF1-360 did not establish which Kallon came to the office where he was before the UNAMSIL incidents. This witness indeed exhibited his lack of knowledge of the accused Second Accused when he constantly gave testimony concerning "Morrison Kallon."

ix) Adverse Evidence Elicited by Co-Accused

269. The Kallon Defence submits that any adverse evidence elicited during the direct examination and/or cross-examination of witnesses of his co-accused, which is prejudicial to the Second Accused should be excluded to the extent that it negatively affects the defence of the Second Accused. This submission is borne of the position that this Chamber consistently took in relation to this matter pursuant to Rule 82(A).[301] The Kallon Defence relies on the following illustrations:

270. During the cross-examination of TF1-314 by counsel for the Third Accused, the Presiding Judge stated that evidence elicited which may offend or prejudice a co-accused will

[299] Transcript 26 June 2006, p. 96 lines 1-15
[300] TF1-044, Transcript 27 June 2006, p127 lines 28-29; p128 lines 1-4.
[301] "In joint trials, each accused shall be accorded the same rights as if he were being tried seperately."

not be used against him and that it is a fundamental rule which the court will apply.[302] The Presiding Judge further stated that any evidence elicited during the cross-examination by counsel for the Third Accused will not be used against the Second Accused.[303]

271. In cross-examination by counsel for the third accused of Prosecution witness TF1-371, Honourable Justice Boutet stated "if this is evidence that is adduced by the third accused, it cannot be used against the second accused, ... evidence led by counsel for the third accused that may prejudice your client, if you don't accept that, it won't be used against your client. That's the rules." [304] The Presiding Judge supported this by reiterating that this was a fundamental principle.[305]

272. During the cross-examination of Prosecution witness TF1-366 the Chamber stated that;

> "I think the question to be asked at this stage is whether each counsel representing the accused persons, of the accused persons should, to the extent that the trials even though they are joint have to cater for the defences of each accused person, one should really want to caution his mind as to whether any defence team can adduce evidence or carry out his cross-examination in a manner that prejudices the interests of the co-accused person. Because here, although they are being tried jointly, they are really being also tried separately, because in the context of the joint trial the interests of each accused person are protected by its defence team. Unless the court so permits, I do not think that a defence team can lead evidence that prejudices the interests of a colleague's client, in indeed Mr. Cammegh's question were to be seen in this perspective."[306]

273. To further illustrate the Chamber's consistency in this matter, the Honourable Judges stated as follows in the CDF Trial;

> "In light of the foregoing considerations, The Chamber, in the circumstances of the present Objection, finds that the potential prejudice that may result from allowing the Prosecution to elicit, during cross-examination, direct evidence pertaining to an accused who has not called the witness in question would outweight any potential probaative value of evidence thereby elicited and would infringe upon the protection afforded by Rule 82(A) to the Second Accused when jointly tried." [307]

274. Judge Thompson has also stated that the Chamber was enjoined to apply the principle of fundamental fairness, and that despite the fact that the Prosecution had alleged JCE, each accused must be granted the guarantees of being tried separately.[308] The Judge raised the issue of whether it was the place of a witness called for a co-accused to incriminate a co-accused or

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[302] Transcript 7 November 2005, p.32 line 24
[303] Transcript 7 November 2005, p.32 lines 21-25
[304] Transcript 2 August 2006, p.25 lines 12-18
[305] Transcript 2 August 2006, p.25 line 20
[306] Transcript 7 November 2005, p.23 lines 2-26
[307] SCSL-04-14-T-731, *Decision on The Permissibility of Eliciting Evidence Involving the Second Accused through Cross-Examination of Witnesses Called by the Third Accused; 10 Nov 2006 para 24*
[308] Transcript 17 June 2008, p.107 line 25-p.108 line 1

the function of the Prosecution,[309] and that the primary purpose of a defence witness is to respond to the Prosecution case against the accused calling the witness,[310] and not to play the prosecutorial role.[311]

275. In his Separate and Concurring Opinion on the Chambers Written Reasoned Decision on the Gbao Motion Requesting The Chamber to Stay Trial Proceedings on Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process,[312] Judge Itoe stated that in relation to Rule 82, soliciting incriminating evidence against Kallon, from a co-accused was objectionable and impermissible.[313]

276. The Defence submits that the same rule applies to evidence elicited in cross-examination by the Prosecution of a witness called by a co-accused which should not be used against a co-accused. Based on the undertaking of counsel for the third accused and the understanding that the questions put to the witness were not designed to elicit incriminating evidence against the second accused, the Bench ruled that counsel could continue leading the witness.[314]

277. Although counsel for the third accused gave the undertaking to lead testimony only in defence of his client and in a manner that would not cause prejudice to the second accused, the questions he subsequently posed and the answers elicited were clearly prejudicial to the second accused.[315]

278. The witness agreed that at the time the UNAMSIL officers were assaulted and the shots were fired at the Makump camp the RUF commanders he had earlier mentioned were all present, including Morris Kallon.[316] The Kallon defence submits that this evidence should be excluded and or disregarded.

279. At the end of the cross-examination of witness DAG-111 counsel for the second accused drew the attention of the Chamber to the conditions under which counsel for the third accused was allowed to lead witness DAG- 111; the prosecution sought to use to their advantage, the evidence led by counsel for the third accused to inculpate the second accused, and this is contrary to the condition under which evidence was allowed, to be led for his defence.[317] What the Prosecution did, the defence submits was contrary to the decision in the

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[309] Transcript 17 June 2008, p.108 lines 7-10
[310] Transcript 17 June 2008, p.108
[311] Transcript 17 June 2008, p.111 lines 11-13, p.113 line 6
[312] SCSL-04-15-T-1201, 22 June 2008
[313] *Id.*para.106
[314] Transcript 17 June 2008, p.132 lines 25-29
[315] Transcript 19 June 2008, p.34-36
[316] Transcript 19 June 2008, p.34 lines 5-15
[317] Transcript 19 June 2008, p.44 lines 10-21

CDF trial and the condition under which the evidence of this witness was allowed. Counsel for the second accused prayed pursuant to Rule 82 that the evidence elicited by the Prosecution be excluded in order to preserve the fair trial rights of the second accused,[318] and reiterates that relief in this submission.

x) Documentary Evidence

280. The Trial Chamber adopted a low threshold approach in the admissibility of documents in line with Rule 89 of the Rules.

281. However admissibility of documents into evidence in the case has no bearing on their weight.[319] The Trial Chamber cannot, *a priori,* accept that the contents of the documents are true, accurate and a complete portrayal of the facts. Documents only have weight if they are reliable, credible and probative in the overall context of the evidence. The Trial Chamber must rely on the best evidence available in the determination of the innocence or guilt of the accused.[320]

282. Documents should not be considered in isolation but in context of the totality of evidence available to the Trial Chamber.[321] Moreover, if the party that tendered a particular document does not persuade the Trial Chamber of the document's reliability, credibility and probative value, such document should be disregarded in the Trial Chamber's deliberation on the totality of the evidence.

283. While requirements of authenticity and trustworthiness are of no much significance at the admission stage, they are of fundamental significance in assessing the weight of the documentary evidence in question. [322] At the very least, some proof of authenticity and authorship is required to attach any weight to a document.[323]

284. The absence of a signature or a stamp may not necessarily mean a document lacks authenticity.[324] In order to determine the authenticity of a document, the form, contents and

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[318] Transcript 19 June 2008, p.44 linens 26-29
[319] *Limaj* Trial Judgment, at para. 12.
[320] *Brdjanin* Trial Judgment, at para.31
[321] *Brdjanin* Trial Judgment, at para.32
[322] *P v Bizimungu et al*, ICTR-99-50-T, Decision on Bicamumpaka's Request for Certification to Appeal a Decision on 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of Testimony of Witnesses GFA, GKB and GAP (17 November 2004), at para. 14
[323] *P v. Delalic et al*, IT-96-21-T, Decision on the Motion of the Prosecution for the Admissibility of Evidence, (19 March 1998) at para 20
[324] Ibid, at para 20

purported use of the document, as well as the position of the parties on the matter, are important factors for consideration.[325]

285. Important considerations in evaluating weigh to be attached to a document include whether it is an original copy; whether it is registered or enrolled with an institutional authority; whether it contains a signature; whether it is sealed, certified or stamped; whether it is officially authorised by an authority or organisation; and whether it is duly executed.[326] Regarding the content of a document, the Chamber will consider all circumstances of the case, 'including its relation to oral testimony given before the Chamber pertaining to the content of the document.[327] These factors are not conclusive. In addition, it should be noted that '[a]s a general rule, it is insufficient to rely on any one factor alone as proof or disproof of the authenticity of the document. Authenticity must be established through reference to all relevant factors.[328]

286. The burden of proving authenticity is with the party seeking to rely on the document in question. If the document is sought to be relied upon by the Prosecution to prove the charges against the Accused, the Prosecution must persuade the Trial Chamber beyond a reasonable doubt of the authenticity, reliability and completeness of a document.[329]

(1) Importance of Assessing the Purpose of Admission

287. In evaluating the weight to be attached to a document, it is equally important to determine the purpose for which a document has been admitted.

288. The Defence submits that a distinction should be made between documents that were introduced during the cross-examination of witnesses to impeach a witness, documents tendered to provide a contextual understanding of a witness's testimony, and document tendered to disprove a legal or factual element of the charges against the accused. Concerning documents used for cross-examination or for context, the ICTR has made the following useful distinction regarding these 2 categories of documents.[330]

> "The Chamber has allowed documents (including witness statements) in two ways. The Chamber has allowed documents to be admitted into evidence for the purpose of

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[325] *Musema* Trial Judgment, at para 66
[326] Ibid, para 67
[327] Ibid, para 70
[328] Ibid, para 72
[329] *Brdjanin* Trial Judgment, at para 32
[330] Prosecutor v Bagogora et al, ICTR-98-41-T Decision on Nsengiyumva Motion to admit documents as exhibits (26 February 2007) at para 6....(footnotes omitted) See also Bagogora Defence Request for admission of documents (21 March 2007) at para 9)

> impeaching the credibility of a witness on cross-examination. In this instance, the document is presented to the witness, and the witness is asked to explain any discrepancies between the statement and his or her testimony before the Chamber. The admitted document may then be specifically relied upon in the Chamber's assessment of the witness' credibility and in the ultimate determination of the case. The Chamber has also admitted documents, including witness statements, into evidence for limited purpose of providing context for a witness' testimony. Here, the document or witness statement often originating from a different witness – is shown or read to the witness for his or her response to the contents contained therein. The document may be admitted as an exhibit and may become part of the record, but it will only be used to assist the Chamber in understanding the testimony of the witness on the stand."

289. The Defence position is consistent with this ruling with the clarification that only the portions of documents admitted for impeachment purposes that were used in cross-examination of a witness can be specifically relied on by the Trial Chamber.

290. The Kallon Defence submits that an out of court witness statement is not under oath, and where the witness does not adopt his statement as the truth it cannot be used in the trial. Where the witness adopts the statement or portions thereof as being true, only those portions which the witness adopts as the truth can become evidence. The Trial Chamber then has to evaluate a statement made out of court which the witness says is true with his testimony in court. If there is an inconsistency it goes to the credibility of the *viva voce* testimony.

291. Regarding documents tendered for the truth of their contents the Chamber is urged to consider the limitation that the Prosecution has to conduct its case within the parameters of the principle that they have to present all of their evidence during the Prosecution's case.[331] The Prosecution cannot in any circumstances tender exhibits for the truth of their contents during the Defence case. Prosecution documents introduced at this stage of the proceedings "can only be admitted in a limited manner and can only be used to establish the credibility of the oral testimony of the witness or to refresh the witness's memory".[332]

292. In *Milosevic* it was held:

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[331] Only rebuttal or fresh evidence can be introduced after both parties have completed their cases. Prosecutor v. Delalic et al, Appeals Chamber Judgment (20 February 2001) at para 275; Prosecutor v. Krstic, Decision on the Defence Motions to Exclude Exhibits in Rebuttal and Motion for Continuance, (4 May 2001), at para. 9; Prosecutor v. Kunarac, Kovac and Vukovic, Decision on Defence Motion for Rejoinder, (31 October 2000) at para 14; and Prosecutor v Milosevic, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, (17 May 2005), at para 17.

[332] Prosecutor v. Hadzihasanovic, Transcript, 29 November 2004, at pages 12523-12527 (oral decision); Prosecutor v. Milosevic, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, (17 May 2005) 11.

> It would plainly undermine the Chamber's control of the trial through careful allocation of time to the Prosecution and Defence to present their cases, *if the Prosecution were permitted to lead its own evidence during the Defence case in order to respond to the particular points raised by Defence witnesses who are simply answering the case or changes made against the Accused that emerged in the course of the Prosecution evidence.* It is, therefore, distinctly possible the evidence of a defence witness may be left "in the air" without any specific contradictory evidence. In such circumstances it will be for the Trial Chamber to evaluate the evidence against the background of all relevant evidence in the case. At the end of the day, it remains open to the Trial Chamber, should be faced with a particular problem arising out of the way in which evidence was presented, to order the production of further evidence, or ex proprio motu summon witness pursuant to Rule 98 of the Rules.[333] [Emphasis provided]

293. During the presentation of the Defence case, the Prosecution sought to introduce certain documents in cross-examining Defence witnesses with the clear intention of establishing certain allegations not proven during the prosecution case. The Chamber is urged to disregard any such documents whose purpose is to substitute oral testimony for documentary evidence. Exhibit 301 was tendered in such circumstances. It is submitted that, in accordance with the aforementioned principles, it should be disregarded.

2) WITNESS CREDIBILITY ISSUES: A GLIMPSE INTO THE PROSECUTION CASE

a) PROSECUTION RUF INSIDER WITNESS EXAGGERATIONS AGAINST 2ND ACCUSED

294. The Defence submits that the Prosecution case against the Second Accused is seriously undermined by a fundamental lack of credibility of the vast majority of its witnesses. Several of the witnesses who testified against Kallon fall in the so-called insider category and are accomplices who in many respects sought to exaggerate the role of the accused whilst minimizing their own roles. In several respects, these witnesses' accounts are clear fabrications to help the Prosecution secure a conviction. In several instances they advance different and fundamentally contradictory versions of the Prosecution case while in

[333] Prosecutor v. Milosevic, Decision on Prosecution Motion for Reconsideration Regarding Evidence of Defence Witnesses Mitar Balevic, Vladislav Jovanovic, Vukasin Andric, and Dobre Aleksovski and Decision Proprio Motu Reconsidering Admission of Exhibits 837 and 838 Regarding Evidence of Defence Witness Barry Lituchy, (17 May 2005) at para 14.

other cases some of them openly lied before the Chamber. Others confessed to having lied to the Prosecutor.

295. In nearly all the gravest accusations against the accused were uncorroborated, although the Prosecution sought to call more than one witness for most of the accusations against the Second Accused.

296. In respect of many of these witnesses, the accounts they provided in their pre-testimony witness statements differed substantially and materially from their oral testimonies before the Chamber. These contradictions were amply exposed on cross-examination. Several of the witnesses did not identify the accused as the Kallon they were leveling accusations against despite massive evidence that there were several Kallons in the RUF.

297. The Defence submits that there are certain common trends with regard to a substantial number of witnesses who testified against the Second Accused which greatly undermine the case and create reasonable doubt regarding specific crimes and, indeed, the overall Prosecution case

298. Because it is not possible to undertake an exhaustive analysis of all Prosecution witnesses within the limited scope of this Brief, the Kallon Defence will, in this section, highlight the main trends in the Prosecution testimonies which in our view have fundamentally undermined the Prosecution's ability to prove its case and have created reasonable doubt regarding the guilt of the accused. In undertaking this exercise, the Defence notes that the Prosecution case against the Second Accused basically revolves around a small cabal of RUF accomplice insiders whose combined testimonies exhibit common trends that portray a determined and conscious desire to fabricate allegations against the accused.

i) TF1-371

299. Although witness 371 attempted to down play his role in the RUF and shift blame to others, it was quite clear during the trial that he was one of the most powerful men in the movement and closest to Foday Sankoh. TF1-045, TFI 371's bodyguard confirmed that in 1996 after TFI 371 came back to the RUF Sankoh instructed troops in various areas that they should regard TFI 371 as one of the high commanders and teachers of the movement.[334] From 1996 onwards it was understood that TFI 371 should be treated as a top commander and

[334] Transcript 22 November 2005, p.49 lines15-29

Sankoh expected that his instructions should be followed by members of the RUF. TFI 371 was regarded as a diplomat and politician working in the high command.[335]

300. TF1-036, also confirmed TFI 371's seniority by saying he trained other senior officers like the First Accused[336] and that TFI 371 was close to Foday Sankoh.[337] Witness TF1-045 confirmed that TFI 371 was full Colonel in 1997 when he came to Freetown (during the Junta).[338]

301. Before coming to testify, the witness had to be assured in writing by the Prosecution that he would not be prosecuted.[339] This clearly demonstrates his position as an accomplice intent on minimizing his own role in the events while exaggerating that of the Accused. Playing down his own seniority, TFI 371 fabricated the allegation that during the junta period the Second Accused was the Battle Group Commander (Sesay's previous position after Sesay became the Battle-Field Commander second to Bockerie).[340]

302. The witness effectively put the Second Accused as No. 3 in the command structure. This positioning of the Second Accused is a fabrication as it contradicts not only the Indictment,[341] but also several witnesses (both Prosecution and Defence) who confirmed that the Second Accused was simply a Major during the Junta period and was nowhere near where this witness attempted to place him in terms of the command structure.[342]

303. The truth of the matter is that TFI 371 was more powerful and more senior to the Second Accused not only during the Junta period but during the entire conflict. It was elicited from him that during the Junta he stated he was director of intelligence.[343]

304. Although as Colonel he was obviously senior to the Second Accused, he attempted to invariably minimize his role and exaggerate that of the accused. Regarding the period of the retreat from Freetown in February 1998 for instance he down played his own position by saying that "[a]ssignment was more important than rank" and that he did not have any assignment[344] "because the Junta had been dislodged _ _ and the intelligence report was in disarray".[345]

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[335] Transcript 22 November 2005, .p50 lines 5-13
[336] Transcript 29 July 2005, p.4 lines 2-4
[337] Transcript 29 July 2005 p.4 lines 9-11
[338] Transcript 22 November 2005, p.56 lines 19-21
[339] Transcript 24 July 2006, p.53 lines 22-24
[340] Transcript 20 July 2006, p.28 lines 11-18
[341] Para.28 of the Indictment states: 'In early 2000 Morris Kallon became Battle Group Commander in the RUF, ...'
[342] Transcript 25 July 2005, p.106 lines 1-10
[343] Transcript 20 July 2006, p.30 lines 27-29, p31: 1-5
[344] Transcript 20 July 2006, p.60 lines 15-29
[345] Transcript 20 July 2006, p.60 lines 24-29

305. For the others however, including the Accused, the command structure was intact. The assignment given to senior military officers and the high command was intact.[346] This desire to minimize his role and magnify that of the accused saw the witness make a fool of himself in one of the clearest of illustrations of his dishonesty and lack of candour.

306. When the witness was shown Exhibit 32 a salute report from Superman to Sankoh in which Superman refers to himself as Battle Group Commander [347] he was tongue tied and sheepishly stated;

> "I_ _ I _ _ he was claming to be. He was claiming to be but he was not the Battle Group. I think that is why they had a problem in term of leadership who was supposed to be"[348]

307. When challenged regarding when Superman had been claiming to be the Battle Group Commannder, the witness further speculated:.

> "I mean, superman always.....he thought, I mean he wouldn't be the next in command. That was his thinking"[349]

308. The witness did not explain why Superman would be impersonating himself to the leader of the movement. Asked when Superman conceived the idea that he was the Battle Group Commander, the witness confessed ignorance but yet tried to give a confusing and speculative response:

> "Well to be honest with you, I don't know where he conceived the idea, but what I know is that in my meeting with him some time late 1998, he expressed that to me. I mean, that was one of the concerns. I mean the issue of leadership. You know, he --I mean, he thought he is the battle group, you know, and Morris Kallon was appointed and operating as a battle group"[350]

309. When shown Exhibit 39 clearly describing Sam Bockarie as the Battle Field Commander and Sesay the Battle Group Commander and asked why he was stating in court that Sesay was Battle field commander, the witness only stated that "....whoever wrote it, relating to the particular position did not reflect what existed"[351] Indeed witness TF1-036, who should have confirmed TFI 371's allegation instead stated *he did not know of Morris Kallon as the battle group commander when JPK made Issa Sesay the battlefield*

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[346] Transcript 20 July 2006, p.61 lines 1-3
[347] Transcript 28 July 2006, p.18; referring to Exhibit 32, at p. 8649
[348] Transcript 28 July 2006, p.18 lines 11-13
[349] Transcript 28 July 2006, p.18 lines 19-20
[350] Transcript 28 July 2006, p.19 lines 24-29- p.20 line 1
[351] Transcript 31 July 2006, p.21 lines 4-10

commander[352] and that he had learnt it was Denis Mingo who was the battle group commander.[353]

310. Apart from engaging in speculation he could not explain why he disagreed that Sesay and Bockerie held the positions as indicated in exhibit 39.[354]

311. In cross-examination, the witness maintained that the Second Accused became Battle Group Commander in 1997 before the pull-out from Freetown. Despite the spirited defence he put in support of his thesis against overwhelming evidence shown to him to the contrary, the only explanation he could finally provide was that the "the title Battle Group Commander for Kallon was indicated on the pay slip or the names they used to give stipend for the RUF"[355]

312. It is not clear, however, how he came to know about this as he did not work with any finance department of the Junta regime.[356]

Kallon being part of Buedu High Command after the Retreat

313. TFI 371's eagerness to magnify the Second Accused's positions and assignments assumed ridiculous dimensions when he alleged that the Second Accused was part of the delegation that accompanied JPK to Kailahun after the retreat[357] and that the Second Accused was part of the high command in Buedu at the time[358] and that the Second Accused was in Buedu from the time he allegedly accompanied JPK there until the ECOMOG pushed the ARFC/RUF out of Koidu.[359]

314. This is clear demonstration of the witness' disregard for the truth and his over-drive zeal to position the Second Accused within the RUF high command in Buedu at this point in time. There is overwhelming evidence on record (both Prosecution and Defence) that the Second Accused never escorted JPK up to Buedu, was never based in Buedu at this point in time and was never part of the High Command in Buedu.

315. In order to minimize his own role in the events, the witness attempted to give the impression that while in Buedu, all he did was merely spend most of his time with Sam

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[352] Transcript 29 July 2006, pp.24-25, lines 27-29, 1-8
[353] Transcript 29 July 2006, p.25, lines 12-16
[354] Transcript 31 July 2006, p.21 lines 8-16
[355] Transcript 31 July 2006, p.130 lines 2-9
[356] Transcript 31 July 2006, p.130 lines 10-14
[357] Transcript 20 July 2006, p.69 lines 21-29, p.70 lines 1-4
[358] Transcript 20 July 2006, p.77 lines 25-29
[359] Transcript 20 July 2006, p.80 lines 22-27

Bockerie at the radio office "which was generally used as the office of Sam Bockerie." That is where, according to the witness, he learnt all of the information relating to the frontline operations. [360]

316. The Chamber is urged to disregard the entirety of the testimony of witness TFI 371 as being untruthful, exaggerated, fabricated and all geared to implicate the accused as one those bearing the greatest responsibility. Other examples of witnesses in this category are TF1-366, TF1-360, TF1-045, and TF1-361.

ii) TF1-366

317. Witness TF1-366 gave one of the most damning accusations against the Second Accused. Yet he was also one of the most unreliable witnesses; often exhibiting absolute disregard for his solemn declaration to tell the truth. He invariably told lies and at one point went overboard when he denied ever telling the prosecution of a trip he alleged to have made to Monrovia despite an elaborate description of this trip in a statement he had given to Prosecution. Although it came as no surprise that he would deny a statement which, given its detail, could only have come from him, the determination and finality with which he made the denial, brought into sharp focus his ability to fully understand the consequences of so blatant a narration of lies to the Chamber.

318. On another occasion he confessed giving a false answer to a question because he was testing Counsel's memory.

319. Several incriminating pieces of evidence that he gave were never corroborated by any other witness. Notably, he is the only witness who alleged the Second Accused involvement in the killing of certain people in Tombodu and also at the Five Five spot in Kono after the retreat.

320. The witness confessed his participation in several crimes thus placing himself in the category of accomplices. The arrest of the witness by the Second Accused during the disarmament exercise appears to have been the driving force behind his fabrications against the Second Accused. The Second Accused in his testimony agreed that they arrested TF1-366 for harassing civilians and taking their property in Tongo fields, so he (Kallon) arrested him

[360] Transcript 21 July 2006, p.41 lines 12-18

and seized the property and that caused a problem between the Second Accused and TF1-366.[361] This Trial Chamber with a similar witness in the CDF case stated that;

> " ...TF2-057 wildly exaggerated his testimony, perhaps because he has a failing memory, because of the trauma he has suffered, or perhaps for other personal reasons. When juxtaposed with the evidence of TF2-067 it was clear that only those parts of his evidence corroborated by other witnesses could be accepted by the Chamber..."[362] [emphasis added]

321. The Defence submits that this Trial Chamber should discard the entire testimony of TFI-366 or in the alternative should only consider others parts that could reasonably be corroborated by other witnesses.

TF1-366's exaggerations against Kallon

322. In many cases the evidence of TFI 366 is inapposite to the Prosecution case, inasmuch as his evidence is contradicted by numerous Prosecution witnesses as well as exhibits tendered by the Prosecution and is inconsistent with the case pleaded in the Indictment. The witness alleged that the Second Accused was appointed to the position of Battle Group Commander in 1998[363]. However, the Prosecution case, as set out in the Indictment, is that the Second Accused received that appointment some two years later, in "early 2000".[364] This is contradicted by TFI 360 TFI 361, both RUF insider radio operators, TFI 263, who was abducted in Koidu, TFI 367, an RUF insider mining commander, TFI 114, TFI 071, TFI 078, TFI 167 and Exhibit 9. In addition, TFI 366 testified that the Second Accused was in overall command in Tombodu, contrary to the evidence of TFI 167 and others who testified that Savage was in command in Tombodu at times relevant to the Indictment and that he was beyond the effective control of any commander. It is submitted that TFI 366 fabricated this testimony in order to attribute to the Second Accused the conduct of a commander who the witness knew was beyond control and committing brutal crimes with regularity and, in so doing, to incriminate the Second Accused.

323. The witness alleged that, in 1997, the Second Accused was "area commander" at Kangari Hills[365] despite the acknowledged stationing of Colonel Isaac Mongor there at that time, who the witness had already stated was senior in rank to both Morris Kallon and Issa

[361] Transcript 11 April 2008, p.94 lines 1-7
[362] CDF Trial Chamber Judgment (SCSL) 2 August 2007, para.283
[363] Transcript 14 November 2005, p.45 lines 15-25
[364] The Indictment, at para.27
[365] Transcript 15 November 2005, p.85 lines 4-6

Sesay, at that time.[366] Notwithstanding his earlier evidence, the witness asserted that the Second Accused issued instructions to CO Isaac Mongor.[367] His evidence was contradicted by Prosecution witness TF1-071 who testified that Isaac Mongor was the area commander of the northern region.[368] It is also inconsistent with the Prosecution case, from which it is discerned that the Second Accused was a Major in rank at that time.[369]

324. The witness also testified that before the Intervention the Second Accused was the commander in Kono, Makeni and Bo.[370] As acknowledged by the witness, the Second Accused was stationed in Bo at that time and the evidence before the Chamber establishes that the Second Accused was continuously stationed there until February 1998.[371] It is submitted that, in the prevailing circumstances, it was impossible to exert such control over three districts so geographically remote from each other. In response to this allegation, the Second Accused explained the implausibility thereof as follows:

> "Even in normal administration in Salone, Makeni is a northern province. It has its own separate structure. Bo is a southern province, it has its own separate administration. Kono is -- falls under eastern province. It has its own separate administration. Both in the civil administration and military administration during the time of AFRC. AFRC, you have the brigade commander in Makeni. You have the SOS in Makeni. You have the brigade commander in Bo. You have the SOS in Bo."[372]

325. This evidence was not corroborated. Notably, Exhibit 35, Salute Report by Sam Bockarie makes no reference to a position encompassing control of all three areas. It is clear example of the attempts of this witness to incriminate the Second Accused through the provision of false testimony.

326. The evidence of TFI 366 is characterised by sweeping generalities, systematically designed to incriminate the three accused in every conceivable way. Read in its totality the evidence of TFI 366 alleged crimes against the Second Accused in almost every crime base and at all times relevant to the Indictment, without providing a credible basis for doing so whilst, at the same time, failing to provide verifiable particulars of the alleged offences. For

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[366] Transcript 15 November 2005, p.85, lines 14-16
[367] Transcript 15 November 2005, p.85 lines 17-25
[368] Transcript 24 January 2005, p.35 line 22
[369] George Johnson, who testified that the Second Accused was a Major at the time of the coup, Exhibit 6, at pg 324; content was established through witness, Transcript 20 October 2004, p.7 line 5-20; TFI 071, who testified that the Second Accused was a Major in March 1998, Transcript 26 January 2005, p.24 lines 10-11; who testified that the Second Accused was a Major in 1998, Transcript, 26 October 2004, p.1 lines 24- 27; and TFI 045, who testified that the Second Accused was a Major in October 1997, Transcript 25 November 2005, p.4 line 2-4
[370] Transcript 11 November 2005, p.50, lines 12-15
[371] See the Kallon Notification of Alibi, at pg 2-3; see also the evidence of TFI 371, Transcript of 31 July 2006, p.109, lines 15-16.
[372] Transcript 14 April 2008, p.30 line 10-17

example, the witness alleged that he abducted women on the orders of the Second Accused in Kailahun, Kono, Makeni, Pendembu, Magburaka, Lungi and Lokomassama during the period from 1991 to 2002. He also systematically implicated all three accused in the use of child soldiers at all times relevant to the Indictment and in a range of locations throughout Sierra Leone, without providing any particulars of the alleged offences. He alleged that he saw the Second Accused with SBUs in Freetown, Makeni, Magburaka, Kono, Guinea Highway, Kailahun, Peyama and in the Northern Jungle[373]. He testified that he saw the SBUs with the Second Accused in 1997, 1994, and in 1998 to 2002.[374] He alleged that he saw Issa Sesay with SBUs in Kailahun, Freetown, Makeni, Buedu, Giema and Guinea Highway from 1991 to 2002[375] and that Augustine Gbao also had SBUs in Kailahun, Makeni, Magburaka and Kono in 2000, 1990, 1996, 1991 and 1992.[376]

327. Under cross-examination it was frequently revealed that these inconsistencies were attributable to a relentless desire to incriminate the accused. For example, although the witness had given a statement to the Prosecution that the Second Accused had ordered that ECOMOG be afforded safe passage from Teko Barracks after it had been captured by the RUF, he denied the statement under cross-examination, offering the following explanation:

> "You deny that now, that you said so?
> A. "That was what I said. It was not Kallon that gave that order. All of us agreed. We were fighters. We had experience. You cannot fight to entrap somebody. That's unprofessional.
> Q. "So you don't want to give any credit to Kallon?
> A. "No, because at that time Kallon's intention was to capture and kill all the ECOMOG soldiers and we did it."[377]

328. In the CDF Judgement, this Trial Chamber in analysing a similar witness stated that "TF2-223 is an example of a self-serving witness who seemed more interested in bolstering his own role in the event rather than in assisting the court to establish the truth." TF1-366's testimony should be rejected in its entirety as being worthlessly incredible.

iii) TF1-360

329. Witness TF1-360 was a senior radio operator. He gave extensive testimony of his involvement in the attacks in Freetown in January 1999 under the command of SAJ Musa and

[373] Transcript 8 November 2005, pp.69-70, lines 28-29, 1-2
[374] Transcript 8 November 2005, p.70 lines 11-16
[375] Transcript 8 November 2005, p.69 lines 11-15
[376] Transcript 8 November 2005, p.70 lines 18-26
[377] Transcript 17 November 2005, p.10 line 28 – p.11 line 5

later Gullit. He also admitted that he looted in Makeni[378] and that he took part in the burning of Koidu.[379]

330. When cross examined by counsel for the third accused he admitted that his testimony on UNAMSIL was "a tissue of lies" and one could not know what to believe of the different versions he gave.[380]

331. The witness falls in the category of accomplices whose testimony, given the absence of any credible corroboration, should be disregarded in its entirety.

Exaggerations against the Second Accused

332. Witness TF1-360 in keeping with the pace set by his insider colleagues also sought to exaggerate the Second Accused's rank during the Junta period by stating that he (Kallon) was promoted to a Lieutenant Colonel[381] and that the promotion was by Mosquito.[382] Witness however did not explain how he learnt of this promotion.[383]

333. And although the witness admitted that Superman was superior to the Second Accused during the retreat[384] and that there were other people in Makeni during the retreat above the Second Accused, he nevertheless sought to give the Second Accused the amorphous and nebulous position of being 'the immediate individual between the soldiers and other commanders.'[385] The evidence has amply demonstrated that the Second Accused, was based in Bo during the junta period, where he commanded a platoon of RUF soldiers. TF1-360, another former RUF radio operator confirmed that "Morris Kallon spent about a month at Makeni and then was posted to Bo."[386]

334. The mass of evidence on record both Prosecution and Defence does not establish a position of the Second Accused being the interface between the soldiers and other commanders in Makeni. Indeed TF1-361, a colleague of 360 was emphatic that the Second Accused was not present in Makeni during the retreat.[387]

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[378] Transcript 25 July 2005, p.113 line 29, p.114 lines 1-2
[379] Transcript 26 July 2005, p.109 lines 12-29
[380] Transcript 26 July 2005, p104 lines 7-29
[381] Transcript 25 July 2005, p.106 lines 25-28
[382] Transcript 25 July 2005, p.108 lines 1-2
[383] Transcript 25 July 2005, p.108 lines 1-4
[384] Transcript 22 July 2005, p.55 lines 27-29
[385] Transcript 22 July 2005, p.56 lines 4-5
[386] Transcript 22 July 2005, p.64 lines 1-3
[387] Transcript 18 July 2005, p.123 lines 25-27

335. Other more credible testimonies confirm that the Second Accused would have had little or no influence or control over any soldiers in Makeni at the time. Most of the retreating soldiers were from Freetown where the Second Accused was not based during the junta period. Indeed there is ample evidence that most of the RUF soldiers in Freetown during the junta had originated from the Western Jungle and owed their allegiance to Superman. Indeed witness TF1-360 in apparent contradiction of his testimony on the Second Accused agreed that Superman led the retreating group into Kono.[388]

336. There is no evidence that the Second Accused would have had any control of the AFRC soldiers in Makeni having never commanded any of them during the junta period. Significantly, evidence has demonstrated that most of the soldiers in Makeni during the retreat were AFRC.

Prior Inconsistent Statements

337. The witness's fabrications are further exposed through several unexplained inconsistencies between his testimony and his previous statements. At page 10010 of his statement of 12 June 2004, the witness had stated that JPK had left for Kailahun with Issa Sesay before the witness's group arrived in Kono after the retreat from Freetown.[389] The witness emphatically denied ever giving the Prosecutor this information "I did not say things in this way. I did not say before we arrived in Kono Issa Sesay and JPK had left Kono to go to Buedu."[390] When cautioned by Counsel to think carefully about the answer he was giving the court he modified his answer "that was why I said I'm not sure that I said so."[391] Significantly, the witness had earlier admitted that whatever was recorded from him had been read over to him for verification.[392]

338. But in another statement recorded from the witness on 25 June 2004 at Pg.10018 the witness stated that he did not see Sesay in Kono at the time he arrived there following the movement from Makeni. He confirmed giving the Prosecution this information but added it was a mistake "That was what I told the Prosecutor. I mean, the Prosecutor. But the statement was a mistake."[393]

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[388] Transcript 22 July 2005, p.77 lines 24-27
[389] Transcript 25 July 2005, p.18 lines 7-14
[390] Transcript 25 July 2005, p.18 lines 17-18
[391] Transcript 25 July 2005, p.18 line 21
[392] Transcript 22 July 2005, p.59 lines 17-29, p.60 lines 1-16
[393] Transcript 25 July 2005, p.19 lines 23-27

339. The witness could not explain why in his statements he was clear Sesay had left Kono when he (witness) arrived from Makeni only to dramatically change his story in court and allege attending a meeting in Kono during which Sesay is supposed to have made announcements of fundamental importance including the setting up of a command structure and burning of Koidu Town. The witness admitted that the first time he had ever spoken about the Sesay meeting and his alleged orders on command structure and burning of Koidu was in court.[394]

340. Defence submits that the divergence between the witness' earlier statements and his oral testimony is so fundamental that it irreparably undermines the witness' credibility and renders his testimony on the alleged order given by Issa Sesay to the Second Accused to burn Koidu town completely worthless.[395] So too, the witness's testimony that during this imaginary meeting at Gandorhun Highway, Sesay set up a command structure in Kono appointing the Second Accused deputy to Superman. [396]

341. In yet another glaring contradiction, the witness had stated in his direct testimony, that he was present in Makeni when the Second Accused came to the radio room and sent a message to Issa Sesay in Kono saying the UN had blocked the highway.[397] But in his previous statement to Prosecution of 25 June 2004 the witness had stated that he was in Kono between late April and early May 2000 when he heard the Second Accused in Makeni on the radio reporting to Foday Sankoh in Freetown about forceful disarmament of 7 RUF men at Makump.[398] When asked to explain this contradiction, the witness stated first that he could not remember too well about this, then "because it was not one person that was interviewing me and finally "Well, if I say I'm a human being, well I am liable to mistakes.[399]

342. During cross-examination by Counsel for Gbao, witness said he had no answer for the discrepancy.[400]

343. Indeed witness had stated in the same statement that he later arrived in Makeni as one of those sent as radio operator with the men who were to fight the UNAMSIL.[401]

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[394] Transcript 25 July 2005, p.20, p.21 lines 1-4
[395] Transcript 20 July 2005, p.15 lines 25-26, Transcript 25 July 2005, p.8 lines 9-10
[396] Transcript 20 July 2005, p.15 lines 16-19, Transcript 25 July 2005, p.8 lines 3-15
[397] Transcript 22 July 2005, p.6 lines 15-20
[398] Transcript 25 July 2005, p.79 lines 7-12
[399] Transcript 25 July 2005, p.80 lines 1-17
[400] Transcript 26 July 2005, p.102 lines 1-16
[401] Transcript 25 July 2005, p.82 lines 17-25

344. The witness initially denied ever stating this to the Prosecution[402] but later stated he could not recall telling the Prosecutor that he was sent with the fighting men before finally stating again that he never stated this to the Prosecutor.[403]

345. Because of these material contradictions between the testimony of witness TF1 360 and his previous statements, defence submits it is not reasonable to conclude that this witness is credible.

346. The Defence reiterates its submission that where a witness is unable to explain a fundamental inconsistency between a previous statement and his oral testimony, his credibility is undermined and his testimony rendered worthless. In the circumstances of this witness and bearing in mind his inability to explain several fundamental inconsistencies between his previous statements and his oral testimony, the court is urged to disregard his evidence.

iv) TF1-361

347. Witness TF1-361 was a radio operator for a long time. During his testimony he exhibited a strong allegiance to Superman whom he depicted as being not on the best of terms with the accused Sesay and the Second Accused. He narrated an incident some time in December 1998 when Sesay and the Second Accused went to arrest Superman who however escaped through the window.[404]

348. The witness also stated that in early January 1999, Sesay arrested TFI-361 because he was perceived to be one of Superman's men.[405] The witness was deeply involved in the activities of Superman particularly during their stay in Koinadugu where the witness alleged they launched a series of attacks on various locations. The witness thus also falls in the category of accomplices with a motivation (demonstrated above) to fabricate testimony against the Second Accused.

Exaggerations Against the Second Accused

349. Witness TF1-361 also attempted to exaggerate the rank of the Second Accused by saying, without any proper basis that between March and May 1998, the Second Accused was

[402] Transcript 25 July 2005, p.82 lines 26-29
[403] Transcript 25 July 2005, p.83
[404] Transcript 12 July 2005, p.102 lines 24-29, p.103 lines 1-2
[405] Transcript 14 July 2005, pp.10-11

a colonel[406] (when it was suggested to the witness that the Second Accused was not colonel at that time but a Major, the witnesses simply stated that: "I cannot deny that fact"[407] without any further explanations as to why he had earlier stated that the Second Accused was a Colonel during the period.

350. Although the witness gave detailed testimony about the Second Accused and attempted to give him positions of responsibility particularly in Kono after the retreat, it emerged during cross-examination that he did not know much about the Second Accused and all he had stated in his oral testimony may have been just fabrications and exaggerations meant to implicate the Second Accused.

351. In an earlier statement which he confirmed he made to the Prosecution, the witness admitted that he had told the Prosecution that while in Kono after the retreat the Second Accused did not have an area of responsibility, he did not have a radio set, and that the witness did not know much about the Second Accused.

> Q. Did you at any time, witness tell the Prosecutor that Morris Kallon did not have an area of responsibility, he did not have a radio set, and that you didn't know much about him? Did you say that to the Prosecution?
> A. Yes I said that.[408]

352. The defence submits that the witness's answer to this important question confirms that all the evidence he gave against the Second Accused attributing to him command responsibility in Kono is baseless as the Second Accused did not have a radio (contrary to the witness' oral testimony) and witness did not anyway know much about the Second Accused.

353. Indeed during his direct testimony, the witness in response to the Prosecution regarding his basis for saying the Second Accused was deputy to Superman, had stated: [409]

> A. The way I was receiving the message, and how it was addressed, and how and what I observed, I got the understanding of how he was coming to Superman and how he was treating him with courtesy and how Superman was giving him instructions and he taking instructions.
> Q. Where would you see Superman giving Kallon instructions and Kallon taking instructions from Superman?
> A. Because any message that came from Mosquito to us in Kono, when we received such message, we'd give it to Superman and he would call Kallon in turn to give him the instruction and Kallon would implement those instructions.

354. But during cross-examination the witness sought to modify his understating of the Second Accused's role as deputy to Superman based on his own perception of circumstances,

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[406] Transcript 18 July 2005, p.81 lines 10-21
[407] Transcript 18 July 2005, p.83 lines 1-2
[408] Transcript 19 July 2005 p.28 lines18-22
[409] Transcript 11 July 2005 p.87 lines 3-13

to a more concrete self declaration by the Second Accused himself, that he was Superman's deputy.

> Q. You stated that Morris Kallon was one of the -- was in that group, that first group?
> A. No, if I had said it, that I had mistaken. He wasn't there. It was of late that he met us in Koidu Town. It was later. After the group had left, that was when he came at one night. He came with some boys that were with us at the signals. That was the time they came and met us in Koidu Town. That he had an appointment that he was going to deputise Superman. He did not go in that group -- with the group. He was not among.
> Q. So you are saying that since the RUF, or the junta as you call them, withdrew from Freetown and settled in Koidu Town, that was the first time that Morris Kallon was arriving, that you were seeing him?
> A. Yes. Kallon was sent for a mission in Liberia. That is Mosquito's mission. When he came he met me in Koidu. The first week he met me in Koidu town.[410]

355. Later in cross-examination the witness contradicted the version he had given in direct testimony that he had simply concluded that the Second Accused was deputy to Superman through his conduct by now alleging that he actually received/monitored a message appointing the Second Accused to that position and that the message came during their first week retreat.[411]

356. The shifting nature of the testimony of the witness on this issue coupled with his admission that the Second Accused had no area of responsibility in Kono and that he (witness) did not in fact know much about the Second Accused rendered the testimony of the witness on the Second Accused's alleged command positions worthless. The Chamber is accordingly urged to disregard this witness' testimony to the extent it implicates the Second Accused, in its entirety.

357. The Chamber's attention is drawn to the witness' allegation that the first time he saw the Second Accused after the retreat from Freetown was a week after arrival in Koidu and that the Second Accused had been on a mission in Liberia[412] and that the Second Accused arrived in Koidu after the JPK group had left for Kailahun.[413]

358. This contradicts the testimonies of several other Prosecution witnesses including TF1-366, TF1-371 and TF1-360.

359. TF1-360 who was staying with TF1-361 in Koidu and indeed arrived together with him after the retreat said before JPK left, testified the Second Accused was in a meeting convened by JPK in Koidu town where certain orders were given to the Second Accused to

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[410] Transcript 18 July 2005, p.120 lines 28-29, p.121 lines 1-14
[411] Transcript 19 July 2005, p.5-1-29
[412] Transcript 18 July 2005,p121 lines 8-14
[413] Transcript 18 July 2005, p.120 lines 18-29 – p.121 lines1-5

burn Koidu town and that the Second Accused remained in Koidu.[414] TF1-371 also says the Second Accused was in the group that left Koidu that went and based in Buedu and that the Second Accused did not return until after a month or 2.[415]

360. How is the Second Accused supposed to know which case he was to answer in the face of all these fundamental contradictions?

361. And how is the Chamber supposed to evaluate these testimonies, and which version is the Chamber supposed to adopt and why? The defence submits it is disingenuous for the prosecution to confront the Chamber with a myriad of contradictory theories about its case and somehow expect the Chamber to untangle the puzzle for the Prosecution; pick on one version and proceed to convict the accused accordingly.

v) TF1-367

Lies

362. Witness TF1-367, mining commander for the RUF, further demonstrates the quality of prosecution witnesses and the lies they were prepared to peddle in order to implicate the accused. The witness stated that when he was being questioned by Prosecution he was scared of being arrested[416] and that this did have an effect on the answers he gave. He confessed that he was just answering so that he would finish and he would release him to go where he wanted to go, so the answers he gave were not very good.[417]

363. When asked if he was suggesting that he had lied to the Prosecution the witness stated "that's what I've told you, that there is no truth in it."[418] The witness confirmed that he lied about being abducted from Bo Jendmea in 1991.[419]

364. The witness's dishonesty was further exhibited in court when despite admitting that he had been looked after by the Witness and Victims Unit of the Special Court since late April 2006,[420] he denied having received 880,000 Leones allowance during the period late April – mid-June. The witness said "we do not have that kind of transaction between us."[421] When he was shown a document from the Witness and Victims Unit detailing payments to

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[414] Transcript 25 July 2005, p.8 lines 1-29
[415] Transcript 31 July 2006, p.141 lines 13-16. But see also 20th July 2006, p.81 lines 1-12 where witness had stated Kallon stayed in Buedu for between 4-5 weeks.
[416] Transcript 22 June 2006, p.75 lines 16-21 & 27-29
[417] Transcript 22 June 2006, p.76 lines 18-27
[418] Transcript 22 June 2006, p.77 lines 8-10
[419] Transcript 22 June 2006, p.77 lines 14-25
[420] Transcript 22 June 2006, p.65 lines 27-29
[421] Transcript 22 June 2006, p.66 lines 1-5

him, he eventually conceded that they had been giving this to him.[422] The document is Exhibit 105 under seal.[423]

vi) TF1-167 (George Johnson)

365. This witness, a member of the AFRC, attempted to also exaggerate the Second Accused's role by giving him a higher rank. This started with the witness alleging that when they reached Masiaka after the retreat all the Honourables from Freetown promoted themselves to Brigadier Generals.[424]

366. In cross-examination witness TFI-167 confirmed that at Masiaka the commanders present promoted themselves to Brigadier Generals[425] and that there were no deliberations regarding these promotions. He heard of the promotions by way of rumour.[426]

367. The witness confirmed that he helped the Prosecution to prepare exhibit 9 and the reference to the Second Accused as Brigadier General was based on the rumour he heard in Masiaka during the retreat.[427]

Q. Did you assist the Prosecution in preparing this Kono Command Structure chart?
A. Yes.
Q. Will I be correct to say that you referred to Morris Kallon as a brigadier general because of the rumour you heard?
A. Yes, and when we left -- when we left Masiaka till we reach Kono, that was the title everyone was calling them.
Q. You referred to Morris Kallon as brigadier general --
A. Yes.
Q. -- because of the rumour you heard?
A. Yes, and he was a brigadier general at that time.
Q. Was he putting on a uniform with the rank of brigadier general?
A. He was not putting on uniforms. He dressed in civilians clothes, but –

368. There is no evidence that the Second Accused ever promoted himself to a Brigadier and the witness's rumour- based testimony is all meant to lift the Second Accused to a much higher rank in order to justify the Prosecution's theory that he (the Second Accused) occupied an important position of command and responsibility.

369. Indeed the defence has demonstrated that the Second Accused was never in Masiaka during the retreat.

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[422] Transcript 22 June 2006, p.67 lines 13-25
[423] Transcript 22 June 20006, p.69 lines 1-5
[424] Transcript 19 October 2004, p.24 lines 9-13
[425] Transcript 20 October 2004, p.2 lines 3-24
[426] Transcript 20 October 2004, p.8 lines 1-7
[427] Transcript 20 October 2004, p.5 lines 19-29, p.6 lines 1-5

370. There is also no corroboration by way of any concrete testimony that any such "self" promotions took place in Masiaka.

Inconsistent Statements-Minimising the Witness' Own Role

371. This witness like many of his colleagues also tried to minimize his own role in Masiaka during the advance to Freetown in December 1998. When he was questioned about the attack on Masiaka on their way to Freetown in December 1998, he stated that he did not go to the scene of the attack,[428] and that he knew about the attack from situation reports which made no mention of crimes committed by the troops at Masiaka.[429]

Witness was emphatic that he never went to Maiska; he stated:

> Q. Are you sure you did not go on the attack, Mr. Johnson?
> A. Yes at Masiaka when we are coming down to Freetown. I never went on that attack. I stayed in the camp[430]

372. He was referred to his earlier statement of 12th May 2003 at page 8497[431] in which he stated clearly that he was on the Masiaka operation and went on to recount a series of first hand experiences in Masiaka. The witness could not provide a credible explanation why he had denied in court going to the Masiaka operation.[432]

373. When it was put to the witness that he had sought to remove himself from the Masiaka operation because of crimes committed by SLA, he denied it.[433] When asked in court if any crimes were committed by the SLA in Masiaka, he denied it stating that:

> Q. What I'm suggesting is that ... well, let me put it this way. Let me ask you this. What crimes did you see committed against civilians in Masiaka by SLA group you were a part of?
> A. Masiaka was attacked at night and purely we attacked the Nigerians for arms and ammunition.
> Q. Is that true?
> A. Say again.
> Q. Is that true, Mr. Johnson?
> A. Yes, we attacked Masiaka at night and that main purpose was to get arms and ammunition to come down to Freetown.[434]

374. But in his written statement of 12th 2003, pg 8597, witness had discussed the killings they committed in Masiaka including the killings of 12 young ladies. When the contents of

[428] Transcript 19 October 2004, p.64 lines 16-24
[429] Transcript 19 October 2004, p.65 lines 1-5
[430] Transcript 19 October 2004, p.65 lines 8-10
[431] Transcript 19 October 2004, p.65 lines 11-13
[432] Transcript 19 October 2004, p.66 lines 19-23
[433] Transcript 19 October 2004, p.66 lines 24-26
[434] Transcript 19 October 2004, p.67 lines 8-18

the statement were read, he readily admitted that indeed the killings had taken place without explaining why he had earlier denied it.[435]

375. The motive for this witness' desire to minimize his role in the events while at the same time magnifying the role of the Second Accused is clearly discernible from his testimony that when he was first asked to testify for Prosecution, he was afraid because he thought as an insider, he could be indicted,[436] and that he expressed that fear to the Prosecution who told him that those to be indicted were those bearing the greatest responsibility.[437]

376. The defence submits that it was in the interests of the witness to try and minimize his role in the atrocities while at the same time assisting the Prosecution by magnifying the role of the accused.

377. Another example of the witness' desire to exaggerate the role of the accused in the case is when he was confronted with evidence that he had never in almost 10 of his earlier interviews, mentioned Sesay as being the commander of Kono. He stated that is was Counsel for Sesay's questions that had "triggered his memory.[438] The witness could however not explain why he forgot that Sesay controlled the richest area in Sierra Leone following the fall of Superman only saying that his memory was not triggered because "I was explaining and those questions were not asked."[439]

378. The Chamber is respectfully urged to evaluate the testimony of this witness with caution and disregard it to the extent it implicates the Second Accused.

vii) TF1-184

379. Witness TF1-184 was an AFRC insider who testified on various issues including the attack on Freetown in 1999. During his oral testimony the witness attempted to exaggerate the role of the RUF in the Freetown attack despite the fact that he had, in an earlier statement which he admitted was taken from him in a language he understood, said no RUF was in Freetown. He stated [440]

Q. And the language of the interview was in Krio?
A. Yes.
Q. So at least you knew what you were saying?
A. Yes.

[435] Transcript 19 October 2004, p.68 lines 1-29
[436] Transcript 19 October 2004, p.98 lines 20-29
[437] Transcript 19 October 2004, p.99 lines 1-10
[438] Transcript 19 October 2004, p.54
[439] Transcript 19 October 2004, p.55 lines 1-12
[440] Transcript 6 December 2005, p.87 lines 14-28, p.88 lines 1-5

> Q. Now, did you there say that - that is the second line, Your Honour -"No RUF was in Freetown at this particular time. It was SLA operation and it was a standing instruction from Gullit that any captured ECOMOG soldier must be put to death. The same goes for any SLPP supporters and Government officials." Is that so?
> A. I disagree to some and I agree to some.
> Q. You agree that no RUF was in Freetown?
> A. No. RUF was in Freetown.
> A. No, no. When we came to town it was different. It was not in hiding. It was open. It was not just the SLA, it was the joint force. You know AFRC had RUF, because it was a full AFRC. When I talk about AFRC, it includes RUF because we had Gibril. They were communicating, you see.

380. The witness further attempted to magnify the presence of RUF in Freetown during the January 1999 attack. In an earlier statement he acknowledged to have given the Prosecution on 7 August 2003, the witness had stated that no RUF was in Freetown during the invasion on January 6; it was an all SLA operation.[441]

381. Although the witness in re-examination by the Prosecution denied ever making the statement the defence submits that the statement was very clearly expressed and it is inconceivable that the Prosecution would have made it up. And although the Prosecution referred him to another statement of 16th and 22nd September in which the witness this time stated that the RUF was in town,[442] no explanation was provided regarding the witness's change of mind between August 2003, when he cited no RUF in Freetown and September 2003 when he suddenly realized there was indeed RUF in Freetown on January 6th.

382. In further exaggeration of the RUF presence in Freetown, the witness during re-examination by Prosecution claimed that 17 RUF came in as reinforcement.[443]

383. In an earlier statement of 23 May 2004, the witness had stated that it was 17 RUF and SLA (see Exhibit 70)

viii) TFI-334

384. The witness also attempted to give the Second Accused a higher status. Although the witness confirmed that during the period after the retreat from Freetown, there were other senior officers of the RUF in Kono such as Col Isaac, Komba Gbundema, Col Vandi and Co Rocky, he knew the Second Accused as a Colonel. On further questioning, the witness could

[441] Transcript 7 December 2005, p.14 lines 17-27
[442] Transcript 7 December 2005, p.18 lines 9-29
[443] Transcript 7 December 2005, p.47 lines 14-20

not explain the basis for his allegation, and indeed acknowledged the lack of any basis. The witness stated thus[444]

> A. He was a colonel.
> Q. Was he putting on a uniform with emblems showing that he's a colonel?
> A. Well, he did not put on the uniform, but this we all called him -- we all called him colonel when we were in Kono. We saluted him as colonel and he was recognized as colonel.
> Q. So, in fact, you are not sure but you people just addressed him as colonel, even though they were not sure whether he was a colonel not?
> A. My Lord, if we were in Kono this is what I'm telling you: You would not be crazy to call Morris Kallon major, you would salute him as a commander, not as a colonel, not as a major.

ix) <u>TF1-045</u>

385. The witness' motivation to fabricate testimony and exaggerate the role of the accused is demonstrated by his confession that when he was approached by the Prosecution he was afraid because "they said that the special court that has come.....has came for the Colonels and the Brigadiers. So I had no idea. I was really worried about my security at the time"[445]

<u>Lies</u>

386. This witness agreed having lied to the prosecution about Sesay killing a Kamajor.[446] The witness confirmed in court that Sesay was not present at the incident. [447] As to why he lied, he stated;

> 'Well, they said that this Special Court was created for the top ones. So anything one did –' ... 'If you kill, you rape, they were responsible for that. That that time I knew that I myself involved in it. So If I said that I involved in it, maybe I think I will be arrested. That was why I lied at him. But I understood that.' ... 'It was not the truth.' [448]

> .... 'I said I myself, I was afraid because such a thing, if I said that I involved in it, it would be a problem for me. So that was why I shifted it to him. But later I came to understand that the truth should be the truth. There was no way to balance it. That was why I told the Prosecution that Issa Sesay was not there and he did not kill any Kamajor. Because I had known that the Court would not hold me responsible for that, even if I agreed for that. [449]

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[444] Transcript 7 July 2006,p.78 lines 1-12
[445] Transcript 22 November 2005, p.30 lines 19-25
[446] Transcript 24 November 2005 pp 30, line 25 – pp 31, line 18
[447] Transcript 24 November 2005 pp 32, lines 16-18
[448] Transcript 24 November 2005, pp.32 lines 19-28
[449] Transcript 24 November 2005 pp 33, lines 6-13

When asked why he blamed Sesay over other commanders he stated that;

> 'During that time both of them were the commanders, Sesay and Mosquito. So when Mosquito was no longer living, that was why I put it on him.' [450]

387. This clearly demonstrates the witness' motivation to shift blame to the accused. The witness further revealed that he was once arrested by the Second Accused. He stated that at some point in time he (the witness) was in the Second Accused's house in Makeni under arrest when he heard that the Second Accused went to Tongo to collect Peleto there.[451] He confessed that during the retreat from Kenema to Kailahun after the intervention in February 1998, he looted a land cruiser belonging to the ICRC.[452]

Exaggerations Against the Second Accused

388. The witness also attempted to implicate the Second Accused regarding the command structure by giving him the undefined position of "taking care of the situation". He stated that the top commander in Kono after February 1998 "was Superman who was the commander but at that time Kallon was assigned by Issa to take care of the situation"[453]

389. Witness stated that TFI 371 was a member of the Supreme Council together with the Second Accused and others. He heard people call it the Supreme Council.[454] The witness attempted to implicate the Second Accused by placing him in alleged meetings in Freetown during the Junta period.

390. He stated that he attended a meeting at Wilberforce Barracks at the Officers' Mess. He explained that the meeting discussed the relations between AFRC and RUF and looting and harassment.[455] And that later they discussed a consignment of weapons to be bought for the AFRC at Magburaka airfield[456]. Others in attendances were TFI 371 his boss, Sesay, the Second Accused, the army chief of staff, and others. The witness stated:[457]

> Q. Did you attend this meeting?
> A. Yes Sir, I myself entered the Hall, because I was an officer. I was sitting there as I am sitting here now" [458]

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[450] Transcript 24 November 2005 pp 33, lines 15-20
[451] Transcript 25 November 2005, p.16 lines 1-3
[452] Transcript 21 November 2005, p.12 lines 7-11
[453] Transcript 23 November 2005, p.4 lines 7-12
[454] Transcript 18 November 2005, p.81 lines 10-20
[455] Transcript 18 November 2005, p.83:25-29, p.84 lines 1-11
[456] Transcript 18 November 2006, p.84 lines 19-22
[457] Transcript 18 November 2005, p.81 line 22-29,p.82 lines 1-3
[458] Transcript 18 November 2005, p.81 lines 25-27

391. The witness's testimony on the alleged meeting is contradicted by TFI 371, his boss who never mentioned any meeting at Wilberforce officers' mess. More significantly witness TFI 371 stated that bodyguards were never allowed into these kind of meetings of senior officers.

392. The witness stated he attended another meeting at Youyi building at the end of September also attended by the Second Accused and others including top AFRC leaders.[459]

393. Witness stated that harassment all over the country was discussed including the pressure that was being brought to bear on the Junta Government by the International Community.[460] Once again this testimony is contradicted by TFI 371, the witness's boss who did not mention this important meeting. Moreover TFI 371 stated bodyguards were not allowed into such meetings where in this instance very important discussions were held. Logically and even without the testimony of TFI 371, it is inconceivable that bodyguards would be allowed into high Government meetings where important and strategic decisions are made.

394. The Defence submits that the testimony of witness TF1-045 on these alleged meetings in Freetown is further demonstration of the witness's fabrications singularly meant to implicate the Second Accused as a senior member of the Junta government.

395. The witness purported to have seen several commanders with SBUS.[461] He however stated that he saw the Second Accused with SBU the longest and that he saw him with these SBUS in Freetown in 1997,[462] in Buedu in 1997 and in Makeni in 1999-2000.[463]

396. The witness did not explain in what circumstances he saw the Second Accused with the SBUs given that he neither lived with nor worked under the Second Accused.

397. Regarding the SBUS he saw with the Second Accused, the witness said they were from 13 to 17, 18.[464]

398. The Kallon Defence submits that the witness evidence on the Second Accused on SBUs is not only too general to establish beyond reasonable doubt that the Second Accused had SBUs but is also exaggerated in order to implicate the Second Accused.

399. The witness spoke again in very general terms about forced mining in Giema. He confirmed that he never went there.[465] But without substantiation he stated that the Second Accused among others knew about this forced mining.

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[459] Transcript 18 November 2005, p.87 lines 19-29
[460] Transcript 18 November 2005, p.88 lines 17-29
[461] Transcript 21 November 2005, p.38 lines 15-16
[462] Transcript 21 November 2005, p.39 lines 6-8
[463] Transcript 21 November 2005, p.39 lines 18-23
[464] Transcript 21 November 2005, p.39 lines 27-28

Q: Do you know if any other commanders were aware of this mining in Giema?
A: The Giema mining, yes, Mosquito knew about that, my commander, Mr. A knew about that, Kallon knew about that mining. Everybody knew. The commander that I mentioned they knew about the Giema mining.[466]

400. This evidence is quite characteristic of the witness's generalized and knee-jerk reaction to questions posed by the prosecution. It betrays an unbridled eagerness by the witness to implicate the accused even where there is no proper foundation.

401. The Kallon Defence submits that with respect to the allegations against the Second Accused " regardless of any evidence presented in the defence of the Accused persons and the weight the Chamber has attached to such evidence, it is the Prosecution that bears the burden of proving, beyond reasonable doubt, the charges against the Accused" [467] [emphasis added]

b) OTHER FACTORS AFFECTING CREDIBILITY OF PROSECUTION WITNESSES

i) RUF Insider Witnesses

(1) TFI 366

(a) Introduction

402. TFI 366 alleged a range of criminal conduct against the Second Accused. The witness stated that he was 27 years old on the date of his testimony to the Court in 2005 and confirmed that he could not read or write.[468] He said that he was with the RUF from his capture in 1991 until disarmament in 2002.[469] Accordingly, the witness was 13 years old when he joined the RUF and 22 at the date of disarmament. His testimony spans all of those years.

403. The witness says he first met the Second Accused in 1994 at Peyama in the Kenema District near Tongo, when the witness was sent by Issa Sesay to take troops to Kono.[470] He states that he was Issa's bodyguard and was an RUF lieutenant fighting with Issa in the Giema Jungle in 1993. Notwithstanding his age (being between 15 to 16 years at the time) and

[465] Transcript 21 November 2005, p.60 lines 1-29
[466] Transcript 21 November 2005, p.61 lines 16-22
[467] CDF Trial Chamber Judgment, 2 August 2007, para.287
[468] Transcript 7 November 2005, p.55
[469] Transcript 7 November 2005, p.56
[470] Transcript 10 November 2005, p.95 lines 24-29

illiteracy, the witness claims that he took troops to Kono in 1994 and was made Issa's representative there, where he worked alongside the Second Accused, who, according to the witness, was Issa's deputy.[471]

404. In his evidence before this Chamber, TF1 366 took every opportunity to inflate his own role within the RUF and to incriminate the three accused in an attempt to derive some compensation for his marginalisation and humiliation during the war at the hands of the accused persons, including the Second Accused, in this trial. As such, the witness purported to have a detailed knowledge of the command structure of the RUF and to occupy prestigious positions himself therein. However, this was betrayed, under cross-examination, by a blatant deficiency in knowledge of the RUF command structure and the reporting system that existed therein and by extrinsic evidence led from other RUF insider witnesses that TF1 366 occupied no such positions.

(b) Motivation for the Provision of False and Misleading Testimony

405. It is submitted that the witness had ample motivation to falsely incriminate the accused, Sesay and the Second Accused, arising from his arrest, humiliating treatment and detention which was implemented and ordered by the Second Accused and Sesay, respectively. The two accused effected the arrest of TF1 366 twice. On the first occasion he was arrested for disrupting the disarmament process. The Second Accused explained as follows, that in December 1999 Sam Bockarie communicated his intention not to comply with the disarmament process and that:

> "Sam Bockarie [communicated] that he, 366, should start mobilising men in Magburaka as is to not take order for carry on any disarmament. That information leaked to us. When I mean to us, myself and Mr Sesay. 366 was arrested and placed in detention."[472]

406. The Second Accused explained the second arrest, in late 2000 as follows:

> "[TFI 366] was sent to Tongo to supersee mining there. Civilians brought a lot of complaint against him that he was harassing, intimidating, and even to the extent undressing civilians, to work in the mines for him. He was calling himself minister of mines. So when this report came to Mr Sesay that time he was now an interim leader. I was a battle-group commander. So he sent me there to go and have him arrested. Myself, when I get in there, I call general meeting, both civilian and the RUF fighter there. The civilian really proved that he was harassing them. So myself, on that spot, I order his arrest. He was undressed and I seized all property he had at that time. I give to some of the civilian who say: Oh, that belongs to me. This belongs to me. That belongs to me. I return to the owners."[473]

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[471] Transcript 10 November 2005, p.96 lines 7-8 & p.97 lines 3-9
[472] Transcript 11 April 2008, p.93 line 12-16
[473] Transcript 11 April 2008, p.93 line 22- p.94 line 5

407. The witness was subsequently detained at the Second Accused's house in Makeni. This was corroborated by TFI 045,[474] who was also arrested at that time by the Second Accused, and by TFI 366 himself.[475]

408. The witness also revealed the extravagant incentives provided to him for giving testimony against the three accused. Responding to questioning under cross-examination, he explained his relationship with the Prosecution as follows:

> Q. "Could I suggest that your cooperation with the Prosecution is another part of your benefiting from the war?
> A. "Oh, yes, I wouldn't deny that because I do eat. I sleep in a decent place."[476]

He continued:

> "My assistance will continue until the Court ends its work. Whenever they call upon me, I will be available."[477]

409. He confirmed that since being approached by the Prosecution he had lived in Freetown where he could "sleep in a decent place" for over a year, that his family and himself were being feed and that he had new clothes.[478] He said that before his involvement with the Prosecution he was "suffering".[479] It is clear that the aforementioned benefits caused a material change to living conditions of him and his family and, it is submitted, that as a result he intended to assist the Prosecution in whatever way he could to repay the benefits already received, as well as to ensure benefits in the future.

410. As a result, it is submitted that the ambitions of the witness to incriminate the three accused were boundless. The witness gave a statement to the Prosecution in which he implicated General Opande and a Chikumbi, who according to the witness was the UN commander in Tongo, in a trade with Sesay of diamonds for arms and ammunition.[480] The witness affirmed the truth of his statement as follows:

> "So let me understand this, if I can. You were suggesting that Issa Sesay was trading diamonds with the force commander of the peacekeeping mission in exchange for weapons for the RUF. Is that what you're suggesting?
> A. "Yes, it did happen in my presence."[481]

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[474] Transcript 14 April 2008, p.72; the evidence is also described in the credibility analysis of TFI 045, *supra.*
[475] Transcript 9 November 2005, p.45 lines 9-29 & p.47, lines 9-22
[476] Transcript 10 November 2005, p.77 lines 9-12
[477] Transcript 10 November 2005, p.79 lines 18-20
[478] Transcript 10 November 2005, p.77 lines 24 – pg 78, line 9
[479] Transcript 10 November 2005, p.77 lines 21-22
[480] Transcript 10 November 2005, p.69 lines 11 – pg 70, line 7
[481] Transcript 10 November 2005, p.70 lines 8-12

(c) Meticulous Preparation For Testimony

411. In cross-examination counsel for Sesay referred to the interviewing process which the witness had undergone prior to giving his evidence before the Chamber. The witness confirmed that he was interviewed on 5 February 2004, 30 August 2004, 17 and 18 February 2005, on six different occasions in August 2005 and on a further four occasions in October 2005.[482] The witness confirmed that, on each occasion, he had spent time under the supervision of the Prosecution going over the contents of his statement, which formed the basis of his oral testimony. It is submitted that the witness underwent such thorough preparation in order to avoid inconsistencies in his testimony and that, whether he gave truthful evidence-in-chief or not, he was able to maintain his evidence under cross-examination and, as such, conceal the disparity between his evidence, which was fabricated in order to falsely incriminate the three accused, and the truth. Under cross-examination, the witness affirmed that he went over his statement to the Prosecution 30 or 40 times and indicated that his testimony was based on material that he had learnt in preparation for giving evidence rather than his honest recollection of events. The witness responded to questioning as follows:

> "Q. You must have gone over these statements at least 30 or 40 times; am I right?
> A. Yes, it did happen almost every day.
> Q. Can I suggest to you, Mr Witness, that what you've done is to learn your statement so that you can implicate the three accused in this courtroom. Do you understand my question?
> A. Well, what was in my mind, that was what exactly I gave. Because if you go to school, when it is time for exams you will take that exam.
> Q. Exactly, and this is to you like an exam.
> A. You have to study for it.
> Q. Exactly. And you've studied your evidence, which I suggest are lies which you've learnt; am I right?
> A. They are not lies. All what I said, I have told you I was there. They are not hearsay. I was there."[483]

(d) Internal Inconsistencies and Contradictions With Prosecution Case

412. The witness' testimony is littered with inconsistencies concerning his own position and material aspects of the case against the three accused, all of which serve to undermine his credibility. His evidence during examination-in-chief blatantly contradicted both his evidence in cross-examination before this Chamber. These inconsistencies concern:

a. The town where "Operation Pay Yourself" commenced, after the Intervention;

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[482] Transcript 10 November 2005, p.62 lines 25 – pg 68, line 5
[483] Transcript 10 November 2005, p.68 lines 7-21

b. The provenance of the order for "Operation Pay Yourself", after the Intervention;

c. The identity of the individual who allegedly set fire to 15 fifteen people in Tombodu;

d. The building in which people were allegedly burnt to death;

e. Mr Sesay's order to loot captured ECOMOG troops in Koidu Town, 1998;

f. Capture of Teko Barracks from ECOMOG and ECOMOG retreat thereafter.

413. Under cross-examination it was frequently revealed that these inconsistencies were attributable to a relentless desire to incriminate the accused. For example, although the witness had given a statement to the Prosecution that the Second Accused had ordered that ECOMOG be afforded safe passage from Teko Barracks after it had been captured by the RUF, he denied the statement under cross-examination, offering the following explanation:

> "You deny that now, that you said so?
> A. "That was what I said. It was not Kallon that gave that order. All of us agreed. We were fighters. We had experience. You cannot fight to entrap somebody. That's unprofessional.
> Q. "So you don't want to give any credit to Kallon?
> A. "No, because at that time Kallon's intention was to capture and kill all the ECOMOG soldiers and we did it."[484]

(e) Conclusion

414. It is submitted that when contact was made between TFI 366 and the Prosecution, he understood that an opportunity had been created for him to exact some retribution for his mistreatment by the accused in this case during his time in the RUF. As such his desire to advance the case of the Prosecution by incriminating the accused in every possible manner was fostered. It was developed further by the material changes to the lives of himself and his family which were apparently derived since he had established contact with the Prosecution. The desire manifested itself in a relentless campaign to falsely incriminate the accused, supplying the Prosecution case with graphic new allegations, purportedly substantiating areas of the Indictment, which no other witness could at that time and offering eye witness accounts of the movements of the accused throughout the was. The Office of the Prosecutor conducted meticulous preparation with the witness in order to protect his evidence under cross-examination. Notwithstanding that, the evidence revealed a lack of credibility by internal inconsistencies and contradictions with the Prosecution case, allegations of sweeping

[484] Transcript 17 November 2005, p.10 line 28 – p.11 line 5

generality, a lack of knowledge of a command structure in which the witness testified that he was an integral part and by making allegations which were completely devoid of a rational or credible basis.

(2) TFI 045

415. TFI 045 is an RUF insider witness who rose to rank of Lieutenant Colonel. He was a bodyguard to TFI 371.

416. The witness alleged that the Second Accused was a Deputy Area Commander in 1997 to Colonel Isaac Mongor at Kangari Hill. He was not corroborated by any other witness. Notably, TFI 045 was never based at Kangari Hill, whereas TFI 360 was based at Kangari Hill from 1996 until May 1997.[485] He was not able to corroborate TFI 045.

417. The witness also alleged that the Second Accused attended meetings of the Supreme Council. This evidence was surrounded by inconsistencies and contradictions.

418. It is submitted that TFI 045 is not a credible witness and that his testimony should be disregarded in its entirety. Two grounds are offered in support of this proposition: (i) the testimony is consistently unreliable; and (ii) the witness was sufficiently motivated to provide false and misleading testimony.

(a) Consistently Unreliable Testimony

419. The witness' testimony is littered with inconsistencies concerning his own position and material aspects of the case against the three accused, all of which serve to undermine his credibility. His evidence during examination-in-chief blatantly contradicted both his evidence in cross-examination before this Chamber. These inconsistencies concern:

a. The year of his capture;
b. The participants in an alleged meeting of the Supreme Council at Wilberforce Barracks in 1997;
c. The date of the alleged meeting of the Supreme Council at Wilberforce Barracks in 1997;
d. Witness' movements between his departure from Liberia and arrival in Freetown;
e. Arrival of the witness in Freetown in 1997;

[485] Transcript 20 July 2005, p.6 lines 18-27

f. Mr Kallon's assignment in October 1997;

g. Witness' involvement in Tongo mining 1997;

h. Alleged abduction by Mr Sesay of Johnny Paul Koroma's wife in 1997;

i. Members of convoy from Kailahun to Gandorhun Gbane in February 1998;

j. Kallon's alleged presence at meeting in Buedu in December 1998;

420. The witness testified to two meetings in Freetown towards the end of 1997, which, if credible, would have substantiated the Prosecution case that the Second Accused was a member of the Supreme Council. In order to give plausibility to that evidence the witness was forced to make series of fabricated statements in relation to timeframes and movements. Thus, (b) to (e) on the list of inconsistencies, supra, relate to evidence of alleged meetings of the Supreme Council in Freetown in October 1997.

421. According to the witness both meetings were attended by himself and the Second Accused, *inter alia*. The first was allegedly held in the Officers' Mess at Wilberforce Barracks and, in his examination-in-chief, the witness said this occurred in "early September 1997".[486] Under cross-examination by counsel for Sesay the witness gave the following contradictory testimony:

> Q. "Well, I want to refer you to evidence you gave in the AFRC trial. Before I do, do you suggest that this meeting was at the beginning of September
> A. "No it was late September; late in September."[487]

422. Thereafter the witness persistently and forcefully denied the date given in his evidence in chief.[488]

423. Counsel for Sesay then presented the witness with his statement, given to the Prosecution in which he described the alleged meeting at Wilberforce Barracks as taking place "around mid September 1997."[489]

424. Subsequently, the witness testified that he was in Monrovia when he heard about the coup, on 25 May 1997.[490] Under cross-examination, he testified that he entered Sierra Leone, with his superior, TFI 371, within two weeks. However, counsel for Sesay put the witness' own testimony in the *AFRC* Case to him in which he had stated that he remained in Monrovia for three weeks.[491] Thereafter, counsel demonstrated that, if he had in fact remained in

[486] Transcript 18 November 2005, p.80 line 10
[487] Transcript 22 November 2005, p.74 lines 2-5
[488] Transcript 22 November 2005, p.74 lines 24-29
[489] Transcript 22 November 2005, p.76 line 14-18
[490] Transcript 22 November 2005, p.76 lines 27 – p.77 line 10
[491] Transcript 22 November 2005, p.78 lines 19-23

Monrovia for three weeks then, in light of the witness' testimony in the *AFRC* Case regarding his movements and related timeframes between his entrance into Sierra Leone and his arrival in Freetown, the witness could not have arrived in Freetown before the middle of October 1997.[492] In which case, his testimony about the alleged meetings in Freetown, which he said that he attended, is rendered an impossibility. It is submitted that the witness, realising these implications, knowingly gave false testimony about has departure from Monrovia, in order to give congruity to his timeframes, thus allowing him to give a purported eye witness account that the accused, Sesay and Kallon, attended the alleged meetings in Freetown and, in so doing, to falsely implicate the accused.

(b) Motivation for the Provision of False and Misleading Testimony

425. The witness' testimony reveals that he was sufficiently motivated to providing the Court with knowingly false and misleading information to the detriment of the Second Accused. The aforementioned inconsistencies can be reasonably attributed to this adverse motivation.

426. It is submitted that inconsistencies were unearthed during cross-examination because the witness knowingly sought to conceal the erroneous nature of the evidence he had given during the *AFRC* case and in his examination-in-chief in the instant case in order to incriminate the Second Accused.

427. The Second Accused gave evidence that he arrested TFI 045, along with TFI 366, as "[one of the] officer who were inciting in Tongo Field" and disrupting the disarmament process.[493] He testified that he did so in a manner, by tying them up and taking them away in a vehicle, that would make an example out of them to warn others not attempt such disruptions to the disarmament process. The Second Accused then took both them to his house in Makeni and detained them there.[494] Under cross-examination, TFI 045 confirmed this.[495] On this basis, it is submitted that TFI 045 had substantial motive for giving false testimony and unduly implicating the Second Accused.

428. The witness also confirmed under cross-examination that he had been given an assurance by the OTP that he would not face criminal charges pertaining to acts committed during the conflict. It was only upon this assurance that he consented to providing

[492] Transcript 22 November 2005, p.80 line 14
[493] Transcript 14 April 2008, p.72 lines 9-11
[494] Transcript 24 November 2005, p.27
[495] Transcript 25 November 2005, p.15 line 27 – p.16 line 3

testimony.[496] It is submitted that this provided the witness with an opportunity to offer false testimony without fear of repercussion, particularly in respect to his own level of involvement in and knowledge of the facts alleged. Indeed, there is a substantial risk that the assurance created, in the mind of the witness, the impression of absolute immunity from prosecution, including charges of perjury.

429. Thus, having given patently contradictory testimony in relation to material aspects of the case of command responsibility, *inter alia*, against the Accused, and in light of the motivation which the witness harboured to incriminate the Accused, which was amply exposed on cross-examination, it is submitted that TFI 045 is not a credible witness and that his testimony should be disregarded by the Chamber in its evaluation of the merits of the case.

(3) TFI 371

(a) Introduction

430. The evidence of TFI 371 was admitted pursuant to a Prosecution motion to vary the witness list, and was subsequently called by the Prosecution as the last witness to testify.[497] In so doing, the Prosecution introduced a raft of new allegations against the three accused which had previously not formed part of the Prosecution case. The motion to add TFI 371 was filed on 10 March 2006, a year and 8 months after the Prosecution called its first witness. At that time the Chamber had already heard 61 of the eventual 84 Prosecution witnesses. The facts disclosed in the motion to which the witness testified were disclosed for the first time at that point.[498] Great prejudice was caused to the Defence because of the lost opportunity to elicit vital evidence in rebuttal of the allegations made by this witness from Prosecution witnesses whose testimonies concluded after the aforementioned Prosecution motion was filed.

431. TFI 371 testified as an ex-commander of the RUF. As such, it can be reasonably expected that he should have an intricate knowledge of the command structure of the RUF, and the movements and actions of RUF commanders, including the three accused. Throughout his testimony, Witness gave evidence leading to a vast number of allegations against the three accused that could not be factually proven, and were only substantiated by the testimony of one other witness TFI 366. There are a great number of inconsistencies in the

[496] Transcript 25 November 2005, p.24 lines 14–16; p.25, lines 2–5

[497] *P v. Sesay et al.*,SCSL-04-15-T-537, Decision on Prosecution Request for Leave to Call Additional Witness TFI-371 and for Order for Protective Measures, 6 April 06; granting *P v. Sesay et al.*, SCSL-04-15-T, Confidential With Ex Parte Under Seal Annex Prosecution Request for Leave to Call Additional Witness and for Order for Protective Measures Pursuant to Rules 69 and 73*bis* (E), 10 March 06.

[498] See the discussion on the section of the Indictment, *supra*.

testimony given by TFI 371, and many instances where he fails to remember facts which could reasonably be expected to fall within his knowledge due to his influential position within the RUF command structure. Therefore, the contradictions in his evidence can only be reasonably explained as a conscious and intentional desire to falsely incriminate the three accused and mislead the Court.

(b) Motivation for Misleading Testimony

432. Witness TFI 371 had ample motive for falsely incriminating the three accused and particularly the Second Accused. The Witness and the Second Accused had grown up in the same village, and knew each other well, but increasingly appeared to have conflicting approaches to the RUF's goals. The Second Accused described two specific events that have had a negative effect on their relationship. Firstly, in 1997, TF1 371 stood for the position of Minister of Trade and Industry.[499] The Second Accused did not support his promotion on the basis that TF1 371 had sought refuge in Liberia for a time and thus was not truly committed to the RUF. It is clear that TF1 371 believed that the Second Accused had thwarted his political aspirations,[500] and this motivated him to falsely testify against the three accused in order to realise a personal revenge.

433. The witness was clearly not afraid to speak out against the Second Accused, and he had previously tried to turn other RUF personnel against him. For instance, on January 18th 2002 there was a symbolic arms burning in Freetown, and TF1 371 had tried to persuade Sesay to command the Second Accused to stay away from Freetown.[501] When the Second Accused did arrive in Freetown, TF1 371 made it clear that he was not pleased to see him.[502] Furthermore, the Second Accused has cited a difference in RUF ideology that caused tension between him and TF1 371. While the Second Accused was "working to please the people of Sierra Leone to end the struggle and [bring] peace"[503]; the Witness was someone who was "definitely going to kill"[504] and was opposed to the disarmament programme of the peace process.[505]

[499] Transcript 11 April 2008, p.95 lines 9 - 13
[500] Transcript 11 April 2008, p.95 lines 19 - 22
[501] Transcript 11 April 2008, p.95 lines 27 - 28
[502] Transcript 11 April 2008, p.96 line 5
[503] Transcript 11 April 2008, p.96 lines 6 - 7
[504] Transcript 11 April 2008, p.96, line 16
[505] Transcript 11 April 2008, p.96 line 29

434. It is clear that there existed a strong degree of malice directed at the Second Accused by the Witness. As well as differences in RUF ideological approach,[506] tension arose from the Second Accused's failure to support the witness' political aspirations.[507] These facts represent an obvious conflict of interest and clearly substantiate the proposition that in testifying the Witness was, in fact, pursuing a personal regime of revenge to further incriminate the Second Accused through fabricating evidence about RUF command structure and the movements of the three accused.

(c) Fabricated Incriminating Allegations

435. As with TFI 366, much of the evidence elicited from TFI 371 is incongruous to the Prosecution case as set out in the Indictment and/or testified to by other Prosecution witnesses. Evidence given by TFI 371 which has been contradicted by other Prosecution witnesses includes allegations that:

a. The Second Accused was appointed to the position of battle group commander in August 1997. Significantly the Prosecution case pleaded in the Indictment that the Second Accused was not appointed to this position until "early 2000", some three years later;
b. The Second Accused was superior to Superman in Kono from March to May 1998;[508]
c. Superman was appointed Battle Group Commander from around August 1997 until the Lome Peace Accord;[509]
d. The Second Accused exercised command authority in Tombodu in 1998,[510] and;
e. The Second Accused was in Liberia in May 1999.[511]

436. All the aforementioned evidence is highly material to the Prosecution case. For many allegations, the witness' testimony is corroborated by TFI 366 only. It is submitted that TFI 366 is not a credible witness, as is demonstrated above. In all other instances, the witness' statements are either internally contradictory or lack factual basis.

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[506] Transcript 11 April 2008, p.96
[507] Transcript 11 April 2008, p.95 lines 9 - 13, 19 - 22
[508] Transcript 11 April 2008, p.95 lines 9 - 13, 19 - 22
[509] Transcript 31 July 2006, p.128 lines 2-4; and p.126 lines 22-26. The Lome Peace Accord was signed on 7 July 1999, see the Indictment, at para 14. Note the contradictory testimony given by the witness in relation to the date of Mr Kallon's alleged appointment, described *supra*. This is contradicted by Exhibit 35- salute report from Sam Bockarie to Foday Sankoh, dated 26 September 1999, in which Sam Bockarie reports his appointment of Superman to Battle Group Commander at that time. It is also contradicted by a "Low report" from Superman to Foday Sankoh, dated 25 May 1999, see TFI 371, Transcript 31 July 2006, p.131 lines 2-6; referring to Sam Bockarie as "Log".
[510] See the discussion on Counts 3-5, *infra*.
[511] Transcript 28 July 2006, p.11 line 26

437. Due to his position of influence within the RUF structure the Witness would have been party to confidential information regarding the movements, call signals and positions of responsibility of different commanders. However, there are significant gaps in the Witness' testimony, suggesting that his evidence has been fabricated to further incriminate the three accused. The Witness confirmed that he received radio messages daily from the Kono front line[512] however he was unable to remember specific factual events, including Superman's departure from Koidu.[513] Moreover, despite being able in earlier statements to differentiate between RUF commanders through their radio call signs, he is unable to identify his own call sign, thus excluding the possibility of incriminating himself.[514] Later in his testimony, the Witness denies ever having a code name.[515] The selective memory of the Witness regarding issues that clearly fell within his competence serves to undermine his credibility.

438. One method used by TF1 371 to further incriminate the Second Accused was to present a picture to the Court that certain command assignments held more responsibility than they actually did. For instance, the Witness asserted that the role of area commander was parallel in the command structure to that of security commander.[516] Thus, Gbao, who was a security commander in March 1998, was in a parallel position to Denis Mingo and Isaac Mongor who were area commanders at that time.[517] However, in later transcripts, TF1 371 confirms that Gbao was not involved in several significant events concerning the movements of RUF personnel.[518] If Gbao's position was in fact parallel to that of a security commander, it could reasonably be expected for him to have had some element of participation in these events. The suggestion of a parallel command responsibility in this instance cannot be corroborated with other testimonies. It is a clear example of TF1 371 providing false testimony that suggests that lower positions within the RUF command structure were assigned to heighten responsibility, thus more greatly incriminating the three accused.

439. Throughout his testimony TF1 371 presented a plethora of evidence indirectly related to the command structure of the RUF. However, when confronted with a line diagram outlining the command structure operating in Kono district around the time of March - May 1998, Witness claimed he could not read the diagram because he did not have a key to

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[512] Transcript 28 July 2006, p.25 lines 10 - 13
[513] Transcript 28 July 2006, p.24 lines 14 - 23
[514] Transcript 01 August 2006, p.22 lines 9 - 10
[515] Transcript 02 August 2006, p.15 lines 1-14
[516] Transcript 01 August 2006, p.106 lines 2 - 13
[517] Transcript 01 August 2006, p.106 lines 2 - 6
[518] Transcript 01 August 2006, p.109 lines 17 - 29; Transcript 01 August 06, p.111 lines 6 - 19; Transcript 01 August 2006, p.111 lines 26 - 29; Transcript 01 August 2006, p.112 lines 6 - 13

decipher it.[519] The Witness failed to cooperate in considering the diagram because he did not want to render his earlier evidence invalid. This is an example of TF1 371's disrespectful attitude towards the Court, and calls into question the credibility of his testimony.

(d) Internal Inconsistencies

440. In addition to the body of evidence which contradicts previous statements by TFI 371, his testimony is also full of internal inconsistencies in relation to highly material aspects of the cases against the three accused. The witness gave contradictory testimony in relation to, *inter alia*:

1. The commanders that were subordinate to Brigadier Mani, present in Makeni in May 1999;
2. The senior commander in Makeni during May 1999;
3. Superman's control over Kono in the Second Accused's absence, March to May 1998;
4. The seniority of Superman over Rambo in Kono, March to May 1998;
5. Whether Sam Bockerie desired to be vice-president of the Junta;
6. Control of mining operations in Tongo;
7. The date of Superman's appointment to Battle Group Commander;
8. Witness' source for information placing the Second Accused in Tombodu at the time of the massacres;
9. The command structure in operation at Camp Naama in April 1991;
10. Gbao's level of involvement in RUF senior commander activities;
11. The role of area commander in relation to the position of security commander;
12. The position of the witness as a senior member of the RUF High Command;
13. The presence of Gbao at a meeting with Bockerie and other High Command in December 1998; and
14. Appointment of witness during July 1997.

441. It is crucial to note that several of these inconsistencies made within 371's testimony are concerned with the relationship of command between Superman and the Second Accused. The witness first asserts that Superman had control over Kono,[520] but then later refutes this

[519] Transcript 31 July 2006, p.136 lines 18 - 19
[520] Transcript 28 July 2006, p.21 lines 14 - 19

statement by claiming that other commanders were in operation at that time.[521] Considering the senior role that the Witness played within the RUF it is suspicious that he cannot be certain of who was in control of Kono. The inconsistency of his testimony in this regard suggests that he is trying to remove culpability from Superman, and thus indirectly implicate the three accused.

442. The witness also initially states that interviews with the Prosecution were his source of information for placing the Second Accused at Tombodu at the time of the massacres. Later in his testimony, he asserts that he had received a signal message confirming the Second Accused's involvement - the first mention of signal messages in relation to the Tombodu massacres.[522] This inconsistency highlights the Witness' aim to pin the acts committed by Savage, the commander in control of Tombodu at the time of the massacres, upon the Second Accused by fabricating evidence related to the Second Accused's involvement in the incident. This is part of a wider regime to more greatly implicate the three accused so as to repay the Second Accused for his lack of support for 371's political career.

443. As observed by counsel for the Second Accused, the witness made a series of statements to the Prosecution, the first of which dates back to at least February 2004.[523] However, the first time that he mentioned the Second Accused's involvement in the events in Tombodu was on 18 February 2006.[524] In the interim, the witness gave statements to the Prosecution on 4 November 2005, 29 November 2005, 10 December 2005, 12 December 2005, 24 January 2006, 25 January 2006, 31 January 2006, 1 February 2006 and 17 February 2006.[525] The witness confirmed that it was only on 18 February 2006, the eleventh day of interviewing with the Prosecution, that he mentioned the Second Accused's name in conjunction with Tombodu.[526]

(e) Conclusion

444. It is submitted that in testifying against the three accused, witness TFI 371 sought to take advantage of an opportunity to pursue a personal regime of revenge against the Second Accused. There is also evidence that the Witness wished to avoid prosecution and escape personal responsibility; factors which have clearly affected the accuracy of his testimony. The majority of the Witness' statements relating to material aspects of the Indictment cannot be

[521] Transcript 28 July 2006, p.23 lines 3- 4

[523] Transcript 31 July 2006, p.143 line 2-7
[524] Transcript 31 July 2006, p.145 lines 16 - 22
[525] Transcript 31 July 2006, p.143 line 13 – pg 145, line 1
[526] Transcript 31 July 2006, p.145

corroborated. Moreover, the vast number of internal inconsistencies within TF1 371's testimony strongly suggests that many of the allegations have been fabricated or embellished. By further incriminating the three accused, the Witness has been able to present a picture to the Court which attributes a greater responsibility to the specific command roles they assumed. Both the motives underlying his testimony, and the internal inconsistencies cast serious doubt over the credibility of the Witness, and the accuracy of the allegations he makes.

(4) TFI 360

(a) Introduction

445. TFI 360 testified as an ex-radio operator of the RUF. As such, it is reasonably expected that he should have a general knowledge of the command structure of the RUF, and the movements and actions of RUF commanders, including the Accused.

446. Throughout his testimony, the witness gave evidence leading to a number of allegations against the three accused that he admitted were based upon personal assumption rather than factual knowledge. At several intervals the witness confirmed that he had made mistakes in his testimony, and many allegations could not be factually substantiated. Furthermore, there were a vast number of internal inconsistencies within his testimony which related to information which could reasonably be expected to fall within his competence due to his position within the RUF command structure. The witness' habit of testifying to events about which he had no factual knowledge, but has drawn personal conclusions, highlights the unreliability and fabricated nature of his testimony. The extensive contradictions within his evidence can also be explained as an intentional desire to falsely incriminate the three accused and mislead the Court.

447. Under cross-examination a multitude of inconsistencies in his evidence were exposed many of which, it was discerned, were the result of memory difficulties on the part of the Witness.[527] TFI-360 also admitted that much of the information given in examination-in-chief which conflicted with his evidence upon cross-examination were "wrong statements" [528] or were "mistaken".[529] After extensive cross-examination relating to the evidence provided about the UNAMSIL attacks, counsel for Gbao put the question:

[527] Transcript 22 July 2005, p.53 lines 5 - 8
[528] Transcript 25 July 2005, p.18 line 11
[529] Transcript 25 July 2005, p.20 lines 2 - 5

> "We cannot know what to believe, can we, because you can't keep the same story? I'm right, aren't I, Mr Witness? That's right, isn't it?

448. To which the witness acceded, in the simplest terms, "Yes".[530] These instances where the witness admitted to providing fabricated evidence and false statements were clearly motivated by his desire to further incriminate the three accused. Therefore, by his own admission, TFI 360 was not a witness of the truth and it is submitted that his evidence must be disregarded in its entirety.

(b) Motivation for the Provision of False and Misleading Testimony

449. There are specific reasons underlying TFI 360's motive for incriminating the Second Accused. The Second Accused allegedly sabotaged the Fiti Fata plan, organized by Superman, and had spoken out against Superman's military regime to both TFI 360 and TFI 361. In another incident, the Second Accused had tried to incite the Witness to fight against Superman, but he refused, choosing instead to inform Superman of the Second Accused's actions.[531] By providing evidence to further incriminate the three accused, the witness is pursuing a personal plan of revenge against those RUF commanders that opposed Superman and thus the rebel ideology that the Witness fought to uphold.

(c) Allegations Based Upon Assumption Rather than Fact

450. Throughout his testimony, the witness made allegations that were not based on firsthand experience, but were deduced from his own personal perceptions. For instance, the witness made extensive allegations relating to the command positions within the RUF held by the three accused. He later confessed that he had no factual knowledge that these positions were held, but had been merely drawing conclusions about command structure "on the basis of how things should work in a military organisation".[532] However, the Witness confirmed that the RUF was a guerilla movement and thus the operating command structure was not parallel to that of a standard military organisation. By alleging various command positions held by the three accused based, not upon fact, but upon his personal conclusions regarding the usual structure of a standard military organization, the witness has deliberately misled the Court. His testimony regarding the command positions held by the three accused has served

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[530] Transcript 26 July 2005, p.104 lines 8 - 10
[531] Transcript 14 April 2008, p.62 lines 4 – 8; p.61 lines 19 - 22
[532] Transcript 25 July 2005, p.6 lines 15 - 16

to further incriminate them, and this evidence must be disregarded on account of its purely speculative basis.

451. The Witness confessed to drawing conclusions based on his personal experience in relation to other allegations material to the Prosecution case. These are listed below:

a. Witness asserted that the Second Accused was overall commander at Bo Jungle in 1996. However, he was unable to identify this location on a map, and later admitted that he had never been to Bo Jungle himself.[533]

b. Witness asserted that Gullit had been part of the convoy traveling to Koidu Town. Upon further questioning he admitted that he had believed this to be true based on something he had been told that Gullit had said.[534]

c. Witness asserted that Foday Sankoh had given the order for the RUF to attack UNAMSIL bases. He later confirmed that his knowledge covered events that only occurred in northern Sierra Leone, thus excluding the events involving the UNAMSIL attacks.[535]

452. It is clear that even the most serious allegations resulting from the Witness' testimony are based upon assumption rather than fact. Evidence relating to the command positions held by the three accused and the UNAMSIL attacks are outside the sphere of knowledge of the Witness and have been deliberately fabricated. Moreover, the admission by the Witness that he made assumptions based upon what he had been told, for instance the composition of the convoy to Koidu Town, render his testimony wholly unreliable and casts serious doubt over the credibility of other allegations made in his testimony.

(d) Internal Inconsistencies and Contradictions Within Prosecution Case

453. The testimony of the Witness is peppered with internal inconsistencies, 'mistaken' evidence, and contradictions which serve to undermine his credibility. At several instances the evidence given in examination-in-chief grossly conflicts with evidence provided upon cross-examination. These inconsistencies concern the following:

a. the existence of a plan to attack Freetown, made by Sam Bockerie in Buedu in 1998;

b. the underlying motive for the attacks at Makeni;

c. the provenance of the order to attack the UNAMSIL personnel;

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[533] Transcript 19 July 2005, p.109 lines 4 - 5
[534] Transcript 22 July 2005, p.73 lines 11 - 16
[535] Transcript 25 July 2005, p.84 lines 21 - 23

d. information relating to the nature of the attacks against UNAMSIL personnel;

e. the nature of radio communications regarding the UNAMSIL attacks;

f. the participants of a meeting at the Flamingo Club in Makeni;

g. the Witness' own role during the attacks in Makeni and those carried out against the UNAMSIL personnel;

454. The fabricated allegation relating to Sam Bockerie's order of the attack upon Freetown is particularly relevant in considering the witness' credibility. This allegation was used by the witness to substantiate claims about the movements of different command groups in 1998, including Superman's presence in Buedu and Koinadugu, and the Witness' travel to Rosos; which have an obvious impact upon the involvement and movements of the three accused. However, the multiple internal inconsistencies relating to this allegation render it useless as a reliable evidentiary source. By fabricating this evidence the witness sought to create a positive perception of Superman and his militia, while also further incriminating the three accused.

455. The witness provided much evidence regarding allegations of direct involvement by the three accused with the attacks on the UNAMSIL personnel. After weaving an intricate story regarding the various levels of participation of the three accused whether directly or by radio communication, it transpired upon cross-examination that the witness himself was not in Kono district, but in Makeni, and thus removed from the immediate scene of action.[536] As he was not physically present in the area at the time, the witness is clearly unable to provide evidence relating to the direct involvement of the three accused, nor to the details of radio communications during that time. The only evidence presented by the witness concerning this event that can be considered reliable, is that he saw trucks with abducted UNAMSIL personnel leaving the location of the attacks.

(e) Conclusion

456. TFI-360 fostered a desire to promote the Prosecution case as a method for realizing personal revenge against the RUF commanders that he had come to view as ideological enemies during his time as radio operator for Superman. His desire to further incriminate the accused manifested into a web of fabricated evidence, misleading testimony and false allegations. Much of the evidence he provided concerning material allegations were based not upon fact, but upon personal assumption. Furthermore, the witness himself agreed at several

[536] Transcript 25 July 2005, p.72 lines 2 -11

instances that his testimony was mistaken, and that it was difficult to know what the truth was. A multitude of internal inconsistencies characterize his evidence, much of which was clearly fabricated or simply made up. The testimony of this witness alleges serious crimes against the three accused but due to its incoherence and obvious basis upon hearsay, this evidence must be disregarding for its unreliability.

(5) TFI 361

(a) Introduction

457. TFI 361 worked extensively as a radio operator within the RUF. As the radio operator for a pivotal command figure, TF1 361 can reasonably be expected to have an acute knowledge of the command structure of the RUF, and the various movements and actions of other RUF factions, including the three accused. Throughout his testimony, the witness gave evidence against the three accused which led to a number of material allegations. However, it is clear that much of TF1 361's evidence is based upon hearsay rather than factual knowledge or personal experience, and the vast number of internal inconsistencies and admitted mistakes in his various statements casts serious doubt as to his credibility as a witness. The evidence provided by the witness was often completely at variance from the truth that had been ascertained throughout the trial period. The extensive contradictions within his evidence highlight his unreliability and the fabricated nature of his testimony. Moreover, the witness has a transparent motive for wishing to mislead the Court and thus further incriminate the three accused.

(b) Motivation For the Provision of False and Misleading Testimony

458. [redacted] it is reasonable to expect that the witness would have developed a sense of loyalty towards his commander. The witness received material benefits including safety, food and security in return for his loyalty to [redacted], and admitted that he was in a privileged position in this role.[537] The extent of the witness' loyalty is demonstrated by the fact that he was tortured after [redacted] death, for being a reliable follower of the commander who, by that stage, was considered by other RUF commanders to be out of control.

[537] Transcript 18 July 2005, p.129 lines 25 - 29

459. Throughout the period leading up to [redacted] effective break from RUF ideology, it can be assumed that other RUF commanders who did adhere to the proscribed ideology were cast as enemies to [redacted] regime. The witness' malicious desire to incriminate the three accused springs from this indoctrination, and from a personal desire to seek revenge for the torture he suffered as a result of being involved in [redacted] unit. By providing false and misleading testimony, the witness is able to satisfy his desire for revenge by further incriminating the three accused.

460. The Second Accused was well known to be a strict adherent to traditional RUF ideology. Moreover, he was fiercely opposed to [redacted] regime of destruction, and was not afraid to publicly resist [redacted] authority. Furthermore, the witness monitored messages sent by [redacted] which singled the Second Accused out as an individual who was interested in instigating his murder.[538] [redacted] clearly viewed the Second Accused as an 'enemy' commander, and this perception of him would have resonated throughout his unit. The many instances where the witness provided testimony relating to the Second Accused's involvement in the atrocities, and his command position are highly likely to have been fuelled by his malicious intent to downplay the role of other commanders so as to further incriminate the Second Accused.

(c) Allegations Based Upon Speculative Information

461. The witness made statements relating to material allegations against the three accused that he later confessed were based upon assumption, hearsay and general knowledge. For instance, the witness made statements founded on information that had been relayed to him by other people. In his transcript of 15 June 2004, TFI-361 stated that he saw Gullit in Makeni at the time of the ECOMOG attacks. Upon cross examination, it transpired that he had merely been told by Superman that Gullit had been present.[539] It is clear that the witness found such speculative gossip to be acceptable as evidence to substantiate material allegations against the three accused. It is likely that other pivotal aspects of the witness' evidence were based upon similarly unreliable sources, thus calling into question the credibility of his testimony.

462. Furthermore, on several occasions the witness admitted that he did not feel the need to give detailed evidence relating to the allegations in his testimony, including the command positions of the three accused, as he believed that obvious facts would be 'pictured' into his

[538] Transcript 18 July 2005, p.97 lines 14- 16
[539] Transcript 15 July 2005, p.22 lines 1 - 3

testimony through common knowledge.[540] This is one excuse that he presents to explain the discrepancies between the evidence submitted under examination-in-chief and that of the cross examinations. However, the acknowledgement by the witness that he deliberately omitted vital facts relating to his evidence suggests a lack of integrity, and calls into question the credibility of his testimony. This is further substantiated by the witness' own admission that the events he presented in his testimony occurred a long time ago and that his memory may not have been entirely accurate.[541]

(d) Internal Inconsistencies and Contradictions With the Prosecution Case

463. Throughout his testimony the witness presented evidence that is at variance with certain facts that had been previously established through the trial process. There are a vast number of discrepancies between the events presented at different points in time, and his testimony is littered with internal inconsistencies that the witness himself confessed were mistakes, or errors in his statements. This large body of contradictory evidence suggests that the witness has deliberately mislead the court by down-playing the roles played by other RUF commanders in order to embellish the command authority of the three accused. It is clear that the witness carefully selected the content of his evidence to present a picture of the three accused that portrayed them in the worst possible light. For instance, the witness was able to give comprehensive and detailed information relating to the events he witnessed as a radio operator during 1997 - 1998 but was unable to remember events that did not concern the three accused in some way.[542]

464. As well as a selective testimony, the witness' testimony is characterised with internal inconsistencies which concern the following:

a. the witness' personal involvement with the RUF;
b. the use of radio sets according to the hierarchy of command;
c. the movement of troops from Bradford to Freetown with the SLA;
d. Sam Bockerie's arrival in Freetown;
e. the commanders present at various meetings, including commanders present in the convoy to Kono;
f. Gullit's presence in Makeni;
g. Colonel Isaac's command position in relation to Kallon during their time in

[540] Transcript 15 July 2005, pg 73, lines 4 - 6
[541] Transcript 14 July 2005, p.63 lines 15 - 19
[542] Transcript 14 July 2005, p.39 lines 18 - 27

Northern Jungle.

465. Particularly relevant to the issue of witness credibility is his testimony relating to the procedures for radio operation within the RUF. The witness stated that the command hierarchy demanded that all radio messages had to be sent to Sam Bockerie through his second in command.[543] Upon the presentation of messages that showed that [redacted] had direct contact with Bockerie, and that Foday Sankoh had communicated directly with the Second Accused and Brigadier Mani without going through the second in command,[544] the witness was forced to admit that the procedure for radio operation was not so straightforward. Later in his cross-examination the witness revised his statement to the effect that an inferior officer could bypass his immediate superior if he was replying to a message from a higher authority.[545] This web of contradictions highlights that there existed no hierarchy of radio operation procedure, and that this statement by the witness was a blatant lie whose aim was to further incriminate the three accused by creating a sense of their direct association with a vast number of military activities.

(e) Unreliability Due to Misunderstanding the Aims of the Criminal Justice Process

466. On several occasions the witness displayed a lack of basic knowledge relating to the parties involved in the cross-examination.[546] He clearly misunderstood the implication of his numerous allegations, suggesting that he was not fully aware that the information he gave under oath must be truthful and not merely his perception of events.[547] It is obvious that the witness did not entirely comprehend either the process or consequences of the criminal justice system he was participating in.

(f) Conclusion

467. It is submitted that when TFI-361 was approached by the Prosecution team, he viewed his involvement in the trial as an opportunity to realise revenge against the RUF regime that caused him physical pain and instigated the death of his leader, [redacted]. He had ample personal and political motive to mislead the court so as to falsely incriminate the three accused in every way possible. The allegations that have resulted from his testimony are

[543] Transcript 14 July 2005, p,3 lines 5 - 9
[544] Transcript 14 July 2005, p.14 lines 13 - 17; pg 16, lines 3 - 5
[545] Transcript 14 July 2005, p.26 lines 22 - 26
[546] Transcript 13 July 2005, p.34 lines 9 - 19
[547] Transcript 13 July 2005, p.38 lines 19 - 25

material to the Prosecution case yet they are obviously based not upon personal experience or eye witness account, but are rather the result of malicious gossip, hearsay and perceived general knowledge. Furthermore, the vast web of internal inconsistencies and contradictions throughout his testimony suggest that the witness was not afraid to use his position in the courtroom to embellish the roles played by the three accused in order to create a sense that they held more authority than was actually the case. Many of his statements cannot be corroborated by other witnesses and, considering the unreliability of his testimony as a whole, are highly likely to have been maliciously constructed so as to more swiftly satisfy the witness' desire for retribution.

(6) TFI 141

468. TFI 141 testified as an ex-RUF combatant. He sought to incriminate the Second Accused with a variety of different uncorroborated allegations, after undergoing a "rehearsal" process, as *he* phrased it, with the Prosecution on a number of occasions. The witness openly described his own participation in atrocities and, to that extent, is an accomplice witness whose testimony, where it is uncorroborated by other *credible* evidence, should be treated with extreme caution by the Chamber.

(a) Meticulous Preparation For Testimony

469. In cross-examination counsel for Sesay referred to the interviewing process which the witness had undergone prior to giving his evidence before the Chamber. The witness confirmed that he had provided the Prosecution with a number of witness statements, including those dated 31st January 2003, 23rd February 2003, 24th February 2003, 9th October 2004 and 10th January 2005.[548] When questioned in cross-examination by counsel for Sesay about the number of times that TFI 141 had met with the Prosecution to go through his story, he replied that "I have met with the Prosecution many times".[549]

470. It is submitted that the witness underwent a process of thorough preparation in order to guarantee the successful delivery of his testimony before the Chamber. Furthermore, the successive meetings between the Prosecution and the witness meant that he was further able to embellish his account of relevant events in order to suit the Prosecution's theory of the case. Not only is this clearly highlighted in the number of times the witness denies segments

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[549] Transcript 14 April 2005 p.11 line 9

of his various statements when challenged in cross-examination, but it is also clearly documented in the following passage:

> "Q. Didn't you have this statement read back to you by Sharan, Mr Witness?
> A. Well, we used to rehearse and she used to ask me questions. We used to rehearse, and I answered them. Yes, she read it to me."[550]

(b) Inconsistencies Within Witness's Own Evidence

471. In cross-examination by counsel for Sesay it was abundantly clear that the witness had not been responsible for the construction and detail of significant parts of his witness statements. On numerous occasions the witness denied various aspects of his witness statements, and his cross-examination was littered with discrepancies between his written testimony and his oral evidence. In particular, when questioned about a allegations made in his statement to the Prosecution dated 31st January 2003, the witness flatly denied providing the Prosecution with such information:

> "Q. Concentrate on the question, Mr Witness. Did you tell the Prosecution that Sam Bockarie left Buedu in the rainy season of 1999?
> A. No.
> Q. No?
> A. No.
> Q. Do you know how that got into your statement?
> A. I don't know
> Q. Did you hear them read it back to you after that statement was finished?
> A. All what I said, all what I talk about later as I'm saying, during the time close to the time we are about to get peace -- peace was far away. So if you look at it now and say the time we wanted peace, this was the year, well, I don't know. I don't know how it managed to get into my statement."[551]

472. In attempting to explain why his oral evidence did not equate with his written statements, the witness made reference to the fact that sections of his statements were not in the order of the events that he described to the Prosecution; "This that I am reading here now is mixed up. I said some of these things, but they are not in line..."[552] Furthermore, when asked whether there are "any other mistakes about what you told the Prosecution?"[553], the witness answered that "yes, there was another mistake" and stated that "mistakes are there".[554]

473. In addition, the witness displayed a peculiar openness in recounting his own involvement in the execution of civilians, stating "For instance, I could remember we've

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[550] Transcript 15 April 2005 p.9 lines 8-12
[551] Transcript 14 April 2005 p.33 lines 3-17.
[552] Transcript 15 April 2005 p.18 lines 21-22
[553] Transcript 15 April 2005 p.87 lines 15
[554] Transcript 15 April 2005 p.87 lines 16

captured a civilian whom we talked to. We asked them whether they voted the SLPP in and because of that we are going to kill all of them and they started pleading that in fact he doesn't know what in fact -- what we were talking about. He didn't know who and who were government members and had no idea about the government. And then just by that we found out that they had no knowledge about the war. So they were innocent about the war. And we were not looking at that, we executed them no matter how much they begged."[555] It i submitted that this attributable to the same discernible lack of understanding and respect for the judicial process which enabled to falsely incriminate the Second Accused without inhibition.

(7) TF1 117

474. TF1 117 was a civilian in [redacted] and was abducted and allegedly trained and fought with RUF and AFRC forces at that time[556], and continued to do so until the end of the war. His allegations against all three defendants were extremely grave, directly implicating Mr Kallon, *inter alia,* in the authorisation of the use of child soldiers[557]. Notwithstanding the multitude of particularised allegations made against the Second Accused, of conduct purportedly eye-witnessed, TFI 117 wrongly identified him in court,[558] thus absolutely nullifying his testimony as regards the Second Accused. In addition, the witness did not mention the Second Accused in his statement to the Prosecution, until a few months before he testified, despite being interviewed by the Prosecution as early as 2004. The irresistible conclusion is that the witness lied under oath in order to incriminate the Second Accused.

475. It should be noted that much of the witness' initial allegations are outside the period of Indictment; including, in particular, the alleged killing of his father by RUF forces, and indeed his initial abduction[559].

476. Further, the witness did not mention Kallon in his first[560] or second[561] statement to the Prosecution; similarly, Issa Sesay's name is also missing[562]. From his initial statement taken

[555] Transcript 18 March 2005, p11 lines 3-12
[556] Transcript 29 June 2006, pg 86 line 9 - pg88 line 1
[557] Transcript 29 June 2006, pg 90, lines 3-7
[558] Transcript 30 June 2006, pg 49 line 18 – pg 52 lines 12
[559] Transcript 29 June 2006, pg 88, lines 6-11
[560]Transcript 04 July 2006, pg 20, lines 12-14
[561] Transcript 4 July 2006, p. 22 lines 14-19
[562] Transcript 3 July 2006, p. 22 lines 12-15

in 2004, the witness does not make any mention of Kallon until his statement in 2006[563]; as such, it is submitted that such an absence is most troubling for the reliability of the witness' testimony. Further, the witness blames the Prosecution lawyers, (specifically Mr Bangura), stating that he was not recording all the witness was saying. He consistently disputes facts from his statements, alleging that statements were not read back to him, and even arguing with the record of the official court transcripts[564].

477. The witness also has problems with identification of other individuals with whom he claims to have spent a great deal of time with, or known, during his time with the RUF. During cross examination, Counsel for Sesay conducts an exercise concerning six photographs[565]. Of the six, only the photo of Johnny Paul Koroma could be identified correctly[566]. The witness was unable to identify Tamba Alex Brima, Gibril Massaquoi, Sam Bockarie, nor Mr Kanu ('Five-Five), all of whom feature in his evidence. Furthermore, the witness incorrectly identified Tall Bai Bureh as 'Master'; Issa Sesay.

478. The witness' testimony is littered with inconsistencies concerning his own position and material aspects of the case against the three accused, all of which serve to undermine his credibility. His evidence before the Chamber was consistently at odds with his previous statements to the Prosecution. These inconsistencies concern:

a) The whereabouts of the witness at the time of the alleged RUF attack in 1992

b) The cause of death of the witness' father in 1992

c) Whether the witness was captured by Akim and sent to a training base in Kono

d) Whether the witness was trained by Monica at Lion Base

e) Whether the witness was sent to fight in Liberia after training at Lion Base

f) Whether the RUF base at Pumpkin Ground was located in Kailahun, or Kabala

g) Whether Issa Sesay or CO Mohamed lead the group, when allegedly delivering a message to Augustine Gbao in Kailahun

h) Whether members of the SLA visited the witness whilst he allegedly resided in the pastoral centre, under the care of Father Victor

i) Whether these visitors to the pastoral centre were RUF, and pointed the witness out to be a member of the SLA

j) Whether the witness was then taken to Freetown Block Road, in order to loot

k) Whether the witness met Johnny Paul Koroma on his way to Makeni

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[563] Transcript 3 July 2006, p. 22 lines 18-19
[564] Transcript 3 July 2006, p. 26 lines 11-14, Transcript 3 July 2006, p. 27 lines 13-18
[565] Transcript 30 June 2006, p. 83 line 25 – pg 85 line 21
[566] Transcript 30 June 2006, pg 84 line 27-28

l) Whether the witness saw Johnny Paul Koroma at the end of a meeting concerning 'Operation Pay Yourself'

(8) TFI 334

479. The witness gave evidence that the "victims and witness unit" paid him 112,000 Leones per week whilst he stayed in the safe house where he remained throughout May and June, 2005, in respect of his evidence in the *AFRC* Case and for a week in respect of his evidence given in the *RUF* Case;[567] 569,500 Leones in respect of medical bills;[568] 695,000 Leones in respect of school charges.[569]

480. The transcript shows that the witness adopted an evasive approach to the questions asked under cross-examination by counsel for Sesay. On several occasions he declined to answer questions put to him, claiming that he did not understand the question, then having been asked the exactly the same question a number of times, he eventually produced an answer.[570] It is submitted that, having given false testimony, the witness played for time in order to fully understand the ramifications on his previous testimony on the answers he gave. That he gave false testimony is evidenced by the internal inconsistencies and contradictions of which his evidence was full by the contradictory nature of his evidence in comparison with other Prosecution and Defence witnesses, and by his volunteering information not asked for by counsel or the Court.[571]

ii) <u>Crime Base Witnesses</u>

(1) TFI 054

481. This witness was led by the Prosecution to allege the direct participation of the killing of the Paramount Chief in Gerihun against Mr Gbao and the Second Accused. Under cross-examination, a range of contradictions was exposed between the evidence-in-chief and

[567] Transcript 6 July 2006, pg 46, line 13-22; pg 47, line 27 – pg 48, line 2; and pg 48, line 3-6
[568] Transcript 6 July 2006, pg 48, line 17-23.
[569] Transcript 6 July 2006, pg 49, line 13-16; see also Exhibit 121, describing the witness payment policy form the witness and victims unit.
[570] Transcript 06 July 2006, p.56, line 24 – pg 58, line 7, responding to the question, "[h]ow many people did it involve attacking Makeni and Issa Sesay?"; T. 06/07/06, pg 59, line 13 – pg 60, line 5, responding to the questioning regarding the date of invasion led by Mr Sesay against the SLA in Makeni; and T. 06/07/06, pg 60, line 6 – pg 61, line 10, responding to the questioning about whether a communication that the witness had previously affirmed was the first he had received regarding Mr Sesay since he was run out of Makeni.
[571] Transcript 06 July 2006, p.62 lines 22-23

previous statements to the Prosecution as well as his *viva voce* testimony in the *AFRC* Case, in relation to material aspects of that allegation. These inconsistencies concern:

1. The number of persons in the delegation who went to the house of the Paramount Chief;
2. The time of day at which the delegation arrived at the house of the Paramount Chief;
3. The identities of the persons in the delegation; and
4. Whether the persons in the delegation were military or civilian.

482. Of note, in particular, is the fact that the witness stated to the Prosecution several times that he could not remember who the members of the delegation were and that it was only one year before his eventual testimony in the *RUF* Case, seven years after the event to which he testified, that he alleged the involvement of the Second Accused and Mr Gbao.

483. [redacted] It is submitted the witness used his oral testimony as a vehicle to exact his own sense of revenge [redacted] by implicating to the accused persons on trial, notwithstanding the fact that they were not actually responsible. It is submitted that this provides reasonable explanation for the witness' omission of the names of the accused, the Second Accused and Gbao from his previous statement to the Prosecution and other aforementioned inconsistencies in relation to actions of the alleged "five-man delegation".

484. In light of the foregoing, it is submitted that the evidence of TFI 054 is not reliable and that it should be disregarded.

(2) TFI 035

485. TFI 035 was a civilian in Tongola Section, Tongo Field in August 1997 and was abducted and forced to mine for diamonds at that time when "AFRC and RUF" forces "took over Tongo."[572] He also testified in the *CDF* Case. He levied allegations of the utmost severity against the Second Accused, implicating him directly in, *inter alia*, forcible mining operations, unlawful killings and the use of child soldiers in Kenema District. He was the only witness to do so. He was also the only witness to allege that the Second Accused was deputy to Mosquito in Kenema District at times relevant to the Indictment. This allegation is inapposite to the Prosecution case, inasmuch as the allegation is neither pleaded in the

[572] Transcript 05 July 2005, p.78 line 21

Indictment nor supported by any other Prosecution witness. Furthermore, it is forcefully refuted by alibi evidence, which establishes that the Second Accused was in Bo District from August 1997 until February 1998, led by Prosecution and Defence witnesses alike.

486. In addition, the witness identified the commander in these allegations as "Colonel Morris Kallon". The evidence establishes that the Second Accused was a Major,[573] based in Bo at the time.

487. All TFI 035's evidence was unreliable hearsay from an unverifiable source. The witness had never seen the Second Accused before. As such, he did not identify him in court. Furthermore, the Second Accused testified that he had never seen the witness before.[574] Counsel for the Second Accused put it to the witness that the Second Accused was in Bo District, as a member of the AFRC government, at the time of the allegations made by him. In responding, the witness confirmed that he had never even seen the Second Accused before and that he actually knew nothing about him:

> "I don't know Morris Kallon; that was the first time I heard that name. I have never seen him. Whether he was a government man or not, I don't know him."[575]

488. Indeed, a recurrent theme seems to appear in the evidence given by the witness in relation to the Second Accused, in the consistently tenuous manner in which the witness links the Second Accused to the events he describes, (directly, or through a reliance on the implications of command responsibility). On one occasion, the witness proffers a few snippets of conversation overheard between a group of rebels as evidence of the Second Accused's rank[576], when even by his own admission, he "did not get all that they were discussing[577]". As such, frequently, the witness' testimony unravels on further examination. For example, in relation to the firing alleged at "Cyborg Pit" on the night of the dance held by the senior officers[578], the only event that the witness himself observed was the *sound* of gunfire[579]; he was not present at the location, and witnessed neither the individuals involved, nor the result of the firing. Moreover, although the witness notes that a 'Colonel Gibbo' imparted such

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[573] Transcript 26 January 2005, p.23 lines 10-11; Transcript 26 October 2004, p.1 lines 27; Transcript 14 October 2004, p.60 lines 2; Transcript 25 November 2005, p. 4 lines 2-4
[574] Transcript 14 April 2008, p.110 lines 26-28
[575] Transcript 07 July 2005, p.27 lines 8-10
[576] Transcript 07 July 2005, p.49 lines 2-6
[577] Transcript 07 July 2005, p.49 line 6
[578] Transcript 07 July 2005, p.37 lines 28-29– p.38line 1
[579] Transcript 07 July 2005, p.8 lines 3 -7

information to him, it is unclear whether even the 'Colonel' witnessed the events in question[580].

489. The witness' testimony is littered with inconsistencies concerning his own position and material aspects of the case against the three accused, all of which serve to undermine his credibility. His evidence before the Chamber was consistently at odds with both his evidence in the *CDF* Case and his previous statements to the Prosecution. These inconsistencies concern:

1. Whether some mining was carried out voluntarily mining at "Cyborg Pit";
2. Alleged daily shootings of civilian miners in "Cyborg Pit";
3. A statement made by Sam Bockarie at the time the "AFRC/RUF" arrived at Tongo Field, August 1997;
4. Whether old men were used to carry gravel rather than as supervision;
5. Whether civilians were forced to mine at night;
6. Whether Mosquito went to Kenema with the diamonds;
7. Whether mining continued in Mosquito's absence;
8. Civilian miners refusing to mine after the "incident with Colonel Manawa";
9. Civilian miners ceasing to mine after the alleged killing of 25 civilian miners; and
10. Voluntary civilian mining;

490. It is submitted that the sheer volume of contradictions and inconsistencies raised in his evidence can only be reasonably explained by fabricated evidence designed to incriminate the accused. Although the witness was illiterate, he was fully aware of the issues in controversy at the two trials at which he testified and revealed a readiness to alter his testimony accordingly. This was the explanation that became apparent during his cross-examination for inconsistencies relating to "alleged daily shootings of civilian miners in 'Cyborg Pit'" and whether mining was carried out there voluntarily for a certain time each day, when he responded to questioning as follows:

> Q. "Listen to these words then, Mr Witness, because these are your words: 'As well, we go down to do the mining. It will not even be 10 or 15 minutes and they open firing on us. That has been happening every day.'
> A. "I don't remember saying those words. I only said -- I only concentrated on the CDF trial. When they started asking me about AFRC/RUF, I started talking."[581]

491. It is submitted that this is also the explanation for other inconsistencies in his evidence where an account, more incriminating to the three accused, was given in his live testimony in the *RUF* Case, when compared to his previous statements and evidence in the *CDF* Case. For

[580] Transcript 07 July 2005, p.39 lines 11-15
[581] Transcript 07 July 2005, p.11 lines 14-20

example, he gave a statement to the Prosecution that, on arriving in Tongo Field in August 1997, Mosquito had given an assurance that the "AFRC and RUF" forces had not come to hurt anyone. However, in his live testimony, he denied having said so. Furthermore, in an earlier statement given to the Prosecution, the witness alleged that when Tongo came under attack from the Kamajors, the AFRC/RUF took civilians into AFRC/RUF headquarters for their protection, and he verifies this testimony in cross examination[582]. Although such testimony does not directly relate to the charges levelled against the Second Accused, it is submitted that such actions provide further evidence of the true RUF ideology, and thus implicitly demonstrate just how unlikely the earlier events alleged by the witness (of forced mining, etc), truly were. Further, the prevalence of such testimony lends further support to the notion of the 'patch-work' of incriminating alterations made to the witness' testimony, in the lead up to the RUF trial. If the version of events asserted by the witness in live testimony were understood to be true, then one would be left with serious questions as to the consistency of the behaviour of the AFRC/RUF towards civilians in Tongo at the time; soldiers which allegedly used fatal force to discipline civilians they have captured and are forcing to mine, later then protect these same civilians from harm at the hands of other political factions, welcoming the civilians into the very heart of the AFRC/RUF organisation.

492. In relation to these inconsistencies the witness merely repeated his explanation that the interpreters had misrepresented his evidence. Of the seven statements given by the witness[583], he claims to have had problems with two different translators, (in 2002 and 2004)[584], and with the Prosecution lawyers.[585] However, he confirmed that his statements were read back to him. Furthermore, the statements bear indications that amendments had been made to other parts of his evidence and that, once those amendments had been made, that the witness had confirmed the truth of their contents. The witness blamed the accuracy of the court records for the inconsistency between his evidence in the *CDF* Case and the *RUF* Case.[586] His cross-examination is full of explanations such as "I think it was the interpreter that made a mistake"[587] and "[a]ll that you're talking now, I don't know about it[588]... My lawyer asked me

[582] Transcript 07 July 2005, p.19 lines 14-29 – p.20 lines 1-14
[583] Transcript 05 July 2005, p.116 lines 28-29
[584] Transcript 05 July 2005, p.119 lines 3-6
[585] Transcript 05 July 2005, p.127 lines 6-7
[586] Transcript 05 July 2005, p.11 lines 24-29 – pg12 lines 1 -10
[587] Transcript 05 July 2005, p.120 lines 22-26
[588] Transcript 05 July 2005, p.127 lines 1-2

about it and I told him that that was not what I said. I do not know whether he corrected it or not."[589]

493. It is submitted that the witness' motivation in testifying against the Second Accused arises from the financial hardship he has incurred, at the hands of whom he perceives to be the AFRC/RUF[590]. Although the defence concedes that there was some criminality in the region (disassociated from the Second Accused and the RUF), it is submitted that the witness is testifying against the Second Accused in a misplaced attempt to gain some form of 'justice' for his experiences during this time. Indeed, the strength of his conviction is such that he describes his current disposition, (now that the AFRC/RUF are no longer in power), as being 'so happy that I now live in a kind of heaven'[591].

494. It became apparent during his testimony, that TFI 035 had a limited capacity to understand the implications of the judicial process in which he was involved as a material witness for the Prosecution, and consistently advanced implausible explanations for his false testimony. As a witness of fact, TFI 035's evidence is fatally inconsistent. It is submitted that the conclusion which the Chamber may reasonably infer from this is that the witness knowingly fabricated evidence in order to incriminate the Second Accused. This is supported by the witness' readiness to alter his testimony according to the parties on trial and, it is submitted, to fulfill his obligations, as he perceived them to be, to members of the Prosecution who he consistently described as "his lawyers". In any case, it is submitted that the volume of inconsistencies renders his testimony unreliable. Given that the key allegations made by him against the Second Accused are unverifiable hearsay which are not corroborated, but instead, are not pleaded in the Indictment and, in some cases, inconsistent with the Prosecution case, it is submitted that this evidence is so unreliable that he cannot form the basis of any conviction against the Second Accused.

3) OVERVIEW OF KALLON DEFENCE WITNESSES

495. The Kallon Defence called a total of 21 witnesses during the presentation of its case (including the Accused). The Defence submits that these witnesses compared to Prosecution witnesses were of high quality and exhibited much more candour and honesty during their respective testimonies. The witnesses are classified into different categories and were drawn

[589] Transcript 05 July 2005, p.127 lines 6-7
[590] Transcript 07 July 2005, p.42 lines 2-20
[591] Transcript 07 July 2005, p. 43 lines 19-20

from different social strata. Several of these witnesses had no motivation whatsoever to testify in favour of the 2nd accused. The testimonies of these witnesses are briefly highlighted hereunder:

a) UNAMSIL IINTERNATIONAL WITNESSES

i) DMK – 130

496. [redacted] The witness testified to meeting Morris Kallon several times over three year period, and he testified that Kallon aligned himself with Sesay and worked closely with him as his number two.[593] He testified on the Second Accused positive role in the disarmament and peace process in Makeni and Magburaka. [594] The witness testified that Peleto and Augustine Amara were the two RUF commanders in Tongo who were against disarmament, and Kallon arrested them by the order of Sesay. [595]

ii) DMK-444

497. The witness arrived in Sierra Leone on 25 December 1999, as the Deputy Force Commander of UNAMSIL and the contingent commander of the Nigerian troops to UNAMSIL. [596]

498. He testified that one of the objectives of UNAMSIL was to disarm the warring factions and stated that these factions to be disarmed were the RUF, the SLA, the Kamajors also referred to as the CDF.[597] He testified on the 1 May 2000 incident,[598] and stated that some RUF combatants disarmed without the consent of their commanders who subsequently requested that UNAMSIL return the weapons. [599]

499. The witness testified that there was 'good cooperation' between the RUF and UNAMSIL, before the events of May 2000 the witness emphasised that [600] the participation of the RUF leaders in the disarmament process was essential. [601] The witness gave a damning

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[592] Transcript 10 March 2008, p.84, p.85 line 1
[593] Transcript 11 March 2008,p. 35 lines 1-11
[594] Transcript 11 March 2008,p. 37 lines 1-20
[595] Transcript 11 March 2008,p. 37 lines 21-25
[596] Transcript 19 May 2008, p.8
[597] Transcript 19 May 2008, pp.14-15
[598] Transcript 19 May 2008, p.43
[599] Transcript 19 May 2008, p.44
[600] Transcript 19 May 2008, p.25
[601] Transcript 19 May 2008, p.26

indictment of UNAMSIL regarding the manner in which it handled the disarmament process leading to the conflict between the UNAMSIL and the RUF troops[602]

iii) DMK – 147

500. The witness was a senior UNAMSIL officer with the Zambian battalion which was abducted near Lunsar on 3 May 2000. He was a victim of the abduction and testified about the abduction stating that nobody identified themselves to him as Kallon and neither did he, hear the name Morris Kallon at the time of the abductions. He testified that a man walking with a limp, was in charge of the men at the roadblock.[603] At that time the witness did not see any other senior RUF officer there apart from this man. [604] From the first roadblock to his abduction, the witness did not hear the name Morris Kallon. [605] The witness further stated that he was not aware that the second accused came to Yengema during their stay there.

iv) DMK – 144

501. The witness testified that Morris Kallon was concerned about civilians' health care and other social aspects, and he did all to help the civilians.[606] Kallon joined the witness in setting up a farm in Magburaka with civilians and ex-combatants and the paramount chief who gave 25 acres of land to Kallon. [607] Witness stated that Kallon was extremely supportive of the disarmament process

v) DMK-145

502. The witness joined UNAMSIL as a MILOB in September 1999. The witness was deployed in Makeni in mid-March 2000 and he met other MILOBs like Major Ganese, Major Knut. He testified on his duties in Makeni, [608]

503. The witness testified about the incident at the DDR camp on May 2000, stating those who were present. He testified that at the DDR camp on that day were Major Ganese and Major Sallahudin. [609]

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[602] Transcript 19 May 2008, p.51,53, 55 & 57
[603] Transcript 6 March 2008, p61 lines 15-25
[604] Transcript 6 March 2008, p62
[605] Transcript 6 March 2008, p63 lines 1-5
[606] Transcript 12 March 2008, p72 lines 1-9
[607] Transcript 12 March 2008, p72 lines 19-24
[608] Transcript 8 May 2008, p.70-72
[609] Transcript 8 May 2008, p.73

504. The witness testified that when he communicated with Major Ganese, he did not tell the witness that he had been assaulted by anybody, neither did he mention the name of Morris Kallon at that time. [610] The witness testified that he did not see Lt.Col. Mende nor Major Knut again on 1 May 2000 after they left for the DDR camp. [611]

vi) DMK-146

505. The witness joined UNAMSIL forces on 20 September 1999. The witness was deployed to Magburaka team site at the end of December and the situation there was good. [612]

506. The witness testified about Sankoh visit to Magburaka .Sankoh came to sensitize people on the disarmament exercise. He stated that Sankoh called a meeting, where he told those carrying weapons, the peacekeepers and the MILOBs to work together in the disarmament exercise. [613] The witness testified that Sankoh introduced to them, (MILOBs and peacekeepers) the leaders of the RUF combatants[614] The witness testified that Sankoh introduced Morris Kallon to them. He identified Kallon in the courtroom. [615] After Sankoh left he saw Kallon, who was deployed in Magburaka. [616] Witness also testified on the 1 May 2000 incident. [617]

vii) DMK-159

507. The witness was in Sierra Leone from March 1999 to December 1999 as the commanding officer of [redacted] ECOMOG battalion. Witness testified about the contribution of Morris Kallon in the peace process during his ECOMOG and UNAMSIL mandate and the risk to his life in so doing [618]

508. The witness came back to Sierra Leone under a UN mission in January 2001. He was the commanding officer of [redacted].[619] Witness testified on Kallon's prominent role in disarmament. [620] Kallon as a moderate believed that civilians' interests should be protected. [621]

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[610] Transcript 8 May 2008, p. 75 lines 9-16
[611] Transcript 8 May 2008, p. 75 lines 17-29
[612] Transcript 8 May 2008, p.99 lines 8-13; p.98 lines 25-28
[613] Transcript 8 May 2008, p.99 lines 14-27
[614] Transcript 8 May 2008, p.100 lines 1-5
[615] Transcript 8 May 2008, p.100 lines 9-29
[616] Transcript 8 May 2008, p.103 lines 7-10
[617] Transcript 8 May 2008, p.103 lines 26-29; p 104 lines 1-21 p.105 lines 13-29
[618] Transcript 12 May 2008 p.12 lines 16-29; p.13 lines 1-6
[619] Transcript 12 May 2008 p. 36 line 29; p. 37 lines 2-6
[620] Transcript 12 May 2008 p. 37 lines 7-16
[621] Transcript 12 May 2008 p. 42

The witness explained how he saved Kallon and his family by disguising him as a peacekeeper in September 2001. [622]

b) LOCAL WITNESSES

i) DMK – 082

509. The witness who was a KAMAJOR whose fighting force surrendered to Kallon [redacted]. [623] Second Accused allowed them to take care of their locality, their people and civilians in particular. [624]

510. The witness testified that in early 1999 Kallon lived in Masingbi, with his family until 2002. [625] The witness testified that Kallon never ferried civilians in trucks from Masingbi to mine in Kono. He did not receive the information nor was he aware that civilians were taken by the RUF for training. [626] Witness supported the Second Accused's alibi, that he was in Masingbi during the UNAMSIL events of, 1st and 2nd May 2000.

ii) DMK – 160

511. He stated that before August it was only Mosquito who use to pass through Bo whenever he went to Kenema. In August 1997, the Kamajors base was at Gerihun. [627] He testified about the killing of the Paramount Chief. [628] Witness did not see somebody who was introduced to them as Morris Kallon on the day the Paramount Chief was killed. Before August Witness did not hear about the name Morris Kallon at all. It was only after August that witness started hearing about that name.

iii) DMK – 161

512. In 2000 Witness had an office in Makeni headquarters and he was the overall armory commander He testified that no RUF commander would make the mistake to disobey Foday Sankoh the leader. If you denied the instructions of Foday Sankoh, he will send for you to be arrested and there was punishment prescribed for that. [629] Witness testified that he did not see

[622] Transcript 12 May 2008 p. 46; p. 47 lines 1-22
[623] Transcript 13 May 2008 p6 lines 4 and 18
[624] Transcript 13 May 2008 p9 lines 20-29; p10 lines 20-28; p11 lines 1-5
[625] Transcript 13 May 2008 p10 lines 20-28; p11 lines 1-5
[626] Transcript 13 May 2008 p22 lines 3-9; p21 lines 10- p.22 line 2
[627] Transcript 21 April 2008, p53
[628] Transcript 21 April 2008, p72
[629] Transcript 22 April 2008, p6

Morris Kallon at Masiaka or at Makeni during the retreat. [630] Superman was the overall commander in Kono afterter the retreat He stated that Morris Kallon never killed anybody the time they were in Koidu. He testified about another Morris Kallon, who was involved in the incident in Kono about a sheep[631] which he had given as a present to Superman. No RUF commander had access to Tombodu. Savage and SLA were in control of Tombodu [632]

iv) **DMK-116**

513. He was at the Tegbadu Zo Bush during the operation Fiti-fata mission[633] Tegbadu was within Yomandu. The commander in Tegbadu was still short Bai Bureh and he still reported to Rambo. Witness confirmed that while they were at Yomandu, the ECOMOG controlled the Nimikoro/Bumpe area.[634] He did not hear of any mission in Nimikoro/Bumpe or about the amputation of hands of civilians in that area before fiti-fata mission and after the fiti-fata.[635] Witness testified that there were no child soldiers among the people fighting with them at the front line. [636]

v) **DMK-072**

514. Witness testified about SLAs commanders in Tombodu; Captain Savage; Staff Alhaji; and Tomba Joe and the atrocities committed from February to June 1998. Witness testified that he did not see Morris Kallon in Tombodu. [637] He testified about SBUs in the RUF. [638] Witness was not aware of transportation of civilians from Magburaka to Kono specifically for mining; he stated that he would have known if it had happened. People were moving freely along the Makeni-Kono Road. [639]

vi) **DMK – 132**

515. Witness testified about Johnny Paul's ordering of Operation Pay Yourself in Masiaka.[640] He testified on the events in Kono stating that they were more that 400 or 500

[630] Transcript 22 April 2008, p17
[631] Transcript 22 April 2008, p25
[632] Transcript 22 April 2008, p37 & p26, p43
[633] Transcript 5 May 2008, pg. 65
[634] Transcript 5 May 2008, pg. 66 lines 1 – 19
[635] Transcript 5 May 2008, p.67
[636] Transcript 5 May 2008, p.46 lines 2 – 5
[637] Transcript 1 May 2008, p.106-107
[638] Transcript 2 May 2008, p.22; p 26-27
[639] Transcript 5 May 2008, p.73 lines 1 – 9
[640] Transcript 29 April 2008, p15-18

people including Komba Gbundema; Rambo; Lieutenant Abdul; Miloskie Kallon and [641] and that they reported to Superman in Kono at the time. [642] In Kono the soldiers that were under Mr Kallon were his security. [643] Witness confirmed that Superman was the overall commander in Kono. Morris Kallon, was a major at the time they went to Kono. [644] Witness denied that Johnny Paul Koroma appointed Morris Kallon as the overall commander in Kono.[645]

vii) DMK – 108

516. Between October 1999 and May 2000, Kallon would come and visit Makeni. he would come and talk to civilians concerning their welfare. [646]

517. Witness was at the DDR camp Makump on 1 May 2000 and testified that Kallon was not involved during the incident that took place there on that day. [647] [648]

518. While at the camp Witness saw Kailondo. He came with his troop shot up, and said: "I would not want to see any civilian here" [649] and asked them all to leave the camp and they all fed. [650]

viii) DMK – 039

519. Witness was a nurse in the RUF. She testified on Kono and Makeni events as well as forced marriage, rape and child soldiers. Witness knew Morris Kallon and testified that she never saw him forcefully getting married to any woman. In the course of practising her profession as a nurse, she came into contact with several women. No woman told her that Morris Kallon forcefully got married to her. [651]

520. Witness testified that the Second Accused held no command position in Bo Jungle and Kangari Hills. [652] While on the retreat from Freetown, she did not see Morris Kallon in

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[641] Transcript 29 April 2008, p22
[642] Transcript 29 April 2008, p24
[643] Transcript 29 April 2008, p25
[644] Transcript 29 April 2008, p42-43
[645] Transcript 29 April 2008, p47
[646] Transcript 29 April 2008, p64
[647] Transcript 29 April 2008, p 67
[648] Transcript 29 April 2008, p70-71
[649] Transcript 29 April 2008, p69
[650] Transcript 29 April 2008, p70
[651] Transcript 25 April 2008, p19
[652] Transcript 25 April 2008, p21

Masiaka or Makeni. Witness testified that Morris Kallon did not have soldiers who were children. [653]

ix) DMK-095

521. Witness DMK-095 was at the DDR camp, Makump on 1st May 2000 and he saw Morris Kallon at the DDR camp while he drove from the direction of Magburaka, through the highway between Makeni and Magburaka and this was before mid-day. [654] Mr. Morris Kallon arrived in a "Blue-black" saloon car; he arrived in the company of three others including a Hindolo Koroma, the G-5 commander and the driver (an elderly man). Witness stated that Kallon greeted him and described Kallon as usually a friendly person. [655] He was not among those involved in hostilities with UNMSAIL

x) DMK – 047

522. Witness testified on Kenema, he states that from August 1997 to December 1997, he was in Kenema and his commander was Mosquito. Between May 1997 to February 1998, he did not see Morris Kallon in Kenema or in Tongo Field. Morris Kallon was never a deputy to Sam Bockarie in Tongo Field. [656] Witness went to Makoth and was told by the battalion commander, Mustafa Paka that the Zambian troops that left Freetown, were arrested at Makoth, and disarmed by Komba Gbundema and Kailondo. Witness was not told about Morris Kallon being in Makoth during that time. [657]

xi) DMK-162

523. Witness DMK-162 who was a radio operator testified that Morris Kallon never sent any messages through his radio. Witness stated that on getting to Kono, he was operating with Superman's radio set in his first week in Kono. There was only one radio set in Kono which was that radio set was under the control of Superman. There were a number of operators including Top Marine and King Perry. [658]

xii) DMK – 163

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[653] Transcript 25 April 2008, p23
[654] Transcript 1 May 2008, p.40 lines 24 – 29; p.41 lines 1 – 7
[655] Transcript 1st May 2008, p.41 lines 15 – 29
[656] Transcript 25 April 2008, p54-55
[657] Transcript 25 April 2008, p57
[658] Transcript 6 May 2008, p.82 lines 1 - 15

524. Witness was a radio operator. His testimony is based on communications in Kono, Makeni and in 2000. Witness did not receive any messages from the accused person Morris Kallon at that time. During the time when Witness was at Bumpe, the accused Kallon did not have a radio set in Kono and so no call sign. [659]

525. The logbook was kept by the operator that is Witness163-DMK and he had free access to it. Witness stated that he never saw any record of any communications by the accused Kallon on that record.[660] CO Kailondo never sent operational messages to the accused person Kallon, because Kailondo was not subject to Kallon, so there was no need. [661]

xiii) DMK – 087

526. Witness was a G5. Witness was superior to Sylvester. Witness testified on Kono Makeni and UNAMSIL. In Kono,. Superman was the commander, Colonel Ibrahim Bazzy was the deputy. Colonel Bazzy was SLA, senior officer. Papa Bangura was the operation commander and Rambo deputised Papa Bangura.[662]

527. He explained the role of the G5 with regards to civilians their protection and welfare.[663]

528. If Kallon had killed three civilians at Five-Five Spot in Koidu Town, Witness would have known about it. They would have told the G5 commander, who was the commander during that time. [664]

529. Witness never heard that the accused, Morris Kallon, was involved in the robbery of a bank. [665] Savage refused to take orders from Superman. [666] Witness testified that Morris Kallon did not have child combatants, apart from his own children and relatives.

xiv) DMK-032

530. Witness was a radio operator. Witness testified about the 1st May 2000 incident, Kailondo came into his office in Makeni without a shirt on and was grumbling about the United Nations troops based in Makump having forcefully disarmed some RUF combatants contrary to the agreement between the government of Sierra Leone, RUF and the United

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[659] Transcript 25 April 2008, p80
[660] Transcript 25 April 2008, p84
[661] Transcript 25 April 2008, p84
[662] Transcript 22 April 2008, p97-97
[663] Transcript 22 April 2008, p106
[664] Transcript 24 April 2008, p3-4
[665] Transcript 22 April 2008, p115
[666] Transcript 24 April 2008, p70-71

Nations. Witness denied the suggestion that it's Morris Kallon who went to the DDR camp and not Kailondo.[667] Witness confirmed that it was Kailondo who brought him the message in exhibit 212, page 28067 to send to the leader. [668] But again the witness stated that he did not send the message that indicates coming "From Brigadier Kallon" [669] Witness maintained that Morris Kallon was merely an Adviser to the commander who was Alfred Touray. [670]

4) ARTICLE 6(3) RESPONSIBILITY: EVIDENTIAL ANALYSIS

a) INTRODUCTION

531. The Prosecution case of command responsibility is intrinsically contradictory. Under cross-examination, Prosecution witnesses contradicted their evidence-in-chief or previous statements, rendering their evidence unreliable. RUF Insider witnesses, led by the Prosecution, contradicted each other over details such as command structures and his ranks. This has created the unmistakable air of fabricated evidence, devoid of credibility, given before the Chamber in order to incriminate the accused in this case.

532. Furthermore, rafts of evidence have been led which seek to incriminate but which does not support the charges as pleaded in the Indictment. The Prosecution has failed to prove that the Second accused held the formal positions ascribed therein. The Defence recalls that no conviction can be sustained on the basis of material facts omitted from the Indictment and that requirements of due process determine that that be so. Furthermore, the Prosecution has failed to establish that he exercised effective control over physical perpetrators of crimes alleged in the Indictment, the formal designations, several of which are denied, notwithstanding.

533. In light of the foregoing, at the end of the case, the Chamber now has before it a body of evidence representing the Prosecution case, which is confused in its nature, as to the relevant positions of authority that the Second accused held. It is incumbent on the Prosecution to prove its case beyond a reasonable doubt in conformity with the legal principles outlined above. It is submitted that no conviction can be sustained for command responsibility on the basis of the trial record.

534. In view of the legal requirements above, the Defence for the second accused finds it necessary at this stage to analyze the positions purportedly attributed to the second accused in

[667] Transcript 6 May 2008, pg. 38
[668] Transcript 6 May 2008, pg. 39
[669] Transcript 6 May 2008, pg. 42
[670] Transcript 6 May 2008, pg.28

the Indictment and illustrate, through the evidence proffered by the Prosecution and Defence, the fabrications and material inconsistencies in the case against the second accused; all of which are insufficient to establish the accused's individual criminal responsibility under Article 6(3) of the Statute. Without prejudice to the defects in the said Indictment on the issue of superior responsibility, which are discussed elsewhere in this Brief, the Defence submits that the second accused did not hold several of the positions attributed to him in the Indictment at the material times indicated therein, and that the Prosecution has failed to discharge its burden of proof in relation to the said positions.

535. Moreover, whilst the Indictment attempts to impose on the second accused positions he did not hold, the Prosecution's evidence during trial on the second accused's purported superiority shows irreconcilable contradictions and material exaggerations. In particular, several witnesses, including senior RUF insiders, gave incredibly divergent versions of the positions and ranks purportedly held by the second accused. The said witnesses contradicted each other on virtually all important details regarding the second accused's purported positions and ranks, and thereby threw doubts on the credibility of their respective accounts to the Court. This is demonstrated as follows:

i) <u>The Prosecution Case: Paragraphs 24-28 of the Indictment</u>

(1) Pleading

536. Paragraph 34 of the Indictment pleads: "In their respective positions referred to above...Morris Kallon...exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces." It is referring to paragraphs 24 to 28 of the Indictment which alleges that the Second accused held specific positions of responsibility, at different times. The allegations are repeated in the Pre-Trial Brief.

537. In paragraphs 25 to 28 of the Indictment, it is alleged that the Second accused held the positions of "Deputy Area Commander", "Battlefield Inspector", "Battle Group Commander", "Battlefield Commander", as well as membership of the "Junta governing body". Paragraph 24 of the Indictment alleges that:

> "at all times relevant to the Indictment, Morris Kallon was a senior officer and commander in the RUF, Junta and AFRC/RUF forces".671

671 The Indictment, at para 24, (editing omitted).

538. Reading the Indictment and Pre-Trial Brief conjunctively it is clear that paragraph 24 does not make a separate allegation against the Second Accused. The Pre-Trial Brief reproduces the allegations in paragraphs 25-28 of the Indictment *verbatim* then states:

> "*[h]ence,* since about May 1996 and until 18 January 2002, Kallon was a senior officer and commander in the RUF, Junta and AFRC/RUF forces".672

539. Furthermore, the positions pleaded in paragraphs 25 to 28 cover the entire Indictment period. It is submitted that the Defence was thereby given notice that the Prosecution case of command responsibility which the Defence must answer is premised on Mr Kallon's tenure of the positions pleaded in paragraphs 25 to 28 of the Indictment. The Prosecution is bound by its indictment to the extent that an accused cannot be convicted on the basis of charges which have not been pleaded. No responsibility will be imparted on the basis of *de jure* authority, without more. Therefore, the Prosecution must also establish that the positions pleaded in the Indictment conferred *effective* control on the accused in the sense of the material ability to prevent or punish, in order to find guilt under Article 6(3).

540. It is demonstrated, *infra*, that the Prosecution has failed to establish its case inasmuch as: (i) the evidence does not establish that the second accused occupied the alleged positions; and, or in the alternative, (ii) the evidence does not establish that the alleged positions conferred effective control over criminal subordinates. Therefore, it is submitted that the Second accused can incur no criminal liability under Article 6(3).

(2) Deputy Area Commander (May 1996 to April 1998)

(a) Kangari Hills/Northern Jungle

541. The Indictment fails to plead which part of Sierra Leone the Second Accused was Deputy Area Commander during the period between "May 1996 and about April 1998"; and it is submitted by the Defence for the second accused that it is, to that extent, defective. The only witness who attempted to place the second accused as Deputy Area Commander in the course of the trial is Prosecution witness TF1-045. The witness stated, under cross-examination by counsel for Kallon, that the Second Accused was Deputy Area Commander under Colonel Isaac Mongor at Kangari Hills in the Northern Jungle.[673] The witness,

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[672] The Pre-Trial Brief, at para 153, (emphasis added, editing omitted).
[673] Transcript 25 November 2005, p.5, line 10-22; p.6, line 20-28

however, confined himself to the timeframe of 1996, and went further to state that he knew about the Second Accused being "an advisor" to the said Colonel Isaac Mongor during the same year (1996) at Kangari Hills in the Northern Jungle.[674] Besides, he did not say how he came by the knowledge that the second accused was "Advisor" and/or Deputy Area Commander in 1996; in addition to his confusion about which of the positions the accused held. This being the case, it is submitted that the witness's recollection of this event is vague and unreliable. The Second Accused testified that the witness was not at the Kangari Hills when he was there.[675]

542. Prosecution witness TF1-045 could not be corroborated in his testimony by another Prosecution witness TF1-360, the latter having more insider information on events at Kangari Hills from the point of view that he (witness TF1-360) was, firstly, at Kangari Hills since early 1996 until the AFRC coup d'etat in 1997, when he subsequently left there;[676] and secondly, [redacted].[677] Witness TF1-360 testified that when he arrived at Kangari Hills together with Colonel Isaac Mongor, they met a certain commander there by the name of George. After that, Colonel Isaac Mongor, being a "senior officer" became the "overall commander" at the Kangari Hills jungle.[678] This account of the witness was corroborated by his Defence witnesses DMK-087, DMK-163 and DMK-039.

543. Also, Prosecution witness TF1-361, who was also a Radio Operator like TF1-360, confirmed in his testimony that Colonel Isaac, a Liberian national, was in command of an area called "Blackwater" in the Northern Jungle at the time "when Foday Sankoh was in Ivory Coast for peace talks" and when they were dislodged by the Kamajors from Bo Jungle.[679] The witness described Blackwater as a hill between "Tungie parts" and "Makali". He said that his stay was brief in Blackwater and then left for Bradford in the Rotifunk area of the Western Jungle to meet Superman, also known as Dennis Mingo.[680] Whilst at Blackwater, the witness made no mention of the second accused being Deputy Area Commander to Colonel Isaac Mongor. Similarly, Prosecution witness TF1-071 stated, under cross-examination by Counsel for Sesay, that in 1996, he heard that "Isaac Mungo" was the Area Commander of the

[674] Transcript 25 November 2005, p.7, line 26 to p.8, line 4
[675] Transcript 11 April 2008, p.91, lines 22-23
[676] Transcript 20 July 2005, p.5, lines 25-27 & p.6 lines 18-20
[677] Transcript 20 July 2005, p.6 lines 2-4
[678] Transcript 20 July 2005, p.6, lines 5-17
[679] Transcript 11 July 2005 p.49, lines 23-29 & p.50 lines 1-12.
[680] Transcript 11 July 2005 p.50, lines 13-29 & p.51, line 1.

Northern Region, but made no mention of the second accused as Deputy Area Commander of the said region.[681]

544. What is more, contrary to the foregoing accounts, Prosecution witness TF1-036, who was the RUF Commander in charge [redacted], Kenema District until he was later assigned in early 1996 to Camp Lion in the Kangari Hills,[682] which the witness also called the Northern Jungle, testified that the overall commander of the said Kangari Hills/Northern Jungle whilst he was there [redacted] was an RUF Vanguard called "Vincent".[683] The witness said that he only he left Kangari Hills in November 1996 when he was asked by Foday Sankoh to join him in a helicopter that took them from Kangari Hills to Kailahun.[684] He never mentioned the second accused as being Deputy Area Commander at Kangari Hills. Given that witnesses were called by the Prosecution to help prove its case against the second accused, who is indicted as being one of those allegedly bearing greatest responsibility for the crimes in the Indictment, positions (if any) occupied by the second accused and any authority wielded by him during the period of the Indictment are not issues that can be glossed over, easily forgotten or waived as immaterial, especially when core insider witnesses testify about what they saw, heard or knew.

545. The above scenario only further reinforces the material inconsistencies in the Prosecution's case when placed alongside the testimony of Prosecution witnesses TF1-366 and TF1-371. Under cross-examination by counsel for the Second Accused, witness TF1-366 testified that the second accused was, in 1997, the commander at Kangari Hills, Northern Jungle, even though he was there with Colonel Isaac Mongor (also called CO Isaac) who was, according to the witness, more senior to the first and second accused "because he trained them on the base."[685] The witness rejected Counsel's suggestion that Colonel Isaac was the commander in the Northern Jungle and said in reply that the second accused was the commander and that sometimes the second accused gave instructions to Colonel Isaac, his senior.686 Also, witness TF1-371 testified that in late 1996/early 1997, Superman was based in the Western area jungle with his men whilst Isaac Mongor was in the Northern region

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[681] Transcript 24 January 2005, p.35, lines 21-22.
[682] Transcript 27 July 2005, p.34, lines 12-27. On the description of the location of Camp Lion in Jui Koya aforesaid, see the same transcript at p.33, lines 11-22.
[683] Transcript 27 July 2005, p.37, lines 27-29 & p.38, lines 1-3. On Kangari Hills being also called the Northern Jungle, see same transcript, p.37, lines 10-11
[684] Transcript 27 July 2005, p.37, lines 12-26
[685] Transcript 15 November 2005, p.85, lines 4-16
[686] Transcript 15 November 2005, p.85, lines 17-25

jungle with hundreds of his men.[687] Under cross-examination by Counsel for the second accused, the witness testified that when the second accused left Bo jungle towards May 1997, he was sent to the Northern Jungle, where Isaac Mongor was the commander. He said that both men did not get on well because Isaac Mongor wanted the second accused to be subjected to him.[688] It is submitted that these accounts do not support the allegation that the second accused was Deputy Area Commander at Kangari Hills.

546. Furthermore, testifying about the arrival of Colonel Issac Mongor in Makeni in early 1998 after his withdrawal from the bush with his troops together with some children, Prosecution witness TF1-174 said that when they went to see Colonel Isaac at Teko Barracks in Makeni shortly after his arrival there, he received and directed them to two of his men, namely, John Karimu who was then Adjutant, and CO Digba.[689] No mention was made of the Second Accused being Colonel Issac's deputy. The witness described Colonel Isaac as "the one who was the highest commander on *(sic)* the time on entering Makeni".[690] Even more significant is the fact that the witness's reference to time was the period between February and March 1998, when according to him, Colonel Isaac, Eldred Collins, John Karimu and others were, *inter alia*, involved in "Operation Pay Yourself" in Makeni for seventeen days.[691] The fact that the second accused was not a deputy to Colonel Isaac at that time was also corroborated by Defence witnesses – DMK-087 (an RUF G-5 commander since 1991), DMK-039 (a nurse in the RUF) and DMK-163 (an RUF signal operator since 1995). They were each at Kangari Hills in the Northern Jungle between 1995 and 1997 and stated that the second accused did not hold any command position there. DMK-163 testified that whilst he was at the Northern Jungle between late 1995 and 1997 when the Junta coup occurred, CO Issac Mongor was the commander of the Northern Jungle, whilst CO George (or Georgie), the then battalion commander, was Isaac's deputy.[692] Similarly, whilst at the Northern Jungle in 1996, DMK-087 testified that the second accused met him there around mid-1996 and that the area commander in charge of the Jungle at that time until the Junta coup in 1997 was CO Issac, and his deputy was CO Georgie aforesaid.693 DMK-039 testified likewise.[694]

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[687] Transcript 24 July 2006, p.86, lines 11-17
[688] Transcript 31 July 2006, p.107, lines 21-29 & p.108, lines 1-6
[689] Transcript 20 March 2006, p.100, lines 18-29
[690] Transcript 20 March 2006, p.100, lines 10-15
[691] Transcript 20 March 2006, p.101, lines 21-29 & p.102, lines 1-27.
[692] Transcript 25 April 2008, p.78, lines 25-29 to p.79, lines 1-17.
[693] Transcript 22 April 2008, p.84, lines 6-29 to p.85, lines 1-29.
[694] Transcript 25 April 2008, p.20, lines 8-29 to p.21, lines 1-17.

547. Finally, on the allegation that the second accused was Deputy Area Commander at Kangari Hills/Northern Jungle "between May 1996 and about April 1998", the evidence of the Defence, supported by the testimonies of the second accused[695] and various other Defence Witnesses, including DMK-087, DMK-163 and DMK-039 is to the effect that: **i)** the second accused left Bo Jungle around August 1996 and arrived at Kangari Hills in the Northern Jungle and remained there until the Junta coup in May 1997; **ii)** that on the second accused's arrival there, he met CO Georgie as ground commander and Colonel Isaac Mongor as overall commander appointed by Corporal Foday Sankoh; and **iii)** the second accused was only a Major then and never held any command position at Kangari Hills or the Northern Jungle until he left. The first accused too, in testifying about the RUF command structure, stated that Foday Sankoh appointed Isaac Mongor as Area Commander for the Kangari Hills and that the said Isaac Mongor remained at that location from January 1996 to May 1997.[696] The first accused made no mention of the position of Deputy Area Commander in the RUF or of the second accused holding such position or being deputy to Isaac Mongor. No exhibit also exists in the Court record about such position in the RUF hierarchy.

(b) Kono

548. The Prosecution's theory of the Second Accused's command responsibility in respect of the Kono crime base is perhaps one of the most confusing aspect of it's case against the Second Accused. On one hand the Indictment charges that he held the position of deputy area commander at a time when he was in Kono. On the other, the Prosecution sought to establish that the Second Accused was the overall commander in Kono after the retreat in cross-examination of defence witnesses.[697] A contemporaneous objection was raised by counsel for Sesay at the Prosecution's failure to state its case.[698] The parties were advised to reserve the issue for final submissions.[699]

549. The Second Accused arrived in Kono in February 1998.[700] Prosecution witness TF1-071, who was a senior RUF G-5 officer carrying the rank of Major [redacted] from 1998 until disarmament, testified that he went to Koidu in March 1998[701] and gave a detailed

[695] Transcript 11 April 2008, p.73, lines 1-29 to p.74, lines 1-20; also p.91, lines 18-29 to p.92, lines 1-9.
[696] Transcript 4 May 2007, p.53, lines 20-26.
[697] Transcript 18 April 2008, p. 63, line 2-3; and p. 80, line 15-16.
[698] Transcript 21 April 2008, p. 26, line 23 - p 27, line 12.
[699] Transcript 21 April 2008, p. 27, line 7-10
[700] Transcript 11 April 2008, p.92, lines 27-29.
[701] Transcript 19 January 2005, p.40, lines 18-26; p41 lines 16-29

explanation of the command structure in Kono District at that time and, as such, was strategically well-placed to know the command positions of RUF and AFRC officers in 1998 in Kono. He stated that Superman was the commander in charge of Koidu in 1998.[702] The witness mentioned the names of several RUF and AFRC/SLA commanders in Koidu in 1998 that he saw or heard of, including the Second Accused, Superman, the Third Accused, Rocky CO, CO Isaac, 55 and Gullit.[703] However, no evidence was elicited from him that the Second Accused was deputy to Superman, or that he was Deputy Area Commander in Kono at that time. He simply said that the Second Accused was one of the commanders in Kono.

550. Additionally, Prosecution witness TF1-041, who was also an RUF G-5 Officer [redacted] in 1998, agreed under cross-examination by the Defence that Superman was the overall commander of Kono until he left Kono around the middle of the rainy season of 1998, about September 1998; which event happened after the Fiti Fata mission.[704] The witness confirmed that Superman was in Kono from February/March 1998 to about September 1998, when he left to go to the Northern Jungle in Koinadugu after the Fiti Fata mission.[705] He also stated that he was aware of the friction between Superman and the second accused around the period of the Fiti Fata mission and that the second accused was asked to report to Mosquito at Buedu[706]. The witness said that soon after Superman left for Koinadugu, Rambo, who was Superman's subordinate, continued to be in charge of the brigade commander.[707] Again, this insider witness made no mention of the second accused being the deputy to Superman as overall commander of Kono in 1998, or of the second accused being Deputy Area Commander in Kono at any time.

551. Furthermore, the above witness's testimonies of Superman being the "overall commander" of Kono District in 1998 are confirmed by Prosecution witnesses TF1-167 and TF1-334, both of whom testified that they were SLA/AFRC soldiers working with the RUF in Kono after their retreat from Freetown in February 1998. TF1-167 testified that Superman was the commander in charge of the attack on Kono after the retreat from Freetown in 1998;[708] that after the capture of Koidu town, Superman, was appointed "battlefield commander of Kono" in a meeting called by Johnny Paul Koroma in Koidu town;[709] and that

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[702] Transcript 19 January 2005, p.47, lines 6-29, p.48, line 1.
[703] Transcript 19 January 2005, 44, lines 6-15.
[704] Transcript 17 July 2006, p.31, lines 18-29; p32, lines 1-4
[705] Transcript 17 July 2006, p.32, lines 5-11.
[706] Transcript 17 July 2006, p.32, lines 12-29; p33, line 1
[707] Transcript 17 July 2006, p.33, lines 2-8.
[708] Transcript 14 October 2004, p.59, lines 1-4 & 15-17.
[709] Transcript 14 October 2004, p.62, lines 11-14.

Superman was Field commander 1 of Kono, whilst Ibrahim Bazzy Kamara, another SLA/AFRC soldier in Kono at that time, was Field commander 2 of Kono, deputizing Superman.[710] The witness tendered Exhibit 9, which is the witness's chart of the command structure in Kono from March to May 1998, and the Exhibit stated that Alex Tamba Brima (Gullit), an SLA, was Field commander 2 of Kono but that Ibrahim Bazzy Kamara acted in his absence. The Exhibit also indicated that the second accused was "Brigadier General" during that period and that he was "responsible for creating obstacles to the movement of ECOMOG troops along the Makeni to Kono highway". This witness, also being an AFRC/RUF insider, equally made no mention of the second accused being the deputy to Superman as overall commander of Kono in 1998, or of the second accused being Deputy Area Commander in Kono at any time.

552. Besides, Prosecution witness TF1-334 also testified that from February 1998, Superman was the overall commander in Kono for the RUF,[711] and that he continued to carry that title even when the SLAs were pulling out of Kono[712] sometime in May/June 1998.[713] The witness confirmed that during his stay in Kono, all radio communications were coming from Superman through his operator.[714] Moreover, the witness confirmed that from February 1998 until the SLAs moved out of Kono, they had "other senior members of the RUF" in Kono like Colonel Isaac, Komba Gbundema, Colonel Vandi, Colonel Rocky CO and the second accused, whom he described as "Colonel".[715] The witness also spoke about a problem between the second accused and members of the SLAs in which the second accused allegedly shot an SLA soldier in Kono.[716] According to the witness, the said incident affected the relationship between the RUF and SLAs in Kono.[717] Nothing was also said by this witness about the second accused being Deputy Area Commander in Kono in 1998, or about the second accused being Superman's deputy in Kono at that time.

553. It must be submitted at this point that the command and control responsibilities of Ibrahim Bazzy Kamara aforesaid in Kono since February 1998 as recounted by Prosecution witnesses TF1-167 and TF1-334 was a crucial issue that formed part of the subject matter of the recent Judgment of the Appeals Chamber of the Special Court in the *AFRC* Case. Since

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[710] Transcript 14 October 2004, p.66, lines 11-19.
[711] Transcript 7 July 2006, p.71, lines 6-8.
[712] Transcript 7 July 2006 p74, lines 22-24.
[713] Transcript 7 July 2006 p81, lines 1-5
[714] Transcript 7 July 2006 p76, lines 7-10.
[715] Transcript 7 July 2006 p77, lines 15-28.
[716] Transcript 7 July 2006 p71, lines 25-29; p 72 lines 13-16.
[717] Transcript 7 July 2006 p72, lines 17-20.

witnesses TF1-167 and 334 testified in both this trial and the AFRC trial on allegations that are contained in substantially similar Indictments, the Defence for the second accused particularly urges the Court to pay special attention to, and be therefore persuaded by, the following statements made by the Appeals Chamber in its said Appeals Judgment:

> "The Trial Chamber noted that there was evidence that Savage [a commander in Tombodu in Kono District] was very difficult to control and that he was unpredictable. The Trial Chamber was satisfied that Savage's unpredictable character was not a bar to finding that Kamara had effective control over him. The Appeals Chamber finds no reason to disturb the Trial Chamber's finding that Kamara is liable as a superior for crimes committed by Savage in Kono District (...) With respect to Kamara's responsibility for the crimes committed by AFRC troops in Kono, the Trial Chamber found that after the departure of Johnny Paul Koroma from Kono District, the AFRC was subordinate to the RUF and that Kamara became the highest ranking AFRC soldier in the District (...) It held that despite the AFRC's subordination to the RUF, including Kamara's subordination to the RUF's Denis Mingo, Kamara still had effective control over some mixed battalions of AFRC and RUF troops (...) In reaching this conclusion, the Trial Chamber relied on the evidence of witness TF1-334 who testified that Kamara, although subordinate to Denis Mingo, was the most senior commander of the AFRC in Kono District and that AFRC combatants "operated under their [*i.e.* Mingo's and Kamara's] command and were answerable to the AFRC commanders." The Trial Chamber also noted the evidence of George Johnson that Denis Mingo appointed and promoted some members of the RUF and this was endorsed by Kamara, and that Kamara exercised authority over promotions within the AFRC troops in Kono District. According to witness TF1-334, although Kamara was subordinate to Denis Mingo and received orders from him, AFRC troops operated under Kamara's command and were answerable to him. Witness TF1-334 corroborated George Johnson's testimony that Kamara made appointments, gave promotions and issued orders which were carried out by AFRC troops."[718]

554. Also, DMK-087, Defence witness for the second accused, testified that Superman was the commander in Kono since early March 1998 after the retreat from Freetown, and that Colonel Ibrahim Bazzy, a senior SLA officer, was his deputy. Another SLA, Papa Bangura, was the operations commander. The witness said that the Kono command structure was set up when JPK called a meeting and said that the SLA and RUF should work together, that wherever there is an RUF commander, there should be an SLA as deputy.[719]

555. Prosecution witnesses TF1-367 (an RUF logistics officer [redacted]) and TF1-078 [redacted] also testified

[718] *AFRC* Appeal Judgment, at paras. 259-261 (with ellipsis provided).
[719] Transcript 22 April 2008, p.97, line 24 through to p.99, line 2.

about events in Kono in 1998.[720] Neither of them mentioned or identified the second accused as being deputy to Superman or Deputy Area Commander during the period of the Indictment. TF1-367 stated further that whilst they were in Kono in 1998, Superman received direct orders from Sam Bockarie who was then in Kailahun.[721]

556. The Prosecution's allegation that the second accused was, between May 1996 and April 1998, Deputy Area Commander is thrown into serious doubt with the testimony of Prosecution witness TF1-366, who had earlier testified too that the second accused, contrary to every available evidence, was the overall commander at Kangari Hills and that Colonel Isaac Mongor, the second accused's senior, was subordinate to him. Witness TF1-366 testified that [redacted], and that whilst in Kono, the second accused served as the RUF Battle Group Commander since the RUF came to Kono from Makeni.[722] He said this was around the time that the first accused left Koidu to go to Kailahun and that Superman became Field Inspector at the same time, whilst the first accused was Field Commander and Sam Bockarie was the RUF Chairman.[723] When confronted in cross-examination by Counsel for the first accused that in his earlier statement to the Prosecution[724] he had said that about the same timeframe, Superman was appointed as Battle Group Commander and the second accused as Battle Field Commander, the witness denied that statement completely.[725] This sworn account by TF1-366 is again contrary to every piece of evidence available to the Court. TF1-366's notoriety for indulging in misleading untruths, exaggerations, inconsistencies and motive-driven accounts is addressed elsewhere in the Brief.

557. Furthermore, Prosecution witness TF1-371, a very senior member of the RUF [redacted] etc., testified in passing about events in Kono in 1998 but, in like manner, gave gravely conflicting and exaggerated accounts of the alleged position held by the second accused between 1997 and 1998. According to the witness, and much contrary to the Indictment against the second accused, Sam Bockarie alias Mosquito appointed the second accused as Battle Group Commander sometime during the Junta period, around August 1997 and that the second accused remained as such until the Lome Peace Accord was signed in

[720] Transcript 26 June 2006, p.17, lines 28-29 (TF1-367), and Transcript 22 October 2004, p.23, lines 4-24 (TF1-078).
[721] Transcript 26 June 2006, p.17, lines 23-25.
[722] Transcript 14 November 2005, p.45, lines 4-6.
[723] Transcript 14 November 2005, p.45, lines 14-25.
[724] at p.13672, para 2, statement made to Mandy Cordwell.
[725] Transcript 14 November 2005, pp.45-46, lines 27-29, 1-12.

1999. The witness said that this was before the second accused was assigned to Bo in the Southern Province.[726] He further testified that during the said Junta period, the second accused, the first accused and Sam Bockarie were responsible for all RUF operations in Sierra Leone, with the first accused serving as Field Commander and Deputy to Sam Bockarie, and the second accused serving as RUF Battle Group Commander.[727] The witness alleged that the second accused held the said position as well when he (the witness) was passing through Kono after the Junta period and that the second accused left with his family, himself, Johnny Paul Koroma and others for Buedu.[728] Apart from the fact that the second accused, in his testimony to the Court, denied the foregoing account against him by the witness, including his alleged trip to Buedu around the said time, the Indictment, as noted, only alleges that the second accused was RUF Battle Group Commander in early 2000.[729] Additionally, this witness never said anything about the second accused being RUF Deputy Area Commander or deputy to Superman in Kono in 1998.

558. Besides, although Prosecution witnesses TF1-361 (who was an RUF radio operator [redacted]), TF1-045 (who was a senior bodyguard to TF1-371) and TF1-360 (another radio operator [redacted]) never actually testified that the second accused was *Deputy Area Commander* in Kono between May 1996 and April 1998, they all respectively stated that the second accused served as deputy to Superman in Kono sometime in 1998. TF1-361 testified that during the first week of their arrival in Kono after the retreat from Freetown, the second accused came from Buedu in Kailahun District with a message from Brigadier Sam Bockarie that he was to deputize Superman in Kono; this was after JPK had arrived in Buedu.[730] According to the witness, he personally received this message as radio operator for Superman and that the message came from Sam Bockarie addressed to Superman.[731] However, none of the relevant Court Exhibits: 32, 33, 34 or 35 (including RUF radio log books) contain any such message. This testimony of the witness, which goes to the extent of saying that the second accused was a loyal deputy to Superman and that he had effective command and control over troops in Kono,[732] is a clear fabrication. His account also veers away from the direction of both Prosecution and Defence testimonies in that it asserts that the second accused came from Kailahun to Kono during the 1998 Junta retreat from

[726] Transcript 31 July 2006, p.126, line 18 through to p.128, line 16.
[727] Transcript 31 July 2006, p.128, lines 17-27.
[728] Transcript 1 August 2006, p.35, lines 2-9.
[729] See para. 27 of the Indictment.
[730] Transcript 19 July 2005, p.4 line 24 to p.5, line 29
[731] Transcript 19 July 2005, p.5, lines 1-20.
[732] Transcript 19 July 2005, p.2, lines 19-29 to p.3, lines 1-6.

Freetown, which was not corroborated at all. Witness TF1-045 on his part testified that around February 1998, they came to Kono to receive JPK, the first accused and TF1-361 in order to take them to Kailahun. He briefly discussed the command structure then in Kono, but did not say that the second accused was deputy to Superman. He stated in lieu that at a meeting held at Gandorhun Gbane in Kono, the first accused gave instructions to the second accused to remain in Kono and take care of that axis.[733] However, Prosecution witness TF1-360, whom, as noted, was another radio operator to Superman in 1998, alleged that the second accused was appointed by the first accused to deputize Superman in Kono.[734] It is the submission of the Defence for the second accused that these irreconcilable doubts should be resolved in favour of the second accused.

559. Finally, on the allegation that the second accused may have served as Deputy Area Commander in Kono "between May 1996 and about April 1998", the evidence of the Defence, supported by the testimonies of the second accused[735] and various other Defence Witnesses, is to the effect that: i) firstly, the second accused arrived in Kono on 18 February 1998, shortly after departing Bo in the South and that he met JPK there, who subsequently called a meeting;[736] ii) that in the said meeting, JPK appointed Superman as overall commander of Kono, deputized by Alex Tamba Brima or in his absence Ibrahim Bazzy Kamara who were both SLA/AFRC soldiers (both Exhibits 194 and 9 support this averment);[737] iii) that after JPK had put his command structure in Kono in place before leaving for Kailahun, Superman assigned the second accused to join Colonel Isaac Mongor in creating obstacles to the movement of ECOMG on the Koidu highway (again Exhibit 9 supports this averment apart from the rank it gives to the second accused);[738] iv) that upon the retreat to Kono from Freetown and Makeni in 1998, the RUF had three Colonels in Kono, namely, Colonel Superman: being the most senior RUF commander in Kono then, Colonel Isaac Mongor and Lieutenant-Colonel Peter Vandi,[739] whilst the second accused continued as Major;[740] and *inter alia*, v) that on the AFRC side in Kono, there were the ex-AFRC PLO 1 & 2, namely, Alex Tamba Brima and Ibrahim Bazzy Kamara, the operational commander of Kono then: Hassan Papa Bangura, and his deputy: Major Rambo.[741] The Defence for the

[733] Transcript 21 November 2005, p.54 lines 20-28.
[734] Transcript 20 July 2005, p.15 lines 4-20.
[735] Transcript 11 April 2008, p.73, lines 1-29 to p.74, lines 1-20; also p.91, lines 18-29 to p.92, lines 1-9.
[736] Transcript 14 April 2008, p.14, lines 4-25.
[737] Transcript 14 April 2008, p.14, lines 25-29 to p.15 lines 1-6 & lines 19-26.
[738] Transcript 14 April 2008, p.16, line 29 to p. 17 lines 1-7.
[739] Transcript 14 April 2008, p.27, lines 6-8 & lines 17-20.
[740] Transcript 14 April 2008, p.18, lines 4-16.
[741] Transcript 14 April 2008, p.27, lines 20-23.

second accused reiterates that no such position as Deputy Area Commander existed in the RUF.

(c) Bo Jungle

560. Though not specifically claimed in the Indictment, it is the case of the Prosecution, through some of its witnesses, including TF1-360, that the second accused was, sometime in 1996, the most senior RUF Officer at the Bo Jungle in the Southern Province.[742] Whilst it is not denied that the second accused was an RUF Major at the Bo Jungle prior to the Junta coup in May 1997, it is submitted that any attempt to infer that his rank impacted or influenced the command situation there and then is challenged and denied. The second accused and his Defence witnesses, including DMK 163, 087 and 039, respectively testified that the ground commander at the Bo Jungle in 1996 was Commander Augustine Kargbo, a Staff Captain, who had absolute authority there, assisted by Captain Flomo as Deputy Battallion Commander.[743] The second accused merely advised them on military matters but did not command or wield any control over them. The Defence for the second accused reiterates the Appeals Chamber of the Special Court's decision that ""Substantial influence" or "persuasive ability" which falls short of effective control is insufficient for a finding of superior responsibility" and that "a finding that a superior exercised effective control is a question of fact to be determined on a case-by-case basis."[744]

(3) "Battlefield Inspector" (April 1998 to December 1998)

561. Two key witnesses testified about the second accused being Battle Field Inspector, to wit, TF1-360 and TF1-071, and they shall be addressed separately. Apart from them, witness TF1-366 testified that in 1998 after their withdrawal from Freetown, and about the same time that the first accused left Koidu for Kailahun, Superman became Field Inspector and reported to the second accused who was allegedly Battle Group Commander, whilst Issa Sesay was Field Commander and Sam Bockarie the RUF Chairman.[745] The witness's reference in this case was to Superman, not the second accused. However, apart from the fact that this witness

[742] Transcript 25 July 2005, p.99, lines 19-24.
[743] Transcript 11 April 2008, p.70, line 29 through to p.72, line 18.
[744] *Prosecutor v Alex Tamba Brima et al*, SCSL-04-16-A, Appeals Chamber Judgment, 22 February 2008, para 289.
[745] Transcript 14 November 2005, p.45, lines 14-25.

was alone in his account about Superman being Field Inspector, the overwhelming evidence is that Superman served as overall commander in Kono sometime in February/March 1998 onwards. The Indictment outlines that the second accused was Battle Field Inspector between April 1998 and December 1999, but failed to specify a command location.[746]

562. Witness TF1-360, who was in a clearly confused state, stated that in March 1998, Sam Bockarie, alias Mosquito, introduced changes in the leadership/command structure of the RUF by appointing Superman as Battle Group Commander in Kono, and Morrison Kallon as "field inspector, battlefield inspector."[747] According to the witness, the duties of the battlefield inspector consisted of knowing exactly what took place at the battlefront, what those at the frontline required and forwarding whatever report he had from the frontline to "the battlefield commander."[748] It is not known, however, who the battlefield commander was and to whom he reported as, by the witness's account, Superman was then the battle group commander based at Sefadu, not battlefield commander. In view of the fact that other Prosecution witnesses had alleged that the second accused was battle group commander in Kono around February/March 1998, this witness's divergent account about the second accused being battlefield or field inspector in March 1998 in Kono makes the Prosecution's case more doubtful. As already explained, the Prosecution alleges in its Indictment that about April 1998, the second accused was still Deputy Area Commander. What is more, the witness stated that he received the information about the changes in the command structure through radio message from Mosquito,[749] but failed to show the logbook or identify relevant Exhibits to verify same. Besides, the witness never stated that the second accused had troops under him by virtue of holding the position of battlefield inspector.

563. Regarding Prosecution witness TF1-071, who was an RUF Lieutenant-Colonel [redacted], it is firstly crucial to note that this witness *particularly and consistently testified, under cross-examination by Counsel for the second accused followed by further repeated questioning by the Bench, that he never received any direct command from the second accused since 1991 to 1999, and that he only received direct command from the second accused in 1999, when, according to the witness, the second accused became RUF battle group commander.* More precisely, the witness, being a senior RUF Officer, *stated that he only received direct command from the second accused between 1999 up to 2001, when the*

[746] See Indictment para. 25
[747] Transcript 20 July 2005, p.18, lines 2-23.
[748] Transcript 20 July 2005, p.18, lines 24-29 & p.19, lines 1-4.
[749] Transcript 20 July 2005, p.18, lines 7-11.

second accused allegedly held the respective positions of RUF battle group commander and battlefield commander in chronology.[750]

564. Furthermore, the witness testified that the second accused was given the position or assignment of 'battlefield inspector' by the first accused, saying that it was "not a rank, it is just a position or an assignment".[751] The witness also stated that the said position was given by Issa Sesay to the second accused "rather before" the 10th or 24th December 1998, after the capture of Makeni, indicating in particular that the position was given "when [the first accused] became battlefield commander".[752] Clarifying the date further, the witness said that after the capture of Makeni in December 1998, and towards the 24th December 1998, Sam Bockarie had become the RUF Chief of Defence Staff, the first accused had become the battlefield commander, and that Superman was, before the attack, still the battle group commander.[753] The witness's perceived view of time was laid to rest in re-examination by the Prosecution when he said that the second accused "became battlefield inspector during the time we went into the bush near when Issa Sesay took over complete assignment as battlefield commander. It was 1998, part of 1998".[754]

565. The witness also agreed under further cross-examination by Counsel for the second accused that even with the position of battlefield inspector, the second accused took instructions from his superiors and that there was always somebody higher than him in the RUF Movement.[755] On what constitutes the duties of a battlefield inspector, the witness said in re-examination that the battlefield inspector was "more or less a special assistant to the battlefield commander" and that he reports all battle activities directly to the battlefield commander, who assigns him.[756] In view of what other witness's said about the positions the second accused held in Kono in 1998, especially Prosecution witnesses TF1-366 and TF1-371, both of whom alleged that the second accused was RUF Battle Group Commander in Kono shortly after the pullout from Freetown in 1998, it is difficult to place witness TF1-071's allegation of the second accused being Battle Field Inspector within the 1998 timeframe without any proven or alleged demotion; the position of battle group commander being quite senior to that of battlefield inspector. Besides TF1- 071 never stated that the second accused had troops under him by virtue of his alleged position of battlefield inspector.

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[750] Transcript 26 January 2005, p.11, line 29 through to p.13, line 23.
[751] Transcript 26 January 2005, p.14, lines 20-21.
[752] Transcript 26 January 2005, p.15, lines 18-20.
[753] Transcript 26 January 2005 p.16, lines 8-20.
[754] Transcript 27 January 2005, p.78, lines 13-16.
[755] Transcript 26 January 2005, p.16, line 21 to p.17, line 3.
[756] Transcript 27 January 2005, p.76, lines 1-5.

566. DIS-069 testified that he did not hear that the second accused was battlefield inspector in Kono; had that being the case, the witness would have known. He testified further that the second accused was not the overall commander of Kono between February and June 1998, nor was he a deputy there. The witness also said that Superman was the overall commander of Kono during this period, deputized by Rambo; and that Peter Vandi was Superman's Adviser.[757]

567. In view of the foregoing, as well as the testimonies of various Defence witnesses, the case for the second accused is that the second accused never held the position of Battle Field Inspector anywhere.[758] In denying the allegations made against him by Prosecution witnesses TF1-360 and TF1-361, the second accused testified that he did not serve as battle field inspector at any time, and cited Exhibit 35, which showed that he was not battle field inspector.[759] The second accused also stated that the positions of battle field inspector and deputy area commander did not exist, and that is why they were not mentioned in the Salute Reports prepared by the RUF commanders.[760]

(4) Battle Group Commander (from "early 2000")

568. Several Prosecution witnesses testified about the second accused being RUF Battle Group Commander at various periods, but the Indictment, as noted, alleges that the second accused held that position "in early 2000" until "about June 2001" when he became "RUF Battle Field Commander".[761] As earlier explained in this Brief, witness TF1-366 testified that the second accused was the RUF Battle Group Commander since February 1998 when the RUF came to Kono from Makeni.[762] Also, witness TF1-371, who gave a detailed chronology of the events he allegedly experienced, said that Sam Bockarie (alias Mosquito) appointed the second accused as Battle Group Commander sometime during the Junta period, around August 1997 and that the second accused held the position until the Lome Peace Accord was signed in 1999.[763] Witness TF1-071 also testified that the second accused became the RUF Battle Group Commander in 1999, taking over from Dennis Mingo, alias Superman.[764] On the

[757] Transcript 23 October 2007, p.26 through to p.29 line 12.
[758] DMK-161 Transcripts 21 & 22 April 2008; DMK-163 Transcript 25 April 2008, & DMK-087, Transcripts 22 & 24 April 2008.
[759] Transcript 14 April 2008, p.41 lines 1-15, p.42 lines 1-9.
[760] Transcript 14 April 2008,, p.43 lines 17-25.
[761] See the Indictment, dated 2 August 2006, paras. 27-28
[762] Transcript 14 November 2005, p.45, lines 4-6.
[763] Transcript 31 July 2006, p.126, line 18 through to p.128, line 16.
[764] Transcript 21 January 2005, p.24, lines 9-10 & lines 17-21.

other hand, witness TF1-360 in his usual confused state, testified that in 2000, when there was no fighting and Superman had already disarmed – being the first to do so, he (Superman) became RUF Battle Group Commander; and that a certain Morrison Kallon started deputizing Issa Sesay when the latter was appointed by Foday Sankoh as RUF Field Commander, after the resignation of Sam Bockarie.[765]

569. Notwithstanding the contradictions and inconsistencies of the said Prosecution witnesses, the second accused testified that he was RUF Battle Group Commander in April 2000. About this time, the Defence only admits that the second accused held that position as a subordinate to Issa Hassan Sesay, the first accused, and Foday Sankoh, the then RUF leader, and not Johnny Paul Koroma (JPK), the ex-AFRC leader, since any semblance of a relationship between the RUF and the AFRC had collapsed; the AFRC being no longer in existence by 2000. Although it was peace time and disarmament had started, as indicated above by witness TF1-360, both Foday Sankoh and Issa Sesay were in absolute control of the RUF Movement as leaders. Witness TF1-360 stated that "all the commanders were to report to Issa. In return, Issa was to report to Foday Sankoh. That was the time when Sankoh was in Freetown, but he used to visit the RUF liberated areas."[766] Many other Prosecution witnesses confirmed this hierarchy.

570. Besides, around this time too, the RUF War Council based in Kailahun, which was the highest-decision making body of the Movement,[767] had become an RUF Peace Council.[768] Foday Sankoh, who had returned to Sierra Leone and was based in Freetown, took immediate and effective command and control of all RUF fighters. In his own testimony, the second accused stated that he became acting battle group commander for the RUF in April 2000 because Denis Mingo, alias Superman, had already disarmed whilst other areas of the RUF had not disarmed;[769] and that he was appointed by Foday Sankoh to act in Superman's capacity.[770]

(a) <u>The Second Accused's lack of Effective Command and Control over RUF Combatants whilst serving as RUF Battle Group Commander</u>

[765] Transcript 21 July 2005, p.50, lines 3-29.
[766] Transcript 21 July 2005, p.51, lines 4-10.
[767] Transcript 14 April, 2008, p.4, lines 10-24.
[768] Transcript 14 April, 2008, p.128, lines 21-24.
[769] Transcript 14 April, 2008 p.45 lines 11-29.
[770] Transcript 14 April, 2008 p.46 lines 9-11.

571. It is the submission of the Defence for the second accused that during the period that the second accused served as RUF Battle Group Commander, which period the Defence contends should be from April 2000 to August 2001, there was serious and widespread disenchantment within the RUF over what was perceived as violations of the Lome Peace Accord by the Government. Besides, Foday Sankoh, as noted, took control of virtually all key operations of the RUF. Sankoh would side-step the RUF command structure and give orders to the combatants he trusted. In this regard, the second accused was not in control of any of those who would ordinarily have been deemed his juniors. Significantly too, the fact that Foday Sankoh was now in the country and fully in charge of RUF matters contrasted considerably with the period when he was away, giving promotions and conferring full authority on his chosen beneficiaries to deal effectively with their juniors on the ground. With Sankoh around and in control, positions became mere decorations to appease loyal subordinates.

572. It was in the above light that the second accused was appointed to act as Battle Group Commander in the absence of Superman. When Sankoh was out of Sierra Leone, dishing out meaningful positions and promotions to his officers willy-nilly, the second accused was never a beneficiary to any of them.[771] Under cross-examination by Counsel for Sesay, witness TF1-168, who was a senior vanguard, confirmed that he heard that in March 1997, when Sankoh was under house arrest in Nigeria, he passed on a message to promote some of his officers, making Sam Bockarie, Isaac Mongor, Denis Mingo alias Superman and Mike Lamin into Colonels, and Issa Sesay, Peter Vandi, Gibril Massaquoi into Lieutenant-Colonels.[772]

573. Moreover, the second accused testified that when Foday Sankoh came back into the RUF command structure around April 1999, at the beginning of the peace negotiations, Sankoh started to contact individual commanders directly himself, such as Kailondo, Superman, Isaac Mongor, Sam Bockarie and the second accused. The second accused stated that Sankoh came one morning into the radio room and contacted all call signs without passing through Sam Bockarie, and that everyone responded to Sankoh's call.[773] He confirmed that after Issa Sesay was attacked by Superman, he was taking orders from Sankoh and Sam Bockarie and that any orders given by any of the two would countermand orders given by Issa Sesay.[774]

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[771] Transcript 11 April, 2008, p.74, lines 6-28.
[772] Transcript 3 April 2006, p.4, line 21; p.5, line 12
[773] Transcript 15 April 2008, p.124 lines 3-23.
[774] Transcript 15 April 2008, p.124 line 28 – p.125 line 6

574. Also, witness TF1-360 agreed under cross-examination that in 2000, prior to the arrest of Foday Sankoh, Issa Sesay as Battlefield Commander would have to refer to Sankoh to make final decisions; Sankoh would also have plans sent to Sesay. He confirmed that on certain exercises, Sankoh would contact the commanders directly as he was the man who was able to exercise authority over a large number of commanders in the RUF.[775] Similarly, TF1-371 testified that Sankoh used to interact with his commanders [redacted] and that when he needed to speak to various commanders, he would contact them through VHF radio.[776] Defence witness DMK-163 also testified that he knew Foday Sankoh as, *inter alia*, a very disciplined and firm person. When he has given an order, all he needed was the implementation of the order; he will not entertain any objection or view on such matters. The witness said that all of them were afraid of him.[777] The witness confirmed further that it was Sankoh who ordered that Rashid Mansaray, his deputy at the inception of the RUF, be killed on an allegation of sabotage and he was killed.[778] In fact Prosecution witness TF1-360 confirmed under cross-examination that in the RUF movement, any failure to obey orders would put one at risk of being killed; the same applied for failure to execute orders given by superiors.[779] Witness TF1-367, another RUF insider, also confirmed that it was understood within the RUF that if Foday Sankoh gave an order it must be obeyed at all costs.[780] Several other witnesses, including the second accused, also confirmed the authoritarian tendencies of Sankoh vis-à-vis the absolute command and control he had over RUF combatants since the start of the Movement.

575. Additionally, by way of reference to the operative command structure of the RUF in 1999, TFI-371 testified that the ultimate command over the RUF rested with Foday Sankoh and that, of all the RUF commanders, only Foday Sankoh had the authority to control AFRC commanders, such as Brigadier Mani, Five-Five, and Gullit.[781] The witness testified as follows:

> A: "[Foday Sankoh] was trying to...exact his influence. As you rightfully say, some obeyed, some disobeyed."
> Q: "And influence was the word. It wasn't like command and control in the typical military sense. It was influence, as you observed?"
> A: "Yes."[782]

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[775] Transcript 22 July 2005, p.26 lines 4-29.
[776] Transcript 28 July 2006, p.89 line 2-12
[777] Transcript 25 April 2008, p.93, lines 2-14.
[778] Transcript 25 April 2008, p.94, lines 1-7.
[779] Transcript 26 July 2005, p.40 line 6-10
[780] Transcript 26 June 2006, p.41, lines 14-17.
[781] Transcript 28 July 2006, pg 64, lines 25 – pg 65, line 2.
[782] Transcript 28 July 2006, pg 65, lines 11 - 15

576. Also, when witness TFI-371 was questioned on Foday Sankoh's intervention in the kidnapping of UNAMSIL personnel, the witness gave the following response:

> Q."Sankoh couldn't, in these circumstances, then take on a purely political role, he had to play the commander-in-chief, and commander in an operational sense with the men on the ground during 1999; do you see my point? I mean, he was vice-president, but at the same time, he was the top of the RUF chain making day-to-day command and control decisions about the RUF, from what you observed?
> A. "I mean, he was the leader of RUF."[783]

577. Also, witness TF1-369, the Prosecution's expert witness on Forced Marriage, reluctantly testified about the impression she had of Foday Sankoh, with whom she had a very close relationship. The witness gave the following account:

> "I found him a very charismatic leader. At the same time, I find him very strange, because he had dual personality. Some occasion when you have to deal with him, he's an exceptionally wonderful person, he's caring, but sometimes when you're dealing with him, you can find out he's very ruthless, you know, the way he deals with things."[784]

> "I think it depends on the occasion. I think he has the dual personality to be the best person if he wants to be, so there are occasion when he can be a real gentleman, and there are occasion when he's a completely different person. You would not know that is the person I just dealt with on the other day".[785]

578. Thus, the case of the second accused regarding the position of Battle Group Commander is that it was a peace-time assignment performed by the second accused as a direct subordinate of Foday Sankoh and Issa Sesay for a short period, with no direct command and effective control over RUF combatants at the time. In fact, merging the second accused's admission of holding this position around April 2000 into the claim in the Indictment that he also became Battle Field Commander about June 2001, would infer that the second accused only held the position of Battle Group Commander for less than a year: April 2000 to June 2001. The Defence for the second accused relies on the evidence provided by its own witnesses as well as those of the first accused, including his own testimony, to prove the case for the second accused that the position of Battle Group Commander in the RUF in 2000 did not confer effective control over subordinates.

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[783] Transcript 28 July 2006, pg 66, lines 11 – 18.
[784] Transcript 27 July 2006, p.10 line 29 to p.11, line 6
[785] Transcript 27 July 2006, p.12 lines 3-7.

(5) Battle Field Commander (from "about June 2001")

579. Like the position of Battle Group Commander, the Defence for the second accused contends that the position of Battle Field Commander was a peace-time assignment performed by the second accused as a direct subordinate of Issa Sesay, and not Foday Sankoh, who had stopped leading the RUF, or Johnny Paul Koroma, since there was no longer any relationship between the RUF and the AFRC, and the AFRC had ceased to exist. The Defence for the second accused submits that the second accused served as RUF Battle Field Commander since August 2001, not June 2001 as the Indictment alleges. It is submitted that the second accused did not wield any authority or exercise any control whilst serving as Battle Field Commander in the RUF that may have led to the commission of any crime whatsoever. In any case, the Defence for the second accused notes that 15 September 2000 is the cut-off date contained in the Indictment for any allegation of criminality against the second accused.786

(6) Member of the Junta Governing Body ("during the junta regime")

580. The Indictment and Pre-Trial Brief allege that the second accused was member of the Junta governing body, during the Junta regime.[787] Witness TFI-045 testified that the second accused was a member of the Supreme Council.[788] He also testified that the second accused attended a meeting held at Wilberforce Barracks in "early September 1997"[789] as well as a meeting at Youyi building "at the ending of September, towards October".[790] Also, Exhibit 6 established that the second accused was appointed a member of the "Council" in September 1997.

581. Whilst the Defence does not dispute that the second accused was an inactive member of the AFRC Council, as evidenced by Exhibit 6, the Defence, however, submits that the evidence adduced by the Prosecution failed to establish the following assertions: (i) that the second accused was a member of the Supreme Council; (ii) that the second accused took an active role in the decision making process of the AFRC Council, such that would impart effective control over subordinates; and (iii) that the AFRC Council failed to take necessary

786 See para. 83 of the Indictment.
787 The Indictment, at para 26; see also the Pre-Trial Brief, at para 150.
788 Transcript 18 November 2005, pg 81, line 16-17.
789 Transcript 18 November 2005, pg 80, line 10.
790 Transcript 18 November 2005, pg 87, line 16-20.

measures to prevent or punish criminality. A detailed discussion of this subject is undertaken in the section on JCE elsewhere in the Brief.

(a) The Second Accused was not a Member of the AFRC Supreme Council

582. According to witness TFI-045, the "majority" of officers present in Freetown in early September 1997 took part in the aforementioned meeting at the Officer's Mess in Wilberforce.[791] Apart from submitting that mere attendance at such meeting, without more, does not establish membership of the Supreme Council, it is further submitted that TFI-045 is not a credible witness. In particular, the witness gave contradictory evidence regarding material aspects of this allegation.[792] Under cross-examination, the witness gave contradictory testimony regarding the date of the alleged meetings at Wilberforce Barracks and Youyi Building. The Defence recalls that TFI-045 also confirmed that he was arrested by the second accused and detained in his house, which, it is submitted, represents substantial motive for the witness to implicate the second accused with false testimony.[793] The Defence urges the Court not to believe TFI-045's account about the second accused's alleged membership of the Supreme Council, especially in view of other evidence that the AFRC Supreme Council was distinct and separate from the AFRC Council to which the second accused belonged.

583. Witness TFI-045 also testified that he saw a "chart" hanging on the wall of the office in which the meeting was held, which he described as depicting the AFRC "command structure" that operated at the time. According to the witness, the chart named Johnny Paul Koroma, Foday Sankoh, Issa Sesay, Sam Bockarie, Peter Vandi, and Eldred Collins. The witness did not mention the second accused's name.[794] Exhibit 6 of the Court Exhibits refers to the AFRC Council. As confirmed by the second accused himself in his testimony, he was a member of the AFRC Council only, not the Supreme Council.

584. Furthermore, witness TFI 334 who was the bodyguard of a senior AFRC personnel and Supreme Council member, testified that when meetings of the Supreme Council were convened, he would wait in the compound of the building in which the meeting was held with the other bodyguards, and that on one occasion he attended the meeting himself.[795] He testified that "handsets" were issued to all members of the Supreme Council in order that they

[791] Transcript 25 November 2005, pg 3, line 25-27.
[792] See "Core Prosecution Witnesses Who Testified Against the Accused", *supra*.
[793] See "Core Prosecution Witnesses Who Testified Against the Accused", *supra*.
[794] Transcript 18 November 2005, pg 82, line 20 to pg 83, line 20.
[795] Transcript 6 July 2006, p 92, line 14-16.

could be summoned by the chairman, JPK, and that JPK could otherwise communicate with them.[796] In relation to this, the Defence recalls the evidence of TFI-361 above in the sense that the second accused "did not have an area of responsibility during this time. So he did not have a radio set."[797] TFI 041 also testified about a "council meeting" in Freetown in January 1998 attended by Johnny Paul Koroma and Mike Lamin, among others. He, however, stated that the second accused did not attend such meetings.[798] Also, Defence witness DMK 162 testified that he saw the second accused only once in Freetown, at that time.[799]

(b) The Second Accused Held No Position of Effective Control in the AFRC Council

585. Witness TFI-334 described the functioning of the AFRC Council in the following terms: that SAJ Musa was the vice-chairman of JPK's cabinet,[800] that the "PLOs reported to those two top men",[801] and that the PLOs had "ministries which [they] were monitoring and [supervising]".[802] Therefore, it is submitted that the substantive decision-making authority was with AFRC members and that RUF membership was a token gesture in order to simulate parity between the two sides of the alliance. Besides, JPK, SAJ Musa, the PLOs and other senior Junta officers, to the exclusion of the second accused and some members of the RUF, were all members of the Supreme Council, the top-most body of the AFRC Junta.

586. As a matter of fact, in Exhibit 224 of the Court Records dated 16th August 1997 and titled "Minutes of an Emergency Council Meeting of the AFRC" at paragraph 16, it was decided that "all Principal Liaison Officers must have effective control over the honorable members within the Council." Thus, the second accused, being an ordinary member within the Council, was a mere subordinate of the PLOs and their superiors and wielded no power whatsoever by such membership.

(7) The Second Accused's Ranks in the RUF Command Structure

[796] Transcript 6 July 2006, p 92, line 20; pg 93, line 12-24.
[797] Transcript 18 July 2005, p 115, line 12-15.
[798] Transcript 10 July 2006, p 23, line 25; p 27, line 8.
[799] Transcript 29 April 2008, p 92, line 24-26.
[800] Transcript 6 July 2006, p. 93 line 1-4.
[801] Transcript 6 July 2006, p. 93 line 7-9.
[802] Transcript 6 July 2006, p. 93 line 10-13.

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587. The case for the second accused regarding ranks is that he held the rank of Major in May 1996 and was an RUF adviser at the Bo Jungle, South of Sierra Leone.803 The second accused held this rank until April 1999, when Sam Bockarie appointed him as commander in Magburaka after Superman's fight with Issa Sesay, and then promoted him to the rank of Lieutenant-Colonel.[804] In essence, the second accused continued to be Major in all the locations he visited or was assigned to, including Kangari Hills, Makeni, Freetown and parts of the Western Area, Kono and Kailahun, otherwise he would not have been promoted to Lieutenant-Colonel within the RUF as that was the immediate rank superior to Major within the RUF organisation. All other ranks attributed to the second accused before April 1999, other than the rank of Major, can at best be described as figments of the attributors' respective imaginations.

588. A case in point has to do with DIS-069, Defence witness for Issa Sesay, who initially testified that during the period, August 1997, the second accused was a "lieutenant-colonel". When it was put to him by Counsel for the second accused that the second accused was in fact a "Major" at that time, the witness replied that "it may be possible" because "during that time we hadn't a direct communication with people at Kangari Hills". When examined further, the witness said he thought that the second accused being "one of the senior officers among the vanguards", came with the rank of lieutenant-colonel.[805] Incidentally, DIS-188, another Defence witness for Issa Sesay, who testified shortly after DIS-069 and was RUF Deputy MP Commander, was able to shed light on the lack of truth in the imaginary and hearsay ranks attributed to the second accused by commenting on Exhibit 9, in which Prosecution witness TF1-167 had described the second accused as "Brigadier-General". He confirmed that the second accused was a "Major" in 1998 and said that any reference to him as "Brigadier-General" cannot be true.[806]

589. In particular, many Prosecution witnesses attached to the second accused, ranks and titles that he did not have within the RUF command hierarchy. Witness TF1-334 referred to the second accused as "Colonel" and said that no one would dare refer to him as "Major" whilst in Kono;[807] witness TF1-361, testified that the second accused was "Brigadier";[808] also, witness TF1-371 testified that JPK promoted himself, the second accused and several other

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[803] Transcript 11 April 2008, p.71 lines 8-18.
[804] Transcript 18 April 2008 p.68 lines 4-28.
[805] Transcript 23 October 2007, p.23, lines 12-27.
[806] Transcript 30 October 2007, p.109, lines 2-13.
[807] Transcript 7 July 2006, p.77, line 26 to p.78, line 12.
[808] Transcript 19 July 2005, p.10, lines 7-15.

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officers to the rank of "Brigadier" during the retreat from Freetown in April 1998;[809] and, *inter alia,* witness TF1-167 also referred to the second accused as "Brigadier-General" in Exhibit 9 within a similar timeframe as witness TF1-371. Further, Exhibit 32, a radio logbook message dated 15 July 1999, referred to the second accused as "Brigadier". However, witness TF1-141 said that the second accused was battlefield commander at the Guinea Highway in Kono with the rank of "Major"; whilst witness TF1-078 testified that in 1998 when he knew the second accused in Kono, "they were calling him Major"[810].

590. As already indicated above, the Defence for the second accused submits that he was an RUF "Major" in May 1996 and continued as such until he was promoted by Sam Bockarie to "Lieutenant-Colonel" in April 1999. Thereafter, in April 2000, Foday Sankoh made him acting Battle Group Commander and promoted him to "Brigadier"; the second accused was then based in Magburaka in the Tonkolili District.[811] As a Major without any meaningful assignment or position in the RUF, the second accused could not wield any authority over his superiors or equals in rank, to wit, those carrying the ranks of major, lieutenant-colonel and above. Little wonder that witness TF1-071, as noted, admitted that he did not receive any direct command from the second accused until, according to the witness, he became battle group commander in 1999.812 Simply put, the second accused was at best an insignificant officer then.

591. What strengthens the foregoing averment is the fact that ranks were, according to witness TF1-168, a senior vanguard, very important to Foday Sankoh, the RUF leader, and that Sankoh often talked about respecting ranks.[813] The witness also confirmed that Sankoh indicated to them that ranks should be respected because he was tired of other titles, such as assignments, taking precedence over rank.[814] Even more significant is that the second accused, as noted, was not a beneficiary of Sankoh's promotions until April 2000, when he was made Brigadier by Sankoh.[815]

(8) Superior Responsibility Not Imputed From Vanguard Status *Per Se*

[809] Transcript 1 August 2006, p.152, lines 11-20.
[810] Transcript 26 October 2004, p.1 lines 24-27.
[811] Transcript 14 April 2008, p.127 lines 13-22.
[812] Transcript 26 January 2005, p.11, line 29 through to p.13, line 23.
[813] Transcript 3 April 2006, p.3, lines 18-23.
[814] Transcript 3 April 2006, p.4, lines 14-17.
[815] Transcript 3 April 2006, p.4, line 21 to p.5, line 12; Transcript 11 April, 2008, pp.74, lines 6-28.

592. Over the course of the trial the Prosecution attempted to suggest that by virtue of being a "vanguard", which is a respected title within the RUF for those who trained at Camp Naama in Liberia - being the first RUF training base, the second accused should be held criminally responsible as a superior for the conduct of his alleged subordinates. The Defence for the second accused submits that this purported inference is firstly, not pleaded in the Indictment, and therefore the second accused cannot adequately respond to it, indeed the Defence 'sensed' only during the presentation of the defence case that status of vanguard could well be part of the Prosecution case on command responsibility based on propositions by the Prosecution to various defence witnesses. Secondly, it is also submitted on behalf of the second accused that no evidence was adduced during the Prosecution's case that placed the second accused in a unique superior command-and-control position by virtue of his status as vanguard. The suggested inference by the Prosecution that vanguards had considerable influence and perceived control in command locations, notwithstanding their assignments or ranks, has no evidential or real basis since it cannot be proved beyond reasonable doubt. Thirdly, it is further submitted that the title of vanguard alone did not command superior authority in the RUF where that authority is not assigned or given, as several instances existed where non-vanguard junior commanders directed, commanded and controlled locations in which vanguards were stationed.

593. For the purposes of the foregoing submissions, the Defence for the second accused again relies on the case of *Prosecutor v. Semanza*[816] in which it was held by the Trial Chamber that "*'substantial influence' over subordinates which does not meet the threshold of effective control is not sufficient under customary law to serve as a means of exercising command responsibility and, therefore, to impose criminal liability.*"

594. Several Prosecution witnesses testified about the status vanguards enjoyed within the RUF, in terms of the respect they carried in the movement. Even more respected and revered were those RUF officers called "Special Forces" who were either trained in Libya or were co-opted into membership of the same by Foday Sankoh in Liberia. The Special Forces, who were regarded as the founding fathers of the RUF, were few and included Foday Sankoh himself, Mohamed Tarawallie alias "Zeno" and Rashid Mansaray.[817] It is understood that Sankoh may have appointed TF1-371, who was a vanguard [redacted],[818] into membership of the Special Forces because of the deference he had for him.

[816] *Semanza*, Trial Judgment, para 402.
[817] Transcript 3 April 2006, p.47, line 29 to p.48, line 6.
[818] Transcript 3 April 2006, p.48, lines 7-13.

Both TF1-371 and Colonel Isaac Mongor, a Liberian vanguard, [redacted].[819]

595. However, whilst it is true that TF1-371 and Colonel Isaac Mongor may have, for example, enjoyed certain privileges in the RUF, such as admiration and great respect among combatants, they were still subject to command and control within the RUF structure and had to particularly obey orders and take directives from Sam Bockarie, being a less senior vanguard, when he was the RUF interim leader and battlefield commander from 1996 to 1999.[820] TF1-045 testified that Sam Bockarie was chosen by Foday Sankoh to head the RUF in his absence, in lieu of TF1-371, because the RUF combatants were, *inter alia*, afraid of Sam Bockarie.[821]

596. In view of the situation of TF1-371 and Colonel Isaac Mongor, both being very senior vanguards [redacted], it becomes crystal clear that vanguards did not impact, influence or direct command and control decisions merely because they were vanguards. The bedrock of RUF authority and survival lay in its rigid chain of command symbolized by its leadership, which in many cases was epitomized by Foday Sankoh or Sam Bockarie assisted by the RUF War Council based in Buedu, Kailahun District. Authority decentralized from the leadership to the least combatant in a team, whilst reports were similarly generated in an ascending order from the team to the battlefield commander. The second accused testified, under cross-examination by the Prosecutor, that in Kono, for example, between February and August 1998, all instructions or daily routine orders (DROs) were coming from Sam Bockarie in Kailahun to Superman, who was the battle group commander in Kono at that time; the DROs then went from Superman to each battalion, then to each company, platoon, squad, team in a descending order. Similarly, reports (FROs) also went from the field commanders, starting from the team units in an ascending order to Superman, and then to Sam Bockarie in Kailahun.[822]

597. Apart from the rigid command structure that the RUF operated, evidence exists before the Trial Chamber that vanguards were, in some instances, mistreated and killed by "junior commandos", namely, commanders trained in Sierra Leone, with impunity. Witness TF1-168, for example, testified under cross-examination by counsel for the first accused that he heard of Gibril Massaquoi, who was a junior commando, killing a number of Vanguards in 1992. He said that it was the biggest news at the time and that the report which was brought to

[819] Transcript 3 April 2006, p.48, lines 10-15.
[820] See Exhibit 35, Sam Bockarie's Salute Report to Foday Sankoh, dated 26 September 1999.
[821] Transcript 22 November 2005, p.56, lines 11-18.
[822] Transcript 18 April 2008, p.13 line 23 through to p.15 line 6.

Corporal Sankoh at Pendembu from Pujehun was to the effect that Gibril Massaquoi and some junior commandos, wanting to get rid of the vanguards, had killed most of them in Pujehun district, including Patrick Lamin, a special force officer, Abdul Rahman Bangura, Tonkara and Ismail.[823]

598. Witness TF1-045 corroborates the killing of 27 vanguards by Gibril Massaquoi in Pujehun district in 1992,[824] a time when vanguards were quite superior. Similarly, witness TF1-371, [redacted], admitted hearing about the execution of more than twenty vanguards by Massaquoi, a junior commando, who was later promoted to senior commander after the incident.[825] According to TF1-371, this incident and the killing of Rashid Mansaray, who was a Special Force officer and the RUF second-in-command in 1993, by lower ranking officers show that the conflict was unlike a more conventional military structure in that personalities played a huge role in command and control.[826] This account of TF1-371 brings to mind the role and authority that Liberian commanders, including the Special Task Force (STF), also wielded in the RUF even during the Indictment period, which would be addressed shortly.

599. In reliance on the role of vanguards and junior commandos in the RUF to prove its case, the Prosecution advanced, through cross-examination, its theory of influence and perceived control that vanguards allegedly had over their subordinates and/or counterparts. The Prosecution, for example, read out to the second accused part of the transcript of Issa Sesay's witness DIS-188,[827] in which the witness testified that vanguards were senior officers who served as advisers to unit and brigade commanders, rank or no rank, assignment or not. The said account was then put to the second accused who agreed that as a vanguard he was always a senior military adviser in the RUF.[828] Contextually, the second accused, by his reply, was not deviating from the RUF ideology, whereby comrade vanguards stationed in the same command positions were to treat each other as colleagues; and in a location where a junior commando was assigned, a vanguard present in the area was automatically to become his military adviser.[829]

600. The above situation is similar to that in the Bo Jungle in 1996 where the second accused was admittedly a Major and was adviser to Staff Captain Augustine Kargbo, who was

[823] Transcript 3 April 2006, p.9 line 23 to p.10, line 24
[824] Transcript 22 November 2005, p.63, line 27 to p.64, line 3.
[825] Transcript 24 July 2006, p.70, line 1 through to p.72, line 27.
[826] Transcript 24 July 2006, p.72 line 9-13
[827] Transcript 29 October 2007 at p.27 lines 7-13.
[828] Transcript 18 April 2008, p.69, line 13 to p.70, line 4.
[829] Transcript 18 April 2008, p.70, lines 7-22.

the Bo Jungle commanding officer and was junior to the second accused; with Captain Flomo being Kargbo's Deputy Battalion Commander.[830] The second accused merely advised them on military matters but did not command or control them. Testifying on events in Kono after the Junta period, the second accused denied the suggestion that by virtue of the fact that he was a vanguard in Kono, he had authority over all commanders and RUF combatants. He stated that he was not where the battalions were deployed, so he could not command them, and the battalion commanders were not making reports to him but to the more senior vanguards present then, namely Colonel Isaac Mongor and Superman[831] – the latter being the overall commander of Kono from February/March 1998.

601. Using similar strategy like above, the Prosecution suggested to the second accused in cross-examination that while in Kono, most of the battalion commanders within the RUF were junior commandos, inferring that all vanguards or senior RUF officers present directed, influenced and controlled the actions and decisions of junior commandos on the ground. Again the second accused denied this and stated that after JPK left Kono, Superman organized battalions, referring the Prosecution to Exhibit 9 which showed that three of Superman's battalions were headed by SLAs, including Lieutenant Tito and Captain Savage. The second accused also testified that Superman appointed strategic positions and assigned officers with the rank of Major to them, such as Major Kailondo who was at Yellow Mosque and was a vanguard, Major Rocky CO another vanguard who was assigned to Wendedu and later to Tombodu, and Major Konuwa, who was a vanguard at PC Ground. Incidentally, Captain Amara Ambush, who was junior commando, was assigned to Wuama, all in the Kono district.[832]

602. Furthermore, Prosecution witness TF1-360 testified that the second accused was surrounded by senior officers, some of whom were vanguards, and confirmed that the second accused could never issue out orders if he is not authorised to do so by his superiors in Buedu.[833] It is the submission of the Defence for the second accused that there was no evidence adduced by the Prosecution to show that vanguards would override the authority of non-vanguard commanders, let alone their colleague vanguard commanders.

603. Various other vanguards in Kono between 1998 and 1999 included Superman (who, according to the second accused and TF1-168[834], was not really a vanguard but claimed the

[830] Transcript 11 April 2008, p.70, line 29 through to p.72, line 18.
[831] Transcript 18 April 2008, p.71 lines 3-10.
[832] Transcript 14 April 2008, p.18 lines 18-29.
[833] Transcript 26 July 2005 p.39 line 16-26.
[834] Transcript 3 April 2006, p.63, lines 7-9.

title because he was one of the former NPFL fighters whom Foday Sankoh considered as senior and more experienced), Lt.-Col. Peter Vandi, Major Kailondo, Major Nyaa, Major Kolu Moriba, Major Johannes Roberts, Ibrahim Dugba, AS Kallon, Major Barbie. In conclusion, the Defence for the second accused submits as follows: i) that mere presence of a vanguard does not constitute effective command and control; ii) that mere influence, which is even lacking in this case, does not confer effective control; iii) that no evidence has been led against the second accused to show that because of his status as a vanguard, he had effective control over his perceived subordinates; iv) that there were many other vanguards in Kono between February 1998 until the RUF left that location; v) that instances existed in which vanguards were less powerful; and vi) finally, that STFs who allied with Superman, like Lt.-Col Morris Kallon, Major Wallace, Captain Nimley and Colonel Isaac Mongor, proved to be sometimes more powerful than the Sierra Leonean vanguards.

(9) Command Structure in Kono Dominated by Liberians

604. Liberian commanders, including members of the Special Task Force (STF), wielded much power and authority in the RUF movement, even during the Indictment period. Under cross-examination by Counsel for the first accused, the second accused testified that in Kono, most of the combatants were not men from operations in Kailahun since 1994, and that most of them were Liberians who were loyal to the Liberian commanders. He stated that all RUF Liberian combatants from the Western and Northern Jungles converged and operated in Kono in most part of 1998,[835] apparently because of the command positions held by Superman and Isaac Mongor there. Both men had commanded the Western and Northern Jungles of the RUF respectively. In this regard, the second accused further testified that loyalty in Kono was based on history of operating together and on Liberian ethnicity. He stated that once a person was with Superman during the retreat, he looked up to Superman as a commander; it happened like wise for Isaac Mongor.[836]

605. Prosecution witness TF1-168 also testified that Isaac Mongor, Rambo and Rocky CO were vanguards of Liberian origin who had basic RUF ideology from Camp Naama. Superman (Dennis Mingo) - a non-vanguard - was also part of this group of Liberians that

[835] Transcript 15 April 2008, p.118 lines 1-7.
[836] Transcript 15 April 2008, p.118 lines 8-18.

chose to stay after the conflict between the RUF and the initial group of Liberians who fought alongside the RUF in the early nineties but were beaten back to Liberia.[837]

606. Defence witness DMK-161 testified that Superman was the commander for Koidu (in Kono district) in 1998 and that "he had the last say". He testified further that the second accused "was an honorary officer for the RUF but under the administration of Superman, he had nothing to say".[838] DMK-132 also testified that Superman was the overall commander in Kono around the same period and that the second accused was a Major whilst Superman, his senior, was Colonel.[839] DMK-087 testified too that the second accused was a Major in Kono without any assignment.[840] To corroborate these further, DIS-214 and DIS-163, both being witnesses for Issa Sesay, the first accused, respectively testified as follows: i) that the second accused was an honorary commander in Kono at that time (1998) and that he was not the deputy to Superman, nor was he commanding any area; (DIS-214)[841] and ii) that the second accused was never a commander in any of the RUF bases in Koidu and its environs,[842] including Superman Ground, which was commanded by Superman; Yellow Mosque/Kamakwie Ground, which was commanded by Major Kailondo; Wendedu/Banya Ground, which was commanded by CO Banya; Gandohun Gbaneh/Woama, which was commanded by CO Isaac; PC Ground, which was commanded by CO Konowa; Tombodu, which was at various periods under Savage and Rocky CO respectively; Bumpeh and Koidu Town which were at some point in time occupied by ECOMOG. (DIS-163).[843]

(10) Second Accused Not Member of the War Council

607. The Second Accused was not at any time a member of the RUF War Council.[844] TF1-168 testified that the RUF War Council was the Supreme decision making body of the organisation. Its members directed the war activities and it was not set up until 1993. The witness stated that "primarily, apart from Corporal Sankoh, that was the highest decision-making body within the RUF territories." The Council consisted of both civilians and soldiers appointed by Sankoh, including the battle group commander, the battle front commander, all

[837] Transcript 3 April 2006 p.61, line 20 to p.62, line 24, & p.63, lines 1-9
[838] Transcript 22 April, 2008 p.61, lines 5-12.
[839] Transcript 29 April, 2008 p.42, lines 18-23.
[840] Transcript 22 April, 2008 p.101, lines 24-29.
[841] Transcript 17 January, 2008, p.69, lines 27-29.
[842] Transcript 14 January, 2008, p.69, lines 11-13.
[843] Transcript 14 January, 2008, p.66, line 28 through to p.69, line 13.
[844] Transcript 14 April 2008, p. 3, line 29 – p. 4, line 1

target commanders and some prominent civilians residing in RUF controlled territories. The head of the Council was a civilian called SYB Rogers and its name changed to Peace Council after the Lome Peace Accord.[845] The witness stated that himself and others in the RUF were to be executed but the War Council intervened and spared their lives.

608. Also Prosecution witness: TF1-360 agreed under cross-examination that the War Council "planned, arranged and took decisions on the prosecution of the war". It had its seat in Buedu aforesaid and the witness also agreed that "all decisions and orders regarding the movement" came from the War Council, being "the RUF high command in Buedu"; it was "the seat of power and authority". The witness ultimately agreed with Counsel for the second accused that the second accused's "role was merely to receive (...) orders and decisions that concerned him and to pass them out for implementation". He also agreed that the second accused can "never – never – issue out orders if not authorized to do so by his superiors in Buedu".[846]

609. In similar vein, the second accused testified about the superiority of the War Council and their decisions. He confirmed that the War Council was the RUF's high command and served as the Movement's ultimate decision-making body based in Buedu, Kailahun district under Sam Bockarie.[847] In this regard, it is the case for the second accused that the War Council further removed from him every inference of superior command and effective control over RUF fighters during the Indictment period. Even more compelling is the fact that the existence of the RUF War Council is an agreed fact between the Prosecution and the Defence for the second accused.[848]

(11) Significance of Radio Sets to Command Responsibility

610. The Prosecution led evidence to the effect that possession of a radio set was indicative of a position of seniority. Former RUF radio operator TFI 361 testified that only "commanders with areas of responsibility" had radios, and proceeded to confirm his previous statement to the Prosecution, which stated, *inter alia*, that: "Distribution of radio set depended on the area of responsibility of a commander. E.g. whether he was at the front lines or a

[845] Transcript 3 April 2006, p 64, line 16 to p 65, line 17.
[846] Transcript 26 July 2005, p.38, line 16 to p.39, line 19.
[847] Transcript 14 April, 2008, p.4, lines 20-24.
[848] Agreed Statement of Facts, at para. 11.

strategy area. If a commander did not have an area of responsibility he would not have a set".[849]

611. Witness TFI-141 testified that he saw the second accused using a communications set carried on the back of a signaller.[850] However, he was only able to affirm that he saw the second accused use the communications set once. In respect of other occasions he gave the following evidence-in-chief:

> "Apart from that day he used to go to the signaller office, but I wouldn't know because I did not see him using the communication set. But I do see him going to towards the signalling office."851

612. Similarly, witness TFI-141 testified that, on a single occasion, he saw the second accused use a radio set.[852] Both evidence, even if found to be credible, does not establish the continual possession of the radio set which would be indicative of command authority as suggested by TFI-361. Furthermore, the Chamber heard evidence which contradicted the Prosecution's case in this regard. TF1-361 himself gave a statement to the Prosecution, the truth of which he confirmed during his testimony, which reads as follows:

> "Morris Kallon was a commander at the time. But radios were only with commanders with areas of responsibility. He did not have an area of responsibility during this time so he did not have a radio set."[853]

613. As noted above, the said witness (TF1-361) had clearly stated that, at the relevant time, the second accused held no "area of responsibility", which was evidenced by the fact that he had no radio set. In the same vein, the witness's allegation that the second accused was the "deputy to Superman"[854] is refuted by virtue of both his self-admission that the second accused held no "area of responsibility" and the earlier references to the accounts of witnesses TF1-167 and 334, who respectively testified that Superman's deputy in Kono in 1998 was Gullit, and in his absence, Ibrahim Bazzy Kamara – both of whom were AFRC/SLA soldiers. It must be also noted here that witness TFI-361 gave confused testimony about his ability to comment on the second accused's role. First, the witness, *inter alia*, said that he spent time with the second accused in the Northern Jungle, that he was in close physical proximity with him for nine years and that he "knew him well".[855] Thereafter, when confronted with his

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[849] Transcript 18 July 2005, pg 115, line 12-15; p 118, line 27 – pg 119, line 6
[850] Transcript 11 April 2005, p 102, line 26 – pg 3.
[851] Transcript 11 April 2005, p 103, line 10-18.
[852] Transcript 11 April 2005, p 95, line 23 – pg 96, line 16.
[853] Transcript 18 July 2005, p 115, line 12-15.
[854] Transcript 18 July 2005, p 114, line 5.
[855] Transcript 19 July 2005, p 26, line 1-16.

previous statement to the Prosecution, he conceded that the second accused did not have a radio set and that he did not in fact know him well at all.[856]

614. Besides the foregoing, several Defence witnesses, including DMK-163, an RUF radio operator, and DMK-161 testified that the second accused did not possess a radio set in Kono during the relevant period of the Indictment.857 In particular, DMK-163 testified that he knew that the second accused did not have a radio because the second accused did not have a call sign by which he could be monitored in the 'radio net'; he noted that call signs are only attached to radio stations, and that persons without radio sets or stations can only be permitted to use them as a privilege, for example, in order to communicate with their families. Besides, DMK-163 further testified that in the course of his duties, he regularly monitored messages between commanders, but that he did not monitor any "operational message" from the second accused to anyone else at that time.[858] Thus, it is submitted that the second accused had no radio set, no radio station and no call sign by which his radio messages and communications could be monitored if he were a senior officer or high-ranking commander in the RUF.

(12) The Second Accused's Alleged Subordinates

615. The Indictment describes the subordinates in respect of whose crimes the second accused should be found to have had command responsibility as 'members of the AFRC/RUF forces'.[859] At no point in the Indictment or (Supplemental) Pre-Trial Brief are the said subordinates defined with any more particularity. Notwithstanding the arguments advanced herein that a pleading of this sort is defective and, therefore, that command responsibility should be dismissed as a mode of liability in its entirety, it is averred that the Prosecution has failed to posit a superior-subordinate relationship of effective control between the second accused and alleged AFRC/RUF personnel.

616. The Prosecution established that the physical perpetrators alleged to be the subordinates to the second accused were an amorphous group of distinct disgruntled units who were under distinct command structures and commanders. To that extent, it is averred that there was no unity between or among the units. Furthermore, the units all had their own individualistic agendas. Where the units shared an ultimate goal, their respective strategies

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[856] Transcript 19 July 2005, p 28, line 18 to p 29 line 13.
[857] Transcript 25 April 2008, p 80, line 5-7; Transcript 22 April 2008, p 23, line 12-15.
858 Transcript 25 April 2008, p 80, line 5 to p 81 line2; Transcript 25 April 2008, p 83, line 17-24
859 Indictment, at para 41

adopted in order to achieve those goals were different. Additionally, the evidence shows that the units and their commanders were beyond the effective control of other commanders.

617. Finally, the totality of the evidence adduced does not establish that the second accused exercised effective control over these particular units. The allegations set out in the Prosecution's Pre-Trial Brief testify to this kind of scenario. For example, it describes how two groups of AFRC/RUF personnel travelled separately north from Kono in the aftermath of the attacks on Koidu by ECOMOG.[860] Consequently, it is the case for the second accused that the so-called "subordinates" described as 'members of the AFRC/RUF forces' were never under his command and control.

ii) Conclusion

618. In conclusion, the Defence for the second accused submits that the basic elements of Article 6.3 of the Statute required to find a conviction against the second accused have altogether not been either established or sufficiently proven beyond reasonable doubt by the Prosecution, and that for the said reason, the case against the second accused in respect of Article 6.3 responsibility should thus be dismissed.

5) JOINT CRIMINAL ENTERPRISE ("JCE")

a) INTRODUCTION

619. The Indictment alleges that "[t]he RUF, including...Sesay...Kallon and...Gbao, and the AFRC, including...Brima....Kamara and... Kanu, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise control over the territory of Sierra Leone, in particular the diamond mining areas". It continues that "[t]he crimes alleged in this Indictment...were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise." Thereafter, the Indictment purports to charge all three indictees with criminal responsibility "pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute" in respect of each and every count. Thus, the Indictment purports to charge all three accused with crimes on a theory of JCE in respect of each and every count.

860 Pre-Trial Brief, at para 47

620. The prosecution of Mr Kallon for crimes on a theory of JCE has been misconceived from its inception. Absent from the Statute, no legal basis for prosecuting on a theory of JCE has been identified by the Prosecution. Furthermore, the parameters of the case of JCE are fatally deficient in precision and clarity. The alleged participants of the enterprise are not clearly defined; the accused's role in the enterprise is not pleaded anywhere and no distinction is made between the cases against the three accused.

621. In addition, the specific theory outlined in the Indictment represents expansive criminal liability of an unprecedented nature: the Prosecution seeks to impute to the three accused liability for all the criminal acts of all AFRC and RUF units, committed throughout the 3 year indictment period,[861] and throughout the Republic of Sierra Leone.[862] It purports to invoke this expansive notion of criminal responsibility for acts which are temporally, geographically and structurally remote from the accused without alleging or establishing any nexus between the accused and the criminal acts and, therefore, any legal basis for imputing liability.

622. Moreover, the evidence in the record shows that any notion of a JCE involving Mr Kallon is misguided. Not only has reasonable doubt been established as to one or more of essential elements of JCE in relation to each allegation, the evidence shows that the picture painted by the Prosecution of Mr Kallon's role in a grand "common plan", generating nationwide criminal activity, is completely unfounded and without merit. The wealth of evidence of the RUF ideology and Mr Kallon's good character, *inter alia*, are testament to that.

623. Thus, the tiered section which follows will advance arguments that no legal basis for JCE is available to the Prosecution, nowithstanding that the burden is on the Prosecution in this regard. It will demonstrate the defective pleading of this mode of liability in the Indictment. Finally, having identified the different possible interpretations of the case pleaded in the Indictment, it will discern the essential elements of the of the from of JCE employed at the ICTR and ICTY and demonstrate that the case is not proven. Any incoherence in the arguments before the Chamber are attributable solely and entirely to the Prosecution case, on the one hand set out with imprecision and confusion in the Indictment and, on the other, seeking to invoke a mode of liability, without statutory basis, the reach of which is limitied only by the temporal and geographical jurisdictions of the Court.

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[861] The Indictment read in conjunction with the AFRC Appeals Judgment which held that the period covered by the JCE which had been pleaded was "that covered by all of the counts in the Indictment".

[862] See Count 12, which charges criminal responsibility pursuant to a theory of JCE, "throughout the Republic of Sierra Leone", the Indictment, at para 68.

b) JURISDICTIONAL VACUUM

624. The Indictment purports to rely on Article 6(1) as the authority for prosecution under JCE. Nowhere does the Statute provide for JCE as a mode of liability. The Prosecution identifies no legal basis whatsoever. Therefore, JCE, as mode of liability in this case, is without legal basis and should be dismissed in its entirety.

i) Primacy of the Statute

625. The Defence recalls that the Special Court is bound to "function in accordance with the Statute".[863] Trial Chambers are bound only by the Statute and decisions of the Appeals Chamber of the Special Court. The Appeals Chamber is bound by the Statute. Decisions of the Appeals Chamber of the ICTY and ICTR serve merely to guide the reasoning of the Special Court. Thus, the Statute is the supreme source of authority governing this trial.[864]

626. The issues surrounding the validity of JCE as a mode of liability capable of sustaining a conviction are yet to be put before the Appeals Chamber.[865] No conviction has been entered on a theory of JCE by either Trial Chamber at the Special Court, such that would cause an appellant to litigate of the *validity* of JCE at appellate level. Therefore, a prosecution on a theory of JCE does not derive authority from a decision of the Appeals Chamber.

627. Furthermore, and more importantly, the Statute does not provide for JCE as a mode of liability. Article 6 of the Statute provides the modes of liability according to which convictions may be entered for the crimes enumerated in Articles 2 to 4. Article 6 is the only authority in the Statute under which individual criminal responsibility can be found. The list contained therein is *explicit* and *exhaustive*.

628. The Prosecution fails to address, specifically, the absence of JCE from the Statute. Instead, the Prosecution relies on an interpretation of the *persuasive* authority of the *ad hoc* tribunals. The Pre-Trial Brief submits that JCE is a valid mode of participation under provisions, corresponding to Article 6(1), in the Statutes of the ICTY and ICTR, "albeit not

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[863] See the Special Court Agreement, Article 1(2).

[864] See "The Law of the Special Court" in "Part 1: Jurisdictional and Other Pre-Trial Issues", *supra*

[865] The Defence notes that Appeals Chamber looked at issues of pleading in relation to JCE in the *AFRC* Case. However, the issues raised herein were not litigated by parties to the appeal and, therefore, not decided by the Appeals Chamber.

expressly mentioned therein".[866] Imputing the same inference to the current proceedings, without basis, is to arrive at an interpretation of the prevailing law which is entirely inconsistent with the Statute. The Statute sets out the modes of liability exhaustively and explicitly. Whilst decisions of the ICTY and ICTR do guide the reasoning of the Special Court, where inconsistencies lie, the Statute has primacy.

629. Indeed, the regime of rules governing the Special Court is in many cases different to those governing the *ad hoc* tribunals. The Rules of Procedure and Evidence are deliberately different. They are subject to amendments by their own plenitpotentiaries. The Trial Chambers at the Special Court adopt the approach most appropriate to procedural issues such as the admissibility of evidence, quite independently of the ICTR and ICTY, where the relevant prevailing circumstances are different. It is misconceived to assume that the statutory interpretation of the ICTY and ICTR imputes to the Statute of the Special Court, without providing basis, and particularly in light of the different legal climates in which they were drafted.

630. The Pre-Trial Brief relies on *Tadic*, and subsequent decisions of the ICTY, in which the Appeals Chamber inferred the validity of JCE, as a mode of liability. According to these decisions, JCE is a jurisprudential doctrine. The Defence notes that the Statute of the Special Court post-dates, and, as such, was drafted with benefit of, the findings in *Tadic.*[867] The jurisprudential doctrine of JCE was created between the drafting of the statutes of the ICTY and the Special Court. Therefore, it is untenable to impute all inferences made by the Appeals Chamber of the ICTY, as to the interpretation of its prevailing statute, to the Statute of the Special Court, without providing basis for doing so. No such basis is advanced by the Prosecution. It is submitted that, had the draftsman of the Statute intended to grant the Special Court jurisdiction to prosecute on a notion of JCE, as recognised by the ICTY, the Statute would have explicitly reflected that. Thus, on any interpretation of the Statute, JCE is not recognised as a mode of liability.

ii) <u>The Prosecution Theory of JCE is Not Part of Customary International Law</u>

631. This basic premise has not been established by the Prosecution. Nor is there any authority to suggest that this is the case. Moreover, relevant findings by authoritative bodies,

[866] The Pre-Trial Brief, at para 319; citing *Tadic* Appeal Judgment, at para 190.
[867] The Statute was annexed to the Special Court Agreement of 14 August 2000. The Appeals Chamber decision in *Tadic* was rendered on 15 July 1999.

including the signatories of the Rome Statute, the UN Security Council and the Appeals Chamber of the ICTY, militate against any such finding.

632. A legal prohibition achieves the status of customary international law on satisfaction of both requirements of state practice and *opinio juris*. *Tadic,* which was decided in 1999, was the first decision of the *ad hoc* tribunals to award JCE the status of customary international law. As such, *Tadic* does not represent authority that JCE was a part of customary international law prior to that.

633. The Rome Statute was predicated upon the legal discourse of a significant number of UN member states and, where unanimity was reached, is commonly regarded as a sufficiently broad global consensus in order to accurately described the nature and extent of customary international law at the time of drafting. Article 25(3)(d) of the Rome Statute criminalises co-perpetration as follows:

> "...a person shall be criminally responsible and liable...if that person...in any other way [not provided in Article 25] contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:
>
> (i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) Be made in the knowledge of the intention of the group to commit the crime".

634. This provision does not support a contention that JCE was part of customary intentional law at the time critical to the Indictment for three reasons. First, the Rome Statute was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 and came into force on 1 July 2002. It does not represent authority as to the nature and extent of customary international law before those dates.

635. Second, the mode of participation described in Article 25(3)(d) does not accord with the definition of JCE as described in *Tadic* and, according to one interpretation of the Pre-Trial Brief, adopted by the Prosecution. For example, the Rome Statute requires that the principal perpetrator of the *actus reus* are members of the group. According to *Brjdanin,* such participation of the principal perpetrator in the enterprise is not condition precedent for criminal liability. Therefore, the mode of participation described by Article 25(3)(d) is not

only vastly different from JCE, it is far more restrictive. The definition and parameters of JCE, as applied at the ICTR and ICTY, are described, *infra*.

636. Third, the Statute of the Special Court, which was concluded after the Rome Statute, does not recognise JCE or any form of co-perpetration. Significantly, in this regard, the Secretary General reported on the establishment of the Special Court that "[i]n recognition of the principle of legality and in particular *nullum crimen sine lege*, and the prohibition on retroactive criminal legislation, the international crimes enumerated are crimes considered to have the character of customary international law at the time of the alleged commission of the crime."[868] Thus, the Statute was designed to include and express customary international law, not to supplement it. Drafted under the auspices of the UN Security Council, and with due deference to the prohibition on retroactive criminalisation, as expressed by the Secretary General, the Statute did not criminalise any form of co-perpetrated liability, such that would have given a clear indication that it did form part of customary international law. It is submitted that its conspicuous omission strongly militates against any notion that JCE attained the standards of *opinio juris* at the time of drafting.

iii) Expansive Criminal Liability of an Unprecedented Nature

637. Not only does the Indictment charge the Accused with a mode of liability, in violation of the primacy of the Statute over proceedings before the Special Court, and without precedent to do so, it invokes a theory of liability which is unprecedented in its expansiveness.

638. The scope of the alleged JCE covers a three year temporal period and boundless within the territory of Sierra Leone. In addition, the pool of potential principal perpetrators is defined only as units of the RUF and units of the AFRC which, given the fluidity and uncertainty of membership of the two groups at any one time, is unclear but potentially vast. Applying the notion of JCE as found at the ICTR and ICTY to the aforementioned theory, loosely described in the Indictment, is both illogical and unfounded.

639. Turner commented on the 'extended' form of JCE, as charged in the Indictment, as follows: "if the prosecution shows that the defendant intended to participate in the common plan, the defendant will be liable for crimes committed by others that he did not intend, as

[868] Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, at para 12.

long as those crimes were foreseeable."[869] He continued that "some chambers have interpreted foreseeable to mean "objectively foreseeable," meaning that the defendant could be convicted even for crimes he did not himself foresee."[870]

640. As observed by Danner and Martinez, this liberal form of interpretation lowers the "mental state required for culpability to recklessness, or in the case of the "objective foreseeability" test, to negligence", which is why the "Association of Defense Attorneys at the ICTY criticized the doctrine as too broad and "susceptible to overreaching and abuse."[871] They continued that "[m]any national systems have also rejected such extended application of criminal liability; even in the few countries that accept liability for crimes that fall outside the scope of the common plan, such liability has often been criticized as guilt by association."[872]

641. In the context of the *RUF* Case, the theory of JCE as pleaded in the Indictment purports to extend criminal liability over large amounts of territory, resulting in strict liability to Mr Kallon, especially where he was not in the area, not in command and the RUF was not in *de facto* control of the area. The Defence notes that the Prosecution have agreed that this was the case in Bombali and Koinadugu Districts, at times relevant to the Indictment.[873] However, even this concession is not sufficient to preclude a conviction under the aspatial and expansive Prosecution notion of JCE.

642. Attempting to apply the liberal notion of JCE as interpreted by the ICTY and ICTR, without Statutory authority or any other valid legal basis, within the parameters described in the Indictment is tantamount to engineering, a limitless prosecution in order to fix one individual with the criminal culpability of an entire nation in the tragic throws of civil war. It is an illogical and unfounded theory designed to conceal the gaps which the OTP has failed to bridge in its prosecution of the persons who bear the greatest responsibility and, at the same time, to divert public and judicial attention from the lack of a concrete case against the accused in this trial.

c) INSUFFICIENCY OF PLEADING

[869] Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Tribunals*, 48 Va. J. Int'l L. 529; Se also Prosecutor v. Tadic, Case No. IT-94-1-A, Judgment, ¶¶ 195 et seq. (July 15, 1999).

[870] Id. See also, Prosecutor v. Kayishema, Case No. ICTR-95-1-T, Judgment, ¶¶ 203-04 (May 21, 1999).

[871] Turner, supra note 3 at 562. See also, Allison Marston Danner & Jenny S. Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 93 Cal. L. Rev. 75, 108-109 (2005).

[872] Danner & Martinez, supra note 8, at 109.

[873] The Agreed Sratement of Facts, at para 9 and 10.

643. Notwithstanding the jurisdictional objections to prosecuting a theory of JCE demonstrated, *supra*, the pleading of JCE, in this case, is equally problematic. The Defence refers the general pleading requirements explained in detail in "Part 3: The Indictment" as well as the pleading requirements specific to JCE explained hereunder.

644. The Indictment fails to set out with precision and clarity:

a. the identities of the alleged participants in the JCE;

b. the alleged 'forms' of JCE on which the Prosecution in relying in relation to each of the alleged offences and to distinguish between them;

c. the role of the Accused in the alleged JCE;

d. that the Accused shared with other alleged participants in JCE, an intention to enter into a 'common plan' which amounted to or involved the commission of a crime under the Statute. Indeed, pleading of a *mens rea* required for a finding of any form of JCE is entirely absent from the Indictment; and the nature and scope of the 'common plan'.

i) Participants Not Sufficiently Identified

645. Where it intends to rely on a theory of JCE, "the Prosecutor…must plead the identities of the participants".[874] While the Prosecution need not name every alleged participant, where the scale of the alleged JCE is large, if it is in a position to name participants it should do so, and if not, equally, it should unambiguously state that the identity of those individuals are not known.[875] The ICTR has held that vague phrases such as "many unnamed others" causes ambiguity.[876]

646. As held in *Gacumbitsi,* language in the indictment that the accused "acted in concert with" others was not sufficient to plead joint criminal enterprise.[877] Therefore, paragraphs 34 and 35 are irrelevant to the pleading of JCE.

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[874] *Cyangugu* Appeal Judgement, at para. 12, ("[I]f the Prosecution relies on a theory of joint crimnal enterprise, the Prosecutor must plead…the identity of the participants"); see also *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 12

[875] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 19.

[876] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 20.

[877] *Gacumbitsi* Appeal Judgement, at para. 171

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647. Paragraph 36 alleges that the "[t]he RUF, including...Sesay...Kallon and ...Gbao, and the AFRC, including...Brima...Kamara and...Kanu" participated in a JCE. Two possible interpretations are available. First, the Prosecution has failed to identify which members of the RUF and AFRC it is alleging as participants and thus the case of JCE is ambiguously pleaded. Second, the Indictment alleges the entire membership of the RUF and AFRC as participants in a JCE. As explained, *infra*, participants in a JCE enter into a "common plan, design or purpose" which is established by a mutual agreement. In light of the magnitude of people which the entire membership of the RUF and AFRC encompasses, the fluidity of membership as well as their geographical remoteness relative to each other, it is submitted that a mutual agreement between *all* members of the RUF and AFRC is an impossibility and, therefore, that such an averment is factually incoherent and bizarre. Therefore, on either interpretation, pleading the "RUF...and AFRC" as the participants in a JCE is defective. As such, it is submitted that the case of JCE, to which the Accused must answer, if any, does not go beyond the alleged participation of the individuals named in paragraph 36, Sesay, Kallon, Gbao, Brima, Kamara and Kanu.[878]

ii) Form of JCE Insufficiently Identified

648. The Indictment fails to allege with sufficient clarity, the form of JCE on which the Prosecution is relying, in relation to each allegation. The Appeals Chamber of the ICTR has held that it is essential that "the indictment should also clearly indicate which form of joint criminal enterprise is being alleged."[879] Whilst the language employed in paragraph 36 is indicative, and not clear and unambiguous, of the 'basic' and 'extended' forms, the Indictment fails to distinguish between the two as they relate to the allegations made therein. The ICTR in *Ntagerura* found the following:

> "In neither its opening statement nor its Final Trial Brief did the prosecution specify which form of Joint Criminal Enterprise it had relied upon. The prosecutions argument that it called 82 witnesses during trial is not indicative of the accused's ability to prepare their defence against the alleged participation in a Joint Criminal Enterprise.[880]"

[878] Note para 34-36 of the Indictment are identical to para 31-33 of the AFRC Indictment. Trial Chamber II examined only para 34 (corresponding to para 36) of the AFRC Indictment when
[879] *Simic* Appeal Judgment, at para 22.
[880] *Cyanagugu* Appeal Judgment

649. Further, in the *Krnojelac* Appeal Judgment, where the prosecution was challenging the trial chambers conclusion that the accused could not be held liable under the third form of JCE set out in the *Tadic* Appeal Judgment with respect to any of the crimes alleged unless an extended form of JCE was pleaded expressly in the indictment, the ICTY Appeals Chamber held that:

> '.... The Appeals Chamber also considers that its preferable for an indictment alleging the accused's responsibility as a participant in a JCE also to refer to the particular form (basic or extended) of JCE envisaged. However this does not, in principle, prevent the prosecution from pleading elsewhere than in the indictment-for instance in a pre-trial brief-the legal theory which it believes best demonstrates that the crime or crimes are imputable to the accused in law in the light of the facts alleged. *This option is, however limited by the need to guarantee the accused a fair trial*[881].'

iii) Role of the Accused Within the JCE is Not Specified

650. The accused must "know the role that he is accused of playing" within an alleged JCE.[882] The Indictment fails to plead the roles of the accused and, it follows, fails to distinguish between their respective roles and, additionally, their alleged criminal responsibility.

iv) Mens Rea Not Pleaded

651. An indictment must plead the *mens rea* element of JCE.[883] The *mens rea* must be common to the Accused and the other alleged participants in the JCE, and this should be pleaded specifically in the indictment. Nowhere does the Indictment fails to plead the *mens rea* required to establish a JCE. It follows that the Indictment also fails to plead that the requisite *mens rea* was shared by the alleged co-participants in the JCE.

v) Nature and Scope of the Common Plan is Not Specified

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[881] *Krnojelac* Appeal Judgment, paras. 138-144, (emphasis added).

[882] *Prosecutor v Karemera et al*, No. ICTR-98-44-PT, *Decision on Defects in the Form of the Indictment* (5 August 2005) at para. 19; see also *Prosecutor v Ntagerura et al*, No. ICTR-99-46-T, *Judgement* (25 February 2004) at para. 34; *Prosecutor v Karemera et al*, No. ICTR-98-44-T, *Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment* (20 October 2006) at para. 12

[883] *Prosecutor v Simba*, ICTR-2001-76-I, Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment, 6 May 2004, at para. 12.

652. It is submitted that the nature and scope of the alleged 'common plan' is undefined. The sharing of a common plan presupposes an agreement, as explained *infra*. The Indictment fails to specify the date from which the agreement took effect. As the Prosecution alleged a JCE between the RUF and AFRC, albeit defectively so, it is discernable that the Indictment is contemplating the alleged union between the AFRC and the RUF, "[s]hortly after the AFRC seized power" as pleaded at paragraph 11. However, this is far from clear and unambiguous and, it is submitted, is defectively pleaded.

653. The Indictment purports to allege a JCE liability throughout the territory of Sierra Leone, over a three year period and with participants encompassing the entire RUF and AFRC membership. It is submitted that this particularly expansive notion of the JCE alleged in the Indictment and the all but limitless potential for criminal responsibility arising therefrom, gives rise to a particularly exigent need to inform the accused clearly and precisely of the nature of the case which he must answer. It is submitted that on analysis of the pleading of JCE as a whole, the Indictment fails to discharge that imperative, that it is defective in this regard and that JCE should be dismissed as a mode of liability in its entirety.

d) JCE AT THE ICTR AND ICTY

654. Three forms of JCE are recognised by the ICTR and ICTY. They all share common elements as to the *actus reus*, but differ as to the *mens rea.* The common elements are: (i) a plurality of persons; (ii) the existence of a common plan, design or purpose, which amounts to or involves the commission of a crime provided for in the Statute, ("the Common Plan"); and (iii) participation of the accused in the common design involving the perpetration of one of the crimes provided for in the Statute.[884]

655. As explained, *supra*, the language of the Indictment indicates that the Prosecution case is reliant on the 'basic' and 'extended' forms only. In the 'basic' form of JCE, in order to hold the accused criminally responsible for the crimes charged in the Indictment, the Prosecution must establish intent to commit the specific crime alleged. As the Chamber held in the *CDF* Trial Judgment:

> "In the first category of joint criminal enterprise the Accused must intend to commit the crime and intend to participate in a plan whose object was the commission of the crime. The intent to commit the crime must be shared by all participants in the joint criminal enterprise."[885]

[884] *Tadic* Appeal Judgment, para 227; see also AFRC Appeals Judgment, at para 75.
[885] *CDF* Trial Judgment, at para 216, (footnotes omitted).

656. In the 'extended' form, the accused willingly participates in the Common Plan and has intent to do so. The accused will be held responsible for crimes committed outside the common design under the following circumstances:

> "(i) it was foreseeable that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk (dolus eventualis)*. The crime must be shown to have been foreseeable to the accused in particular."[886]

i) Common Plan: Genuine Concerted Action

657. In respect of both the 'basic' and 'extended' forms of JCE, the Prosecution must prove that the accused shared a common purpose with co-participants, amounting to or involving crimes under the Statute. Whilst there need not be a formal agreement, [t]he persons in the criminal enterprise must be shown act together".[887] The ICTY has found that

> "A common objective alone is not always sufficient to determine a group as different and independent groups may happen to share identical objectives. Rather it is the interaction or cooperation among persons – their joint action – in addition to their common objective, that makes those persons a group."[888]

658. As such, it is submitted that the Prosecution must establish a *genuine* concerted action between the participants and such agreement cannot be inferred from mere membership of a group, such as the RUF or the AFRC.

ii) Participation of the Accused in the Common Plan

659. A JCE requires that the parties to an agreement took action in furtherance of that agreement.[889] The accused does not have to commit the specific crime, but rather may act to assist in, or contribute to, the execution of the joint criminal enterprise.[890] The degree of participation required must be "significant", as to render the enterprise "efficient or effective".[891]

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[886] *Brdjanin* Appeal Judgment, para 365.
[887] *Krajisnik* Trial Judgement, at para. 884; citing *Stakic* Appeal Judgment, at para 69.
[888] *Id.*
[889] *Prosecutor v. Milutinovic*, IT-99-37-AR72, Appeals Chamber, Decision on Ojdanic's Motion Challenging Jurisdiction- Joint Criminal Enterprise, 21 May 2003, para.23
[890] *Tadic* Appeal Judgment, para. 227.
[891] *Kvocka* Trial Judgment, paras 309 and 311.

660. The Chamber took the view in the *CDF* Trial Judgment that the participation of the Accused must be linked to the crime under consideration. It held that:

> "the Accused must at least have made a significant contribution to the crimes for which he is held responsible."[892]

iii) Intent to Commit a Crime at the Time of Formation of the Common Plan

661. As already explained, the 'extended' form requires that the accused willingly entered into the Common Plan which amounted to or involved crimes under the Statute. Therefore, although not necessarily his primary objective, on entering into the Common Plan, the accused must have intended the commission of crimes. Furthermore, the 'basic' form requires that the accused intended the commission of the particular crime under consideration.[893] Therefore, both forms require that the Prosecution establish intent on the part of the Accused to commit a crime under the Statute.

662. In such cases, where no direct evidence exists of intent to enter into a Common Plan, such agreement may be inferred. However, where the Prosecution relies upon proof of state of mind by inference, that inference must be the only reasonable inference available on the evidence.[894]

iv) Subject Crime Must be Part of the Common Plan ('Basic') or a Natural and Foreseeable Consequence Thereof ('Extended')

663. In order to impart criminal responsibility on a theory of JCE the crime alleged must have been part of the Common Purpose, in the 'basic' form, or a natural and foreseeable consequence thereof, in the 'extended' form.

664. In overruling the Trial Chamber, the Appeals Chamber in *Brjdanin* held that for the 'basic' form, what is important is that the crime in question "forms part of" the Common Plan. Without defining the meaning of this requirement any further, it stated that participation of the principal perpetrator in a JCE in which the accused is a participant or the fact that the principal perpetrator is aware of the JCE, whilst not sharing the requisite *mens rea* in order to

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[892] *CDF* Trial Judgment, at para 215.
[893] *Stakic* Appeal Judgment, 22 March 06, at para 65.
[894] *Vasiljevic* Trial Judgment, paras 68-69.

become a member of the JCE and the fact that "the accused or any other member of the JCE closely cooperated with the principal perpetrator in order to further the common criminal purpose" are indicative of such a link.[895] Thus, liability under the 'basic' form requires a high level of proximity between the crime and/or the principal perpetrator and the accused.

665. Liability under the 'extended' form requires that the accused participated in the Common Plan with the requisite intent and that it was foreseeable such a crime might be perpetrated by one or more of the persons used by him; and (ii) the accused willing took that risk. The inquiry is into the foreseeability of the crime in question and that crime must be subjectively foreseeable to the accused.

666. Both forms of JCE involve imparting criminal responsibility to an accused person for acts of another. As such, *Brjdanin* explains that both forms require the existence of a "link" between the accused and the crime alleged[896], as the legal basis for imputing liability.[897] In cases where the principal perpetrator is a non-participant in the JCE the requisite "link" may also be "inferred",[898] where the crime can be "imputed" to a participant in the JCE.[899]

667. Although Brjdanin explains that "the existence of this link is a matter to be assessed on a case-by-case basis",[900] it is submitted that the Prosecution is under to an onus to firmly establish the "link" contemplated in *Brjdanin* in order to resist findings of "guilt by association". The requirement that the crime alleged be a part of the Common Purpose, or natural and foreseeable consequence thereof, must be interpreted as a check which should be engaged by the trier of fact, according to which it should insist on a degree of proximity between the crime and the criminally responsible individual. Conversely, the requirement demands that no criminal responsibility be imparted to accused persons too remote from an *actus reus*.

668. Indeed, to impart criminal liability in cases where the principal perpetrator is not a participant represents an extension of the doctrine's historical usage. In the seminal case of *Tadic,* in which the doctrine of JCE was first articulated, although the participation of the principal perpetrator was not specifically addressed, it is clear that the Appeals Chamber envisaged a doctrine which would extend criminal responsibility no further than the parties to a Common Purpose which included the principal perpetrators.[901] In *Furundzija*, the physical

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[895] *Brdjanin* Appeal Judgment, para 410.
[896] *Brdjanin* Appeal Judgment, para 411.
[897] *Brdjanin* Appeal Judgment, para 412.
[898] *Brdjanin* Appeal Judgment, para 410.
[899] *Brdjanin* Appeal Judgment, para 412.
[900] *Brdjanin* Appeal Judgment, para 413.
[901] *Tadic* Appeal Judgment, at para 210.

perpetrator was Furundzija's partner in the interrogation of the witness.[902] In *Krstic*, the physical perpetrators were the soldiers in the Drina Corps which General Krstic commanded,[903] and in *Blagojevic* the officers of the Army and members of the military police.[904] In *Vasilijevic*, the physical perpetrators were the accused's companions in the shooting of seven men on the banks of the Drina River.[905] In *Simic*, the physical perpetrators were the police, paramilitaries, and 17th Tactical Group of the Army.[906] In every case, the principal perpetrators were participants in the JCE under consideration.

669. Whilst the Appeals Chamber of the ICTY in *Brjdanin* indicated that the applicability of JCE liability to large scale cases may be permitted, such application is relatively untested. Historically, the *ad hoc* tribunals have convicted on a theory of JCE only in small-scale cases. For example, limited to a specific military operation and only to members of the armed forces[907], a restricted geographical area[908], a small group of armed men acting jointly to commit a certain crime[909], or for the second category of joint criminal enterprise, to one detention camp,[910] not to two large separate rebel forces.

670. The Indictment purports to plead a JCE between the entire RUF and AFRC membership. In such cases there is substantial potential for imparting criminal responsibility to an accused too far remote from the commission of the *actus reus*. In order to avoid such findings, it is submitted that the Chamber should make a restrictive and stringent evaluation of the existence of a "link" between an accused and the alleged crime.

671. The Defence recalls that it is incumbent on the Prosecution to prove its case beyond a reasonable doubt. Accordingly, where the link between the accused and the *actus reus* is not established by the principal perpetrator's participation in the JCE and, as such, can only be established through inference, it is submitted that such inference must be the only reasonable one available on the evidence.

v) Withdrawal From a JCE

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[902] *Furundzija* Appeal Judgment, para. 115
[903] *Krstic* Trial Judgment, at para. 610, listing the Drina Corps as members of the JCE
[904] *Blagojevic* Trial Judgment, para. 709
[905] *Vasilijevic* Trial Judgment, para. 210: "if the agreed crime is committed by one or other of the participants in a joint criminal enterprise such as has already been discussed, all of the participants in that enterprise are equally guilty of the crime regardless of the part played by each in its commission."
[906] *Simic* Trial Judgement, para. 984
[907] *Krstic* Trial Judgement, para. 610.
[908] *Simic* Trial Judgement, paras 984-985.
[909] *Tadic* Appeal Judgment, para. 232.
[910] *Krnojelac* Trial Judgement, para. 84.

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672. Even in cases where it has been established that an accused entered into a Common Plan with the requisite intent, he or she can still withdraw from the JCE. A theory of liability which did not accommodate the ability to withdraw would potentially result in strict criminal liability covering indeterminate period of time. In the present case, if withdrawal from a JCE were not possible, criminal liability resulting from participation in a JCE would be determined only by the lapsing of the Indictment period. Therefore, where the accused has distanced himself or herself from the JCE, evidenced by demonstrable acts on the part of the accused, he or she is no longer criminally responsible for acts which form part of the Common Plan or which are a natural and foreseeable consequence thereof. It is submitted that, in such cases, an effective withdrawal is demonstrated.

673. As already explained, the formation of a JCE requires a mutual agreement between participants to further a common criminal purpose. Therefore, it is submitted that a withdrawal is effected in two situations. First, where the accused ceases to pursue the Common Plan. Second, where the mutual agreement between the participants ends. The occurrence of either of these two acts of withdrawal must be evidenced by demonstrable acts of the accused and the co-participants. In the case of the latter, a withdrawal occurs where the relationship, forged through the pursuit of common goals, deteriorates to the extent that, either the co-participants can no longer be said to be pursuing the same purpose, or, although still pursuing the same purpose, are no longer doing so in a concerted fashion.

vi) <u>Conclusion</u>

674. Based on the foregoing analysis of the applicable law, several cumulative conditions precedent emerge which the Prosecution must prove beyond a reasonable doubt, in order to persuade the Chamber to convict on a theory of JCE. Therefore, no conviction based upon JCE may be entered where the Defence demonstrates reasonable doubt in respect the following: (i) that there existed a Common Plan, evidenced by genuine concerted action between the alleged participants which involved or amounted to the commission of a crime under the Statute; (ii) that the accused rendered significant participation by acting to assist in, or contribute to, the execution of the joint criminal enterprise; (iii) that the accused intended to enter into an agreement which involved or amounted to the commission of a crime under the Statute and, therefore, intended the commission of crimes at that time; (iv) that the accused intended the commission of the crime in question, in respect of the 'basic' form or (v)

that the crime was "part of" the Common Plan, or a natural and foreseeable consequence thereof, in other words, that there was a "link" between the accused and the crime in question; and (vi) that the accused did not effectively withdraw from the JCE, either by distancing himself or herself from participants or by ceasing to pursue the common purpose.

675. Furthermore, where the state of mind is to be inferred from the circumstances, an inference leading to a finding of guilt must be the only reasonable one available on the facts.

e) THE EVIDENCE

i) Introduction

676. As demonstrated, *supra*, in terms of participants, the case presented in the Indictment is confined to Sesay, Kallon, Gbao, Brima, Kamara and Kanu, owing to defective pleading. The lack of precision of pleading notwithstanding, it is discernable that the case pleaded in the Indictment is that a JCE was formed at the time of the *coup*.[911] On analysis of the evidence on the record, the existence of a JCE has not been established on the merits and should be dismissed on that basis.

677. The evidence has shown that no common purpose existed between the RUF and AFRC. The Invitation to the RUF to join the AFRC was received with suspicion as it was inconceivable that the AFRC, comprised of the SLA which had consistently attacked them and with whom they had been engaged in combat from the outset of the armed conflict in 1991, could become genuine partners. Indeed, the evidence shows that any notion of partnership was a token gesture on the part of the AFRC to the RUF who, in the absence of Foday Sankoh, lacked any respectability in the eyes of the AFRC. The Chamber has heard evidence of attacks launched against the RUF by the SLA, often acting in concert with the Kamajors, throughout the Junta period. For example, on the day of the *coup d'etat* RUF positions were assaulted by Kangari Hills and Giema by SLA and Kamajors personnel.

678. Within the AFRC Council no positions of responsibility were given to RUF personnel, whereas the leadership and decision-making powers rested with AFRC. AFRC personnel contemptuously referred to their supposed RUF partners as untrained bush soldiers and refused to take orders from them. To the extent that an alliance of any substance existed at all, the breakdown in cooperation began shortly after its formation and accelerated thereafter until its complete dissolution, to the extent that full-blown war broke out between the two sides.

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[911] See the Indictment, at para 11 and 36.

The dissolution of the alliance is established, *inter alia*, by evidence that RUF personnel were captured by AFRC, JPK was detained by Sam Bockarie, Superman's infighting with SAJ Musa and the absence of RUF involvement personnel in the Freetown invasion in January 1999. The Chamber has evidence of infighting as between the AFRC and RUF as well as within the RUF itself, arrests of RUF personnel by AFRC.

679. In respect of an alleged JCE with other RUF personnel the Prosecution has failed established beyond a reasonable doubt that the Second Accused agreed with others to pursue a common criminal purpose.

680. The Prosecution has led no evidence according to which the Chamber could find such an agreement. Instead the Chamber has heard overwhelming evidence of how the Second Accused ardently adhered to and sought to enforce the RUF ideology, at times risking not only his safety and life but that of his family as well.[912]

ii) Common Plan: Genuine Concerted Action Between RUF and AFRC?

(1) Alleged Inception of the JCE During the Junta Period

681. The Prosecution must prove beyond a reasonable doubt that there existed a Common Plan, evidenced by *genuine concerted action* between the alleged participants which involved or amounted to the commission of a crime under the Statute, in order to sustain a conviction on a theory of JCE.

682. The Prosecution theory of JCE is premised upon an alleged marriage of the RUF and AFRC shortly after *coup* whereby, pursuant to an invitation from Johnny Paul Koroma, Foday Sankoh ordered RUF personnel to join the AFRC. The AFRC Council was formed and in its membership, as detailed in Exhibit 6, were several RUF officers, including the Second Accused. The Prosecution has also sought to establish that the Second Accused was a member of the Supreme Council.

683. The invitation of Foday Sankoh to join the AFRC and the combined RUF and AFRC membership of the AFRC Council has been portrayed by the Prosecution as the clearest indication that an alliance existed between the two factions. It has already been acknowledged

[912] See, e.g. DMK 159, Transcript 12 May 2008, p. 39-43, testifying to an incident in Makeni when he shot a looting RUF ex-combatant, resulting in him being subjected to attack by the looter's accomplices.

in this case that the AFRC and RUF were "two distinct and separate entities *ab initio*."[913] Moreover, the record reflects that there was neither a *de facto nor de jure* alliance between the two and that they did not pursue a common purpose.

(a) Joining the Junta: the Second Accused's Scepticism

684. The AFRC, being comprised of SLA, had been engaged with the RUF in active hostilities and therefore, the response of the RUF to the AFRC *coup* and the subsequent invitation to unite was met with suspicion and apprehension. In his testimony before the Chamber, the Second Accused explained that, on 25 May 1997, he was in Kangari Hills and had, that day, sustained heavy losses and casualties in an attack on their position by SLA forces, *inter alia*.[914] He said that he reacted to news of the *coup* with reticence because he had been engaged in hostilities with the SLA throughout the war.[915] The Second Accused explained his personal attitude toward the SLA as follows:

> "...in Kono and elsewhere, I was not the friendly man to the SLA. One, because when they called the RUF they did not recognize the RUF. At the same time, they were calling the RUF ranking bush officers and that RUF are not trained. RUF are civilians. And, as I told you last week, the very day they invite us, that very day, the SLA attack our position in Kangari Hill and kill many RUF. So, all along, if I was the leader of the RUF at that time, I cannot allow any RUF to join this SLA. And more or less again we do not go with the same ideology. Even though they say they were professional army, but their conduct do not prove to me that they were professional army at that time."[916]

685. Second, the substance of the RUF membership of the AFRC Council did not go beyond token gesture presence, in an attempt to give symbolic credence to the alliance supposedly reached between the two factions after the *coup*. As the Second Accused explained, all positions of influence and responsibility were retained by the AFRC.

> "When we came, when they invited us, we met them in their full military structure from the army CDS, Army Chief of Staff, colonel of operation, brigades commanders and so on and so forth. From deputy defence minister clean down to the last rank of military deployment. It was like that. No battalion commander was given to RUF, neither company commander, even a squad position was not given to RUF as a sign of reintegration into the national army."[917]

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[913] *Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu*, SCSL-2003-07-PT, Decision and Order on Prosecution Motions for Joinder, 27 Jan. 04, at para.23
[914] Transcript 11 April 2008, p.98 lines 10-18
[915] Transcript 11 April 2008, p.98 lines 24-26
[916] Transcript 14 April 2008, p.25 lines 12-22
[917] Transcript 11 April 2008, p.111 lines 1-8

686. The Second Accused explained the lack of *de facto* integration, at any time, on any level of RUF with AFRC.[918] Indeed TFI 360 testified to "cracks and splits" between the AFRC and RUF.[919] Furthermore, he affirmed that, *ab initio*, each side had their own agenda, namely, "[t]o outsmart the other with regard to taking power".[920] TFI 334 also testified to "infighting" between elements of the RUF and of the SLA. He gave evidence that Superman solicited the assistance of Gullit to attack Sesay and that, in March 1999, the assistance was forthcoming and that the reason for this was that Superman was sympathetic to and used to operate with the SLA and that he had displayed such sympathy from the time of the *coup*.[921]

687. In addition, the Chamber heard evidence that the Second Accused's relations with the SLA, were particularly bad. In this regard, DMK 161 testified the SLA and the Second Accused "were never together".[922]

688. It is submitted that the alliance between the RUF and the AFRC, shortly after the Junta, was an alliance in name only. As is described, *infra*, the AFRC did not operate according to an ideology as the RUF did. The substance of the relationship between the two, previously warring factions was undermined by suspicion, on the part of the RUF as to the intentions and methods of the AFRC, and contempt, on the part of the AFRC, as to the military and political standing of the RUF. It is noted that proof of a common plan, in order to find JCE liability, requires more than a shared objective, it requires genuine concerted actions. It is submitted that no common plan, in the sense of a genuine concerted effort, existed between the RUF and the AFRC, as alleged in the Indictment. On that basis, the Prosecution theory of JCE liability is not proven.

(b) RUF Ideology: Lack of Common Criminal Purpose With the AFRC

689. The evidence establishes that the purpose of the RUF was not criminal. It is submitted that this precludes a finding that the accused *intended* to enter into the Common Plan which involved or amounted to the commission of a crime under the Statute and, therefore, intended the commission of crimes at that time.

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[918] Transcript 11 April 2008, p.110 lines 24-26
[919] Transcript 26 July 2005, p.47 lines 10-15, p.48 lines 23-24
[920] Transcript 26 July 2005, p.47 line 28-p. 49 line 22
[921] Transcript 06 July 07, p.51 line 23 – p.52 line 12
[922] Transcript 22 April 2008, p.4 line 7-9

690. The Chamber has heard a range of evidence, from Defence and Prosecution witnesses alike, testifying to the RUF Ideology, at the heart of which was discipline amongst the rank and file, backed-up by punishment, and respect for the civilian population. The evidence establishes that it was held in high regard by those who adhered to it.

691. Prosecution witness TFI 367 testified that the RUF ideology "involved fighting against corruption within the government"[923]; "involved prohibiting the mistreatment of civilians through behaviour such as rape, burning or other types of abuse"[924]; and that "they did not want any criminal and it was not part of the RUF ideology to get involved in criminal behaviour".[925]

692. TF1-041, a G5, gave the following evidence about the role of G5 and the RUF ideology, affirming under cross-examination: that the reason that G5 had been created was to ensure the welfare of civilians in RUF occupied territory;[926] that civilians were kept far away from the frontline;[927] that he himself and [redacted], also G5, were appointed to their positions because they were considered sympathetic to civilians;[928] that his role as G5 was to promote the RUF ideology;[929] and that the RUF ideology was disseminated.[930]

693. The witness gave a detailed account of the operative RUF ideology. He stated that it included three "points of attention" and "eight codes of conduct".[931] He described the three "points of attention" as follows: "Number one...is to obey orders in all your actions...Number two is do not take a single piece of bread or a single needle from the masses. That is the civilians....Number three...is to report everything that you capture".[932] He described the eight "codes of conduct" as follows: "Number one, to speak politely to the masses...two... [to] pay fairly for what you buy...number three, to report what you borrow...Number four, to pay for what you damage...Five, do not take liberty at a woman...Six, you are not to damage crops...and property....Number seven, do not ill treat captives...[number eight] civilians should not be harassed or intimidated".[933]

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[923] Transcript 26 June 2006, p.33 lines 9-11
[924] Transcript 26 June 2006, p.33 lines 12-15
[925] Transcript 26 June 2006, p.33 lines 23-25
[926] Transcript 11 July 2006, p.11 lines 23-26
[927] Transcript 11 July 2006, p.12 lines 7-11
[928] Transcript 11 July 2006, p.13 lines 5-16
[929] Transcript 11 July 2006, p.13 lines 18-21
[930] Transcript 11 July 2006, p.13 lines 25-29
[931] Transcript 11 July 2006, p.14 lines 3-4
[932] Transcript 11 July 2006, p.14 line 13-23
[933] Transcript 11 July 2006, p.14 line 28 – pg 15, line 25

694. TF1-168, [redacted], [934] testified that civilians displaced during battles between RUF and opposing forces were kept in liberated areas at a safe distance from the combat line.[935]

695. The witness testified that, as the AFRC and RUF fled from Freetown, civilians comprising young men, women, children and the elderly retreated with them.[936] Amongst these civilians were those that felt threatened because they had expressed their jubilation for the *coup* and taken part in the *coup* government.[937] He also testified that some civilian women fell in love with and married RUF combatants. He added that the women never complained about marriage, only the treatment they received from the men.[938] TFI 367 testified that the RUF had laws prohibiting rape, burning of houses, amputations, looting, harassment and killing of innocent civilians.[939] Witness testified that the RUF did not want criminals in its membership or to conduct criminal behaviour.[940]

(c) RUF Commitment to Lome and Abidjan

696. Prosecution and Defence witnesses alike testified to the commitment of the RUF to the implementation of both the Lome and Abidjan Peace Accords. TFI 168 testified that the priorities of the RUF leadership, once Foday Sankoh was had been detained, were in securing alternative means to ensure the implementation of the Abidjan Peace Accord. He gave evidence that, at a meeting between the external delegation and the "top hierarchy of the RUF", it was disclosed by the former that Foday Sankoh "had been arrested and they had to come up within someone else as the new leader who will work towards the implementation of the Abidjan Peace Accord."[941]

697. DMK 087, a G5, testified to Foday Sankoh's directive to work towards peace, in light of the Abidjan Peace Accords, stating that "the war that he came with was not meant for destruction, so it has come to the point where we need peace". According the witness, on that very day, the Kamajors attempted an attack on their positions.[942]

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[934] Transcript 03 April 2006, p.50 lines 2–6, 11–14
[935] Transcript 03 April 2006, p.51 lines 9–16; p.52 lines 20–29; p.53 lines 4–7
[936] Transcript 03 April 2006, p.53 lines 17–20; p.54 line 6
[937] Transcript 03 April 2006, p.53 lines 17–26; p.54 lines 16–26
[938] Transcript 03 April 2006, p.59 lines 19–25; p.60 lines 23–26
[939] Transcript 26 June 2006, p.33 lines 12–15; p.47 line 29 - p.48 line 12
[940] Transcript 26 June 2006, p.33 lines 16–18, 25–26
[941] Transcript 31March 2006, p.56 line 29 – p.57 line 2
[942] Transcript 22 April 2008, p.86 line 15 – 29

698. The commitment of the RUF and, in particular the Second Accused, to the implantation of Lome is fully described in the evidential analysis of Counts 15 to 18, *infra*.

(d) JCE and the Second Accused: Alleged Membership of the Supreme Council

699. Apart from pleading in a general form that the Second Accused was a member of the Supreme Council and that the Supreme council was the Executive and legislative organ during the Junta, the Prosecutor led no evidence to establish that the said organ was criminal and membership of the said organ in and of itself was criminal. Indeed the Prosecution has not proven that a Supreme Council existed within the AFRC and that the Second Accused was a member of such an organ. It is demonstrated, in the discussion on Article 6(3) responsibility *supra*, that the Second Accused was not a member of the Supreme Council at any time.

700. The Chamber is urged to adopt the persuasive reasoning of Trial Chamber II which stated, when dealing with a similar issue, that that it was not satisfied with the evidence relating to Accused Brima's position and function as senior member of the AFRC which would lead to a conclusion regarding relationship with subordinates and that membership of the Supreme Council and attendance of meetings is not enough to prove that Brima was a superior-subordinate.[943] By analogy, it is submitted that the Second Accused's mere cosmetic membership of the AFRC Council does not establish common intent to pursue a common purpose *per se*.

701. The Chamber also noted that the Prosecution, just as in the present case, had failed to prove the fact that the Accused Brima's position in the Supreme Council gave him effective control over subordinate perpetrators for crimes committed in the districts during the AFRC Government period and that the burden for the proof of 'effective control' is high.[944]

(e) RUF / AFRC Power Equation

702. Several of the prosecution witnesses explained how the actual decision making lay with the AFRC and not the RUF during the Junta period.

[943] AFRC Trial Judgment, para.1657-1659
[944] AFRC Trial Judgment, para.1659-1660

703. Witness TF1-367 agreed that in essence it was the SLAs who took power in May 1997 and that JPK and the SLAs invited the RUF to come to Freetown.[945] The witness agreed that the real power in Freetown at the time of the Junta was in the hands of JPK and the AFRC and said that it was because they did the overthrow.[946] The witness agreed that, while the AFRC were in power and cooperating with the RUF, there was nonetheless mutual suspicion between the AFRC and RUF [947] and that commanders within the ARFC used to refer to them as bush commanders. This caused a lot of problems among them.[948]

704. The witness further confirmed that the AFRC committed atrocities against civilians and the RUF were unhappy about it, and requested them to stop because the RUF had rules about this, and said this had caused problems in Makeni.[949] The witness agreed that amputations of civilians were not occurring in Makeni but that it was in Kabala area where that was done by the SLAs and ULIMO soldiers who were with Superman.[950] The witness confirmed that amputations did not occur in Magburaka or Kailahun.[951] The witness confirmed that the amputations all started with JPK's people.[952]

705. Witness George Johnson, an AFRC/SLA member associated with the top ARFC leadership testified the there was a distinction between the Supreme council and the council.[953] He stated that the Supreme Council comprised of the vice president, the army Chief of Staff, the CDS and the Under Secretary of State for Defence.[954] The witness stated that the AFRC Council on the other hand consisted of "16 members and RUF high command, like Superman, Morris Kallon, Rambo, Rogers, Gibril and Lamin."[955] The witness stated that the Supreme Council was the primary decision making body, and that exhibit 6 showed the council members.[956]

706. Witness further stated that one of the reasons the Junta fell was due to lack of co-ordination between the AFRC/RUF. RUF were taking commands from their own superior, whereas the SLA took command from their own supervisor.[957]

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[945] Transcript 26 June 2006, p.67 lines 14-21
[946] Transcript 26 June 2006, p.67 lines 22-28
[947] Transcript 26 June 2006, p.70 lines 14-17
[948] Transcript 26 June 2006, p.70 lines 18-21
[949] Transcript 26 June 2006, p.72 lines 4-11
[950] Transcript 26 June 2006, p.72 lines 22-26; p.73 lines 18-21
[951] Transcript 26 June 2006, p.73 lines 24-29 p.74 line 1
[952] Transcript 26 June 2006, p.74 line 4
[953] Transcript 18 October 2004, p.115 lines 1-4
[954] Transcript 18 October 2004, p.116 lines 4– 10
[955] Transcript 18 October 2004, p.117 lines 11 – 15
[956] Transcript 18 October 2004, p.115 lines 25 – 29
[957] Transcript 18 October 2004, p.112 lines 14 – 21

707. Witness TF1-361 corroborated the evidence of the sour relationship between RUF and AFRC when he confirmed that there was distrust between the RUF and AFRC on both sides as to each other's intention. He agreed that the SLAs were keeping the powerful positions to themselves to keep control of their regime.[958] He confirmed that Bockarie headed off to Kenema to have his own regime. [959]

(f) Conclusion on the Junta period

708. The Prosecution has not demonstrated that by being involved in the Junta Government as a member of the AFRC council, the Second Accused, took part in a JCE. The prosecutor's own witnesses have clearly demonstrated the lack of co-ordination between AFRC and RUF caused by poor relations between the two. There is no credible evidence that the Second Accused played any role of effective responsibility during the Junta period or that he exercised any authority in the context of a JCE.

(2) The Retreat From Freetown- February 1998

709. The Prosecution has attempted to advance the case of a JCE during the retreat from Freetown to Kono/Koinadugu in February 1998. The Defence however notes that it is not the entire retreat from Freetown that is charged in the indictment. The Defence submits that any evidence adduced against the accused in relation to events between Freetown and before Kono in February 1998 should be excluded and or disregarded as falling outside the scope of the indictment. The period of the retreat (February 1998) is clearly outside the specific time frames pleaded in respect of 3 relevant crime locations pleaded in the indictment which are Freetown and Western Area, Port-Loko and Bombali District.

710. In respect of counts 1-13, the indictment period for Freetown Area/Western is between 6th January 1999 and 28th February 1999, Port-Loko February 1999 and April 1999 and Bombali between 1st May 1998 to 30 November 1998. In respect of count 14 of the indictment the indictment period changes slightly for Bombali district to be between 1st March 1998 and 31st November 1998.

(a) Allegations Are Relevant Only to Kono Crime Base

[958] Transcript 14 July 2005, p.75 lines 20-22
[959] Transcript 14 July 2005, p.75 lines 23-25

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711. The Defence submits that any evidence of allegations against the Second Accused regarding JCE can only be used in respect of what happened when the retreating Forces arrived in Kono. The relevant counts of the indictment are 3-5. As part of the particulars for these counts, the Prosecution supplemental Pre-trial brief details that between 14th February 1998 and 30th June 1998 following their flight from Freetown, the AFRC/RUF killed several hundred civilians in various locations in Kono as part of Operation Pay Yourself and which it is alleged was part of the announcement by the AFRC/RUF leadership of "AFRC/RUF" during the retreat to Makeni then Koidu. The Prosecution Pre-Trial Brief in paragraph 319(a) alleges that there were widespread killings throughout Kono District as part of "Operation No Living Thing" and "Operation Pay Yourself;" the Pre-Trial Brief also alleges in paragraph 320(d) the announcement by the AFRC/RUF leadership of "Operation Pay Yourself" during the retreat to Makeni and then to Koidu.

(b) Kallon Not in Freetown, Masiaka or Makeni

712. There does not appear to be any serious dispute regarding the fact that the Second Accused was based in Bo during the Junta period. Both prosecution and Defence witnesses confirmed that the Second Accused was based in Bo during this period. Prosecution witnesses do not indicate when he moved there but Defence witnesses including the Second Accused himself stated that he moved there around August 1997. During his testimony, the Second Accused stated that he went to Bo on 2nd August 1997 and was there until February 1998.[960] Defence witness DMK-161 testified that during the junta period the Second Accused was based in Bo, [961] and also during the retreat.[962] DMK-162 was in Makeni for a week during the retreat from Freetown and when he listed the commanders in Makeni at that time, Kallon is not listed as being among them.[963]

713. The Defence has established that the accused was not in Freetown during the retreat in mid February 1998. The Second Accused testified that he did not retreat from Freetown.[964] The accused confirmed the testimony of Prosecution witness TF1-361 which was put to him that the Second Accused was not present during the retreat from Freetown to Kono in

[960] Transcript 11 April 2008, p.24 lines 9- 10; p.107, p.108 lines 20-29, p.128; 18 April 2008, p.16 lines 5-10
[961] Transcript 22 April 2008, p.50 lines 1-3 lines
[962] Transcript 22 April 2008, p.12 lines 2-6
[963] Transcript 29 April 2008, p.95 lines 5-14
[964] Transcript 11 April 2008, p.131 line 29

February 1998.[965] Prosecution witnesses however attempted to place the Second Accused in Masiaka and Makeni. The testimony of these Prosecution witnesses is however inconsistent and not worth relying on. As has been indicated in the section on credibility of Prosecution witnesses, several of the witnesses who purported to place the Second Accused in both Masiaka and Makeni are accomplices with clear motives to implicate the accused. Some of them have admitted their participation in criminal conduct during the retreat, and generally during the conflict. The respective accounts of each of these witnesses hardly corroborate each other and are fundamentally contradictory of each other. Before we undertake an analysis of the contradictions that emerged during the Prosecution case in relation to the retreat from Freetown a short review of the situation during the retreat is relevant.

(c) Freetown to Masiaka

714. Most of the witnesses who testified on the retreat both Prosecution and defence painted the picture of total disorder and disorganization among the retreating forces.

715. Witness TF1-366 stated that when they left Freetown there were thousands of AFRC trying to escape Freetown as fast as possible and not in an ordered fashion. The witness agreed that it was the AFRC and RUF commanders' priority to get their families out of Freetown.[966]

716. The witness stated that on the way to Masiaka he saw RUF, SLA, STF all of them combined looting, burning houses. "It was like an operation. Operation Pay yourself that was the way we called it."[967] The testimony suggests that long before getting to Masiaka, the witness and his colleagues were already talking of "Operation Pay Yourself" in an environment of chaos, panic and disorder. It is not correct therefore that it is the Second Accused who announced "Operation Pay Yourself" in Makeni on the instructions of Sesay.[968]

717. Witness TF1-071 also explained the level of disorder after the fleeing troops left Freetown. He agreed that there was disorganization "because of the panic and everybody was just trying to survive for his life. They were not in any position to fight and they did not even have any plan to fight except to retreat that is all: "Just to leave, go into our hiding places."[969]

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[965] Transcript 11 April 2008, p.131 lines 18-27
[966] Transcript 11 November 2005, p.60 lines 23-27
[967] Transcript 7 November 2005, p.100 lines 9-11, 15-17
[968] Transcript 14 November 2005, p.4
[969] Transcript 24 January 2005, p.102 lines 15–17, p. 103, lines 3–4

718. Witness stated that Superman was already the battle group and then agreed that "He was the boss". Witness also agreed that "it was very impossible" for any other high-ranking members of the RUF in other districts like Kenema or Kailahun to foresee what Superman and his force were about to do, and what happened was Operation Pay Yourself, which followed from Superman's orders.[970]

719. Witness TF1-361 stated that just before the retreat, soldiers were in no mood to be taking orders from their commanders,[971] and added that when the troops left Freetown no order was given. There was general panic as everyone tried to get out of Freetown and everybody trying to look after themselves in their attempts to leave.[972]

720. Witness TF1-184 an AFRC soldier too confirmed that during the retreat everything was in disarray and state of confusion.[973] Witness TF1-167 also testified in similar terms. He stated that at Masiaka nothing else was discussed other than the attack of Bo. He explained that no instructions were given about looting but looting was going on.[974]

721. Regarding the level of control of the various troops after they arrived in Masiaka, witness TF1-334 stated that JPK announced Operation Pay Yourself in Masiaka over BBC,[975] and from the time of the announcement, command structure broke down.[976]

> "Well everything started after the intervention in Freetown and after the withdrawal and as the troops went to Masiaka they never had any strong command structure again because everybody was trying to get what he wants after Johnny Paul declared Operation Pay Yourself."[977]

722. The witness added that troops from BO, Kenema had no command,[978] and that command control started in Kabala (after Makeni).[979] To emphasis this, the witnesses alleged that it was in Kabala that Superman went about talking to the soldiers telling them to come together and organize instead of just passing around.[980]

723. Witness TF1-371 a senior member of the RUF high command also stated the level of disorder during the retreat. He said that there was lots of confusion as there were thousands

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[970] Transcript 26 January 2005, p.57 lines 10 - 28
[971] Transcript 14 July 2005, p.79 lines 1-4
[972] Transcript 15 July 2005, p.9 lines 10-17
[973] Transcript 06 December 2005, p.68 lines 3-6
[974] Transcript 20 October 2004, p.22 lines 21-26
[975] Transcript 6 July 2006, p.100
[976] Transcript 6 July 2006, p.101
[977] Transcript 6 July 2006, p101 lines 6-10
[978] Transcript 6 July 2006, p102 lines 1-2
[979] Transcript 6 July 2006, p.101
[980] Transcript 6 July 2006, p.110 lines 24-26

of ex-combatants both AFRC and RUF as well as civilians that retreated along with the fleeing troops.[981]

724. Although the witness attempted to indicate that there was a level of command that was maintained in Masiaka (witness stated that in Masiaka the honorables maintained their positions),[982] the overall tenor of his testimony was that there was general disorder.

725. The Defence submits that the picture that emerges is one in which command and control would have been minimal if not entirely impossible in view of the utter chaos and panic that characterized the sudden retreat from Freetown.

726. The Prosecution has not demonstrated beyond a reasonable doubt that there was a well structured retreating force with a homogenous command structure that would have been involved in any joint design to commit crimes on the way to Kono through Makeni.

(d) Kallon Not Present in Masiaka

727. The Second Accused denied ever coming to Masiaka during the retreat.[983] Several defence witnesses also denied ever seeing the Second Accused in Masiaka. DMK-132 in his testimony stated that he did not see the Second Accused in Masiaka during the retreat.[984] DMK-032 also testified that on retreating their first stop was in Masiaka. The witness was there for four days and he went to Makeni. He was in Makeni for about a week. The witness testified that he did not see the Second Accused, either in Masiaka or in Makeni.[985] DMK-072 testified that on or around 14 February 1998 he was retreating from Benguema barracks to Mile 38, to Masiaka. [986] The witness testified that he did not see the Second Accused in Masiaka.[987] DMK-162 was also part of the retreating forces from Freetown and he stated that he retreated through the peninsular route to Masiaka and then Makeni, the witness testified that at that time the Second Accused was in Magburaka and he personally met Kallon there.[988] DMK-039 also retreated from Waterloo after the ECOMOG intervention in February 1998, she testified that she went to Masiaka, and the Second Accused was not there, she disagreed that the Second Accused was part of the group that retreated to Masiaka.[989]

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[981] Transcript 20 July 2006, p.58 lines 1-5
[982] Transcript 20 July 2006, p.59 lines 26-29
[983] Transcript 14 April 2008, p.8 lines 17-18
[984] Transcript 29 April 2008, p.42 lines 1-14
[985] Transcript 5 May 2008, p.13 lines 23-26
[986] Transcript 1 May 2008, pp.101-102
[987] Transcript 1 May 2008, p.102 lines 18-25
[988] Transcript 29 April 2008, p.96 lines 17-28
[989] Transcript 25 April 2008, p.35 lines 19-21

728. Prosecution witness TF1-041 testified that he left Freetown, and walked towards Tombo; at that time, the Second Accused was not there, and witness stated specifically that the Second Accused was in Bo.[990] Prosecution witness TF1-361 also testified that the Second Accused was not present during the looting on the way from Freetown,[991] thereby implying that the Second Accused was not in Masiaka or Makeni during the looting.

729. This account was corroborated by Prosecution witness TF1-071 who spoke of a meeting in Masiaka in which "the rest of other commanders were present in that meeting except Morris Kallon was not there."[992]

730. Witness TFI 371 on the other hand stated that the Second Accused was not at Masiaka initially and that he arrived two days after the witness's arrival. He stated that the Second Accused and Issa Sesay arrived together.[993] However Issa Sesay denied that the Second Accused came to Masiaka. Sesay in his testimony stated that the Second Accused was not in Masiaka, he stated that when they withdrew from Bo, Kallon stopped at Mile 91.[994] Witness TF1-334 in his testimony initially stated he did not see the Second Accused at Masiaka when JPK declared Operation Pay Yourself.[995]

731. On a question by the Chamber, the witness however changed his position and stated that "because troops moved from BO to Mile 91 then Masiaka, Morris Kallon must have been in Masiaka.[996] The witness's assertion on the Second Accused's presence is based on the witness assumption and speculation. The Defence submits that this assumption by witness TF1-334 must have driven many witnesses to simply speculate the Second Accused's presence in Masiaka and Makeni due to the possibility that some troops may have retreated to Masiaka from Bo where the Second Accused was stationed during the Junta period.

732. The Defence submits the Prosecution has not established beyond reasonable doubt that the Second Accused was ever in Masiaka during the retreat.

733. If the Chamber is however persuaded that the Second Accused went to and was present in Masiaka, the Defence respectively submits that mere presence without more does not connote criminality. It has not been credibly established that the Second Accused was involved in any meeting or plan to commit any crimes at Masiaka. TFI 371, who seized every conceivable opportunity to fabricate testimony against the Second Accused, testified about a

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[990] Transcript 10 July 2006, p.27 lines 4-7
[991] Transcript 11 April 2008, p.131 lines 19-29, Transcript 18 July 2005, p.123 lines 25-27
[992] Transcript 24 January 2005, p.98 lines 12-14
[993] Transcript 20 July 2006, p.58 lines 24-29, p.59 lines 1-2
[994] Transcript 9 May 2007, p.24 lines 13-14
[995] Transcript 7 July 2006, p.68 lines 5-10
[996] Transcript 7 July 2006, p.67 lines 28-29, p.68 lines 1-2

meeting in Masiaka but for once spared the Second Accused his many fabrications. He did not mention the Second Accused being present at the meeting. Although he states the Second Accused came later to Masiaka, TFI 371 does not, (quite significantly) attribute any wrong doing to the Second Accused either in Masiaka or later when the troops get to Makeni. Indeed, TFI 371 does not mention the Second Accused in relation to events in Makeni, including meetings allegedly held at Teko Barracks.

(e) Operation "Pay Yourself"

734. As a key preliminary issue the Defence submits that neither the indictment nor the pre-trial brief plead this material fact against the Second Accused. As discussed elsewhere, the jurisprudence of the international tribunals is clear that where an accused is alleged to have personally committed a particular offence, this is a material fact that should be clearly pleaded in the indictment.

735. It is noteworthy that although Operation Pay Yourself is not expressly pleaded in the indictment, the only mention of it is the supplemental pre-trial brief at paragraph 320 (a) which states that Kallon is charged under Article 6.1 responsibility for the Kono crime base in respect of counts 3 – 5 among others, because of the announcement by the "AFRC/RUF leadership of "Operation Pay Yourself" during the retreat to Makeni and then Koidu."

736. There is no mention of the Second Accused as the person who ordered the operation as would be required by the law. Paragraph 321 of the Supplemental Pre-trial Brief which sets out the basis for the Second Accused's presumed responsibility under Article 6.1 does not at all allege that the Second Accused issued the order for Operation Pay Yourself.

737. Moreover, the alleged order by the Second Accused of Operation Pay Yourself in Makeni was purportedly announced in Makeni within Bombali district sometime in February 1998 and is therefore outside the indictment periods for this district in respect of all counts in the indictment. The defence therefore urges the Chamber to disregard the testimonies on an alleged order by the Second Accused for Operation Pay Yourself. In the alternative and without prejudice to the argument on defective pleading, the Kallon Defence urges the Chamber to disregard the prosecution case against the Second Accused on the alleged Operation Pay Yourself as being contradictory and lacking in any credit – worthiness.

(f) Contradictory Evidentiary Basis

738. There has been contradictory evidence regarding Operation Pay Yourself with some witnesses alleging that the Second Accused gave the order for this operation in Makeni while others either said it was JPK or Superman who announced it. Defence witness DMK-132 testified that he attended a meeting of SLAs called by JPK in which he advised them to pay themselves, because he did not have any money to give them,[997] which is what became operation pay yourself.[998] DMK-116 in his own testimony stated that when he got to Makeni during the retreat looting was going on, the soldiers who were looting referred to it as Operation Pay Yourself and they said it had been pronounced by JPK, in Masiaka.[999] Prosecution witness TF1-334 testified that 'Operation Pay Yourself' was announced by JPK. The witness confirmed that JPK announced over the international media Operation Pay Yourself when at Masiaka, after the intervention.[1000] He said he found out about it through listening to the BBC.[1001] Witness TFI 071, a G5, on the other hand stated that it was Superman who announced "Operation Pay Yourself"[1002]

739. Witness TF1-366 in his usual manner specifically attempted to implicate the Second Accused in an alleged order for Operation Pay Yourself. He stated; without caring to clarify and provide specifics; that it was Issa Sesay, the Second Accused and Superman who gave orders about Operation Pay Yourself[1003] and that Operation Pay Yourself started in Masiaka and continued until they arrived in Makeni and entered Kono and it stopped in Koidu Town.[1004] In cross-examination and in his characteristic twisted logic, the witness stated that Operation Pay Yourself started in Masiaka but the order was given in Makeni,[1005] while in his statement to the Prosecution of August 2005, about Operation Pay Yourself, witness had stated that the Second Accused had announced Operation Pay Yourself when they were between RDF and Masiaka. When confronted with this, the witness stated he did not say between RDF and Masiaka but" Masiaka coming down to Makeni."[1006]

740. The defence submits that the evidence of this witness should be disbelieved. The defence has demonstrated sufficiently that this is a witness with a motive to fabricate

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[997] Transcript 29 April 2008, p.16 lines 5-7
[998] Transcript 29 April 2008, p.17 lines 13-15
[999] Transcript 9 May 2008, p.40 lines 18-29
[1000] Transcript 6 July 2006, p.100 lines 2-8
[1001] Transcript 6 July 2006, p.100 lines 10-11
[1002] Transcript 24 January 2005, p. 95 lines 12-15
[1003] Transcript 7 November 2005, p.108 lines 7-16
[1004] Transcript 7 November 2005, p.109, lines 17-22
[1005] Transcript 11 November 2005, p.74, lines 9-10
[1006] Transcript 14 November 2005, p.4, lines 18-19

testimony against the Second Accused. His testimony on Operation Pay Yourself is moreover contradicted by several other prosecution and defence witnesses and is largely uncorroborated in its material details.

741. Remarkably, one of the witnesses advancing the theory that the Second Accused announced Operation Pay Yourself is witness TFI-360 an immediate superior and fellow radio operator of witness TFI-361. The two witnesses travelled together to Kono during the retreat.[1007]

742. On his part witness TFI-360 states that he saw the Second Accused in Makeni together with Superman and other top officers[1008] and that the Second Accused told them about Operation Pay Yourself:

> A: So Mr. Kallon _ _Morrison Kallon revealed to us that Issa Sesay has informed him that this is Operation Pay Yourself. So each and every individual should try to get food and vehicle to take into the bush. There you can't ask anybody to feed you, so everybody should prepare himself to go to the bush. He said because they, too, had done the same thing on their way coming with their families, and that was how we saw them with vehicles and looted properties. Secondly_ _[1009]

743. Witness further stated that he heard about a meeting at the Flamingo Club through "a widespread rumour."[1010] He modified this by saying that he heard about the meeting from "the other man whose name, I have called, that is Mr. Kallon, who said they had a meeting at Flamingo Club and he is a man who never lies to me at that time".[1011]

744. The testimony of witness TF1-360 is seriously undermined by that of TF1-361. TF1-361 was in Makeni at the same time as TF1-360 and indeed the two travelled together to KONO where they again together until they parted after Superman went North to join SAJ Musa.[1012] Surprisingly, witness TF1-361 does not implicate the Second Accused in any operation pay yourself. In fact according to this witness, the Second Accused was not even present in Makeni and on the way to Kono during the retreat. Indeed, the witness stated that the first time he saw the Second Accused in Kono was after the JPK group had left for Koidu.

1007 [redacted]

1008 Transcript 22 July 2005, p.48 lines 8–9
1009 Transcript 20 July 2005, p.10 lines 19 - 26
1010 Transcript 22 July 2005, p.53 lines 12 – 16
1011 Transcript 22 July 2005, p.55 lines 1 - 2
1012 Transcript 15 July 2005, p.88 lines 3-7

According to the witness, the Second Accused had been on a mission in Liberia before his arrival in Koidu.[1013]

745. Besides, TF1-361 supports the theory that Operation Pay Yourself was a spontaneous reaction by soldiers (mostly SLA according to Defence witnesses) who with the fall of the Junta and the attendant redundancy that they faced, had to find a self-sustaining means of survival. Witness TFI-361 for instance stated:

> Q: What did you see happen on the way from Masiaka to Makeni?
> A: I saw massive looting, people's vehicles and harassment of people in the villages along the route and there was also soldier [sic] out of control. They named the operation Operation Pay Yourself.[1014]

746. The witness in fact denied the issuance of any order for people to loot and that the soldiers went on the rampage on their own, and that they named this Operation Pay Yourself.

> Q: Yes, witness, remember the property among which was your Honda. Do you remember?
> A: Yes, they were looted properties.
> Q: Is that the property pool that was looted from Freetown by the SLA and later seized by the RUF?
> A: No. SLA and RUF, all of us looted as we were going to Kono. Those are the properties I have referred to.
> Q: Witness, is it that the property that you say was confiscated from the soldiers, the combatants, the people who had looted the property?
> A: Yes, but it was taken from everybody.
> Q: And if I understood you well you stated that nobody gave the order for people to loot, the soldiers went on the rampage on their own; is that correct?
> A: Yes, because from Masiaka to come to Freetown and Koidu Town, all soldiers _ _I never observed somebody to give an order, command. Everybody was looting and they named the operation as Operation Pay Yourself. So that properties that were looted in Koidu, those were the properties that were collected.
> Q: Is that the property you stated that was seized by Morrison Kallon?[1015]

747. Witness indeed confirmed that on the way from Freetown when looting took place the Second Accused was not present.

> Q: But you agree with me that on the way from Freetown when this property was looted Morris Kallon was not present?
> A: Yes, he wasn't there.[1016]

748. The witness further explained that at this time the Second Accused was in Liberia.[1017] Although the Defence disputes that the Second Accused was at any time during this period in

[1013] Transcript 18 July 2005, p.121lines 8 - 14
[1014] Transcript 11 July 2005, p.71 line 29 - p.72 lines 1-3
[1015] Transcript 18 July 2005, p.122 lines 23-29 - p.123 lines 1-14
[1016] Transcript 18 July 2005, p.123 lines 25 - 27
[1017] Transcript 18 July 2005, p.121 lines 8-14

Liberia, the mere fact that a witness of TFI-361's position and status did not see the Second Accused at all during the retreat, did not hear him order Operation Pay Yourself and did not see him command troops casts enormous doubt on the "Other Prosecution case" against the Second Accused. There are several versions of the prosecution case against the Second Accused not only in respect of the retreat but in a myriad other cases as well.

749. It is significant that witness TF1-361 just like TF1-360 gave one of the most comprehensive testimonies of alleged activities of the RUF. Based on the nature and scope of his testimony he was portrayed as extremely well informed. The fact that he is clear that the Second Accused was not present during the retreat and thus not part of Operation Pay Yourself, is of extreme significance. Indeed when questioned on the commanders he saw looting on the way to Makeni, he mentioned Superman, JPK, etc and not the Second Accused.[1018] Yet according to some other prosecution testimony, the Second Accused is supposed to have been instrumental in ordering Operation Pay Yourself.

750. As the Chamber is aware, witness TFI-371 was one of the members of the RUF high command although he attempted to minimize his status during his testimony. Although the witness attempted to implicate the Second Accused by stating that he briefly came to Masiaka but left later to repel militia attacks in Bo,[1019] he did not implicate the Second Accused in the events of Makeni and did not indeed say the Second Accused ever came from Bo to Makeni. Witness stated that the fleeing troops were in Makeni for a couple of weeks and that during this period there was a lot of confusion in Makeni with sporadic shooting at night, harassment of civilians and indiscriminate killing at night which was not really under control until they finally left for Kono.[1020]

751. The witness stated that later, the commanders "requested" the fighters to be organized for a retreat again from Makeni to Kono.[1021] It is significant that in his discussion of the events in Makeni, witness TFI-371 never mentioned the Second Accused or indeed associate him with "Operation Pay Yourself." Given the witness' demonstrated propensity to readily level accusations against the Second Accused and to invariably exaggerate the Second Accused's positions and responsibilities, an order such as Operation Pay Yourself coming from the Second Accused; given its magnitude and seriousness, would hardly have escaped the attention and memory of TFI 371.

[1018] Transcript 18 July 2005, p.123 lines 25-27; Transcript 11 July 2005, p.72 lines 10-22
[1019] Transcript 20 July 2006, p.60 lines 9 - 13
[1020] Transcript 20 July 2006, p.63 lines 23 – 29, p. 64, lines 1 - 2
[1021] Transcript 20 July 2006, p.64 lines 20 - 24

752. Regarding meetings, the witness stated that they used to be held at Teko Barracks (Makeni Barracks),[1022] and agreed that there was no meeting in Makeni involving JPK as far as he could remember and that the way JPK worked at the time was to meet seniors at his house in his village and give instructions through them.[1023] Witness TFI-371's testimony casts serious doubt on TFI-360's assertion that it was after the Flamingo meeting that they were given the specific order of finding food and vehicles to prepare themselves to go to the bush.[1024]

753. Regarding those who left Makeni for Kono, TFI 371 mentioned Superman as one of them. He did not mention the Second Accused.[1025] Even when the prosecution prompted the witness to mention more names, the witness still did not expressly mention the Second Accused.

> Q: Those that you have mentioned, I'm not asking you to repeat them, is there any other persons who you remember taking part in this movement towards Kono District?
> A: Yes, besides the advance team, all the members of the Junta were part of that movement, that included Johnny Paul Koroma, SAJ Musa, Five-Five.
> JUDGE ITOE:
> You have been through all that.
> THE WITNESS:
> Yes, sir, I mean, those are the people that I can remember.
> MR HARRISON:
> Q: And do you remember which persons were in the middle group? You said there was an advance team; were there other teams?
> A: No, no, no. I mean besides the advance team, the rest of the convoy moved _ _ I mean, it was a very long convoy, anyway. You had more than 500 vehicles.

(g) Superman was Commander of RUF Retreating Forces

754. As has been demonstrated above both Prosecution and Defence witnesses painted the picture of a situation out of control and without effective command, during the retreat from Freetown to Makeni. It has also been demonstrated through key Prosecution witnesses and many Defence witnesses that the Second Accused was not with the retreating Forces in Masiaka and Makeni. The attempt to confer some form of authority on the Second Accused in Makeni is therefore contradictory and ill-conceived.

[1022] Transcript 20 July 2006 p.64 lines 26 – 29, p. 65 lines 6 - 10
[1023] Transcript 31 July 2006, p.11 lines 7-18
[1024] Transcript 26 July 2005, p.21 line 29, p.22, lines 1 - 3
[1025] Transcript 20 July 2006, p.67 lines 28 – 29, p. 68 lines 1 - 28

755. Although his level of control is not clear at this point in time, it has however been demonstrated that it was Superman at the head of the RUF troops during the retreat having moved with several troops loyal to him from Freetown. DMK-161 in his testimony stated "Superman was the overall commander to lead us to go back to the jungle."[1026] It is also obvious from the testimony of DMK-132 that wherever Superman went the soldiers from Western jungle followed.[1027] Prosecution witness TF1-361 in his testimony indicated that majority of the men who were with Superman at Bradford, joined him in Freetown and in Kono, and most of the men who were with him in Kono had been with him for several years.[1028] Defence witness DMK-132 also indicated in his testimony that the soldiers with Superman were those who had been with him at the Western Jungle and who were loyal to him.[1029](who had also been with him in the western jungle before the Junta period). There is no evidence that the Second Accused had any troops loyal to him either in Masiaka or Makeni that would have placed him in a position of effective control and command hence capable of issuing orders during the retreat.

756. On the other hand, the Prosecution has not demonstrated the category of troops that the Second Accused could have given orders to, in relation to Operation Pay Yourself. Given the presence of both RUF and AFRC and the evidence of a chaotic retreat from Freetown, it is impossible for the accused to defend himself in the absence of any particularisation of the nature and scope of his authority during the retreat.

757. Even assuming the Second Accused is meant to answer for the activities of the RUF, the Defence urges the Chamber to adopt the reasoning of Trial Chamber II which dismissed allegations against the accused because the prosecution in that case had not differentiated between crimes committed by AFRC troops and those committed by RUF rebels, consequently the Trial Chamber was unable to determine the affiliation of the perpetrators.[1030]

758. The Chamber is also urged to take special note of the contradictory nature of the prosecution case in relation to the Retreat. It is ridiculous that witnesses who purported to be at the same place and holding more or less similar positions and supposedly observing the same events would give such contradictory narrations about the presence/absence of the Second Accused during the retreat from Makeni to Koidu. Remarkably, witness TFI-360 stated that although there were other people in Makeni above the Second Accused during the

[1026] Transcript 22 April 2008, p.18 lines 1-2
[1027] Transcript 29 April 2008, p.12 lines 20-26
[1028] Transcript 14 July 2005, p.59 lines 20-26
[1029] Transcript 29 April 2008, p. 12
[1030] AFRC Trial Judgment, para.1872

retreat, he (the Second Accused) was the immediate individual between the soldiers and other commanders.[1031]

759. It is puzzling that [redacted] TFI-361 did not notice the Second Accused given the Second Accused's alleged strategic positioning as described by TFI-360. More puzzling is the fact that according to TFI-361 the Second Accused is on a mission in Liberia at this point in time.

760. Indeed TF1-371, a senior RUF member of the high command does not seem to have noticed the Second Accused in any of the meetings he attended at Teko barracks or during the actual trip from Makeni to Kono as he does not mention his name among the people who attended the meetings or were in the entourage to Kono.[1032]

(h) Meetings in Makeni

761. Other inexplicable contradictions in the prosecution theories about events during the retreat relate to alleged meetings in Makeni. While witness TF1-371, says the meetings were held at the Teko Barracks, witness TF1-360 talks of meetings at the Flamingo nightclub[1033] which TF1 371 seems to know nothing about.[1034] Witness TF1-366 on the other hand says a meeting was held in the Government Hospital in Makeni.[1035]

762. Witness TF1-371 stated there was no meeting in Makeni involving JPK as far as he could remember and that the way JPK worked at the time was to meet seniors at his house in his village and give instructions through them.[1036]

763. Witness could not recall any meeting at the Flamingo Club.[1037] This contradicts the testimony of witness TF1-366. Given the position of witness TF1-371, he should have known or at least heard of any meeting such as the one allegedly held at Flamingo Club or at the government Hospital bringing together many senior RUF/AFRC officials during which significant decisions are purported to have been taken. The only meetings witness TF1-371 recalls were these held at the Teko barracks.[1038] Indeed as 371 confirmed the situation in Makeni was extremely volatile at the time with jets attacking from almost the time the troops

[1031] Transcript 22 July 2005, p.55 lines 27 - 29
[1032] Transcript 20 July 2006, p.65 lines 2-18; p.66 lines 3-18
[1033] Transcript 20 July 2005, p.9 line 24-27
[1034] Transcript 31 July 2006, p.11 lines 19-23
[1035] Transcript 11 November 2005, p.71 lines 19-21
[1036] Transcript 31 July 2006, p.11 lines 7-18
[1037] Transcript 31 July 2006, p.11 lines 19-21
[1038] Transcript 31 July 2006, p.11 line 23

arrived.[1039] It would thus have been imprudent to hold meetings in public places.[1040] Indeed the witness stated it was not possible to hold a general meeting of all combatants due to the security situation.[1041]

764. It is significant to note that there is no credible testimony that the alleged meetings were meant to plan criminal objectives.

(i) Kono After the Retreat

(i) Poor Relations With AFRC/SLA

765. On arrival in Koidu in 1998, a meeting was called by Johnny Paul Koroma and attended by RUF and AFRC personnel. At that meeting a command structure was put in place consisting of both AFRC and RUF officers.[1042] The structure is described by Exhibit 9, prepared under the supervision of AFRC insider witness TF1-167. It is noted that the Second Accused is depicted as having a peripheral role in the prevailing command structure, with no AFRC beneath him. Although Superman was the overall commander at this time, notwithstanding the official hierarchy, TF1-071 testified that the SLA had one command structure and the RUF had another, quite separate command structure.[1043]

766. Referring to Tombodu during the occupation of Kono, TFI-167 testified that Savage and Staff Alhaji, both SLA, operated there beyond the control of any commander.[1044] This was corroborated by TF1-071 who testified that he saw the Second Accused at a meeting of RUF commanders held at Tankoro Police Station in April 1998.[1045] The meeting was called to discuss the amputations, killings and burnings committed recently in the area, and supposedly perpetrated by Savage.[1046] Two weeks later a second meeting was called and the Second Accused was present, the subject of which was the continued disobedience by the SLA.

767. This time Superman issued orders, which the witness recounted as follows:

> "as of now whoever don't take his order should either leave Kono or go elsewhere. That, he was referring to the SLAs, former SLA."[1047]

[1039] Transcript 31 July 2006, p.11 lines 24-26
[1040] Transcript 31 July 2006, p.12 lines 8-10
[1041] Transcript 31 July 2006, p.12 lines 21-23
[1042] Transcript 14 April 2008, p.14 lines 19-27
[1043] Transcript 19 January 2005, p.55 lines 7-15
[1044] See the section, "Command Responsibility"
[1045] Transcript 19 January 2005, p.53 lines 1-12
[1046] Transcript 19 January 2005, p.46 line 26
[1047] Transcript 19 January 2005, p.53 lines 11 - 17

768. Although, at the time of the Koidu occupation, both RUF and AFRC were present, as testified by TF1-071, after ECOMOG forces recaptured Koidu in May 1998.[1048] TF1-366 testified that, the SLA "broke away...and went to SAJ Musa at Kurubonla", as a result of a complete deterioration of relations between the two factions. In this regard, the Prosecution has stated its case in the Pre-Trial Brief as follows:

> "[s]ometime after ECOMOG attacks in Koidu, two major groups separately travelled north to connect with the AFRC/RUF group based in Koinadugu District. The first group proceeded from Koinadugu District to set up a base in Bombali District, eventually to a location known as 'Rosos'. The second group, however, remained to join with the group based in Koinadugu for a good portion of 1998."[1049]

769. The Defence notes the statement of uncontested facts in which the Prosecution agrees that the Second Accused was neither present, nor a field commander in Koinadugu at that time.[1050]

770. According to TF1-360, the Second Accused was the reason for the differences between the RUF and AFRC in Kono at the time.[1051] In his testimony, the Second Accused described an incident where he shot, but did not kill, two SLA combatants who were setting fire to civilian houses and refused to stop.[1052] He said that this happened in May 1998.[1053]

771. Based on the foregoing, the Prosecutor has not established the existence of a common plan between the Second Accused and members of the AFRC, either during the retreat or in Koidu after the retreat.

(3) Alleged Plan to Attack Various Locations Including Freetown

772. The Prosecution theory on Joint Criminal Enterprise finds considerable expression in the alleged meetings and execution of a plan by RUF and the AFRC (SLA) to attack various towns in Sierra-Leone including Freetown after the ECOMOG intervention of February 1998.

773. Although several Prosecution witnesses testified on this subject, the Defence wishes to raise, as a preliminary issue, the fact that the Second Accused's specific role in these attacks

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[1048] Transcript 21 January 2005, p.50 lines 9-10
[1049] The Pre-Trial Brief, para.47
[1050] See *P v. Sesay et al.*, SCSL-04-15-T-727, Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07, Annex H, at para.9 and 10.
[1051] Transcript 25 July 2005, p.3 lines 22-25
[1052] Transcript 14 April 2008, p.23, line 12-21
[1053] Transcript 14 April 2008, p.24 line 3-4

is not expressly pleaded in the Indictment and it was therefore difficult to establish in what respect the accused was supposed to defend himself.[1054]

774. The Defence further submits that the mere planning of attacks against the ECOMOG and the Kamajors; which the prosecution evidence suggests was the case, does not amount to a JCE. There is no credible evidence by any of the prosecution witnesses that there was a plan to commit atrocities against civilians during these attacks.

(a) Agreed Statement of Facts: The Second Accused Not in Koinadugu and Bombali

775. Some of the attacks alleged by the prosecution through his witnesses fall within the KOINADUGU and BOMBALI districts of Sierra Leone. Some of the planning is also alleged to have taken place within KOINADUGU district and specifically at CAMP ROSOS. The Defence draws the Chamber's attention to the Statement of Agreed Facts between the Kallon Defence and the Prosecution in which the Prosecution conceded that the Second Accused was not in the two districts at all material times of the indictment period.[1055]

776. Although not a pre-requisite for criminal responsibility under JCE (particularly the extended form) or 6.3 responsibility, the Defence submits that the presence of an accused at or within reasonable proximity of a crime base is an important consideration. In assessing the evidence of the alleged attacks by the RUF/SLA troops in the two districts, Defence therefore respectfully urges the Chamber to consider, as a key factor, the Prosecution concession of the Second Accused's absence.

(b) Evidentiary Analysis

777. The Prosecution testimony on the attack in Freetown of January 1999 and other towns, came largely from witnesses TF1-360, TF1-361, TF1-366, TF1-184, TF1-167,TF1-334 TF1-371 and TF1-045.

[1054] See the discussion on the Indictment, for the legal principles requiring precision of \pleading.

[1055] See the Agreed Statement of Facts, at para 9 , which states: "[b]etween 14 February and 30 September 1998, Morris Kallon was not a RUF and/or AFRC field commander in any location on Koinadugu district, and did not reside there"; and para 10, which states that "[b]etween 1 May 1998 and 30 November 1998, Morris Kallon was not a RUF and/or AFRC Field Commander in any location in Bombali District, and did not reside there.":

778. Defence submits at the outset that the testimonies adduced by these witnesses are either intrinsically contradictory or lack any clear expression of a joint criminal enterprise in which the Second Accused was a participant.

(i) TF1-360 and TF1-361

779. The testimonies of these two witnesses refer to an alleged meeting in Buedu, in May 1998, (around the period of "fiti fata"). This meeting is neither pleaded in the Indictment nor particularised anywhere in the Pre-Trial Briefs. The testimonies of these two on this meeting therefore fall outside the scope of the Indictment.

780. Witnesses TF1-360 and 361, RUF insiders and radio operators gave comprehensive accounts of how the Freetown attack was purportedly planned, co-ordinated and ultimately implemented. As indicated in the analysis above, on the movement from Makeni to Kono during the retreat, these 2 witnesses were both in Makeni and travelled together to Kono where they again lived together working under Superman as Radio operators. Indeed TF1-360 was the immediate superior of TF1 361.

781. Instead of corroborating each other, their accounts however are contradictory in a material sense. As accomplices who themselves participated in some of the crimes they testified and confessed to, the Chamber is urged to evaluate the testimony of these witnesses with caution. In relation to issues incriminating the accused the Chamber is urged to altogether disregard their testimonies. Like several other insider Prosecution witnesses, TF1-360 and TF1 361 in their answers sought to either minimize their own role in the events or attempted to exaggerate the role of the accused.

782. This argument applies with equal force in relation to the testimonies of Prosecution witnesses TF1-371, TF1-045, TF1-366, TF1-167, TF1-334 and TF1-184, dealt with in detail in the section discussing the credibility of Prosecution witnesses, *supra.*

(c) Planning of the Freetown Attack

(i) TF1-360

783. This witness testified that sometime after the RUF was pushed out of Koidu and went to base at the Superman Ground, Superman then based in Kono, received a letter from Sam

Bockarie summoning him to go to Buedu in relation to diamonds which had been taken away from JPK and for "other arrangements."[1056] He explained that the other arrangements were the plan to re-attack areas previously occupied by the RUF/AFRC including Freetown [1057]

784. The witness stated that he saw this letter although it was not clear in what circumstances. It was unclear why Sam Bockarie would convene a meeting through a letter instead of using radio which apparently was the preferred means of communication during this period going by the witness's elaborate narrations about radio communications during this period. When questioned on this issue, the witness gave a vague and convoluted answer:

> "Well, there were certain things; if they were ready to do those things they would not use the radio. They would use the radio to inform. Like the letter.....they only used the radio to inform us that they have dispatched a group of men that would come with the letter and with other arrangement. It is not all the time that radio is used." [1058]

785. Curiously the witness, stated that they discussed the letter before the people, that is the RUF and AFRC" meaning there was nothing confidential about its contents hence any reason why Mosquito should not have communicated the information on radio.[1059]

786. Significantly, this letter was not produced in court and the testimony of the witness on the letter was never corroborated. He further testified that after receipt of the letter he accompanied Superman to Buedu where they spent less than a week.[1060]

787. Witness stated that while in Buedu, a meeting was held to discuss the re-attack of areas previously held by the AFRC/RUF including Freetown. The meeting allegedly took place at Mosquito's residence[1061] and those in attendance were JPK, SYB Rogers who was the RUF war council chairman, Isaac and Lamin.[1062] Witness stated he was physically present in the meeting although it is unclear why he would be in attendance of a meeting of senior commanders discussing an apparently important and strategic military decision. Sesay, according to the witness, was in Pendembu on punishment over an alleged misuse of diamonds issue hence did not attend.[1063]

788. The witness confirmed during cross-examination that the Second Accused did not attend this meeting. Although the witness did not offer any explanation for the Second Accused's absence, it would seem he (the Second Accused) was not invited despite the role

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[1056] Transcript 20 July 2005, p.47 lines 26-29
[1057] Transcript 20 July 2005, p.48 lines 6-10
[1058] Transcript 25 July 2005, p.22 lines 1-7
[1059] Transcript 25 July 2005, p.22 lines 9-10
[1060] Transcript 25 July 2005, p.24 lines 2-6
[1061] Transcript 20 July 2005, p.48 lines 25-29
[1062] Transcript 20 July 2005, p.48 lines 11-22
[1063] Transcript 20 July 2005, p.48 lines 18-22

the witness attempted to apportion him in the overall plan to attack Freetown which was to "stay in Kono and later be reinforced to take care of Kono, Magburaka up to Mile 91."[1064]

789. Regarding others like Gullit and SAJ Musa who would later play a central role in the attack on Freetown, they too did not attend the alleged meeting in Buedu. Concerning Guillit, witness TF1-360 casually stated that "communication with Guillit took place before and after the meeting.[1065] No explanation was proffered regarding the nature of this communication with Guillit including who communicated with him, when, the nature of the communication and how the witness knew about it.

790. According to the witness, SAJ Musa (who would ultimately be the commander of the Freetown attack) did not attend the meeting. The witness stated that SAJ Musa knew of the plan through Superman when the later took off from Kono to Koinadugu.[1066] When questioned on the role SAJ Musa was to play in the plan, the witness initially denied any knowledge of any role for SAJ Musa. "Well I cannot tell because I did not experience that" he stated.[1067]

791. Later in the proceedings, the witness however attempted to provide an unclear role for SAJ Musa as follows:

> Q. And was SAJ Musa to do anything in this plan?
> A. Yes, what we made on the ground, they agreed on the plan.
> Q. What was it SAJ Musa was supposed to do.
> A. Well in the first place when this request had moved from Rosos, Guillit passed it to Mosquito, Mosquito passed it to Mar Kallon and his wife to SAJ so that SAJ would reinforce them with a fighting force to join him [1068]

792. It is inconceivable that such a remarkable war plan would be discussed in the absence of the supposed main protagonists like SAJ Musa, Guillit, Sesay etc. The logical conclusion is that either there was no such meeting or if there was, it had nothing to do with any plan to attack Freetown and other areas in Sierra Leone.

793. Any suggestion by TF1-360 that either-SAJ Musa or Gullit were a party to or knew any RUF plan to attack Freetown at this point in time is also greatly undermined by TF1-361 who accompanied Superman when the latter left Koidu to join SAJ Musa in Koinadugu. According to TF1-361 when they arrived North, the forces they met there under SAJ Musa,

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[1064] Transcript 26 July 2005, p.38 lines 20-29
[1065] Transcript 20 July 2005, p.52 lines 14-18
[1066] Transcript 20 July 2005, p.53 lines 1-2
[1067] Transcript 20 July 2005, p.52 lines 26-28
[1068] Transcript 20 July 2005, p.53 lines 3-9

General Brophleh and Brigadier Mani were jittery and took positions to fight the Superman group.[1069]

794. This scenario of combat-readiness of troops under SAJ Musa hardly suggests cordiality as would be expected of commanders working on a joint enterprise. It fundamentally undermines witness TF1-360's allegations of a co-ordinated joint plan to attack Freetown at this point in time.

795. The theory of an alleged plan hatched in Buedu to attack Freetown is further undermined by the fact that witness TF1-360 had never discussed the plan in previous statements given to the Prosecution. One such statement recorded on 25th June 2004 clearly contradicts his oral testimony in court. In that statement the witness had spoken of attacks specifically in relation to Kabala and Makeni for 3 reasons, none of which had anything to do with the invasion of Freetown. These were: to create a means of getting ammunition from Guinea Army deployed along the border with Sierra Leone, to capture Makeni which was strategically placed for the AFRC/RUF and finally and most important; to regain lost territory so that the AFRC/RUF could bargain from a position of strength during the peace talks should the intention to seize power fail.[1070]

796. Contrary to his oral testimony that the plan on Freetown was hatched during a meeting in Buedu that *he attended*, in this previous statement, the witness had stated that he learnt about what he stated to Prosecutor (which had nothing to do with any attack on Freetown) *from discussions he overheard on radio.*[1071]

(ii) TF1- 361

797. Remarkably, TF1-361 alleges that he went [redacted] to Buedu together with [redacted] 15 others.[1072] But in a dramatic contradiction of the testimony of witness TF1-360, witness TF1-361 also a radio operator [redacted] gives a totally different account of the alleged Buedu meeting. He stated that after the retreat from Koidu town to Superman Ground, Superman had a discussion on the radio with Sesay and Mosquito when it was agreed that Superman go to Buedu.[1073] Significantly, TF1-361 makes no mention

[1069] Transcript 12 July 2005, p.43 lines 23-29, p.44 lines1-28; p. 45 lines1-2 p. 46 lines15-18
[1070] Transcript 25 July 2005, p.32 lines 19-29, p.33 lines 1-2
[1071] Transcript 25 July 2005, p.33 lines 1-2
[1072] Transcript 12 July 2005 p.24 lines 18-23
[1073] Transcript 12 July 2005 p.24 lines 9-17

of a letter as alleged by TF1-360. TF1-361 on the other hand says it was Sesay and Mosquito who summoned Superman while TF1-360 says Sesay was not in Buedu at the time.[1074]

798. While TF1-360 states that he was physically present in the meeting in Buedu, TF1-361 is clear that he and other operators stayed at Mosquito's veranda while Superman, Mosquito and Sesay entered Mosquito's bedroom where the meeting apparently took place.[1075]

799. Regarding what was discussed at the meeting, TF1-361 stated that Superman came out after the meeting and briefed them (those at the veranda). He told them that Mosquito had some ammunition for them, that Charles Taylor would provide a herbalist to initiate AFRC/RUF/SLA soldiers in order to challenge the enemy[1076] and that Superman should go north to join SAJ Musa and "force him in order to have one operation."[1077] He stated that the reason why Superman was being asked to go to SAJ Musa in the north was to control him (SAJ Musa).[1078]

800. TF1-361 never stated there was a plan mooted during this meeting to re-attack Freetown as testified to by TF1-360, and that Superman was proceeding north to "expedite matters according to plan."[1079]

801. The Defence submits that these serious contradictions (on a critical issue) between 2 key prosecution witnesses who both claim first-hand knowledge of the alleged Buedu meeting renders the prosecution theory on JCE irreparably misconceived and untenable. It is important to note that as demonstrated in the submissions on the movement from Makeni to Kono, these contradictions are not only consistent in respect of these witnesses but also touch on fundamental issues which the prosecution has put forward for determination by the Chamber. Such contradictions not only seriously blur the accused's vision regarding which case he has to defend, but also greatly undermine the integrity of the entire prosecution case.

802. The only logical inference in the circumstances is that either the events described by these witnesses did not happen at all; or if they did, then in a completely different form.

803. Regarding the alleged Buedu meeting, defence submits that if it ever took place then the agenda to launch attacks in the manner described by these witnesses has been concocted in order to implicate the accused on an imaginary JCE.

804. The Defence further submits that were the Chamber to find that the meeting did take place, both TF1-360 and TF1-361 make no mention of the Second Accused having attended

[1074] Transcript 25 July 2005, p.23 lines 27-29
[1075] Transcript 12 July 2005, p.25 lines 26, p.26 lines 26-27
[1076] Transcript 12 July 2005, p.27 line 9-14
[1077] Transcript 12 July 2005, p.28 lines 3-12
[1078] Transcript 12 July 2005, p.30 lines 26-29
[1079] Transcript 21 July 2005, p.6 lines 1-6

the said meeting or in any way contributing to its agenda. The Kallon Defence Further submits that launching attacks to conquer certain towns does not *per se* constitute a crime under the Statute of the Special Court.

(d) Meeting in Buedu- December 1998

805. While witnesses 360 and 361 testified about the Buedu meeting taking place mid 1998 around the FITI FATA period (which would be about JULY-AUGUST 1998 according to Defence testimonies) other witnesses notably TF1-371 and TF1-045 discussed 2 separate versions of such a meeting taking place in December 1998 in BUEDU.

(i) TF1 371

806. It is significant to point out that although witness TF1 371 alleged he was in Buedu the entire period from the time he left Koidu in March with JPK until the alleged December meeting, he did not mention the meeting discussed by 360 and 361.Yet he alleged he was constantly in the company of Mosquito and was in the position able to monitor what was happening in Buedu but also in other areas where the RUF was based during this period. (Witness TF1-371 explained that he spent most of his time in Buedu with Sam Bockerie at the radio office, which was generally used as the office of Bockerie. That is where according to the witness he learnt about all information relating to frontline operations).[1080]

807. Given his position as a high ranking officer of the RUF, it is surprising that he appears ignorant of anything to do with this all important meeting discussed by TF1 360 and TF1 361 as he said nothing about it. Indeed according to TFI 371, Superman went North because of the personal problems he had with Sam Bockerie,[1081] an explanation that diametrically contradicts TF1 360's thesis that he (Superman) was proceeding north in order to expedite the plan discussed in Buedu[1082] or 361's theory that Superman went North to bring SAJ Musa under control.[1083]

[1080] Transcript 21 July 2006, p.41 lines 12-18
[1081] Transcript 21 July 2006, pp.38-39
[1082] Transcript 21 July 2005, p.6 line 3-5
[1083] Transcript 12 July 2005, p.30 lines 24-29, p.31 lines 5-9

808. During this December 1998 meeting[1084] witness TFI 371 stated that those in attendance included the Second Accused and Gullit of the AFRC among others[1085] and that this was a strategic meeting to plan the attack of Kono and recapture Freetown.[1086]

809. During cross-examination the witness confirmed Gullit's presence in the meeting and further stated that Gullit was in Kailahun and that most of the time he was in Buedu.[1087] Witness denied suggestion by the defence that in December 1998 Gullit was in and around Camp Rosos and Superman was in Koinadugu.[1088]

810. The testimony of this witness on the alleged meeting in Buedu early December 1998 to plan the attack of Freetown is yet another of his many fabrications. His attempt to place Gullit in this meeting is sufficient demonstration of his anxiety to implicate the Second Accused in a joint criminal enterprise. There is sufficient evidence in the trial that in December (even before December) Gullit and his AFRC colleagues were never in Kailahun.

811. Witnesses TF1-167, TF1-334, TF1-184 and TF1-360 all testified about the strained relationship between the AFRC and RUF at the time; and in particular about Gullit's presence at Camp Rosos where he was later joined by SAJ Musa before the AFRC single-handedly launched the march to Freetown. Despite massive evidence to the contrary, the witness lied by suggesting that Gullit never left Kailahun after the retreat from Freetown in February 1998 and that he used to see him in Kailahun on a regular basis.

> Q. I suggest he left Kailahun within a few weeks of the arrival of the AFRC/RUF in Koidu town in March 1998.
> A. To go to.....North?
> Q. Yeah. He left Kailahun at that stage, I suggest.
> A. To go where? Gullit was in Kailahun
> Q Koidu Town
> A. No. no. I am not aware about that.
> Q.You say you saw him on a regular basis in Kailahun District, do you?
> A. Yes. Yes. Yes of course. I used to go to Kailahun town.....
> Q. Did you speak to him?
> A. Say?
> Q. Did you speak to him on a regular basis?
> A. Not on a regular basis.Periodically. Not every day.I mean, each I'm going to Pendembu, sometimes I stop in Kailahun and I talk to him. I mean with his wife, his girlfriend he had, in their compound.
> Q. This is the same Gullit who was PLO 2?
> A. Yes.[1089]

[1084] Transcript 21 July 2006, p.42 lines 1-7
[1085] Transcript 21 July 2006, p.42 lines22-29
[1086] Transcript 21 July 2006, p.43 lines 1-3
[1087] Transcript 31 July 2006, p.49 lines 2-5
[1088] Transcript 31 July 2006, p.48 lines 19-29
[1089] Transcript 31 July 2006, p.49 lines 9-24

812. As noted above this testimony however contradicts the testimony of witnesses TF1-360 and TF1-361 and several other prosecution witnesses who were clear that around this period SAJ Musa, Gullit and the rest of the AFRC high command were at Rosos and their relationship with the RUF was at its worst. Indeed this is the same period that SAJ Musa working closely with Gullit had banned any communications from the AFRC to the RUF. As will be seen in the analysis that follows SAJ Musa was so serious about the ban on communications with the RUF that violators faced the death sentence. The witness indeed alleged that Gullit and the Second Accused joined Sesay as part of the attack on Kono and Makeni, ("the Kono-Makeni flank").[1090]

813. This testimony once again contradicts TF1 360 and TF1 361 who place Gullit with the AFRC colleagues having nothing to do with the RUF. The first time Gullit communicated with the RUF (Bockerie) is when they reached Freetown after the death of SAJ Musa and Bockerie was surprised and amused that they had been so foolish to enter Freetown.[1091]

"Operation No Living Thing"

814. Although witness TF1-371 stated that 'operation no living thing' was the name given to the Freetown attack during the alleged meeting in Buedu, he confirmed in cross-examination that the phrase was not explained during the meeting and that the explanations he gave during his testimony were just "an implication."[1092] He further affirmed that operation no living thing did not mean "destroy all civilians." The objective was to reach your target.[1093]

[redacted]

815. Witness said that in early December 1998 when he was in Kpaima Mosquito summoned a meeting at Buedu of representatives from all frontlines. Witness was selected to attend.[1094]

816. Witness named those present at the meeting as himself, Kailondo, [redacted], Sesay, the Second Accused, SYB Rodgers Mosquito and a lot other commanders, and that about 40-50 people attended.[1095] According to the witness, during that meeting, Bockerie stated that they should attack Kamongo, Segbwema, Daru, Bunumbu, Kenema and capture

[1090] Transcript 21 July 2006, p.46 lines 16-24
[1091] Transcript 21 July 2005, p.30 lines 10-20
[1092] Transcript 31 July 06 p.51 lines 12-15
[1093] Transcript 31 July 2006 p.59 lines 20-29
[1094] Transcript 21 November 2005, p.68 lines 15-22
[1095] Transcript 21 November 2005, p.69 lines 12-21

those towns. Bunumbu, Segbwema, Daru, Kenema were to be attacked under the supervision of Bockerie and Col. Denis and the Second Accused and Sesay would attack Kono up to Makeni.[1096] He stated that this mission was called "operation spare no soul."[1097]

817. The testimony of this witness which apparently is meant to corroborate witness TF1-371 fundamentally contradicts TF1-371. TF1-045 does not state any intentions of those who attended the meeting to attack Freetown. It is clear that the target was the towns that the witness specifically and very exhaustively enumerated which were Kono, Kamongo, Segbwema, Bunumbu, Daru, Makeni. Indeed regarding Sesay and the Second Accused, the target was to attack Kono and advance up to Makeni. The witness states:

> Q. Were any towns discussed
> A Yes. He said that we had to attack Kono, Tongo; we should attack Segbwema, Daru, Bunumbu, Kenema. All these areas he stated in his statement when he was talking. So he said us for Bunumbu, Segbwema, Daru, Kenema. He himself would organise, together with Brigade commander, Colonel Denis, in order to attack these towns I have mentioned. Then he said General Issa should join Morris Kallon in Kono in order to attack Kono up to Makeni. In fact, after that meeting General Issa buttressed what General Mosquito said and he emphasised the respect that we should listen to commands and that no commander shall challenge any command that had been passed down to him to do whatever he had been asked to do.[1098]

"Operation Spare No Soul"

818. Whereas witness TF1-045 says the operation was given the name Operation spare no Soul, TF1-371 on the other name stated that it was termed operation no Living thing. The two appear conceptually different at least based on the explanation given by TF1-371 regarding his perception of the meaning of 'Operation No living Thing'. And it would seem surprising that the two witnesses gave two different versions of what transpired in a meeting that they both apparently attended.

819. Significantly, witness TF1-045 does not mention Gullit as one of those he could remember attending the meeting. Although the witness mentioned there were several other names of persons in attendance whose names he could not recall, the presence of Gullit, a Senior AFRC commander ought to have easily stuck in the witness' memory. Indeed the witness was able to remember the little known name of one Major Lamin Salia as an AFRC soldier who attended this meeting.[1099]

[1096] Transcript 21 November 2005, p.72 lines 25-29, p.73 lines 1-29
[1097] Transcript 21 November 2005, p.75 lines 13-15
[1098] Transcript 21 November 2005, p.72 lines 24-29, p.73 lines 1-7
[1099] Transcript 21 November 2005, p.68 lines 15-24, p.69 lines 7-18

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(iii)Attacks on the Towns

820. The defence submits that there is nothing criminal about recapturing towns that were under ECOMOG occupation. There is no evidence that any civilians were specifically targeted during these attacks. Regarding the actual attacks on these towns, the witness stated:

> "We attacked Segbwema, we captured Segbwema. We attacked Bunumbu and captured there. We attacked Daru, but we were unable. We attacked Kenema, but we were unable. But we are still in Segbwema, Dodola [phon), Bendu Junction, Bunumbu. All those areas fell under control. Then we heard over the news, through communication, that Kono had been attacked, that General Issa and others had attacked Kono, and Akim had come to Tongo and has captured there. We heard all of that"[1100]

821. There was no suggestion by the witness of evidence that any civilians were specifically targeted during these attacks. He stated further:

> "we attacked Segbwema, civilians died there, we burnt down the place, we dug holes in the road, so we did exactly what we were told to do because Segbwema was a risky point, it was in between Kenema and DARU and Ecomog and Kamajors were based there. We were in between them"[1101]

822. The witness therefore says that civilians died without specifying the circumstances. It cannot be argued that in the context of legitimate military combat civilians will not die.

823. Regarding the burning, the witness does not state which exact places were burnt to rule out burning of legitimate military targets especially in view of the witness' own confession that ECOMOG and Kamajors were based there.[1102]

824. Indeed the witness' testimony on alleged 'Operation Spare No Soul' is contradicted by his own admission during cross-examination that during the attack on Kono onwards to Makeni, the group led by Sesay (including the Second Accused) captured 13 Nigerians who were kept as prisoners of war and later released, that he heard of 600 CDF who surrendered in Masingbi and were kept safe, and 200 others captured and kept safe in Makali.[1103]

825. The defence submits that any allegation of intention to commit atrocities by those attending the alleged Buedu meetings is clearly eliminated by this aspect of the evidence of TF1-045.

(e) Relationship Between the RUF and AFRC During the Period of the Alleged Meetings in Buedu

[1100] Transcript 21 November 2005, p.75 lines 26-29, p.76 lines 1-5
[1101] Transcript 21 November 2005. p. 76 lines 13-17
[1102] Transcript 21 November 2005, p.76 lines 13-17
[1103] Transcript 24 November 2005, p.75, p.76

(i) Kono

826. The Defence submits that witness TF1-360's testimony on the alleged meeting in Buedu to plan a joint RUF/AFRC offensive on Freetown and other areas in Freetown, fly in the face of several accounts given by the witness himself and other Prosecution witnesses, strongly suggesting that it was near impossible to bring together; for a common design, the RUF and AFRC during this period. The Defence relies on the argument presented in relation to the poor AFRC and RUF relations in Kono after the retreat, *supra*.

(ii) Koinadugu

827. Regarding the planned attack on Freetown, witness TF1-184 testified that SAJ Musa stated while in Koinadugu that the SLA should forget about the RUF, they had no business with the RUF. "... that is what he told them, that they should forget about the RUF, they had no business with the RUF. The stride they were taking was an SLA stride."[1104] The witness further explained how during their stay north at Kurubola after the retreat to Koidu, some men under the command of one captain Korpomeh came with a message from Kono that SAJ Musa should subordinate himself to Mosquito. SAJ Musa refused to obey the order and instead ordered the arrest of these men from Kono and ordered their execution.[1105]

828. After the execution of the men from Kono, witness TF1-184 stated that SAJ Musa declared a high alert because he expected an attack from the RUF "which he did not want to deal with."[1106] The witness further recounted how a week after the incident of the men from Kono, Superman together with a mixture of SLA and RUF men came to SAJ Musa and Superman said he had come to take SAJ Musa to Kailahun, SAJ Musa refused and ordered the arrest of Superman.[1107]

829. TF1360 further corroborates this testimony when he confirms that SAJ Musa had refused to work with the RUF and up to the time of the alleged meeting in Buedu to plan the attack on Freetown he was still on his own, still refusing to work with the RUF. The witness confirmed that Superman's trip to Koinadugu was to force SAJ Musa to work under Sam

[1104] Transcript 5 December 2005 p.29 lines 3-12
[1105] Transcript 6 December 2005, p.26 lines 1-29
[1106] Transcript 6 December 2005, p.27 lines 16-29
[1107] Transcript 6 December 2005 p.29 lines 1-17

Bockarie, that is why Superman went there with an elite fighting force[1108] and that SAJ Musa ran away for his life from Superman.[1109]

830. The Kallon Defence submits that the foregoing evidence completely negatives the Prosecution thesis that there could have been any planning and or Joint Criminal Enterprise between the Second Accused or the RUF and the AFRC, at this point in time.

(iii)Superman's Reason for Joining SAJ Musa

831. The prosecution attempted to link Superman's joining SAJ Musa in the North to the alleged plan between the AFRC and RUF specifically to attack Freetown and to some extent other towns. This link however could not hold due to the many other competing theories that the prosecution advanced through his witnesses. The Defence respectfully submits that where the Prosecution advances a main theory and then proceeds to dilute that theory through his own witnesses, there is created reasonable doubt regarding the entire Prosecution Case on the issue. This doubt, we humbly submit, should be to the benefit of the accused person.

832. While witness TF1-360 attempted to demonstrate that Superman's departure from Kono to join SAJ after Fiti-Fata was the result of the alleged plan to advance to Freetown, witness TF1-167 provided a different account. He stated that Superman left because when Sesay was sent to Kono, Superman did not trust him.[1110] According to the witness, Superman left Kono because he had a fracas with Sam Bockarie over the Kono command [1111] "Superman had the impression that Issa Sesay may have received instructions from Bockarie to arrest him," the witness admitted upon a question from the Chamber.[1112]

833. In further demonstration of the level of distrust and bad blood between Superman and Mosquito which may have led to Superman deciding to go his way north, witness TF1-167 stated that after the witness, SAJ and others pulled out of Kono, Sam Bockarie sent instructions to Superman to go after them and arrest them. Superman did not carry out these instructions because he was still in Kono trying to gain control there.[1113]

834. Witness TF1-361 further corroborates the theory that Superman's mission north had nothing to do with any plan to attack Freetown. The witness who moved to Koinadugu with Superman states that during their second week of stay in Koinadugu, Mosquito banned all

[1108] Transcript 25 July 2005 p.28
[1109] Transcript 25 July 2005, p.29 lines 8-9
[1110] Transcript 19 October 2004, p.34 lines 12 – 20
[1111] Transcript 19 October 2004, p.42 lines 1 – 9
[1112] Transcript 19 October 2004, p.42 lines 6 – 9
[1113] Transcript 19 October 2004, p.45 lines 6 – 15

communications between Superman and the RUF. In effecting the ban, Mosquito according to the witness said that Superman was no longer part of the RUF. This instruction was given to all RUF stations warning them against any breach of the ban consequences whereof would be punishment by death.[1114]

835. The witness further confirmed that after the ban by Mosquito, Superman was no longer part of the RUF and any operations he may have conducted at the time were between himself, SAJ and Brigadier Mani until later in the year 1998.[1115] Significantly the witness stated that he was in Koinadugu with Superman for somewhere between 3 to 6 months.[1116]

836. Witness TF1371 also on his part stated that Superman went to join SAJ Musa because he (Superman) had a strained relationship with Sam Bockerie.[1117] The witness affirmed that Bockerie saw Superman's girlfriend at the Guinea highway as a distraction to Superman. This led to the fall-out between Superman and Bockerie culminating in daily insults between the two.[1118]

837. The witness confirmed that the Second Accused had serious differences with Superman. According to the witness the Second Accused was trying to implement Mosquito's instructions to have Superman submit to the authorities in Buedu to which Superman was not willing to accept because of what he felt was Bockerie's interference in his personal affairs.[1119]

838. This testimony sharply contradicts that of TF1-360, which suggested that Superman was sent north to join SAJ in order to expedite the plan to attack Freetown.

(4) Events After the Alleged Buedu Meeting in Mid-1998

839. Evidence of the relationship between the RUF and the AFRC and happenings in Kono, Koinadugu, Rosos, and Eddie Town (where the Freetown attack was launched according to witness TF1-360) from mid to late 1998 further depict a clear picture of the lack of any Joint Criminal Enterprise between the Second and or the RUF on the one hand and the AFRC on the other during this period.

[1114] Transcript 18 July 2005 p.39 lines 22-29
[1115] Transcript 18 July 2005 p.39 lines 14-20
[1116] Transcript 18 July 2005 p.44 lines 5-24
[1117] Transcript 21 July 2006, p.41 lines 1-5
[1118] Transcript 28 July 2006, p.26 lines 15-23
[1119] Transcript 1 August 2006, p.29 lines 2-13

840. Witness TF1-360 stated that the Second Accused was neither with the forces in the North in 1998, nor in Freetown with the fighting forces in 1999.[1120]

841. It is not clear how witness TF1-360 found himself with the troops that attacked Freetown, but he stated that after the meeting in Buedu and the Fiti-Fata mission in Koidu "instructions came from Mosquito to Morrison Kallon at Superman Ground to dispatch radio operators including the family of Gullit and Five-five to SAJ Musa so that SAJ Musa could reinforce the fighting force."[1121]

842. The Defence disputes this testimony and observes that witness TF1-360's account of how and why he travelled north is not corroborated by any other Prosecution witness. On this point the Chamber's attention is drawn to the testimony of witness TF1-167 who explains how Alfred and other RUF operators found themselves in the north with the SLA troops that attacked Freetown in January 1999. The witness stated that at one time when witness was in Kono, Mosquito sent some men to go and get SAJ so they can take him to Kailahun forcefully. According to the witness, when the men got to SAJ they disclosed their mission. However the forces they found on the ground were too strong for them hence were unable to carry out their mission but decided to stay with SAJ. According to the witness that is how some RUF were with SAJ. The witness further confirmed that these RUF stayed with SAJ throughout and gave their loyalty to him. The witness further stated that these RUF who decided to stay with SAJ were just small in number but met thousands of fighters with SAJ Musa.[1122]

843. Witness TF1-361 somewhat corroborated the explanation given by TF1-167. He stated that during the second week after Superman went to Koinadugu from Kono, Mosquito banned all communications between Superman and RUF.[1123] This, the witness agreed, was because according to Mosquito, Superman had not wanted to fight because he had a white woman and the communication ban meant Superman's radio station was no longer considered an RUF station.[1124]

844. Witness stated that after the ban some men arrived from Mosquito and initially Superman's group was suspicious and stayed alert thinking they were under attack.

[1120] Transcript 26 July 2005, p.46 lines 1-12
[1121] Transcript 21 July 2005, p.7 lines 1-5
[1122] Transcript 19 October 2004, p.38 lines 10 – 16
[1123] Transcript 18 July 2005 p.39
[1124] Transcript 18 July 2005 p.38 lines 26-29

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845. These men henceforth were under Superman's command.[1125] At this time, the witness stated, there was no communication between Superman and either Kailahun (where mosquito was based) or Kono (Where the Second Accused was based).[1126] Some of these men, witness agreed, went to Gullit.[1127] The witness gave the following testimony.[1128]

> Q. There was no understanding, was there, Mr. Witness, between Superman and control at this time. None whatsoever?
> A. There was no understanding.
> Q. Right. So we can leave control out of it for the moment.
> A. But it was he who sent those people, Alfred Brown and Jin Gbandeh
> Q. I know you are keen to talk about control. I am keen to talk about Superman at the moment. Sam Bockarie may have sent the men but the men are not, at this time, in touch with Sam Bockarie, are they?
> A. No, we are not in speaking terms.
> Q. Right. So the men that were sent, whatever Sam Bockarie's intention, now operate under Superman, do they not?
> A. Yes.
> Q. Thank you. And Superman was the one who sent them on to Gullit, did he not?
> A. Yes, he dispatched them.

846. Indeed in an earlier statement confirmed by the witness, he had stated that it was Superman who sent a radio operator by the name of [redacted] to support Gullit:

> "We then retired to Koinadugu and we were there for approximately six months. Whilst we were in Koinadugu there was good communication between Superman, SAJ and Gullit, who were exchanging radio messages on a daily basis. An example of these communications is that Superman sent a radio operator by the name of King Perry to support Gullit. King Perry was an RUF man and he was sent as an RUF plant in Gullit's operations to get information. However, when King Perry went to Gullit he was not allowed to use the radio personally. I do not know the reason for this".[1129]

847. The Defence submits that the witness' allegations that it is the Second Accused who dispatched him to join the AFRC in the north is an invention meant to create an imaginary link between the Second Accused and the purported Joint Criminal Enterprise to attack Freetown and other parts of Sierra Leone. It is sufficient to note that the witness does not cite a single radio communication between himself or any of his colleagues with the Second Accused in Kono from the time he leaves Superman Ground after the Fiti-Fata attack right to when they attack Freetown in January 1999. This is singularly surprising in light of the

[1125] Transcript 18 July 05 p.43 lines 7-22
[1126] Transcript 18 July 2005 p. 43 lines 23-26
[1127] Transcript 18 July 2005 p. 43 lines 27-29
[1128] Transcript 18 July 2005 p.50 lines 8 - 25
[1129] Transcript 18 July 2005, p.44 lines 5-15

witness' testimony that it is the Second Accused as commanding officer of Kono who dispatched them to the north.

848. The witness alleged that they were dispatched from Superman Ground approximately around August 1998[1130]. He stated that in Koinadugu he saw combined forces of AFRC, RUF and STF soldiers each commanded by their own boss.[1131] The commanders were Superman, SAJ Musa and General Bropleh respectively.[1132] The witness stated that they moved from Koinadugu to Rosos on 1 September 1998.[1133] Witness stated that a majority of those on the trip to Rosos were ARFC. The contingent had about 300 men and the RUF had one platoon of 64 men.[1134] The commander of the entire contingent was one O-Five an AFRC appointed by SAJ Musa.[1135]

849. Witness testified that they finally got to Eddie Town and while there news came over commercial radio of the execution of 24 soldiers by the government.[1136] After this news, witness stated that everybody was determined, and it was decided," no time should be wasted to attack Freetown."[1137]

850. The witness stated that around this same period, SAJ Musa was on the way from Koinadugu to join Guillit at Eddie Ground and sent a message that all RUF at Eddie Ground should be arrested and their guns confiscated before his arrival.[1138]

851. It is clear from the testimony of this witness that there is no involvement of the Second Accused in the activities going on at this time in Koinadugu, Rosos and Eddie Town. Indeed the involvement of the RUF, itself is either completely lacking or negligible at best.

852. Although Superman is said to have left Kono to join SAJ Musa in Koinadugu in order to "expedite things according to the plan,"[1139] when the witness arrives in Koinadugu and leaves for Rosos to Eddie Ground there is no mention at all of the involvement of Superman in this movement. Indeed as seen above, the RUF had only 64 fighters against 300 SLA soldiers during the trip to Eddie. Moreover as stated by witness TF1-361, communications between Superman and the RUF were banned soon after he arrived in Koinadugu.

[1130] Transcript 21 July 2005 p.8 lines 1-19 where the witness states that when they were dispatched from Superman Ground to Koinadugu, they passed through Tefeya where Bai Bureh was commander to Yomandu, then Koinadugu, He stated that they were at Yomandu approximately around August 1998. Transcript 21 July 2005, p.8-12

[1131] Transcript 21 July 2005, p.24-25

[1132] Transcript 21 July 2005, p.10 lines 22-24

[1133] Transcript 21 July 2005, p.10 lines 22-24

[1134] Transcript 21 July 2005, p.10 lines 25-29

[1135] Transcript 21 July 2005, p.10 lines 25-29

[1136] Transcript 21 July 2005, p.19 lines 27-29, p.20 lines 1-3

[1137] Transcript 21 July 2005, p.20 lines 7-16

[1138] Transcript 21 July 2005, p.20 lines 18-27

[1139] Transcript 21 July 2005, p.6 lines 1-2

853. Witness TF1-167 who moved with Gullit confirmed that during their movement to Rosos they did not have any communication with the RUF and they were not taking any orders from the RUF.[1140] The witness gave those in the command structure during the movement as – Brima, Field commander; Bazzy Kamara, his deputy. The next person was the operations commander Hassan Papa Bangura. Witness acknowledged that the mission was controlled by SLA and all the high command was SLA except the 3rd Battalion commander who was RUF but took orders from SLA high command. Later, Superman had an in-fight with SAJ Musa and the latter pulled out of Krubonla in a hurry to join the Guillit group at Eddie.[1141]

(a) RUF Soldiers on Frolic of Their Own

854. The Defence submits that the few RUF with the AFRC troops in the north during this period were not under any instructions from the RUF high command. It has not been established that the presence of these few RUF with the SLA had the formal or informal approval of the RUF high command. These are soldiers who for a number of reasons including duress had become part of the AFRC and owed their loyalties and allegiance to the AFRC. Indeed 2 weeks after Superman leaves Kono, there is according to TF1-361 the no nonsense ban on any communications between him and all RUF stations. So serious is the ban that any violators face a death punishment.

855. It is logical to argue that the RUF troops who find themselves with the AFRC at that time neither received nor carried out any instructions from the RUF command. There were engaged in a frolic of their own; to borrow from a well established Common Law principle.

(5) Eddie Town: Launching Pad for Freetown Attack

856. Witness TF1-167 on his part admitted that the plan to attack Freetown was ordered at Eddie Town and the command composition at Eddie Town then was basically SLA.[1142] He agreed that one of the aims of the SLA mission to Freetown was to rejoin the army and in that context the advancing troops wanted nothing to do with the RUF.[1143]

[1140] Transcript 19 October 2004, p.47 lines 11 – 19
[1141] Transcript 19 October 2004, p.48 lines 1 – 29
[1142] Transcript 19 October 2004, p.59 lines 3 – 19
[1143] Transcript 19 October 2004, p.59 lines 20 – 29

857. He admitted that the planning for the attack was done by the SLA. Regarding ammunition for the attack, the witness said it mainly came from an attack on the Guineans at Masiaka. He confirmed that they had a problem with ammunition because they had no access to ammunition from any other group.[1144]

858. According to the witness TF1-360, it is at Eddie Town, a location in the North of Sierra Leone that the attack on Freetown took off. The witness testified that while at Eddie Town information came that he (SAJ) had fought with Superman with guns and that SAJ Musa was on the run to Eddie Town.[1145]

859. Subsequently, SAJ Musa sent a message that all RUF at Eddie Town be arrested and their guns taken away from them.[1146]

860. As opposed to any alleged plan to attack Freetown hatched between the RUF and the AFRC, witness TF1-360 provided some indication to explain the AFRC determination to attack Freetown. At that time, news came at Eddie town regarding the execution of 24 SLA soldiers by the government of Sierra Leone. "That was the news we heard, everybody felt sad about it and everybody later became determined" he stated.[1147] The witness stated that after this news a meeting was convened where it was decided that no time should be wasted to pursue the mission "which we have for Freetown."[1148] When SAJ Musa arrived the soldiers at Eddie Ground went into celebration. They liked him so much, the witness stated.[1149]

861. Witness stated that SAJ Musa arrived early November 1998.[1150] Witness stated that up to this time, the senior RUF person present at Eddie Ground at the period was Alfred Brown who was a Liberian and senior communications officer in the RUF.[1151] Witness stated that Alfred Brown had come with him after they were dispatched to join SAJ Musa.[1152]

862. Upon his arrival at Eddie Town, SAJ Musa stamped his full authority and announced he was the overall commander, the commander in chief and nobody was permitted to do anything without his approval. He then proceeded to take measures that dealt a death blow to any relationship between the AFRC and the RUF. He banned any radio messages from Eddie Town to Superman or Sam Bockarie. He gave a letter to all RUF radio operators (the witness, Alfred Brown and one Sheku) warning them against talking on the radio or indeed going near

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[1144] Transcript 19 October 2004, p.60 lines 1 – 9
[1145] Transcript 21 July 2005, p.19
[1146] Transcript 21 July 2005, p.20 lines 20-29
[1147] Transcript 21 July 2005, p.20 lines 1-3
[1148] Transcript 21 July 2005, p.20 lines 10-16
[1149] Transcript 21 July 2005, p.21 lines 1-8
[1150] Transcript 21 July 2005, p.23 lines 1-2
[1151] Transcript 21 July 2005, p.21 lines 21-25
[1152] Transcript 21 July 2005, p.21 lines 27-29

a radio and that if they disobeyed this order, they would be killed. The witness and his colleagues heeded the warning.[1153] The witness further stated that it was after this warning that it was announced that they should attack Freetown under the command of SAJ Musa.[1154]

863. The chain of events from the time the witness alleged there was a meeting in Buedu where it was decided Superman was to be sent to join SAJ Musa at Koinadugu to the point the witness is at Eddie Town clearly indicates a complete lack of any concerted action between the RUF (the Second Accused) and the AFRC amounting to a joint criminal enterprise.

(6) Actual Attack on Freetown

(a) Second Accused Not in Freetown

864. Although the Indictment does not plead the presence of the Second Accused in Freetown during the January 6 attack, the Supplemental Pre-Trial Brief alleges that he arrived in Freetown during the invasion with reinforcements and arms on directions from Sam Bockarie.[1155] The Defence submits that no evidence has been adduced that the Second Accused ever arrived in Freetown during the invasion. Indeed, save for a few junior RUF soliders, acting on the orders of the AFRC, the RUF was never in Freetown during this invasion.

(i) Evidence

865. Witness TF1-184 who testified that he took part in the attack on Freetown right from its planning at Eddie Town stated that SAJ Musa got extremely incensed by a BBC broadcast by Mosquito that it was his men who were advancing on Freetown[1156] and that he assaulted and warned the RUF operator Alfred Brown against communicating with RUF at all, regarding their activities as they advanced on Freetown.[1157]

866. The witness stated that at the time after the death of SAJ Musa, the witness could identify only Alfred Brown in the RUF group which he said was "a little bit over 20."[1158]

[1153] Transcript 21 July 2005, p.22 lines 1-2
[1154] Transcript 21 July 2005, p.22 lines 24-26
[1155] At para.353(d)
[1156] Transcript 5 December 2005, p.32 – 33
[1157] Transcript 5 December 2005, p.33 lines 15 – 20
[1158] Transcript 5 December 2005, p.37 lines 10 – 12

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After committing many atrocities in Freetown, witness stated that they left Freetown because they asked for reinforcement and there was no reinforcement. [1159]

867. From the witness' testimony, it was clear that there was no clear joint objective between the RUF and AFRC regarding the attack on Freetown. The AFRC led by SAJ Musa wanted to reinstate the army. The RUF on the other hand were wary of the AFRC's intentions thus unwilling to send reinforcement.[1160] Witness agreed that the SLAs in Freetown were angry about insufficient reinforcements.[1161] Witness confirmed that SAJ Musa remained in control from Rosos to Benguema with Guillit as his 2nd in command and after SAJ died, Guillit took command of all troops in Freetown.[1162] Right from Koinadugu, SAJ the commander did not want any communication with the RUF and discouraged any such communication and assaulted those who attempted.[1163]

868. Witness admitted that Gibril Massaquoi who was in Freetown during the attack had just been released from Pademba Road prison together with others including civilians; there is no evidence that Gibril Massaquoi represented the RUF command in Freetown. No evidence that he ever communicated with the RUF command regarding the activities in Freetown.[1164] Witness stated that he did not know if Gibril communicated with the RUF command in Freetown and that the first time he saw Gibril talk to RUF was in Waterloo and Benguema.[1165]

869. Witness TF1-360 who also alleged he took part in the Freetown attack stated that they got to Waterloo in December 1998.[1166] It is after the death of SAJ Musa that a decision was reached to call Sam Bockarie for advice.[1167] Guillit asked the witness to contact Sam Bockarie who seemed unaware of what was happening and who considered it foolhardy for them to have attempted to enter Freetown.[1168] Bockerie's ignorance of the happenings in Freetown at this point in time is an indication of an absolute lack of any common plan or design between the RUF and AFRC to attack Freetown. There is no credible evidence that the Second Accused was involved in either this communication or any other subsequent ones.

[1159] Transcript 5 December 2005, p.64 lines 20 – 26
[1160] Transcript 6 December 2005, p.40 - 41
[1161] Transcript 6 December 2005, p.56 lines 24 – 29
[1162] Transcript 6 December 2005, p.84 lines 4 – 11
[1163] Transcript 6 December 2005, p.84 lines 12 – 18
[1164] Transcript 6 December 2005, p. 85 lines 1 – 29
[1165] Transcript 6 December 2005, p. 85 lines 15 – 27
[1166] Transcript 21 July 2005, P. 26 lines 6-10
[1167] Transcript 21 July 2005, p.28 lines 17-22
[1168] Transcript 21 July 2005, p.30 lines 13-26

870. Although the witness alleged that Sam Bockarie stated to Guillit that they should try to make a base where they had reached and wait for reinforcement from Superman's group and the Second Accused's group, there is no credible evidence that the Second Accused had a group headed for Freetown and that he received any communication from Sam Bockerie.[1169]

871. Moreover the witness stated that when Guillit consulted his men about Sam Bockarie's advice, they objected and insisted they should continue with the attack on Freetown. They entered Freetown and freed prisoners. When they entered Freetown, Guillit was in control. He entered State House and gave orders from there.[1170] This was in January 1998.[1171]

872. Indeed when Guillit allegedly contacted Sam Bockarie for the second time, Bockerie was still insistent that Guillit was not doing things well because he had advised him not to enter Freetown, which advice he had ignored.[1172] Significantly Witness TF1-360 stated that it was after this communication with Sam Bockarie in which he (Sam Bockerie) was disappointed that Gullit had ignored his advice; that Five-Five, Guillit and Bazzy gathered the fighters and ordered them to apply "gori-gori" that they should cut hands, kill and destroy government property in order to induce a lull in the fighting[1173]and that chopping of hands, burning, killing started after this order.[1174] Clearly the RUF and certainly the Second Accused were not party to either the attack on Freetown as an object nor these atrocities as a means of achieving the object.

873. According to the witness, no reinforcement came because "the other side did not respond the way we expected from them. Aside from Waterloo and Hastings, they did not respond the way we expected them to have responded."[1175] The witness explained that the Second Accused, Superman, Rambo were sitting down at Waterloo waiting for the witness and others. [1176] The witness made it quite clear that the RUF was not willing to come to Freetown. Rambo Red Goat (SLA) who had the will to come managed to join them in Freetown.[1177]

874. Witness TF1-334 also testified that it was the SLA who attacked Hastings on 4 January 1999 although they had some RUFs. Witness acknowledged that the RUF with them

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[1169] Transcript 21 July 2005, p.30 lines 20-29
[1170] Transcript 21 July 2005, p.34 lines 1-26
[1171] Transcript 21 July 2005, p.33 lines 1-29
[1172] Transcript 21 July 2005, p 35 lines 1-8
[1173] Transcript 21 July 2005, p.35, lines 10-19
[1174] Transcript 21 July 2005, p.35 lines 21-26
[1175] Transcript 21 July 2005, p.42 lines 10-12
[1176] Transcript 21 July 2005, p.43 lines 12-14
[1177] Transcript 21 July 2005, p.42 lines 18-22

were within the command structure of the SLA. Guillit was in charge.[1178] He further affirmed that it was the SLAs who set fire to the whole of Hastings and the next day at Allen Town, Guillit ordered that Freetown should be burnt and the witness and all the others agreed with the order.[1179]

875. Witness stated that as they entered Freetown, the only pass words they created were check-back and back-clear.[1180] Witness stated that it was the 3rd week of being in Freetown when Guillit, Bazzy and Kanu said they were going to get reinforcements from the RUF [1181] and this was after burning and committing crimes for the 3 weeks.[1182] Witness TF1-334 admitted that the only reinforcement was a small group of SLA soldiers led by Rambo Red Goat who came.

876. The Defence submits that Rambo Red Goat cannot be described as part of an RUF reinforcement because as witness TF1-167 stated, Red Goat was an SLA soldier who was with the RUF and absconded from the RUF to join the AFRC in Freetown.[1183]

877. TF1-334 further admitted that the RUF refused to come to Freetown because they did not believe SAJ Musa was dead. The RUF instead of assisting started taking property off the SLAs withdrawing from Freetown. [1184]

878. The RUF position at the time is further clarified by witness TF1-167 who stated that after SAJ Musa died, Guillit communicated with Sam Bockarie for reinforcement in order to attack Freetown[1185] but Mosquito said it was a trick; the request made by Guillit.[1186]

879. Witness TF1-334 further stated that as they fought their way to Freetown, they got their arms and ammunition from the SLA soldiers and that this is why Guillit said it was a self-reliant struggle.[1187]

880. Witness TFI 167 (George Johnson) admitted that the RUF with them in Freetown were "very few"[1188]. During the attack on Freetown, there was no RUF commanders within the SLA fighting force.[1189] Witness stated that following the meeting at Kabala during the retreat SAJ Musa decided he could not serve under Superman and went to Krubola. SAJ went

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[1178] Transcript 21 July 2005, p.39, 40
[1179] Transcript 21 July2005, p.40 lines 13-20
[1180] Transcript 21 July 2005, p.40 lines 28-29
[1181] Transcript 21 July 2005, p.41 lines 24-26
[1182] Transcript 21 July 2005, p.42 lines 2-4
[1183] Transcript 18 October 2004, p.76 lines 23 – 27
[1184] Transcript p.42 lines 13-29
[1185] Transcript 18 October 2004, p.33 lines 23 – 29
[1186] Transcript 18 October 2004, p.34 lines 1 – 10
[1187] Transcript p.45 lines 16-18
[1188] Transcript 20 October 2004, p.54 lines 18 – 21
[1189] Transcript 20 October 2004, p.54 lines 22 – 29

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with Alfred Brown of the RUF.[1190] He further explained how the RUF radio operator found himself with the SLAS.

881. Witness stated that until they got to Benguema there was no significant involvement of the RUF in the Freetown attack force. SAJ Musa did not communicate with any RUF at the time.[1191] Witness stated that after the death of SAJ Musa, Gullit radioed Mosquito who however thought it was a trick. During the operations that followed within Freetown no reinforcement came from RUF.[1192] Witness stated that they promised to send reinforcement but the reinforcement only stopped at Waterloo.[1193]

882. Witness TF1-371 on the other hand corroborated the position that RUF was not involved in the Freetown attack. He stated that the Freetown attack aborted because of the particular interest of the AFRC who at that point in time proved recalcitrant to the RUF "..... the invasion of Freetown was not well co-ordinated between the two groups."[1194]

883. Witness spoke of radio communications between SAJ Musa, Gullit and Sam Bockerie during this period which he stated were meant to mend the strained relationship between their faction and the RUF high command in Buedu in order to have a joint operation but the problem was not resolved as Sam Bockerie was expecting.[1195]

884. Witness stated that later from monitoring, he came to know that a senior command of the AFRC, who were not at all willing to be part of the RUF, set up a jungle at Okra hill and RUF were at Lunsar and waterloo axis.[1196]

iii) 'RUF in Waterloo?': Re-Moulding the Prosecution Case

885. The prosecution after realising the futility of pursuing a Joint Criminal Enterprise based on the presence of the RUF in Freetown during the attack, sought to remould its case in the course of the trial and specifically during cross-examination of Defence witnesses to suggest that the RUF stayed at Waterloo to provide a safe exit for the AFRC troops retreating from Freetown and to that extent were part of a joint criminal enterprise. The Defence objections are captured in the decision of the Chamber on Defence Motion for an Order to the Prosecutor to Clarify and Specify the Scope of its Case Regarding the RUF Involvement in

[1190] Transcript 20 October 2004, p.51 lines 1 – 12
[1191] Transcript 20 October 2004, p.52 lines 7 – 11
[1192] Transcript 20 October 2004, p. 52 lines 12 – 29
[1193] Transcript 20 October 2004, p. 53 lines 2 – 7
[1194] Transcript 21 July 2006, p.48 lines 13-20
[1195] Transcript 21 July 2006, p.49 lines 9-18
[1196] Transcript 21July 2006, p.50 lines 21-24

the Freetown Invasion.[1197] The Defence reiterates its objection to this shifting of goal posts which to the extent it denies the accused the opportunity of promptly knowing the case against him, should be rejected by the Chamber. The Prosecution should not be permitted to alter their case against the accused as and when it suits them.

886. The Defence disputes the prosecution testimonies on the presence of the Second Accused or the RUF in Waterloo for the purpose of facilitating any criminal enterprise. In his testimony, the Second Accused stated that he went to Waterloo with Sesay to receive Politicians released from Pademba Prison.[1198]

887. Nevertheless and without prejudice to the foregoing we submit that the prosecution has not established beyond a reasonable doubt that the Second Accused's presence or that of the RUF in Waterloo was in furtherance of either a criminal objective or a means of attaining that objective.

(1) Evidence on Alleged Second Accused/RUF Presence at Waterloo

888. Taking witness TF1-360 as a point of departure, he alleged that he and others subsequently managed to get out of Freetown into Waterloo where they met the Second Accused, Superman, Rambo and other authorities, [1199] and that a meeting was held there attended by Superman, Bazzy, Guillit, Five-Five, Sesay and Rambo to plan the re-attack of Freetown because some men were left there.[1200]

889. Witness stated that around this time some RUF was based at Lunsar under Superman.[1201]

890. The witness alleged that during the meeting it was agreed that they attack Tombo first in order to get material. Tombo was according to the witness attacked without success. Next was an attempt to attack Kossoh Town which also failed.[1202]

891. The witness alleged that after the failed attacks on Tombo and Kossoh town, they went back to Waterloo and "the bosses started retreating from Waterloo to Makeni. Some people started retreating from Waterloo to Lunsar."[1203]

[1197] *P v, Sesay et al.*, SCSL-04-15-T-1034, Decision on Defence Motion for an Order to the Prosecutor to Clarify and Specify the Scope of its Case Regarding the RUF Involvement in the Freetown Invasion, 6 March 2008.
[1198] Transcript 15 April 2008, p.8 lines 14-18
[1199] Transcript 21 July 2005, p.45 lines 2-4
[1200] Transcript 21 July 2005, p.45 lines 11-29
[1201] Transcript 21 July 2005, p.46 lines 21-25
[1202] Transcript 21 July 2005, p.46 lines 1-7
[1203] Transcript 21 July 2005, p.46 lines 10-12

892. The witness explains that after the retreat from Waterloo to Lunsar and also Makeni "another troops came and push us out of Waterloo. We went around 6 Mile, that is where we stayed". Witness reveals that 6 Mile was predominantly occupied by AFRC.[1204]

893. The witness then further revealed that by the time they were being pushed to 6 Mile, the RUF bosses had pulled out and were at Lunsar, Masiaka, Makeni, Magburaka.[1205]

894. The Defence submits that the alleged events in Waterloo are a distinct transaction independent of the failed Freetown attack.

895. The narration of alleged events at Waterloo though disputed by the Kallon Defence further strengthens the defence submission regarding lack of any Joint Criminal Enterprise between the AFRC and the RUF. It is not established that the alleged failed attacks on Tombo and Kossoh respectively were for any criminal purpose. It is established through the witness that during this time Kossoh at least, was occupied by ECOMOG Forces, a legitimate Military target.[1206]

896. After the failed attacks on Tombo and Kossoh, the RUF retreated to Lunsar and others to Masiaka, Makeni-Magburaka areas. Arguably, after the failed attacks, they had no business in Waterloo and had to retreat leaving behind the AFRC who were shortly afterwards pushed out of Waterloo and settled at Mile 6. That the RUF left the AFRC soldiers in Waterloo is strongly indicative of lack of any Joint Criminal Enterprise between the 2. The prosecution has failed to establish that the Second Accused had the *mens rea* to commit any crimes in Freetown during this period. Also, the *actus rens* is missing.

897. Witness TFI 334 says that the first contact with RUF of the retreating SLAs was in Waterloo.[1207] Superman was the senior RUF man in Waterloo at the time and that Issa and (Kallay) had come but they had returned to Makeni.[1208]

898. Later Waterloo was burnt by Superman and his group and subsequently the witness heard of Issa Sesay in connection with attempts by the latter to arrest Superman.[1209]

899. Witness TFI-361 stated that during the attack on Freetown he monitored message from Sam Bockerie instructing Rambo to move to Jui so as to meet Gullit. That after this instruction witness learnt that the Rambo group attacked Jui twice captured it but Gullit's force was nowhere to be seen.[1210] Witness stated that he then heard from Rambo's Radio

[1204] Transcript 21 July 2005, p.46 lines 12-15
[1205] Transcript 21 July 2005, p.46 lines 16-18
[1206] Transcript 21 July 2005 p.39, p.40 lines 7-17
[1207] Transcript 7 July 2006, p.47 lines 7-13
[1208] Transcript 7 July 2006, pp. 47-48
[1209] Transcript 7 July 2006, p.48 lines 14-24
[1210] Transcript 12 July 2005 p.115 lines 6-19

operator that [redacted] who was in Freetown had told Mosquito and Issa Sesay that the AFRC has entered Freetown and shared positions without considering the RUF. That Mosquito and Sesay got angry and asked Rambo to withdraw the RUF force to Waterloo and not receive the AFRC any more.[1211]

900. Witness further stated that he monitored [redacted] in Freetown saying that they had been over come hence they were finding a route to escape Freetown. That Brigadier Issa Sesay gave a mandate to Rambo so as to receive those from Freetown and to take all their belongings.[1212] Witness said he received this information from Rambo's operator.[1213] Witness TF1-167 stated that the withdrawal from Freetown started after the first five days in Freetown.[1214] He stated that on arrival at Orugu village, a radio message was sent by Brima to Mosquito that they had lost control of Freetown. Mosquito advised that they pull out as fast as possible.[1215]

901. Witness said when they arrived at Waterloo, they met Superman, the Second Accused, Rambo RUF and later Issa who chaired a meeting to plan the re-attack of Freetown.[1216] Witness said the Second Accused, Superman and Rambo were to take the Tombo road to Freetown.[1217] Peleto, Bazzy were to take the Hastings route.[1218] The alleged plan to re-attack Freetown did not succeed because the RUF that they met at Waterloo were harassing fighters that came from Freetown for properties. From then on, Issa pulled back to Makeni, Superman to Lunsar and Kallon to Magburaka.[1219]

902. Witness TF1-184 stated that a meeting was held at Benguema between Gibril Massaquoi, Kallon and Guillit, Five-five after which a combined RUF/AFRC force was ordered to attack Tombo. The attack was unsuccessful. It was not indicated if the witness attended the meeting. It is not clear which Kallon.[1220]

903. Witness stated that the RUF troops in Waterloo during their retreat from Freetown were commanded by Superman and he is the one who called the meeting of all commanders including AFRC – Guillit, Five-five and Bomblast.[1221]

[1211] Transcript 12 July 2005, p.116 lines 8-19
[1212] Transcript 12 July 2005 p.117 lines 10-16
[1213] Transcript 12 July 2005 p.117 lines 4-5
[1214] Transcript 18 October 2004, p.65 lines 19 – 29
[1215] Transcript 18 October 2004, p.78 lines 3 – 8
[1216] Transcript 18 October 2004, p.79 lines 5 – 13
[1217] Transcript 18 October 2004, p.79 lines 25 – 29
[1218] Transcript 18 October 2004, p.79 lines 27 – 29; p.80 line 1
[1219] Transcript 18 October 2004, p.80 lines 11 – 23
[1220] Transcript 5 December 2005, p.66 lines 15 – 29
[1221] Transcript 6 December 2005, p.57 lines 3 – 17

904. He further stated that during the meeting at Waterloo, Superman told the commanders present to prepare for the attack on the Guinean ECOMOG troops based at Newton. There is clearly no criminal purpose for the attack on the Guineans. They attacked the Guineans and thereafter Superman withdrew to Lunsar where he was in charge.[1222]

905. According to witness TF1-167 the alleged plan to re-attack Freetown did not succeed because the RUF that they met at Waterloo were harassed fighters that came from Freetown for properties. From then on, Issa pulled back to Makeni, Superman to Lunsar and Kallon to Magburaka.[1223]

906. Lastly witness TF1-366 testimony on the alleged presence of Kallon in Waterloo and the atrocities committed there during the attacks on various points in the environs of Waterloo is not corroborated by any other prosecution witness. As has been demonstrated elsewhere in the brief, witness 366 testimony is ill-motivated against the accused Kallon and should be disregarded for lack of any credit-worthiness.

907. Moreover, whereas witness 366 places the Second Accused physically present in Waterloo during these attacks and the ensuing atrocities, these are material facts that ought to have been pleaded in the indictment. None is pleaded and the Chamber is respectfully urged to disregard the testimony of this witness on the alleged attacks at Waterloo.

iv) <u>After Lome, 1999</u>

908. The Prosecution case itself identifies a division between the RUF and AFRC. The Pre-Trial Brief alleges that the West Side Boys were formed as a result of "their perceived marginalization at the Lome peace talks."[1224] It states that the "West Side Boys" originated from "a disgruntled faction of the AFRC/RUF". However, a simple examination of the terms of the Lome Peace Accord reveals that it was the AFRC, not the RUF, who were marginalised by the Lome Peace Accord. The RUF, in Foday Sankoh, was a negotiating party to the Lome Peace Accord. Therefore, the Prosecution assertion that elements of the RUF formed the West Side Boys as a result of their marginalisation is based on a false premise.

909. Furthermore, the evidence before the Chamber demonstrates that the West Side Boys were a faction of the AFRC not RUF. The mere fact that RUF were signatories to the Lome Peace Accord and not the AFRC indicates that these were two separate entities and, therefore,

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[1222] Transcript 6 December 2005, p.58 lines 15 – 29
[1223] Transcript 18 October 2004, p.80 lines 11 – 23
[1224] The Pre-Trial Brief, para.52

that the names AFRC and RUF should not be used interchangeably as the Prosecution misleadingly does. They were not united and, thence, could not pursue or agree to a common purpose, which would support a finding of JCE.

910. TFI 334 testified that the "West Side Boys" operated "throughout the whole of 1999" and that Kamara was the "boss"[1225] and that he "formed his own brigade" there, "planned his own operations" and that he was "in control...of the various troops within his brigade".[1226] Thereafter the witness volunteered that this was done on the order of Mosquito,[1227] but he confirmed that Kamara planned the operations of the aforementioned brigade "on a day-to-day basis."[1228]

6) ALIBI

a) KENEMA DISTRICT

911. The Indictment charges Mr Kallon with criminal responsibility for crimes committed in Kenema District "[b]etween about 25 May 1997 to 19 February 1998".[1229]

912. The Kallon Defence notified the parties of its intention to rely on the following alibi defences: (i) that Mr Kallon was not present in Kenema "from 25 May 1997 to about 19 February 1997"; (ii) that Mr Kallon was in Makeni from around 5 June 1997; and (iii) that Mr Kallon "was in Bo District from 2 August 1997 until the pull out in mid-February 1998".[1230]

913. Mr Kallon testified that he was in Kangari Hill on 25 May 1997.[1231] This was corroborated by DMK 039, who also present at Kangari Hill at that time.[1232]

914. On 1 June he went to Mile 5 and then on to Matotoka.[1233] On 3 June, having sustained a heavy attack by Kamajors, he went to Teko Barracks where he remained until 2 August 1997.[1234] This was corroborated by DMK 161.[1235]

[1225] Transcript 06 July 2006, p.62 lines 8-12
[1226] Transcript 06 July 2006, p.62 lines 17-23
[1227] Transcript 06 July 2006, p.62 lines 22-23
[1228] Transcript 06 July 2006, p.63 lines 25-26
[1229] See the Indictment, at para 47, charging "unlawful killings"; para 63, charging "physical violence"; see also para 70, charging "abductions and forced labour"..."[b]etween about 1 August 1997 and 31 January 1998"
[1230] The Kallon Notification of Alibi, at pg 2-3.
[1231] Transcript 11 April 2008, pg 98, line 6.
[1232] Transcript 25 April 2008, pg 20, line 20-23.
[1233] Transcript 11 Apirl 2008, pg 99, line 27 – pg 100, line 1.
[1234] Transcript 11 April 2008, pg 100, line 1-6.
[1235] Transcript 22 April 2008, pg 9, line 1-23.

915. On 2 August he moved to Bo.[1236] He also testified that was in Bo at the time of the Intervention, on 12 and 13 February 1998.[1237] This was corroborated by DMK 161[1238], TFI 071[1239], TFI 125[1240], TFI 367[1241] and TFI 041[1242] who testified that Mr Kallon was stationed in Bo during the Junta period.

b) BO DISTRICT

916. The Indictment charges Mr Kallon with criminal responsibility for crimes committed in Bo District "[b]etween about 1 June 1997 to 30 June 1997".[1243] These timeframes are pleaded again in the Pre-Trial Brief.[1244]

917. The Kallon Defence notified the parties of its intention to rely on the following alibi defence: that "Morris Kallon was present in Makeni forma round 5 June 1997 and made a few trips to Freetown during this time. He was not within Bo District within the timeframe stated in the Indictment, from 1-30 June 1997, and only went to Bo District on 2 August 1997".[1245]

918. Mr Kallon testified that on 1 June he went to Mile 5 and then on to Matotoka.[1246]

919. On 3 June, having sustained a heavy attack by Kamajors, he went to Teko Barracks where he remained until 2 August 1997.[1247] This was corroborated by DMK 161.[1248] It was not until 2 August that he moved to Bo.[1249]

PART IV: COUNT BY COUNT ANALYSIS

1) INTRODUCTION

920. In order to more fully respond to the allegations contained in the Indictment vis-à-vis the evidence adduced in Court, the Defence for the second accused shall first respond to

[1236] Transcript 11 April 2008, pg 102, line 10-11.
[1237] Transcript 11 April 2008, pg 128, line 15-16.
[1238] Transcript 22 April 2008, pg 9, line 11-23; and pg 50, line 1-3.
[1239] Transcript 26 January 2005, pg 19, lines 18 - 21
[1240] Transcript 16 January 05, pg 79, line 8-14; pg 82, line 26 – pg 83, line 5.
[1241] Transcript 26 June 2006, pg 22, line 25-28.
[1242] Transcript 10 July 2006, pg 27, line 5-7.
[1243] See the Indictment, at para 46, charging "unlawful killings"; at para 78, charging "looting and burning".
[1244] At para 67.
[1245] The Kallon Notification of Alibi, at pg 2.
[1246] Transcript 11 April 2008, pg 99, line 27 – pg 100, line 1.
[1247] Transcript 11 April 2008, pg 100, line 1-6.
[1248] Transcript 22 April 2008, pg 9, line 1-23.
[1249] Transcript 11 April 2008, pg 102, line 10-11.

Count 3 upwards to Count 14, then address Counts 1 and 2 respectively, and conclude with Counts 15 to Count 18. This is because the Indictment alleges that the second accused acting in concert with the co-accused and "members of the AFRC/RUF subordinate to and/or acting in concert with [them] committed the crimes set forth in paragraphs 45 through to 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."[1250] Subject to any submissions to the contrary set out in this brief, the Chamber's interpretation of the law applicable to the Counts in the Indictment, in deciding the Rule 98 defence motions, is adopted.[1251] The Defence also relies on the alibi evidence as set out, *supra*.

921. It is the submission of the Kallon Defence that in addition to the Prosecution proving that the second accused is individually criminally responsible under Articles 6(1) and 6(3) of the Statute for the offences charged in the Indictment and that he bears greatest responsibility for the same, it must prove beyond reasonable doubt that the evidence as led satisfies each of the legal requirements of each offence charged. As a cardinal rule of law any deficiency in the Prosecution's case must be resolved in the accused's favour.

922. The Defence at the outset submits that the Prosecution has proferred a myriad versions of its case at different points in time during the proceedings, including leading evidence that does not materially support the allegations contained in both the Indictment, bringing witnesses to Court who gave substantially conflicting accounts and exaggerated versions of the said allegations.[1252]

923. It is submitted that the foregoing are serious legal issues and concerns that confront and challenge the second accused's rights to fair trial and an adequate time to prepare his case pursuant to Article 17 of the Statute, especially considering his inability to properly prepare his case and respond to the Prosecution's sudden strategies and divergent evidence sprung upon him in the course of the trial without notice. By reason of their peculiarly unforeseen nature in the sense that the affected pieces of evidence only sprouted during the presentation of the Prosecution's case, the second accused is uncertain as to whether the Prosecution was trying to incorporate by reference particulars of offences he did not plead to at the time the Indictment was read to him in Court. These are issues the Kallon Defence respectfully craves the Court's indulgence to take special notice of in the process of adjudication.

[1250] See paragraph 44 of the Indictment.
[1251] See Transcript 25 October 2006
[1252] See, for example, the analyses in this Brief on command responsibility and joint criminal enterprise.

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2) KOINADUGU AND BOMBALI DISTRICTS: AGREED STATEMENT OF FACTS

924. The Indictment charges Mr Kallon with criminal responsibility for crimes committed in Koinadugu District "[b]etween about 14 February 1998 and 30 September 1998".[1253] In respect of Counts 1 to 14, the Second Accused is also charged with criminal responsibility for crimes committed in Bombali District "[b]etween about 1 May 1998 and 31 November 1998".[1254] It also charges the burning of civilian buildings "[b]etween about 1 March 1998 and 31 November 1998"[1255]

925. It is agreed between the parties that "[b]etween 14 February and 30 September 1998, Morris Kallon was not a RUF and/or AFRC field commander in any location in Koinadugu District, and did not reside there."[1256] It is agreed between the parties that "[b]etween 1 May and 30 November 1998, Morris Kallon was not a RUF and/or AFRC Field Commander in any location in Bombali District, and did not reside there." [1257] As it is undisputed that Mr Kallon was neither physically present nor exercised command in Koinadugu at all times material to the Indictment, it is submitted that this concedes the Prosecution case in respect of command responsibility in Koinadugu District.

926. The Defence relies on its submissions against a finding of command responsibility or JCE, *supra*. In every other respect, it is submitted that the case against the Second Accused , in Counts 1 to 14, in respect of Bombali and Koinadugu Districts is effectively conceded.

3) COUNTS 3 TO 5

927. In order to substantiate the foregoing Count charges, the Prosecution alleges that the Second Accused, by his "acts" or "omissions", is individually criminally liable for the crimes alleged in paragraphs 45 to 53 of the Indictment, pursuant to Article 6.1 and Article 6.3 of the Statute. The said allegations touch and concern eight sets of occurrences at various locations in Sierra Leone, to wit, the Districts of Bo, Kenema, Kono, Kailahun, Koinadugu, Bombali,

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[1253] See the Indictment, at para 50, charging "unlawful killings"; para 56, charging "sexual violence"; para 64, charging "physical violence"; para 72, charging "abductions and forced labour"; at para 79, charging "looting and burning".

[1254] See the Indictment, para 57, charging "sexual violence"; at para 51, charging "unlawful killings"... "[b]etween about 1 May 1998 and 30 November 1998"; para 65, charging "physical violence"; para 73, charging "abductions and forced labour"

[1255] See the Indictment, at para 81.

[1256] *P v. Sesay et al.*, SCSL-04-15-T, Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07, Annex H, para 10.

[1257] *P v. Sesay et al.*, SCSL-04-15-T, Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07, Annex H, at pg 90, para 10.

Freetown and the Western Area, and Port Loko. Though the crimes as alleged are specific to the said locations within outlined timeframes, they are said to have been perpetrated between the broad periods of 25 May 1997 and April 1999 and it is alleged that members of AFRC/RUF, including the Second Accused, "unlawfully killed" an unknown number of civilians. The factual analysis below takes each occurrence, within the confines of a stated location, on its merits vis-à-vis the evidence available to the Court.

a) BO DISTRICT (1 June 1997 to 30 June 1997)

i) Prosecution Case

928. The Indictment alleges that: "[b]etween about 1 June 1997 and 30 June 1997, AFRC/RUF attached Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians".[1258] The Prosecution lead evidence from TFI 054, TFI 008 and TFI 004 in support of the aforementioned allegations.

929. The Prosecution lead no evidence of unlawful killings in Telu and Mamboma.[1259]

ii) Notice and Relationship to the Indictment

930. The Indictment does not plead the personal physical perpetration of the crimes by Mr Kallon. Therefore, the evidence of TFI 054 cannot be used to support such a finding.

931. The material facts pertaining to these allegations are entirely absent from the Indictment.

932. The evidence of TFI 054 adduced by the Prosecution in support of this allegation that Mr Kallon was in the company of a "five-man delegation" who participated in the killing is at variance with the Supplemental Pre-Trial Brief which simply holds the Accused responsible because of his alleged position as Deputy Area Commander of the RUF.[1260]

933. Moreover, the identities of the physical perpetrators are not mentioned therein. In the case of an alleged murder of a single identified victim, it is submitted that the Prosecution is obliged to particularise the identities of physical perpetrators.

[1258] The Indictment, at para 46.

[1259] *P v. Sesay et al.*, SCSL-15-04-T-650, Consolidated Prosecution Skeleton Response to the Rule 98 Motions by the Three Accused, 6 Oct. 06, at para 22.

[1260] Supplemental Pre-Trial Brief, at para 304-305.

934. The allegations made by TFI 004 are not mentioned in the Pre-Trial Brief or the Supplemental Pre-Trial Brief. Therefore, the Defence received no notice of these allegations whatsoever.

iii) The Evidence

935. In order to prove part of these alleged incidents, Prosecution witness TF1-054 testified that "the AFRCs and the juntas" were in control of Bo District after the May 1997 coup, referring to "the juntas" as soldiers.[1261] The witness mentioned the following AFRC Junta officers he knew as "the commanders in Bo District" at the time: Boysie Palmer was the then Brigade Commander, A. F. Kamara was the Resident Minister responsible for Southern Province and, another officer, ABK, was the officer-in-charge of the AFRC secretariat in Bo District.[1262]

936. The above sharply contrasts with the Prosecution's case theory that the Prosecution will lead evidence to show that "[the second accused] held a position, individually or in concert with other AFRC/RUF superiors, superior to the AFRC/RUF subordinates engaged in the unlawful killings and had effective control over the subordinates".[1263] To the contrary, the evidence below will show as follows: i) that the said AFRC/Junta commanders were in effective control of several parts of Bo District between May 25 and August 1997; ii) that witness TF1-054 never knew or heard about the second accused and only saw someone introduce himself as "Morris Kallon" amidst a 5-man civilian delegation that went to Gerihun sometime after the coup; iii) that the Kamajor/CDF fighters were also in effective control of the remaining parts of Bo District, which is incidentally also admitted by the Prosecution in its Supplemental Pre-Trial Brief;[1264] and iv) that no evidence is given of the second accused being in command and control of combatants in any part of Bo District between May 25 and August 1997.

(a) Gerihun

937. Regarding the offences charged in Counts 3 to 5 of the Indictment and the second accused's alleged role in them, witness TF1-054 gave evidence about the killing of [redacted]

[1261] Transcript, 30 November 2005, p.11, lines 4-16.
[1262] Id., p.11, lines 19-29.
[1263] Supplemental Pre-Trial Brief, para. 307.
[1264] Id., para.304 (c) and (d).

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[redacted] a paramount chief, in Gerihun together with other civilians around June/July 1997 and alleges that a certain Dr Tommy, Augustine Gbao, Mike Lamin, Boysie Palmer, A.F. Kamara, ABK, and a certain Morris Kallon were at the scene of the killing. In particular, he testified that the said Morris Kallon introduced himself as such and was part of a 5-man civilian delegation that went to Gerihun to talk to the townspeople so that the latter and the Kamajors can work with the AFRC Junta.[1265] Whilst at the schoolroom where the meeting with the townspeople was held, the witness said that he heard gunshots coming towards Gerihun and later saw the 5-man delegation, including Dr Tommy, Augustine Gbao, Mike Lamin, Morris Kallon and a fifth person, walk together with Boysie Palmer, A.F. Kamara, ABK and other soldiers in a group towards the paramount chief's compound.[1266] The witness also testified that he hid in a room in the paramount chief's house when he heard Boysie Palmer and A.F. Kamara respectively give orders for the paramount chief to be shot and stabbed, and that the chief was subsequently stabbed,[1267] before the witness could escape. The witness stated as well that after the attack on Gerihun, he, on the next day, saw several corpses with "civilian clothing on them", including a certain Pa Sumaila that he personally knew.[1268] This account of the witness contrasts with the Prosecution's theory that it was "the Paramount Chief of Bo District" and other civilians that were killed in an attack on Tikonko commanded by Sam Bockarie under an alleged AFRC/RUF control, with the second accused reporting directly to Sam Bockarie.[1269]

938. Notwithstanding the deficiency of the Prosecution's theory, several issues come out about witness TF1-054's account to the Court. During cross-examination by Counsel for the second accused, the witness admitted that he really could not tell the exact month that the alleged incident happened at Gerihun, though, according to the witness, it happened in the year of the AFRC Junta coup.[1270] The fuzziness of the witness's recollection of the timeframe of the alleged crime becomes glaring as he guesses the date of the incident, agreeing with Counsel that it could have been on Thursday, the 25th or 26th.[1271] In fact, the Prosecution also displayed lack of clarity about the date of the alleged incident in its in examination-in-chief by asking the witness about his whereabouts in the months of June and July 1997, to which

[1265] Transcript, 30 November 2005, p.22, line 17 to p.23, line 29.
[1266] Transcript, 30 November 2005, p.31, lines 4-18.
[1267] Transcript, 30 November p.33, line 19 to p.34, line 8.
[1268] Transcript 30 November, p.34, lines 20-28.
[1269] Supplemental Pre-Trial Brief, para. 304 (e-j), supra.
[1270] Transcript, 30 November 2005, p.37, lines 8-16.
[1271] Transcript, 30 November 2005 p.37 line 27 to p.38, line 6.

the witness replied "Demby Hotel" in Bo, and later said, "No, I can't recall the month."[1272] The significance of timeframe here need not be emphasized, as the timeframe for the crimes alleged in Bo under Counts 3 to 5, as noted already, falls "between about 1 June 1997 and 30 June 1997". It is submitted that any guesswork by and between the Prosecution and the witness about any timeframe outside the stated period in the Indictment should be resolved in favour of the second accused. In any case, and as illustrated below, DMK-160 gave a precise date about this incident.

939. Secondly, witness TF1-054 stated that the men in the 5-man delegation, including a Morris Kallon aforesaid, were in civilian clothes.[1273] He also confirmed giving evidence in a court martial against the three AFRC Junta soldiers: Boysie Palmer, A.F. Kamara, ABK about the killing of the paramount chief; and said that he heard that the soldiers were found guilty and executed.[1274] He confirmed giving evidence in the AFRC trial at the Special Court regarding the incident,[1275] and admitted knowing a certain [redacted].[1276]

940. Whilst not challenging the evidence that it was the AFRC Junta soldiers who were responsible for the said killings in Gerihun and that they were punished for it, it is submitted that the second accused, who also bears the name of Morris Kallon, was never a party to the said incident. The second accused clearly denied being part of any delegation to Gerihun around June/July 1997 and testified that he was in fact in Makeni at that time;[1277] his identity was thus mistaken. Describing the paramount chief as easy to see, famous and admirable, the second accused lamented his killing as contrary to the 25 standing orders of the RUF ideology and testified that if he had been around and known the chief's assailants, he would have challenged them.[1278] Besides, as already noted herein, the AFRC soldiers, including Boysie Palmer, A. F. Kamara and ABK, were in full command and control of parts of Bo District during the AFRC Junta period. The RUF had long ceased to operate the Bo Jungle in the Southern Province, after it was attacked and destroyed by the Kamajors in 1996.

941. [redacted]

[1272] Transcript, 30 November 2005, p.13, lines 6-28.
[1273] Transcript, 30 November 2005, p.38, lines 22-24.
[1274] Transcript, 30 November 2005, p.42, line 16 to p.43, line 24.
[1275] Transcript, 30 November 2005, p.44, lines 4-6.
[1276] Transcript, 30 November 2005, p.41, lines 21-28.
[1277] Transcript, 11 April 2008, p.102, line 25 to p.103, line 15.
[1278] Transcript 11 April 2008, p.104, line 10 to p.105, line17.

[redacted]

942. Finally, DMK-160, [redacted], testified that he was at Gerihun when the AFRC soldiers overthrew.[1281] He continued to stay in Gerihun between May 1997 and February 1998 and was promoted to CDF Battalion commander in charge of the Bo/Kenema Highway.[1282] Witness DMK-160 confirmed that the AFRC soldiers were in control of Bo during the said period.[1283] He testified that the said AFRC soldiers in fact killed the paramount chief on Thursday 26th June 1997 in Gerihun,[1284] and said that he was present when the soldiers, including Boysie Palmer, ABK and AF Kamara, attacked Gerihun on Friday, 20 June 1997.[1285] He stated that on the 26th June 1997, the day the paramount chief was killed, he was the one who received at Nyandehun - being a CDF defensive position to protect Gerihun from further attacks - a delegation of four SLPP men, including his uncle: Dr. Tommy, Mr. Mucktaru Swarray, Mr. AC Gbow and a certain Mr. Lamin, and then led them to the town chief, Alhaji Josie Lahai and subsequently to the paramount chief in Gerihun; the visitors were on an SLPP political mission and were not part of those who attacked Gerihun.[1286] DMK-160 denied seeing Prosecution witness TF1-054 at the meeting with the paramount chief, [redacted][1287] DMK-160 testified that he never heard any member of the delegation introduce himself as Morris Kallon and that he only first heard about that name after August 1997 when some RUF fighters went to Gerihun to surrender to Kamajors.[1288]

943. TFI 054 gave evidence in the AFRC Case which patently contradicts his evidence in this case, belying an intent to falsely incriminate the accused. In light of these inconsistencies

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[1279] "Agreed Statement of Facts between the Second Accused and the Prosecution in Compliance with order 3 of the Scheduling Order concerning the Preparation and Commencement of the Defence Case", 5 March, 2007, para.4. [Agreed Statement of Facts between the Second Accused and the Prosecution].
[1280] Transcript, 20 July 2006, p.25, line 10 to p.26, line 7.
[1281] Transcript, 21 April 2008, p.50, lines 10-28.
[1282] Transcript, 21 April 2008, p.51, line 1 to p.52, line 5.
[1283] Transcript, 21 April 2008, p.52, lines 6-19.
[1284] Transcript, 21 April 2008, p.56, lines 20-28.
[1285] Transcript, 21 April 2008, p.57, lines 2-12.
[1286] Transcript, 21 April 2008, p.59, line 3 to p.60 line 24; and p.63, line 21 to p.64, line 13.
[1287] Transcript, 21 April 2008, p.65, lines 10-22.
[1288] Transcript, 21 April 2008, p.72, lines 9-26.

and others, it is submitted that TFI 054 is not a reliable witness. His lack of credibility is demonsrtated, *supra.*

944. In view of the foregoing evidence, and the earlier submissions that the second accused was merely an RUF Major/vanguard without an assignment or posting during 1996 through to August 1997 and beyond, it is submitted that no evidence has been led by the Prosecution to show, beyond reasonable doubt, that the second accused is individually criminally responsible both under Articles 6(1) and 6(3) of the Statute for any alleged unlawful killing in Gerihun or any part of the Bo District at any time.

(b) Tikonko and Sembehun 17

945. Besides the above, Prosecution witnesses: TF1-004 and TF1-008 respectively testified about attacks on Tikonko and Sembehun 17 in the Bo District. According to TF1-004, 'junta soldiers' dressed in military fatigues attacked Tikonko from the Bo area in June 1997.[1289] They entered the town in military vehicles and killed Kamajors and civilians.[1290] The witness testified that over 200 corpses were buried by them after the incident,[1291] and about 500 houses were burnt down in Tikonko as well.[1292] He admitted under cross-examination by Counsel for the second accused that at the time of the incident, the AFRC Junta soldiers were in control of Bo and made specific reference to Boysie Palmer, A.F. Kamara and ABK as the AFRC officers in charge of Bo District at that time.[1293] He also admitted that the bulk of the people killed in Tikonko were part of the household of the AFRC Minister of Finance's father, who hails from that town but, however, testified that it was not the Kamajors but soldiers who attacked and killed the people of Tikonko;[1294] although it is doubtful as to how the AFRC would have sanctioned an attack on the household and hometown of its minister. Again, on this incident, it is the case of the second accused that he bears no criminal responsibility both under Articles 6(1) and 6(3) of the Statute for any alleged unlawful killing in Tikonko or any part of the Bo District at any time. The second accused, as said, was an RUF Major/vanguard without an assignment or posting throughout 1997 and beyond and he was never at Tikonko.

[1289] Transcript, 7 December 2005, p.64, line 18 to p.65, line 8, & p.69, lines 12-21.
[1290] Transcript, 7 December 2005, p.73, lines 14-28, & p.76, lines 22-28.
[1291] Transcript, 8 December 2005, p.12, line 27 to p.13, line 7.
[1292] Transcript, 8 December 2005, p.13, lines 23-24.
[1293] Transcript, 8 December 2005, p.28, lines 5-29.
[1294] Transcript, 8 December 2005, p.30, lines 10-20.

946. Witness TF1-008 testified that Mosquito, an RUF rebel, came to Sembehun 17 with a group of fighters one month after the Junta overthrow.[1295] He said that Mosquito took Le. 800,000.00 from the section chief,[1296] whilst his boys went about shooting and setting more than 30 houses on fire in Sembehun 17.[1297] He also testified that a man was killed for his x-bass tape,[1298] and several others injured. He admitted that SLA soldiers were in town when Mosquito's group arrived but that they withdrew;[1299] he also admitted that Kamajors were around the location,[1300] but denied being a Kamajor himself,[1301] even though Exhibit 71, his additional statement to the Prosecution, showed an admission that he was indeed a Kamajor.[1302] The witness also denied that it was the Kamajors that had attacked the SLA soldiers in Sembehun 17.[1303]

947. On the above incident, it is the case for the second accused that he bears no criminal responsibility both under Articles 6(1) and 6(3) of the Statute for any alleged unlawful killing in Sembehun or any part of the Bo District at any time. The second accused was never with Mosquito in any part of Bo District as portrayed by the Prosecution in its case theory, nor was he a part of any joint enterprise to attack towns and commit crimes in the district. In fact, according to Prosecution witness TF1-371, and several other Prosecution witnesses, Sam Bockarie, alias Mosquito, was operating from Freetown around the time of this alleged incident as the RUF high command; he was the RUF commander-in-chief then.[1304] The witness also testified that the RUF had its own hierarchy, distinct from the AFRC; and that despite the fact that the two groups were working together there was loyalty to the RUF hierarchy by RUF fighters.[1305] It is submitted that the AFRC Junta soldiers and the Kamajors, as explained, controlled respective parts of Bo District during the period of these alleged incidents in Sembehun and other areas of the district.

948. As a matter of fact, the "Agreed Statement of Facts between the Second Accused and the Prosecution" mentioned herein states that "during the latter part of 1997, the Secretary of State South at Bo was A.F. Kamara while the AFRC Army Brigade commander was Boysie

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[1295] Transcript, 8 December 2005, p.33, line 14 to p.34, line 3.
[1296] Transcript, 8 December 2005, p.35, lines 19-29.
[1297] Transcript, 8 December 2005, p.36, lines 9-14.
[1298] Transcript, 8 December 2005, p.36, line 17 to p.37, line 7.
[1299] Transcript, 8 December 2005, p.43, line 29 to p.44, line 19.
[1300] Id., p.44, lines 7-12.
[1301] Transcript, 8 December 2005, p.46, line 4, & lines 18-19.
[1302] Transcript, 8 December 2005 p.48, line 23 to p.49, line 10.
[1303] Transcript, 8 December 2005, p.45, lines 20-25.
[1304] Transcript, 31 July 2006, p.22, lines 13-23.
[1305] Transcript, 31 July 2006, p.23, lines 8-10.

Palmer".[1306] On the whole, it is submitted that Prosecution witnesses TF1-054, 004 and 008 were either Kamajors themselves who refused to admit their identities or were Kamajor-sympathizers. This being the case, it is doubtful as to whether their respective references to "civilian killings" were not in fact references to "Kamajor killings", the latter of which will fall short of civilian categorization for purposes of the definition of crimes against humanity under Counts 3 to 5 as earlier outlined. Furthermore, the crimes alluded to in their respective testimonies cannot qualify as being "widespread" or "systematic" in nature to invoke the offences of murder or extermination. Finally, the second accused himself testified that he was assigned to Bo on 2nd August 1997 by Sam Bockarie and that he left Makeni with his manpower for Bo the very day.[1307] Little wonder that DMK-160 only heard about the second accused after August 1997 as already indicated.

b) KENEMA DISTRICT (25 May 1997 to 19 February 1998)

i) Prosecution Case

949. In paragraph 47 of the Indictment, it is alleged that in the Kenema District, "between about 25 May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/RUF unlawfully killed an unknown number of civilians". It is also the Prosecution's case theory that Sam Bockarie, alias Mosquito, ordered many crimes, including the torturing and killing of civilians, in Kenema town and its environs about this time.[1308]

950. The Prosecution's case theory further alleges that the second accused planned, instigated, ordered, committed or aided and abetted unlawful killings in Kenema district by virtue of: i) his alleged position as Deputy Area Commander, which was never substantiated as already contended, ii) his alleged membership of the AFRC Supreme Council, iii) that he was in communication with and reported directly to Sam Bockarie in the field, iv) that he was present and ordered the killing of civilian labourers at Tongo/Cyborg mining sites as well as those who did not respond to his alleged commands, v) that he held a position of responsibility and command within the AFRC/RUF hierarchy and that his subordinates were

[1306] Para. 8, dated 5th March 2007.
[1307] Transcript of 11 April 2008, p.122 lines 12-16.
[1308] Supplemental Pre-Trial Brief, paras. 311-312, supra.

engaged in the unlawful killing of civilians in Kenema District,[1309] vi) and that he failed to take measures to prevent or stop the said alleged crimes.

ii) Relationship to the Indictment and Notice

951. The locations of the allegations made by TFI 141, TFI 035 and TFI 060 are not pleaded in the Indictment. Indeed, it is submitted that the location given by TFI 141 does not exist.

952. The evidence of TFI 141 and TFI 122 must be excluded to the extent that it alleges looting and the burning of houses in Kenema District, as the accused has not been charged with those crimes.[1310]

953. Paragraphs 113 and 311 of the Pre-Trial Brief and Supplementary Pre-Trial Brief, respectively, do make mention of the mining at "Cyborg pit" but they fail to provide the level of detail as to material facts, required to put an accused on notice. In particular, the date and level of involvement of the Accused are all absent. Furthermore this allegation is not within the meaning of "large scale" as contemplated by the jurisprudence to relax the stringent requirements of the obligation on the Prosecution. Accordingly, the evidence should be excluded as outside the scope of the Indictment.

iii) The Evidence

(1) Kenema Town

954. Prosecution witnesses TF1-125 and TF1-122 both testified that Sam Bockarie/Mosquito in alliance with certain AFRC superiors, in particular a certain Eddy Kanneh who was Secretary of State in the East, had absolute command and control over Kenema town and district during the Junta period. They also spoke about how Mosquito arrested, tortured and killed certain civilians suspected of being Kamajor supporters, including B. S. Massaquoi, or of being armed robbers, including Bunny Wailer.[1311] Regarding the second accused, witness TF1-125 testified that he never knew him, nor was he aware of

[1309] Supplemental Pre-Trial Brief, paras. 313-317.
[1310] See the Indictment, at para 77-82
[1311] See Transcript of 12 May 2005, p.102, lines 2-28; p.104, line 13-28; p.109, lines 1-17: (TF1-125) & Transcript of 7 July 2005, p.69, line 1 to p.70, line 28; p.84, line 8 to p.91, line 7.

him being in Kenema during the period up to August 1999, saying in particular: "True. I can never remember any episode in relation to Morris Kallon in Kenema".[1312]

955. Also, witness TF1-122, in acknowledgement of his previous statement to the Prosecution, alleged to have seen the second accused in Kenema on several occasions during the Junta period, but that he was not active at that time. He stated that the second accused was "very friendly", kind and protective of civilians and narrated an incident in which the second accused rescued a woman whose money had been taken away from her by soldiers. He also stated that he did not know the second accused's functions, if any.[1313]

956. Moreover, in order to illustrate that Prosecution witnesses were uncertain of where and when to place the second accused in the conduct of the Prosecution's case, witness TF1-071, was quite categorical about the second accused not being in Kenema at all, saying, "Not at all. I did not see him in Kenema." (...) "Morris Kallon was not in Kenema".[1314] In the same vein, witness TF1-367, a senior RUF SO1 under Sam Bockarie's direct control,[1315] testified that he went to Kenema and Tongo during the relevant Indictment period but unwaveringly confirmed that the second accused "was not even close to" Tongo and Kenema during that period, nor was he a commander in those locations.[1316]

957. The following are therefore the case for the second accused: i) that he was never in Tongo at the time of the alleged incidents testified to by witness TF1-035, rather the second accused testified that he was assigned to Bo on 2nd August 1997 by Sam Bockarie and that he left Makeni with his 'manpower' for Bo the very day;[1317] this was confirmed by Defence witness DMK-160 aforementioned, who testified that he only first heard about the second accused's name after August 1997, when some RUF fighters went to surrender to the Kamajors in Gerihun[1318]; ii) that the second accused was never a deputy to Sam Bockarie in August 1997 or beyond, as already stated in this Brief; iii) that the second accused was not a Colonel in August 1997 but was an RUF Major, as explained in this Brief; iv) that during this time, the second accused never commanded or controlled any subordinate in Tongo Field or in any part of Kenema District; v) that the second accused never ordered the killing or harassment of anyone in Tongo Field or in any part of Kenema District nor did he commit or aid and abet any killing at all; and finally, vi) that the evidence before the Court, including the

[1312] Transcript of 16 May 2005, p.82, line 20 to p.83, line 5.
[1313] Transcript of 8 July 2005, p.93, line 29 to p.94, line 11.
[1314] Transcript of 26 January 2005, p.19, lines 18-21; and p.20, lines 1-11 (same Transcript).
[1315] Transcript of 26 June 2006, p17, lines 1-10.
[1316] Transcript of 26 June 2006, p.23, lines 4-10.
[1317] Transcript of 11 April 2008, p.122 lines 12-16.
[1318] Transcript of 21 April 2008, p.72, lines 9-26.

testimonies of witnesses TF1-125, TF1-371, TF1-071 and several others in fact show that Sam Bockarie/Mosquito, together with certain AFRC soldiers, were in absolute command and control of Kenema district during the Junta period without any military presence of or assistance from the second accused.

958. The "Agreed Statement of Facts between the Second Accused and the Prosecution" referred to herein, states that "during the latter part of 1997 and early part of 1998, Mosquito resided in Kenema and was the most senior RUF commander in that district".[1319] Consequently, it is the case for the second accused that he bears no criminal liability both under Articles 6(1) and 6(3) of the Statute for any alleged unlawful killings in Tongo Field, Kenema or any part of Kenema District at any time.

959. Similarly, it is contended that the killing by Mosquito of B. S. Massaquoi and others in Kenema cannot, *strictu sensu*, amount to "civilian killings" because Prosecution witness TF1-071, being an RUF G-5 commander and an insider witness, testified that a box/carton of single-barrel rounds and documents implicating the victims in active collaboration with Kamajors were found in B. S. Massaquoi's house in Kenema.[1320] To this extent, the said victims would fall short of civilian categorization for purposes of crimes against humanity under Counts 3 to 5 as outlined. Furthermore, it is submitted that the crimes alluded to in the witnesses' testimonies do not qualify as being part of a "widespread" or "systematic" attack so as to invoke the offences of murder or extermination, as they were neither widespread nor systematic in nature.

(2) Locations Not Pleaded

(a) "Cyborg Pit", Tongo Field

960. Prosecution witness TF1-035 testified that in August 1997, combined AFRC/RUF forces took control of Tongo Field and that their commander was called Mosquito, an RUF rebel.[1321] He stated that Mosquito introduced himself as "General Mosquito" and told everybody that they were all under his command and control, and that he was going to set up government diamond mining in Tongo Field, so everybody should cooperate. He testified also that Mosquito told them that they were to forcibly mine the said diamonds, and were to spend

[1319] Para. 7, dated 5th March 2007.
[1320] Transcript of 19 January 2005, p.11, line 13 through to p.14, line 16.
[1321] Transcript of 5 July 2005, p.78 line 14 to p.79 line 6.

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five hours for the government and two hours for themselves at Cyborg Pit.[1322] The witness further stated that on the third day, when the civilians tried to mine diamonds for themselves, Mosquito came and gave orders to Colonel Manawa, an RUF commander, in his presence to shoot at the people so that they would leave the pit. Colonel Manawa then fired an RPG in the air, whilst Mosquito was standing where the SBUs were. The SBU boys subsequently opened fire and killed people in the Cyborg Pit. The witness stated that he saw about 20 people who were killed.[1323]

961. Regarding the second accused, the witness, in further testimony to the Court, stated that he does not know and had never seen 'Morris Kallon' before and only heard the name for the first time after he was released from detention in Tongo after the August 1997 attack. He said that he was told by his colleagues who begged for his release from detention that Mosquito had appointed the said Morris Kallon as his deputy whilst he (the witness) was in detention. He also said that he was unaware that the said Morris Kallon was based in Bo between August and December 1997.[1324] The witness maintained under cross-examination that even when a certain Mustapha later tried to identify a certain Colonel Morris Kallon to him in Tongo as Mustapha's boss, he did not know or recognize the said Colonel Morris Kallon.[1325]

962. Notwithstanding this lack of knowledge of Morris Kallon, the witness proceeded to believe in and rely upon the hearsay evidence that Morris Kallon was Sam Bockarie's deputy in Tongo and that he acted in Bockarie's absence; he also created the impression that Morris Kallon was controlling the SBUs allegedly found in the Tongo mining pits and that they reported to him.[1326] The witness testified that he once saw the said SBUs shoot and kill 25 people in the mining pit in the presence of their commanders, including Morris Kallon aforesaid.[1327] According to the witness, the SBUs were between the ages of 9 to 12.[1328] Besides, the witness further testified that the senior commanders once had a dance at night in Tongo and that, in the middle of the night, he heard heavy shooting from the Cyborg site. He said that in the morning, a certain Colonel Gibbo checked at the guide post and reported that in the night, "while the dance was going on, some junior commanders (...) took some

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[1322] Transcript of 5 July 2005, p.80 lines 2-25.
[1323] Transcript of 5 July 2005, p.86, line 1 to p.87 line 21.
[1324] Transcript of 7 July 2005, p.27 lines 2-13; see also Court Transcript of 5 July 2005, p.89 line 27 to p.90, line 5.
[1325] Court Transcript of 7 July 2005, p.35, line 25 through to p.37, line 1.
[1326] Transcript of 5 July 2005, p. 92 lines 1-3.
[1327] Transcript of 5 July 2005, p.92, lines 12-21.
[1328] Transcript of 5 July 2005, p.94, lines 2-4.

civilians to do some mining at Cyborg. So they had some quarrel with the SBUs. One of the SBUs reported to Colonel Morris Kallon. Morris Kallon went there. And in that firing, 15 people died who are civilians."[1329]

963. It is submitted that in view of the evidence available to the Court, including the Indictment and the testimonies of Prosecution witnesses such as TF1-361, and Defence witnesses such as DIS-069 (for the first accused) and DMK-160 (for the second accused) as well as Exhibits 7 and 35, the above account by witness TF1-035 throws serious doubt into the Prosecution's case. Exhibit 35, which is the Salute Report of Major-General Sam Bockarie (the then RUF leader) dated 26th September 1999, showed that Sam Bockarie was "Battlefield Commander of the RUF/SL" since November 1996.[1330] Prosecution witness TF1-361 also confirmed in his testimony that in 1996, Sam Bockarie was RUF Battlefield Commander after the death of Zeno (Mohamed Tarawallie);[1331] whilst DIS-069, a Defence witness for Issa Sesay, testified that during the period, August 1997, the second accused was not a Deputy to Sam Bockarie, and that he did not participate in the attack on Tongo; the second accused was then an officer at the Kangari Hills.[1332] DIS-157 also confirmed that he heard or received no such report about the second accused in Tongo and that the then RUF Ground Commander there was CO OG.[1333]

964. Simply put, if the second accused, whom witness TF1-035 did not actually know or recognize in Tongo Field, were to be deputy to Sam Bockarie as alleged, he would have been the RUF Deputy Battle Field Commander, and not Deputy Area Commander as alleged in the Indictment or the Prosecution's Supplemental Pre-trial Brief. It cannot equally be admitted that the witness's reference was to the second accused being deputy to Sam Bockarie for the purposes of mining in Tongo or to command and control Tongo as that does not form part of the witness's testimony.

(b) "Operation Born Naked" in "Nyiama Joru"

965. Prosecution witness TFI 141 testified that he took part in "Operation Born Naked" in "Nyiama Joru" which he testified was in Kenema District, under the command of the Second

[1329] Transcript of 5 July 2005, p. 94 line 24 to p. 95 line 19.
[1330] See page 1/2 of the Exhibit.
[1331] Transcript, 14 July 2005, p.56, lines 12-19.
[1332] Transcript of 23 October 2007, p.22, lines 17-27.
[1333] Transcript of 25 January 2008, p.21, line 1 to p.22, line 12.

Accused.[1334] He testified that they burnt houses and killed civilians in villages surrounding "Nyiama Joru" in their retreat having been repelled from there by ECOMOG forces.[1335] Subsequently, under cross-examination the witness referred to Nyiama and Joru as two separate locations.[1336]

966. It is submitted that the Chamber should exercise caution in accepting the credibility of uncorroborated accomplice evidence.

967. As regards this particular allegation, the erroneous nature of this evidence is demonstrated by the internal inconsistencies with regard to the location of the allegation. Indeed, the maps reflect that Nyiama and Joru are separate villages in Kailahun District and Kenema District respectively and that there is no such place as "Nyiama Joru."

968. Moreover, it is submitted that no conviction can be based on evidence of criminal conduct not pleaded in the Indictment, and pertaining to an unspecified period of time.

(c) Sighting of a Corpse in Tokpombu

969. TFI 060 testified that he saw a female corpse by the Church of Salvation in Tokpombu, Kenema District, in August 1997. He said that "according to the investigation, they said it was a stray bullet" of RUF and SLA combatants.[1337]

970. It is submitted that this evidence cannot support a conviction for the following reasons, *inter alia*:

a. The Prosecution has failed to establish beyond reasonable doubt that the perpetrators were RUF and/or AFRC;

b. Given the evidence that the death resulted from a "stray bullet", the Prosecution has failed to establish that the alleged perpetrators intended to kill.

c) KONO DISTRICT (14 February 1998 to 30 June 1998)

i) Prosecution Case

[1334] T. 12/04/05, pg 58, line 16-18.
[1335] T. 12/04/05, pg 64, line 2-12.
[1336] T. 18/04/05, pg 62, line 10-12; pg 83, line 11-15.
[1337] T. 29/04/05, pg 60, line 9-17.

971. The Indictment alleges that: "[b]etween about 14 February 1998 and 30 June 1998, members of the AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foidu, Willifeh, Mortema and Biaya." The Prosecution have conceded that there is no evidence of "unlawful killings" in Willifeh and Biaya.[1338]

ii) Relationship to the Indictment and Notice

972. TFI 071 and TFI 360 alleged criminal conduct in locations not pleaded in the Indictment and TFI 077 alleged criminal conduct in timeframes not pleaded in the Indictment. Therefore, their evidence should beexcluded.

973. Through the evidence of TFI 366, TFI 263, TFI 360 and TFI 141, the Prosecution sought to establish that Mr Kallon personally and physically perpetrated crimes. The Indictment does not plead a case of physical and personal perpetration of crimes against Mr Kallon.[1339] Therefore, it is submitted that the aforementioned evidence must be disregarded for that purpose.

974. Notwithstanding the Defence submission that the Indictment is the only instrument capable of notifying an accuse dof a case of physical and personal perpetration, the Prosecution case, broadly described in the Pre-Trial Briefs and opening statement seems to to extend only to participation in "the killing of a civilian while looting his sheep".[1340] It was only during the course of the trial that the Prosecution sought to extend its case in this regard, by introducing further allegations against the Second Accused, in violation of rules of procedural fairness.

975. No material facts are pleaded in the Indictment, the Pre-Trial Brief or the Supplemental Pre-Trial Brief that would have put Mr Kallon on notice of the allegations identified hereunder. For example, the following material facts underpinning allegations against Mr Kallon were not pleaded:

a. that civilians were unlawfully killed at five-five spot and Court Barri in the presence of the 2nd accused in Tombodu. The Supplemental Pre-Trial Brief alleges the Second Accused's "presence at a meeting" and, in so doing, falls a long way short of alleging the physical and personal perpetration of criminal acts. In

[1338] *P v. Sesay et al.*, SCSL-15-04-T-650, Consolidated Prosecution Skeleton Response to the Rule 98 Motions by the Three Accused, 6 Oct. 06, at para 22.
[1339] See the discussion on the Indictment, *supra.*
[1340] Supplemental Pre-Trial Brief, para 321(i)

addition, it makes no mention of these specific allegations nor the material facts which underpin them;

b. the identity of the victims who TFI 360, TFI 366 and TFI 263 alleged were shot by the Second Accused and the location of the alleged shootings. The Supplemental Pre-Trial Brief alleges the killing of a "civilian in Kono while looting [the Second Accused's] sheep". In the case of a single, isolated killing it is submitted that this is insufficient particularity to put the defence on notice that the allegation will form art of the Prosecution case;

c. that Rocky and Rambo perpetrated the alleged killing of 101 civilians in Koidu and, if it is the Prosecution case, that the Seocnd Accused exercised any or any effective control over them;

d. that Rambo killed a Nigerian woman, the location, and and, if it is the Prosecution case, that the Second Accused exercised effective control over him;

e. the circumstances under which the alleged missions to Nimikoro and Bumpe was undertaken and the Second Accused's level of involvement.

976. On those bases, it is submitted that the following evidence cannot form the basis of any conviction against Mr Kallon.

iii) The Evidence

(1) Tombodu

(a) Court Barri Allegation

977. Prosecution witness TF1-366 alleged that the second accused, himself and some combatants went to Tombodu where the second accused ordered his bodyguards to burn alive 12 civilians out of a total of 15 who had been initially selected by putting them in a room in the Tombodu 'court barri' and then lighting them up using a grass mattress and petrol.[1341] The witness alleged that when this incident occurred, Savage and Rocky CO, who were the commanders at Tombodu, had ran away from Tombodu to Kurubonla to join SAJ Musa.[1342] He alleged that Savage use to report to the second accused and Superman when a complaint was sent against them and testified that the reason why they came to Tombodu on this

[1341] Court Transcript of 8 November 2005, p.39, line 4 through to p.41, line 26.
[1342] Id. p.42, lines 8-9 & p.38, line 8.

occasion was because complaints continued against Savage by civilians and soldiers alike, and that the second accused decided to follow the witness to Tombodu this time as the witness was, according to his testimony, the operations commander.[1343] Also, he alleged that at the time of the incident the second accused was "the most senior commander in town" as Savage and Rocky CO had, as noted, ran away.[1344] He said that after the incident, himself and the second accused "returned to Kono (...) at 6:00", and that he later sent a report through radio communication to Sam Bockarie and Issa Sesay.[1345]

978. Apart from the fact that the witness's said responses raise serious questions as to whether the Tombodu he was referring to is part of Kono district and whether the post-Savage era in Tombodu is within the timeframe of the Indictment based on the accounts of other Prosecution and Defence witnesses, the witness's radio report to Sam Bockarie and Issa Sesay about the burning alive of the 12 civilians could not be corroborated by any of the RUF Radio operators who testified to the Court, nor was a radio log book produced to substantiate his account. The "Agreed Statement of Facts between the Second Accused and the Prosecution" aforementioned states that "there existed a system of communication within the RUF in which every radio operator was supposed to keep a radio log book into which he was supposed to enter all communications received and sent."[1346] Moreover, under cross-examination by Counsel for the second accused, the witness was firstly, referred to his first statement to the Prosecution[1347] in which he said that 'in 1998 he saw the second accused and Savage force people *into a house* [not a barri] at Tombodu and set fire on it'; to which the witness replied in the following words: "but I did not talk about Savage, but all that you've said is true".[1348] As with the vast majority of the allegations made by TFI 366, this allegation is not corroborated accomplice evidence.

979. Also, in the witness's proofing notes of 8th to 16th August 2005,[1349] he indicated that himself, the second accused and others went to Tombodu because they got information that a big diamond had been found there and that the second accused wanted a meeting to be called but the civilians were running away; so 15 of them were captured and put in *a court barri* in Tombodu, which is a public building where events are held, and the second accused "along with his bodyguards, spray petrol on the building and set it on fire and light the roof of the

[1343] Id., p.38, lines 6-29.
[1344] Id., p.42, lines 4-9.
[1345] Id., p.42, lines 9-20.
[1346] Para. 13, dated 5th March 2007.
[1347] At page 13666.
[1348] Court Transcript of 16 November 2005, p.26, lines 7-29.
[1349] p.13701, para 15.

building".[1350] The witness's zealous untruth again showed up in his answer: "Yes. All that you've said are my words."[1351] The confusion here is glaring: were 15 or 12 people burnt alive? Were they burnt alive in a house or a court barri? Did the second accused come to Tombodu to address a complaint against Savage's conduct or to search for a big diamond? Was Savage present, and did he participate in the alleged crime? Did the second accused take part in the crime himself? Was a grass mattress used or was the building merely sprinkled with petrol? The witness's fanciful imaginings undoubtedly showed out.

980. It must be noted at this stage that witness TF1-366 was highly motivated against the second accused and attempted to place him in every crime spot. His prejudice marred his independence and credibility alleging, for example, that the second accused was the RUF Battle Group Commander since February 1998 when the RUF came to Kono from Makeni,[1352] contrary to the Indictment; and admitting too that he has bones to pick with the second accused. In his testimony to the Court, the witness stated that both the second accused and Issa Sesay ordered his arrest in Tongo Field and subsequent detention in Makeni.[1353] The second accused himself explained that his relationship with the witness got bad when sometime in December 1999, it was discovered that the witness was secretly communicating with Sam Bockarie to mobilize RUF fighters in Magburaka so that they could not disarm. The witness was arrested and detained, whilst Sam Bockarie fled to Liberia pursued by the second accused and Issa Sesay[1354]. Also, the second accused testified that sometime between 2000 and 2001 when he became RUF Battle Group Commander, he was sent by Issa Sesay, who was the then RUF Interim Leader, to arrest the witness in Tongo for maltreating and harassing civilians there to work in the mines for him; the witness had declared himself "Minister of Mines". The second accused then ordered the witness's arrest after proving the complaints against him in a public meeting. The witness was undressed and the second accused had to distribute to the civilians all that the witness had forcefully seized from them in Tongo.[1355] The witness's dislike for the second accused arguably flows from his said arrest, detention and treatment.

981. Besides, being an insider accomplice witness, the SCSL Appeals Chamber has held in the *AFRC* Case that "in assessing the reliability of accomplice evidence, the main consideration for the Trial Chamber should be whether or not the accomplice has an ulterior

[1350] Transcript of 16 November 2005, p.27, lines 9-24.
[1351] Id., p.27, lines 26-27.
[1352] Transcript of 14 November 2005, p.45, lines 4-6.
[1353] Transcript of 9 November 2005, p.45, lines 9-29 & p.47, lines 9-22.
[1354] Transcript of 11 April 2008, p.92, lines 21-29 & p.93, lines 1-21.
[1355] Id., p.93, lines 21-29 & p.94, lines 1-7.

motive to testify as he did".[1356] The Appeals Chamber also opined that "there is no requirement that in order to qualify as an accomplice, a witness must have been charged with a specific offence".[1357]

(b) TFI 371's Non-Specific Allegation

982. Also, Prosecution witness TF1-371 (whom the second accused similarly accused of prejudice against him for his opposition to [redacted]), testified that he was aware of reports [redacted] about the second accused's involvement in the killing of civilians in Tombodu, Kono district and that the said killings took place around mid-1998 in the rainy season, probably 'sometime in July'. According to the witness, this report came about the same time that similar report of the killing of civilians in Tombodu involving Savage reached them in Buedu. The witness said that the second accused was "recalled from Tombodu" to Buedu by the RUF high command and sanctioned for the alleged killings in the town. Whilst there, the witness said that another report reached them about the killing of civilians in Tombodu by Rocky CO.[1358] Apart from the total lack of clarity about the sequence of the said events in the witness's answers to the Court, including the fact that he stated categorically that he could not recall the month of the incident involving the second accused, the witness's account that the second accused was in Tombodu, where he killed civilians, and that he was recalled to Buedu from Tombodu, where he was impliedly based, is challenged and denied.

983. For the several reasons stated in this Brief, including the evidence of DMK-072 below, the said report, which was never made available to the Court, could clearly not have been sent against the second accused as he was at no point in time a commander in Tombodu, nor did he take part in, order, encourage, assist, aid or abet or plan with any one to kill civilians or commit crimes in any part of Kono. In fact, both the witness and the Prosecution, as well as Counsel for Issa Sesay, agreed that the first time the witness mentioned Tombodu in his more than 15 statements to the Prosecution was in his second to last statement made on 18th February 2006 at page 23801 of the said statement.[1359] In this case, it is evident that such

[1356] SCSL-2004-16-A, *The Prosecutor -v- Alex Tamba Brima et al,* Judgement of the Appeals Chamber, 22 February 2008, para. 128.
[1357] Id., para. 127.
[1358] Transcript 24 July 2006, p.3, line 13 through to p.6, line 11.
[1359] Transcript 31 July 2006, p.145 lines 16-26; p.146 lines 9-13; p.148 lines 8-21; p.165 lines 9-12; See also

account may have been either suggested or rehearsed after the fact. Also, the witness agreed with Counsel for the second accused that at the time the alleged report about Tombodu was received in Buedu, the witness had no idea about what part of Kono district the second accused was based, considering that ECOMOG had pushed the RUF to the outskirts of Koidu where Superman created several bases/grounds.[1360]

984. Moreover, witness TF1-361 who, unlike TF1-371, was presumably in Kono during the relevant Indictment period, testified that the command assignment for Tombodu at that time was in the hands of Savage, who later went insane and was replaced by Rocky CO.[1361] In particular, witness TF1-361 confirmed that the second accused "did not have an area of responsibility during this time, so he did not have a radio set".[1362] Superman was the overall commander of Kono during the period, and every fighter in the district, including Savage, Rocky CO and the second accused, reported to him.

(c) Savage Was Effective Commander and an "Outlaw"

985. TFI 167 gave evidence that Savage was a "SLA commander battalion 2 at Tombodu village"[1363] and that Staff Alhaji, who was also SLA, was his deputy.[1364] He testified that these appointments were made at a meeting which was convened by Superman, after he returned form Kailahun, having escorted Johnny Paul Koroma to there. According to the witness, Savage remained commander there until the "[SLA] pulled out of Koidu".[1365]

986. Under cross-examination, TFI 167, Junior Lion, affirmed his previous statement which read "[y]es, but he does not listen to nobody, Savage"[1366] and "[Savage] does not listen to RUF; neither SLA commanders".[1367] He also affirmed that Savage had a "stash of weapons which he had taken from ECOMOG" and that he had "men who were loyal to him".[1368] The witness described Savage as an "outlaw"[1369] and agreed with Defence counsel that both Savage and his deputy, Staff Alhaji, were "particularly vicious commanders"[1370]

Transcript 1 August 2006, p.2 line 16 to p.3 line 10.
[1360] Transcript 1 August 2006, p.6 lines 4-29.
[1361] Court Transcript of 18 July 2005, p.121, lines 26-29.
[1362] Id., p.115, lines 12-19.
[1363] Transcript 14 October 2004, pg 57, line 15-16
[1364] Transcript 14 October 2004, pg 57, line 29 – pg 58, line1.
[1365] Transcript 14 October 2004, pg 66, line 14-16.
[1366] Transcript 18 October 2004, pg 120, line 1.
[1367] Transcript 18 October 2004, pg 121, line 11-12.
[1368] Transcript 18 October 2004, pg 121, line 18-22.
[1369] Transcript 18 October 2004, pg 122, line 6-9.
[1370] Transcript 18 October 2004, pg 123, line 6-12.

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987. This evidence was corroborated by DMK 072, [redacted], who testified that "Savage was a man who never feared anything. He was lawless and he had weapons",[1371] and by DMK 161, who testified that, at the relevant time, no "RUF commander...had access to Tombodu....Savage was in control of Tombodu."[1372]

988. DMK 072 was posted to Tombodu by Superman [redacted].[1373] He gave evidence that the commanders in Tombodu at that time were Savage, Staff Alhaji and "one Tomba Joe".[1374] The witness retained this assignment from February to June 1998.[1375] He stated that, at no point, did he see Mr Kallon in Tombodu.[1376] The witness testified that, in the course of his duties, Savage had denied the authority of Superman, stating, "Superman is not a commander for him. He is a commander for himself. He is the commander in Tombodu. Bush commander cannot be a commander for him".[1377] He testified to one instance where Savage killed nine civilians.[1378] The witness testified that he made three separate reports to Superman of Savage's behaviour in Tombodu and that, consequently, Superman held a meeting at Tankoro police station to discuss the problem posed by Savage.[1379]

989. Therefore, Mr Kallon cannot be said to have exercised effective control of Savage or any of his subordinates and, as such, cannot be held criminally responsible for alleged crimes committed in Tombodu Furthermore, witness DMK-072 testified that on three different occasions, he filed a complaint to Superman about Savage. Superman then held a forum at the Tankoro Police Station where he said that he did not want the SLAs in Kono any more because of the way they were treating the civilians; that he wanted to attack Savage and others at Tombodu but Savage went mad and eventually left the Tombodu area and went to Kurubonla. Superman then sent Rocky CO/Major Rocky to take over the place.[1380] The Witness testified that he was the only person Superman sent to Tombodu to address Savage as the witness was an RUF commander himself.[1381] He said that Savage was a fearless and

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[1371] Transcript 01 May 2008, pg 111, line 1-2.
[1372] Transcript 22 April 2008, pg 26, line 24-26.
[1373] Transcript 01 May 2008, pg 105, line 28 – pg 106, line 17.
[1374] Transcript 01 May 2008, pg 106, line 12-17.
[1375] Transcript 01 May 2008, pg 106, line 23-26.
[1376] Transcript 01 May 2008, pg 106, line 27-29.
[1377] Transcript 01 May 2008, pg 107, line 24-26.
[1378] Transcript 01 May 2008, pg 108, line 14-15.
[1379] Transcript 01 May 2008, pg 110, line 9-18.
[1380] Transcript 01 May 2008, p.110, lines 14-26.
[1381] Transcript 01 May 2008, p.112, lines 8-12.

lawless man who had weapons.[1382] The witness confirmed that the second accused was never at Tombodu at that time.[1383]

990. The Defence notes the persuasive finding in the *AFRC* Case, attributing criminal responsibility to Kamara for the conduct of Savage.[1384] Many of the material witnesses for the Prosecution testified in both trials.

991. Moreover, it is the further case of the second accused that he did not plan, instigate, aid and abet or conspire in any form with Mr. Ibrahim Bazzy Kamara, Savage, Staff Alhaji or anyone whatsoever for the commission of the said found crimes. In this regard, the ruling below of the SCSL Appeals Chamber aforesaid on Savage and the incidents in Tombodu in 1998 continues to be crucial to the second accused's case:

> "The Trial Chamber's conclusion that Kamara exercised effective control over Savage was based on its consideration of all the evidence before it, including evidence that Savage was subordinate to Kamara and reported to him, that Kamara supervised the activities of Savage, and that Kamara was present in Tombodu at the time when that town was under Savage's control.[1385] As such, the Trial Chamber's finding that Kamara bears individual criminal responsibility under Article 6(3) for the crimes committed by Savage was not based solely on evidence of who appointed or promoted Savage. Kamara has not demonstrated that the alleged discrepancy in the evidence of Prosecution witnesses TF1-334 and TF1-167 about who appointed or promoted Savage affected the Trial Chamber's finding that Kamara bears individual criminal responsibility under Article 6(3) for the crimes committed in Kono District".[1386]

992. Several other Prosecution witnesses gave grave accounts about events in Tombodu and the roles of Savage and a certain Staff Alhaji, both being AFRC soldiers, in them. These include witnesses: TF1-197, 012, 064, 304, 334 and 141. None of them, however, mentioned the second accused as being involved in or linked up with any crime in Tombodu; nor did they allege any collaboration, cooperation, link or understanding between the perpetrator-commanders (Savage, Staff Alhaji and Rocky CO) and the second accused.

993. In several instances, the witnesses either alluded to a chain of command flowing from Sam Bockarie through Superman to the said perpetrator-commanders (for example, witness TF1-012 testified that Staff Alhaji read out from a paper orders given to them by Mosquito that "whosoever goes into the bush now must be killed" and that it was Superman, Rambo, Gullit, 55 among others who came with the order from Kailahun)[1387]; or to a direct link between Mr. Ibrahim Bazzy Kamara and Bomb Blast, both of the AFRC, and the said

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[1382] Transcript 01 May 2008, p.111, lines 1-3.
[1383] Transcript 01 May 2008, p.106, lines 27-29; & p.112, lines 1-2.
[1384] See *AFRC* Appeals Judgement, at para 141.
[1385] See also AFRC Trial Judgment, para. 1884.
[1386] SCSL-2004-16-A, Judgment of the Appeals Chamber, 22 February 2008, para. 141.
[1387] Transcript 2 February 2005, p.17, lines 1-4; & p.16, lines 4-22.

perpetrator-commanders (for example, TF1-334 testified that Savage once invited Ibrahim Bazzy Kamara alias 'Bazzy' and Bomb Blast to Tombodu to witness his capture of some 75 civilians who were caught dancing for ECOMOG and that after their arrival, Savage killed all the civilians; Superman too went there after the event).[1388] In another instance, however, witness TF1-012, testified that 'Savage killed so many people in Tombodu that he became mad and was taken away by his people', whilst Staff Alhaji failed to submit himself to any command supervision in Tombodu.[1389] He confirmed further that 'all orders came from Buedu where Mosquito was' during that period.[1390]

(2) Koidu

(a) Alleged Killing by the Second Accused for a Sheep, Lamb and/or Goat

994. Witness TF1-366, also testified that whilst at Guinea Highway, along the Kono road to Guinea where the RUF made its headquarters, he saw the second accused kill an RUF soldier called Christopher, a member of Pa Sankoh's Black Guard Security unit, for his lamb that went missing.[1391] He said that Superman, the Black Guards and himself sent messages about the incident to Sam Bockarie and Issa Sesay, who were the second accused's superiors, and that the second accused was consequently recalled to Buedu for two nights.[1392] Apart from the fact that the alleged victim of this incident, which is entirely denied, was an active combatant and not a "civilian" for the purposes of the requirements of crimes against humanity, several other Prosecution witnesses gave varied accounts of this allegation.

995. Witness TF1-360 testified that although he was not present, he heard that a certain Morrison Kallon who was then Field/Battlefield Inspector,[1393] had shot "a Kono fellow" called Kai in the head for killing a sacrificial sheep belonging to the said Morrison Kallon.[1394] He said that the incident happened at Hill Station in Koidu town, where the said "Mr. Morrison Kallon"[1395] was residing, and that the corpse of Kai was on the ground when he left Dabunde Street, also in Koidu town, for Hill Station.[1396] The witness testified that the incident

[1388] Transcript 7 July 2006, p.78, line 13 to p.79, line 7.
[1389] Transcript 4 February 2005, p.31, lines 25-28; & p.33, line 18 to p.34, line 8.
[1390] Id., p.34, lines 2-3.
[1391] Transcript 8 November 2005, p.46, line 8 through to p.48, line 15, especially p.48 lines 2-15.
[1392] Transcript 8 November 2005, p.48, lines 16-28.
[1393] Transcript 20 July 2005, p.18, lines 21-23.
[1394] Transcript 20 July 2005, p.23, lines 9-27.
[1395] Transcript 20 July 2005, p.24, line 8.
[1396] Transcript 20 July 2005, p.23, lines 9-27.

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happened in March 1998.[1397] The Defence for the second accused challenges and denies any reference to the second accused regarding this alleged offence. It is the case for the second accused that he did not kill anybody for a sheep or lamb, in addition to the submission that the second accused is and was not "Morrison Kallon" and has never also been an RUF Field or Battlefield Inspector as alleged by this witness - TF1-360.

996. Furthermore, witness TF1-263 testified that at a town called "Banya Ground" in Kono, he was told by a certain Junior, his friend, that the second accused had just shot a boy, who later died in his presence, for dragging a goat to death.[1398] Under cross-examination, the witness was referred to his statement of 2004[1399] in which he had said that he was informed by Johnny, a civilian, that one day he went to fetch water at Banya Ground when he saw the second accused shooting at one boy because he tried to tie a goat which eventually died;[1400] the witness answered in reply as follows: "Ah, Ah. What I said -- I said I saw Johnny go to fetch water. There I asked for his commander's name (...) I only asked him who is his commander then he said he was staying with Rambo. Then we made friends and we started discussing issues."[1401]

997. Given that the witness's initial account was hearsay, it could be argued that the same hearsay may have been told to him in a different circumstance when himself and Johnny had just "made friends and [had] started discussing issues". Thus, if Johnny may have told him about the shooting during friendly discussions, it is equally possible that the witness could not have seen the boy when he was allegedly shot, nor could it be ascertained, in the absence of any evidence of probative value, such as Johnny himself affirmatively testifying to that effect, that the boy died, assuming without conceding that he was even shot in the first place. The fact that this hearsay evidence is open to different possible interpretations creates windows of doubt in the Prosecution's case. Even if this account is held to be a distinct and unrelated incident from the allegation that the second accused killed someone for a sheep, it is submitted that its unreliable hearsay foundation weakens it completely.

998. Perhaps to strengthen his feeble account to the Court, the witness said, under further cross-examination, that he met the second accused as the commander of 'Banya Ground'[1402] in 1998 when mangoes were ripening and that the second accused was then a Colonel.[1403]

[1397] Transcript 20 July 2005, p.24, line 12.
[1398] Transcript 6 April 2005, p.23, line 1 to p.24, line 11.
[1399] Page 9829, para. 1182.
[1400] Court Transcript of 8 April 2005, p.100, lines 11-17.
[1401] Id., p.100, lines 19-24.
[1402] Id., p.101, lines 16-18.
[1403] Id., p.102, lines 3-18.

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There is, however, ample evidence before the Court to show that the second accused was not the commander at Banya Ground at any time. DIS-163, Defence witness for Issa Sesay, testified that the second accused was never a commander in any of the RUF bases in Koidu and its environs, including Wendedu or Banya Ground, which was commanded by CO Banya.[1404] Incidentally, witness TF1-263 does not even know the actual name of Banya Ground, to wit, Wendedu, since 'Banya Ground' was merely a pseudonym for Wendedu, named after CO Banya. It is contended that the fact that there were also many 'Kallons' in Kono at the time, including Major A. S. Kallon who was the RUF Military Adviser and Joint Security Commander, Miloskie Kallon who was Superman's 'senior bodyguard commander', Baggie Kallon, Momoh Kallon and, *inter alia*, the second accused,[1405] it is possible to attach the surname 'Kallon' to a crime or crime-base without need for a first name, especially if the account-maker is merely rehearsing a hearsay.

999. Moreover, DMK-161, Defence witness for the second accused testified that the second accused was never involved in the killing of anyone for a sheep. Rather, it was a soldier who shot and killed another Morris Kallon (who was a Lieutenant-Colonel and an STF and adjutant to Superman then) for investigating him about a missing sheep which the witness had brought for Superman from Yomandu.[1406] It is significant to note here that Exhibit 336 of the Court Records, being the 'nominal roll for certain senior RUF officials in Kono between February and June 1998 disclosed by the Prosecution under Rule 68 of the Court's Rules of Procedure and Evidence',[1407] showed that a certain Lt.-Col Morris Kallon, among several other Kallons, also served the RUF in Kono during the timeframe of the crimes alleged in Kono district.

(b) Alleged Killing of SLA(s) and Suspected Kamajors by Second Accused in Kono

1000. Witness TF1-360 testified, in his usual style, that a certain Morrison Kallon who was then Field/Battlefield Inspector shot and killed an AFRC soldier who had refused to attend a 'formation' called by the second accused in March 1998 at Sefadu in Kono to discuss war plans. The witness said that this caused a division between the SLAs and the RUF in

[1404] Court Transcript of 14 January, 2008, p.66, line 28 through to p.69, line 13.
[1405] Transcript of 11 April, 2008, p.23, line 17-27.
[1406] Transcript of 22 April 2008, p.24, line 21 through to p.26, line 11.
[1407] Transcript of 11 April, 2008, p.24, line 14 through to p.26, line 27 especially at p.25, lines 25-27 where both 'Lt-Col Morris Kallon' and 'Major Kallon' are mentioned on the said nominal roll.

Kono.[1408] Giving a seemingly different account about the reason for the division between SLAs and the RUF in Kono to the extent of the SLAs leaving Kono later for Kurubonla, witness TF1-366 testified that he sent a message to Issa Sesay about the second accused killing the relatives of SLAs in Koidu, referring in this case to his allegation that the second accused had killed three civilians at a night club at 55 spot near Koidu town whom he accused of being spies and Kamajors.[1409]

1001. Regarding the first account that the second accused had shot and killed an AFRC soldier for failing to attend a war-planning formation, it is averred that the AFRC insider witness who testified about this incident for the Prosecution, witness TF1-334, said that the second accused shot at one SLA soldier called Fofo in the leg for conducting a muster parade, claiming that the SLAs did not have any right to call up muster parades in Kono at that time. Although it is unclear from his answers as to whether the soldier actually died, the witness said that the incident affected the relationship between the SLAs and the RUF. He also testified that the shooting occurred after the second accused had returned to Kono after accompanying JPK to Kailahun, but that he cannot remember the month; he noted that "it took a lot of time before [the second accused] came back to Kono". [1410]

1002. Apart from the fact that the alleged victim of the foregoing incident, which is denied, was an active combatant and not a "civilian" for the purposes of the requirements of crimes against humanity, the second accused, in his testimony as explained, denied shooting any SLA soldier at or whilst attending a muster parade, and stated rather that he confronted 2 SLA soldiers because they were burning houses in Kono,[1411] contrary to the RUF ideology. It is crucial to note here that it was the Prosecution that suggested to the second accused during cross-examination that 'he shot [not killed] 2 [not 1] SLAs for not attending muster parades'.[1412] Besides, Defence witness DMK-161 testified that the second accused never organized muster parades, although he has the right as an officer to take part in it and address parades. He said that it was Superman, as commander-in-charge, that called muster parades during the relevant Indictment period in Kono.[1413]

1003. On the allegation of witness TF1-366 that the second accused killed three civilians at a night club at 55 spot near Koidu town suspecting them to be Kamajors, DIS-188, being a Defence witness for Issa Sesay and an RUF Deputy MP Commander, testified that he was

[1408] Transcript of 20 July 2005, p.22, line 3 to p.23, line 7.
[1409] Transcript of 8 November 2005, p.32, line 14 through to p.36, line 12.
[1410] Transcript of 6 July 2006, p.72, lines 2-20.
[1411] Transcript of 18 April, 2008, p.56 lines 8-19.
[1412] Id., p.56, lines 8-10.
[1413] Transcript of 22 April, 2008 p.27, line 28 to p.28 line 7; p.59, line 29-p.60, line 8.

based at 55 spot (where the club was) in Koidu at the relevant time but never received any report before August 1998 implicating the second accused in the killing of any civilian at the said 55 spot.[1414] TF1-366's account was uncorroborated. Besides, under cross-examination by Counsel for Sesay, the witness was confronted with his earlier statement to the Prosecution[1415] in which he had said that he had seen 4 or 5 civilians being shot and killed by the second accused who claimed that they had been mining. The witness then replied that he had said that it was 3 people not 4.[1416]

1004. Under further cross-examination by Counsel for the second accused, the witness testified that he knew that the three people allegedly killed were civilians because they did not have anything to show that they were Kamajors, soldiers or rebels. He said that the second accused, exercising his powers as Battle Group Commander then, investigated the suspects and killed them straight away. The witness agreed that if the second accused had not been Battle Group Commander as alleged, he would have had to hand the civilians over to the G5 in Koidu to be investigated as normal procedure. He also agreed that 55 spot was a nightclub where soldiers and civilians frequented, but said that the alleged incident took place at night and that there was nobody around then. However, being questioned further, the witness later agreed that the said incident took place at 4 o'clock in the evening but insisted that there was no one around. Counsel also suggested that the first time the witness mentioned this incident to the Prosecution was in August 2005, but he replied saying: "No, 2004 up to 2005 I am still telling him".[1417] As already stated by the Defence, at the material time of this alleged incident in 1998, the second accused was not the RUF Battle Group Commander as claimed by the witness but merely an RUF Major without any position; even the Indictment,[1418] as noted, claims erroneously too that the second accused became the RUF Battle Group Commander "in early 2000".

1005. Besides the foregoing, in examination-in-chief, the witness testified that himself and the second accused were coming from Bumpeh when the alleged event occurred, no mention was made of the second accused's bodyguards at that time.[1419] However, under cross-examination by Counsel for the second accused, he testified that himself, the second accused and his bodyguards were coming from destroying part of the Sewafeh Bridge on the instructions of Issa Sesay when the second accused came across the suspected Kamajors and

[1414] Transcript of 1 November, 2007 p.18, lines 1-7.
[1415] At p.13701 of the bundle, para 14.
[1416] Transcript of 14 November 2005, p.73, line 12 to p.74, line 9.
[1417] Transcript of 16 November 2005, p.32, line 21 to p.38, line 14.
[1418] See para. 27 thereof.
[1419] Transcript of 8 November 2005, p.32, lines 26-28.

killed them.[1420] These glaring contradictions that border on incredulity are not peculiar when dealing with this witness, considering that, as noted in this Brief, the witness has a flare for exaggerations and placing the second accused everywhere, in addition to being highly motivated at the time of testifying. Also, apart from the fact that the alleged victims of this incident, which is totally denied, were suspected Kamajors and therefore combatants removed from the definition of a "civilian population" for the purposes of crimes against humanity, it is the case for the second accused that the alleged crime was neither widespread nor systematic; nor was it directed against a civilian population.

(c) The Alleged Kamchende Street and Igbaleh Atrocities

1006. Witness TF1-015, [redacted], narrated in detail his ordeal with RUF Colonel Rambo, Major Rocky CO and Sylvester Kieh [redacted] at Sunna Mosque and a place called Igbaleh, a valley at the back of Kamachendeh Street in the east part of Hill Station in Koidu town in April 1998. He testified that out of 250 people who had been abducted, one was killed and the remaining 249 of them were first taken to Sunna Mosque, where the witness saw Colonel Rambo, and then subsequently to Igbaleh. The witness said that because the rebels were dressed in ECOMOG uniforms and had ECOMOG badges on the uniforms, the other civilians did not know that they were rebels and were praising them saying, "You delivered us from those evil people. They burnt our houses. Now you've driven them. Thank you". He said that, at Igbaleh Major Rocky indicated that 'they, "the junta rebels", have taken over Kono'. Shortly afterwards, Major Rocky started shooting into the crowd. Thereafter, he went up to Colonel Rambo, saluted him and told him that he had killed 101 abductees.[1421]

1007. The witness's only reference to "Morris Kallon" was when he was taken back to Sunna Mosque where, according to the witness, a group of 30 commanders were present, and Colonel Rambo allegedly called for a vote amongst them to decide whether or not the witness should be allowed to live. Although he could not recall the names of all the 30 commanders present, the witness testified that "Morris Kallon" was among 15 commanders who voted for him to die, whilst 15 other commanders voted for him to live. He, however, said that it was only the casting vote of Sylvester Kieh (whom the witness described as 'a small boy among

[1420] Transcript of 16 November 2005, p.35, line 24 to p.36, line 3.
[1421] Court Transcript of 27 January 2005, p.113, line 6 to p.128, line 28.

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the commanders') that saved his life. He said that Colonel Rambo then handed him over to Major Rocky and they left for Wendedu.[1422]

1008. Under cross-examination by Counsel for the second accused, the witness confirmed that he never told a certain Mr. J. R Sandi [redacted] anything about the incident at Kamachende Street, or anything about how Major Rocky killed the civilians, or that only 60 people were killed during the incident. He also said that he had not testified that Sylvester Kieh saved the life of someone during the incident and confirmed that Sylvester Kieh "was standing just by Rocky" at Igbaleh when the alleged executions took place. The witness also testified that he was the only survivor during the alleged massacre apart from the abducted women.[1423]

1009. Prosecution witness TF1-071[redacted] a senior RUF officer and G-5 Commander [redacted] from 1998 to disarmament testified about an incident at Kamachendeh Street incident, "located from the main Kaikondu road".[1424] The witness said that he was "going towards from the hospital by Kono Park" in Koidu township when he "heard rapid firing within the area of Yambasu Street and Koroma Street", so he diverted his course and went in that direction. When he arrived at the intersection of Koroma and Yambasu streets, he saw a long line of civilians, including women and children, carrying their bundles on their heads. [redacted] testified that the Yambasu and Koroma Street area and when he did so, he saw Major Rocky with his bodyguards and "a bit over 30 to 40" bodies.[1425]

1010. Eventually, the witness said that he asked Major Rocky about the civilians and their 'conditions', to which Rocky replied: "these people are all enemies because they have heard that ECOMOG have occupied Koidu, so they have come to spy on our locations". The witness then stated that in his capacity as G5 or welfare commander, he told Rocky that "these people were not militants, but civilians" and then "[the witness] stood before the line which was next to be executed". According to the witness, upon his request, Major Rocky turned the surviving civilians over to him and also gave permission for him to take them to Wendedu. The witness reiterated [redacted] that told him that it was Rocky CO and his bodyguards who had opened fire on the said civilians, and clarified that Rocky CO or Major Rocky worked with Superman and reported to him as his superior

[1422] Id., p.147, line 5 to p.149, line 2.
[1423] Transcript 31 January 2005, p.83, line 1 to p.84, line 24.
[1424] Transcript 21 January 2005, p.47, line 28 to p.48, line 12.
[1425] Transcript 21 January 2005, p.49, line 8 to p.51, line 6.

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commander. He concluded that those who died included the old and young, male, female and even corpses of children.[1426]

1011. [redacted] further testified that Major Rocky or Rocky CO, whom the witness had identified as the key perpetrator of Kamachende Street incident, was reporting to somebody superior at the time, but not the second accused. In that regard, he stated that "there was no instruction as in relation as command from Morris Kallon to Rocky related to Kamachendeh incident" because both of them "were majors" and that there was thus nothing much the second accused could do to avert the alleged incident.[1427]

1012. TF1-071's account shows that 101 people may not have been killed, and that because the corpses were of mixed sexes, including dead children, not 'all males' were killed as alleged by TF1-015.

[redacted]Prosecution witness TF1-078, a civilian, testified on the other hand that whilst in Wondedu, Captain Rocky went out with some of his men one afternoon and upon his return, the witness saw Captain Rocky [redacted]

1015. [redacted]

[1426] Transcript 21 January 2005, p.51, line 8 to p.53, line 14.
[1427] Court Transcript of 26 January 2005, p.22, line 14 through to p.25, line 5.
[1428] Court Transcript of 25 October 2004, p.14, line 1 to p.17, line 3.

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[redacted]

1016. As stated earlier, TF1-078's hearsay account corresponds in many ways with the account of TF1-015. It mentions that the alleged incident occurred somewhere at Hill Station in Koidu town; that the people came out jubilating for ECOMOG thinking that those to whom they were 'surrendering' were ECOMOG forces; [redacted]; and, *inter alia*, that it was Rocky that executed a good number of the affected people. The proximity in time and space between the incident that TF1-015 allegedly experienced and his alleged report about it to TF1-078 at Wendedu is quite close. TF1-015 said that after the incident, himself, Rocky and Sylvester Kieh returned to Sunna Mosque to meet Colonel Rambo who ultimately handed him over to Rocky and they proceeded to Wendedu thereafter. This being the case, it is astounding that TF1-015 completely denied telling [redacted] about the alleged Kamachende street incident, as well as denying that he was not called by his actual name during that period. These denials shred out the credibility of TF1-015 vis-à-vis his lone-survivor's account to the Court. [redacted]

1017. [redacted] testified that he identified "Morris Kallon" as one of the commanders based on information subsequently given to him.[1431] He did not identify the Second Accused in Court.

1018. Furthermore, the only nexus between the Second Accused and the alleged killings arises from [redacted] testimony that he encountered "Morris Kallon", subsequently, at Sunna Mosque. According to [redacted] Rocky and Rambo were the commanders present at Igbaleh. Through the evidence of [redacted] it is established that Rambo was superior to Mr Kallon at the

[1429] Id. p.17, line 5 to p.18, line 16.
[1430] Transcript 22 October 2004, p.74, lines 21-26.
[1431] Transcript 31 January 2005, p. 96, lines 2-7

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time.[1432] Therefore, Mr Kallon did not exercise "effective control" over the perpetrators in the sense that he "possessed the material ability to prevent or punish the commission of the offence"

1019. Notwithstanding the varying and suspicious nature of the foregoing accounts, it is the case for the second accused that he had nothing to do with the Kamachende street incident as alleged, nor was CO Rocky, a Major like the second accused, subordinate and answerable to the second accused in any way and at any time.

(d) Alleged Bank Robbery

1020. Besides, other allegations by Prosecution witness TF1-141 involving alleged killings of civilians on food-finding missions in Kono[1433] or at a bank robbery in Koidu,[1434] or at any murder-related events in which the second accused is referenced are challenged and denied wholesomely. It is submitted that this witness showed overwhelming propensity to indulge in falsities and make false statements even at the onset of his testimony to the Court. For example, although he was testifying as an SBU whose age had been estimated by Save the Children, an NGO, in late 2000 as 14, the witness gave his age as 18.[1435]

1021. But what is disturbing is the fact that the witness eventually agreed with Counsel for Issa Sesay, under cross-examination, that he had told the Prosecution in 2003[1436] that he was 18 years old in order to gain some benefits. His words flowed as follows: "Yes, I said it earlier and I'm saying it again. The first time I met with this woman, I never knew what would happen after I have spoken to this woman. I had that fear in me. So I didn't have any confidence to talk to her. I decided to be putting things indirectly."[1437] He then continued: "Well, as I said, I never knew who this woman was or why those questions. Now I told her I was 18 because the time we came to disarm we the children were removed. We had no benefit. We suffered. I thought it was something like that that was coming. So let me give an age, this age, so that I might not be removed."[1438] As has been illustrated already, evidence subsists to show that the second accused cared for civilians and their welfare a lot, and could not have planned, ordered, incited, aided or abetted, or conspired with anyone in any form

[1432] TFI 071, Transcript. 26 January 2005, pg 25, line 26, pg 26, line 1.
[1433] Transcript of 11 April 2005, p.92, line 22 to p.93, line 14.
[1434] Id., p.98, lines 1-7.
[1435] Id., p.77, line 29 to 79, line 14.
[1436] See witness's initial statement of 2003 made to the Prosecution, at p.9700 of Bundle.
[1437] Transcript of 14 April 2005, p.23, lines 18-23.
[1438] Id., p.23, line 28 to p.24, line 6.

about their killings as alleged. Also, there is ample evidence, as shown *infra*, that the second accused was never a party to the bank robbery at Koidu town.

1022. For the very reasons of the gross incredibility of TF1-141 and the fact that sufficient evidence has been shown to the effect that Sam Bockarie and other identified AFRC officers were in absolute command and control of Kenema District during the Indictment period, to the exclusion of the second accused, this witness's account that the second accused commanded and took part in "Operation Born Naked which was conducted at Joru Nyiama in the Kenema District" wherein civilians were killed and houses burnt down in the villages,[1439] is robustly challenged and vehemently denied. This account bears no timeframe, not pleaded in the Indictment and uncorroborated. Besides, from his narrative, the witness is uncertain as to whether Joru Nyiama aforesaid is in the Kenema or Kailahun districts – as the location is unpleaded in the Indictment, unidentified and unknown to the Court.

(3) Foindu

1023. Witness TF1-064 testified about various killings in Foendu, including severe attack on members of her family by a group of rebels led by a certain Tamba Joe, who grew up in Foindu but was subordinate to their "boss" in Tombodu called Kapay.[1440] The witness testified that the rebels killed many members of her family, including her two sons, three brothers, in-laws, and *inter alia* the village chief.[1441] The witness, who also testified about other incidents in Tombodu, however, failed to recall the year and month of the various incidents she saw, including the Foindu killings, saying that it happened between 'the rainy and dry season'.[1442] Apart from the fact that this failure to recall the timeframe is fatal to the Prosecution's case, it is the case for the second accused that, as repeatedly stated herein, he was not and is not responsible for any of the conduct of the commanders and their subordinates in Tombodu and its environs. For a vital part of the Indictment period on Kono district, Tombodu and its environs were under the command and control of Captain Savage and Staff Alhaji, both of whom were SLAs loyal and answerable to Ibrahim Bazzy Kamara and Superman.

(4) Locations Not Pleaded

[1439] Transcript of 12 April 2005, p.57, line 29 to p.64, line 12.
[1440] Transcript of 19 July 2004, p.75, lines 17-22 & p.77, lines 19-34.
[1441] Id., p.46, lines 33-37.
[1442] Id., p.74, lines 21-25.

(a) Alleged Killing of a Nigerian Woman by the Second Accused

1024. The propensity of witnesses of the Prosecution to vary their accounts to suit their respective whims becomes even more glaring when one considers the testimony of witness TF1-071 about the killing of a certain woman of Nigerian nationality by Major Rocky aka Rocky CO. The witness, who was the [redacted] in 1998 till disarmament and therefore a senior officer with authority to protect civilians and promote their welfare, started his account of the above incident by empathizing with Major Rocky for killing the said Nigerian lady whom the witness called Waiyoh. The witness said that, according to information he received from civilians, Major Rocky was pressurized by the second accused to kill Waiyoh, who had lived in Kono for years, for security reasons, indicating that the second accused was concerned that because Wendedu was closer to the ECOMOG base and Waiyoh was Nigerian, there was a higher risk that she will escape to the said ECOMOG base and divulge RUF military secrets to the enemy.[1443]

1025. Due to the fact that the said account was initially unclear to the Court, the witness rehearsed his narrative by giving the impression that he was himself present on several occasions when the second accused was pressuring Major Rocky to eliminate Waiyoh.[1444] When cross-examined by Counsel for the second accused about why it did not occur to him to suggest a relocation of the woman to another safer zone [redacted] the witness's banal and evasive response was as follows: "that was not referred to me. If I was told I could have done that. In fact, I was not present when the incident took place."[1445]

1026. What, however, worsened the witness's case was when he tried to redo the command structure for Kono in 1998 to suit his story. Initially, the witness had said that the second accused was "just one of the senior officers at that time [s]ince 1998", and when asked whether the second accused was superior to Rocky, the witness replied: "Of course. Yes"; he then proceeded to say that the second accused also reported to Superman who was the Battle Group Commander at the time.[1446] Later, contrary to his previous account, the witness testified that the second accused and Major Rocky were "were just ordinary colleagues" and that the second accused was not a "commander for Rocky"; rather, both of them and everyone

[1443] Transcript of 21 January 2005, p.57, line 15 through to p.59, line 29.
[1444] Id., p.60, line 1 through to p.68, line 10.
[1445] Transcript of 26 January 2005, p.30, lines 20-29.
[1446] 21 January 2005, p.69, lines 5-14.

else respectively reported to Superman in Kono in 1998 until the command structure changed in 1999.[1447] This sudden change caught the Prosecution off guard as recognized in the following statement: "*Well, I thought it was clear. I thought we had a structure here where Major Rocky was reporting to Morris Kallon, and Morris Kallon was reporting to Superman. I thought the answers were perfectly clear on the record, but they don't appear to be now.*"[1448]

1027. To the contrary, TF1-078, who knew the deceased Nigerian lady very well in Kono, said that Major Rocky 'did not feel comfortable with the tribal marks' on the face of Yawo, as the lady was called. The witness stated that Rocky at this time had between 300 to 400 civilians under his control. He said that Rocky consequently ordered his bodyguard, Kini, to execute the lady and later mentioned ECOMOG security concern as the reason for the murder.[1449] As noted earlier, witness TF1-078 was crystal clear about his recollections of the love that the second accused had for civilians in Kono and how he once personally communicated that to Major Rocky to the witness's knowledge. Redirecting such an account to infer that it was the second accused who was the villain and Major Rocky the coerced peaceful subordinate is unacceptable.

1028. In the same vein, it is submitted that the testimonies of Prosecution witnesses about other killings by Major Rocky and his subordinates in Kono district throughout 1998 and beyond ought not to be directed at the second accused in any shape or form as he was neither Rocky's superior commander nor did he incite, aid or abet his crimes. The same holds for any other commander in Kono district throughout 1998.

(b) Mission to Nimikoro, Bumpeh

1029. Regarding alleged incidents at Bumpeh and other locations, as usual, witness TF1-360 testified that a certain Morrison Kallon sent him on his first mission in Kono together with Rocky, whom he described as a Liberian vanguard and the leader of the mission, and, *inter alia*, the bodyguards of the said Morrison Kallon and Superman. According to the witness, the mission was to attack Bumpeh in the Kono District and Tongo on the highway; but that they started at Nimikoro, which is a chiefdom in the Kono District. The witness stated that Morrison Kallon sent him on the said mission to serve as RUF radio operator together

[1447] Id, p.70, line 15 to p.71, line 4.
[1448] Id., p.69, line 29 to p.70, line 4.
[1449] Transcript of 22 October 2004, p.80, line 10 to p.82, line 18.

with an AFRC radio operator, and that Morrison Kallon also told Commander Rocky that whoever sees them whilst on the mission should never see a rebel again, or that they were to amputate people's hands. The witness said that they, the AFRC/RUF fighters, consequently burnt down many houses during the mission and captured, amputated and killed many people.[1450] At Bumpeh in particular, the witness said that they amputated the limbs of captured civilians and killed some of them, telling them to go and report to ECOMOG.[1451]

1030. Again the witness, however, failed to give precise timeframe to the entire incident, including month and year, saying that he cannot tell the month but that "it was almost during the raining season (...) But it occurred during the rainy season. Because in Kono normally the rains come there earlier."[1452] Besides, this crucial gap in his account, it is essential to note that it was this witness, TF1-360, who testified in a rather confused manner that in March 1998, Sam Bockarie introduced changes in the command structure of the RUF by appointing Superman as Battle Group Commander in Kono, and Morrison Kallon as "field inspector, battlefield inspector".[1453] Assuming without admitting that the said Morrison Kallon is the second accused, this reference to him as "field inspector, battlefield inspector" in March 1998 will be contrary to the Indictment, which alleges that the second accused became RUF Battle Field Inspector "between about April 1998 and about December 1999".

1031. For the purposes of the second accused, the above account of TF1-360 is challenged and denied for the reasons that it is, firstly, outside the timeframe of the Indictment, if not timeless; secondly, that Bumpeh and Nimikoro are not specifically pleaded in the Indictment; and thirdly, that there is ample evidence to show that Rocky CO, an RUF Vanguard Major in 1998 in Kono, like the second accused, could not have been commanded and controlled by the second accused in 1998 in Kono. Even the witness admitted, under cross-examination as noted already, that the second accused "could never - never - issue out orders if not authorized to do so by his superiors in Buedu", and continued to also state that the second accused was surrounded by persons superior in rank to him upon their retreat to Kono from Freetown.[1454]

1032. In fact, contrary to TF1-360's account, witness TF1-366 also testified that the second accused, *inter alia*, sent him on an attack on Njaiama Nimikoro with Akim Turay as the mission commander because they were in search of ammunition to attack Kono, claiming that the mission was well planned and that they "had forums" in which the second accused, Peter

[1450] Transcript of 20 July 2005, p.55, line 25 through to p.57, line 7.
[1451] Id., p.57, line 12 to p.58, line 8.
[1452] Id., p.58, lines 10-14.
[1453] Id., p.18, lines 2-23.
[1454] Transcript of 26 July 2005, p.39, lines 7-23.

Vandi; Superman; Akim Turay and himself sat and planned together.[1455] The witness said that the alleged attack on Njaiama Nimikoro took place after the attack on Guinea, which according to the witness, was also ordered by the second accused and that it took place at the time Mr. Sani Abacha, the then Nigerian President, died. Though the witness did not know the date that Mr. Abacha died, the Court admitted into evidence the obituary of Mr. Abacha published in the New York Times dated 9 June 1998 as exhibit 54.[1456] It is particularly submitted that when this account, which allegedly occurred in June 1998 being the rainy season too in Kono, is juxtaposed with the account of witness TF1-360, both witnesses vary on whom the commander of the Nimikoro mission was, even though it was well-planned according to TF1-366. Was it Major Rocky CO, Akim Turay or either of the two witnesses? Things become even more confusing when witness TF1-366 narrated that a series of RUF/AFRC military attacks were executed on ECOMOG in various parts of Kono during 1998, without any clarity as to a specific timeframe.

1033. Thus, in testifying about the series of RUF/AFRC military attacks on ECOMOG in various parts of Kono, including 55 in Koidu, Bumpeh and Njaiama Nimikoro, which the witness said occurred about two weeks after his arrival in Koidu,[1457] TF1-366 stated that they launched a serious attack on Bumpeh, where ECOMOG soldiers were based, and seized lots of arms and ammunition, and noted that many civilians, ECOMOG soldiers and workers died there. He especially testified thus: "We burnt down Bumpe completely, because that was the order that was given to us by Issa and that we should implement it." He then described Bumpeh as being at a junction with roads leading to Tongo, Freetown, Kono and Nimikoro up to Guinea and said, "that is where we created a defensive."[1458]

1034. Regarding witness TF1-366's reference to the second accused about these military attacks, the witness said that some ECOMOG soldiers went towards Nimikoro but were unable to use the main road because the second accused had set a 7 mile ambush on the main road.[1459] The witness then testified that after the attack on Bumpeh, he was told by Issa to assemble and send all the arms and communication equipment they had captured from ECOMOG to him in Koidu; the witness alleged that Issa later assembled all the fighters in Kono and handed them over to him at Bumpeh, ordering him to join Akim and fight in Njaiama Nimikoro. The witness said that himself, Akim Turay, Victor, Kailondo attacked

[1455] Transcript of 8 November 2005, p.63, line 8 to p.64, line 3.
[1456] Id., p.64, line 4 to p.65, line 25.
[1457] Transcript, 9 November 2005, p.2, lines 9-14.
[1458] Id., p.13, lines 17-27.
[1459] Id., p.13, line 27 to p.14, line 2.

ECOMOG in Nimikoro and they seized arms and ammunition and two armoured cars and burnt them; he stated that many civilians and ECOMOG soldiers died there. The witness confirmed that he was present when this occurred and sent the message to Issa that Nimikoro was under control.[1460] Also, the witness described Njaiama Nimikoro as being on the main road from Tongo to Kenema in between Bumpeh and Tongo.[1461]

1035. It is submitted that the above account, even if challenged, undoubtedly lays to rest the following issues: i) that the attacks on Bumpeh and Nimikoro referred to in the testimonies of both TF1-360 and 366 were military in objective and nature; ii) that the second accused was not at Bumpeh and Nimikoro during the said attacks; iii) that the order for the said attacks came from the second accused's superiors, hence the reason why the second accused was himself militarily deployed, according to TF1-366; iv) that the second accused could not have ordered such attacks as a junior officer; and v) that TF1-366's account reads into the testimony of TF1-167 and Exhibit 9 of the Court Exhibits that the second accused was, in 1998, assigned to create obstacles on the Kono highway against the movement of ECOMOG troops, which was a military task. It was in fact the second accused's repeated testimony to the Court that he initially had no area of responsibility whilst in Kono after his arrival there on 18 February 1998. He said that when Superman, who was then the overall commander of Kono, realized that he was "idle", Superman sent him on an assignment to create obstacles on the highway between Koidu and Makeni, specifically at Sewafe bridge, and he had to work under Colonel Isaac Mongor for the better part of 1998.[1462]

(c) Other Allegations

1036. Besides, all other broad or specific allegations in similar terms as the above about or concerning the second accused by any other Prosecution witness are challenged and denied *seriatim*. It is the case for the second accused supported by his testimonies to the Court[1463] and those of various Defence Witnesses that "between about 14 February 1998 and 30 June 1998" the second accused did not commit any of the crimes stipulated under Counts 3, 4 and 5 of the Indictment in any location in Kono district, nor did the Prosecution lead any credible evidence beyond reasonable doubt to show that the second accused committed any of the said crimes in Kono district within the said timeframe. It is also the case for the second accused

[1460] Id., p.15, lines 13-26.
[1461] Id., p.16, lines 16-21.
[1462] Transcripts of 11 April 2008, p.62 lines 5-20 and 14 April 2008, p.18 lines 4-10.
[1463] Transcript of 11 April 2008, p.73, lines 1-29 to p.74, lines 1-20; also p.91, lines 18-29 to p.92, lines 1-9.

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that he did not plan, incite, instigate, aid or abet anyone to commit any of the said crimes in Kono district within the timeframe specified, nor did he have any command and/or control over any perpetrator-combatant in the said district within that period. It is moreover the second accused's case that he did not bear the greatest responsibility for the alleged crimes.

1037. Furthermore, the Defence for the second accused submits that the second accused did not engage in any joint criminal enterprise with anyone or group of persons in Kono district within the outlined timeframe to commit any of the crimes under Counts 3 to 5 aforesaid. As a matter of fact, in confirming TF1-360's account of how Gullit and Five-Five (both being senior AFRC/SLA commanders in Kono) had told him in Kono in March 1998 that they did not want to work with the second accused because they had problems with him, the second accused, in his testimony, related his unfriendly relationship with the AFRC/SLAs in Kono in 1998 to the fact that the AFRC/SLAs considered the RUF as "bush officers" who were "not trained" and that SLA soldiers also attacked and killed many RUF fighters at Kangari Hills on the very day that the AFRC/SLAs invited them to come out and join them after the May 25 1997 junta coup. The second accused in turn accused the AFRC/SLA soldiers of unprofessional conduct, saying that the RUF and the SLAs did not have the same ideology. He concluded that if he were the RUF leader, he would not have permitted the RUF to join the SLAs.[1464]

1038. Many other witnesses, as noted herein, confirmed that there was no love lost between the second accused and the AFRC/SLAs at least in Kono district, after the Freetown pullout. It is submitted that the second accused could not have had any joint criminal enterprise with the AFRC/SLAs at any time during the Indictment period.

1039. The second accused similarly testified about the unfriendly relationship he had with Superman in Kono, when the latter, who was the district's overall commander then, attempted to forcibly use members of the second accused's large family to mine diamonds in Kono in line with instructions that Superman had given to his G-5 commander to gather civilians to mine.[1465] Several Prosecution witnesses, including TF1-078, who stated that the second accused was not permanently in Kono in 1998 and had been withdrawn at sometime to Kailahun, also testified the about the strained relationship between between Superman and the second accused whilst in Kono during 1998.[1466] It is thus submitted that the second accused

[1464] Transcript of 14 April 2008, p.25 lines 2-22.
[1465] Transcript of 11 April 2008, p.63 line 24 to p.64 line 4.
[1466] Transcript of 26 October 2004, p.4 lines 1-25.

could not have engaged in any joint criminal enterprise with Superman or his loyal subordinates during that time in Kono district.

1040. Finally, in addition to previous averments on command and control issues in Kono district, the Defence for the second accused deems it crucial to conclude with the testimony of Prosecution witness TF1-371, who, as noted, was a [redacted] RUF officer and adviser. He unwittingly debunked any allegation of the second accused having command and control authority over alleged perpetrators of crimes in Kono district in 1998/99 by stating thus, *"I did not say he was in control of Kono, I said he was a senior man."*[1467] As a matter of fact, this witness attested, on several occasions, to the frequent movements of the second accused in and out of Kono during 1998, indicating that the second accused was not permanently in Kono district during the relevant timeframe of the Indictment. In particular, the witness testified repeatedly that the second accused was with them in Kailahun for about 4 to 5 weeks or about two months, since March 1998 when the troops withdrew with JPK from Freetown, and that he only returned to Kono between April and June 1998.[1468] Also, the witness testified that the second accused was recalled to Buedu in Kailahun district around June/July 1998 as the witness saw him in Buedu at the beginning of August 1998; and that on this occasion, the second accused was there for less than a month.[1469] Again, the witness testified that the second accused was sent on another assignment around September 1998 and that he returned to Kono in late December 1998.[1470]

d) KAILAHUN DISTRICT (14 February 1998 and 30 June 1998)

i) The Prosecution Case

1041. In paragraph 49 of the Indictment, it is alleged that in the Kailahun District, "between about 14 February 1998 and about 30 June 1998, in locations including Kailahun town, members of AFRC/RUF unlawfully killed an unknown number of civilians".

ii) Relationship to the Indictment and Notice

[1467] Transcript of 31 July 2006, P.134 lines 25-29.
[1468] Transcript 20 July 2006, p.80 line 28 to p.81, line 7; Transcript 28 July 2006, p.21 lines 3-19; and Transcript 31 July 2006, p.141 lines 6-16.
[1469] Transcript of 28 July 2006, p.21 line 3 to p.22, line 21; and Court Transcript of 31 July 2006, p.141, line 22 to p.142, line 7.
[1470] Transcript of 31 July 2006, p.142, lines 8-15.

1042. Prosecution witnesses TFI 141 and TFI 371 alleged criminal conduct against the Second in locations not pleaded in the Indictment. It is submitted that the evidence cannot form the basis of any conviction against the Seocnd Accused.

1043. In addition, no material facts are pleaded in the Indictment or in any of the disclosure materials. TFI 141 and TFI 371 sought to establish that the Seocnd Accused held effective control by virtue of his leading a mission in Kailahun District. The Supplemental Pre-Trial Brief alleges that the Second Accused is criminally responsible because of his "presence when about 60 Kamajor supporters were being killed". The Prosection witnesses did not place him there at that time. If it is the Prosecution's case that the Accused is criminally responsible for the killing of suspected Kamajor's through some remote form of association, this should have been pleaded.

iii) The Evidence

1044. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 3 to 5 of the Indictment, under Articles 6(1) and 6(3) of the Statute in Kailahun District "between about 14 February 1998 and about 30 June 1998". In particular, in an attempt to link the second accused up with events and crimes in Kailahun District,

(1) Kailahun Town

1045. Regarding the killing of 65 Kamajor suspects in Kailahun as noted in the Court's oral Decision on the rule 98 RUF Motions aforesaid, witness TF1-168 testified that only 64 Kamajors were killed in Kailahun with one old man surviving; the witness recounted the incident in detail and stated that those who gave orders for the incident were the overall RUF Commander or CDF at that time: General Sam Bockarie, the overall MP Commander: Gbao and the District MP Commander: Duawo and other MPs below him.[1471] Witness TF1-045 also testified that when he arrived at Kailahun town, he met Mosquito (Sam Bockarie) and Gbao, and then Mosquito asked Gbao about the surrendered Kamajor/civilian suspects he had sent to him for investigations. The witness said he was present when Gbao told Mosquito that he had investigated the suspects and found out that they were all Kamajors. He said that they were

[1471] Transcript of 31 March 2006, p.64, line 5 through to p.67, line 4.

many and Gbao did not want them to continue to live amongst the RUF; so Mosquito passed an order for them to be killed and the witness took part in the killing too.[1472] Also, no mention was made of the second accused in the said incident.

1046. Again, witness TF1-366, on his part, testified that he went to Kailahun for up to one month after the AFRC was pushed out of Freetown, saying that he left Guinea Highway in Kono for Kailahun because he was told that his father was ill.[1473] Whilst in Kailahun, he said that he knew about the Kamajor suspects being kept in the cells there, and went on to say that it was Issa Sesay who gave "an order to Augustine Gbao that he was going to Pendembu, that when he reaches there, he should kill these people." The witness said that he knew that it was Sam Bockarie, who was then in Buedu, that had given the order to kill to Issa Sesay. The witness said he heard Issa's order to Gbao himself, and that the people were shot and killed when the witness had gone to town to buy some wares.[1474] Fundamentally too, the witness made no mention of the second accused regarding the said killings in Kailahun, notwithstanding his flare for placing the second accused in almost every crime base.

1047. In view of the fact that Buedu was the seat of the RUF high command, where both Sam Bockarie, the leader of the RUF during the relevant period of the Indictment, and the RUF War Council were based, it will be most incredible to infer that the second accused had command and control over RUF combatants, and therefore their conduct, in the Kailahun district. No evidence was led to link the second accused with the alleged crimes in Kailahun, including the killing of a certain Fonti Kanu and a doctor as alleged, *inter alia*, by witness TF1-141. By similar stretch, no credible evidence was produced to suggest that the second accused was in a joint criminal enterprise with the perpetrators of the alleged murders in Kailahun. Merely being in the same organisation with Sam Bockarie and other perpetrators in command position does not create an occasion for joint criminal enterprise. There is also no evidence of any internal organizational planning or conspiracy between the second accused and the alleged perpetrators to commit the said crimes *inter se*.

1048. Therefore, any inference of aiding and abetting, devoid of evidence, cannot be legally sustained. Consequently, the Prosecution's case theory of inferring Articles 6(1) and 6(3) liability against the second accused on broad assumptions without proof beyond reasonable doubt ought to fail. In view of the averment in the Prosecution's case theory that the second

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[1472] Transcript 21 November 2005, p.41, lines 1-18.
[1473] Transcript 8 November 2005, p.50, lines 14-20.
[1474] Id., p.59, line 10 to p.60, line 22.

accused was "present" when 60 people were killed in Kailahun,[1475] which has proven to be wholly untrue by virtue of the evidence available to the Court, it is submitted that the Prosecution's case against the second accused on that allegation must fail.

(2) Locations Not Pleaded

1049. Prosecutor witnesses TF1-141 and TF1-371 respectively testified that the second accused traveled with JPK and his entourage to Kailahun after the troops had arrived in Kono, following the AFRC retreat from Freetown in early 1998. Witness TF1-371 testified that the second accused spent a couple of weeks in Buedu, Kailahun district, upon his arrival there with JPK around February/March 1998.[1476] Witness TF1-141 also testified that the second accused was the 'main commander' of the troops that accompanied JPK to Buedu, among other commanders present.[1477] TF1-141 said that after crossing the Moa river, he saw Sam Bockarie at Baoma, where Bockarie received 'government property', including guns and money, from civilians and combatants at a muster parade;[1478] and then they proceeded to Buedu, where Sam Bockarie was based.[1479] Both accounts regarding the second accused's trip to Buedu as alleged are denied and challenged. The second accused explained to the Court that on his way to Buedu, he was recalled by Sam Bockarie to return to Kono as his deployment area, and that he did not go to Buedu but returned to Kono.[1480] In fact, witness TF1-045 testified that he was among the group of fighters that Sam Bockarie sent to take JPK to Kailahun. According to him, upon their arrival at Gandorhun Gbane in Kono, Issa Sesay gave instructions to the second accused, who was also present, to remain in Kono so that he can take care of 'the Kono axis'.[1481]

1050. Witness TF1-141 did not mention the second accused when relating his account about attacks on Daru in Kailahun district. He was categorical about the fact that the order to attack Daru, where houses were burnt down and civilians killed, came from Sam Bockarie, alias 'Skinny'; the witness said that it was Sam Bockarie who brought logistics, including arms and ammunition, for the attack.[1482] What is more, the witness could not recall any date for the

[1475] Prosecution's Supplemental Pre-Trial Brief, paras. 329 (b), supra.
[1476] Transcript of 31 July 2006, p.138, lines 6-20.
[1477] Transcript of 15 April 2005, p.64, line 16 to p.65, line 2.
[1478] Transcript of 12 April 2005, p.10, lines 1-27.
[1479] Transcript of 15 April 2005, p.66, lines 23-25.
[1480] Transcript of 18 April 2008, p.47, lines 22-27.
[1481] Transcript of 21 November 2005, p.53, line 16 to p.54, line 28.
[1482] Transcript of 12 April 2005, p.40, line 18 to p.41, line2. See also p. 42, line 6 through to p.46, line 12 (same Transcript) on the allegations of killing and burning of houses at Daru during the attack.

attack and had no knowledge of time regarding the said incident. Similarly, the witness, in testifying about other attacks and missions in Kailahun district, stated that various commanders, other than the second accused, were assigned to various missions. The 'Segbwema Mission' was, for example, assigned to a certain Colonel Eagle, who also later reassigned it to another Colonel Gassimu.[1483] The witness's only reference to the second accused outside of Kono was about the alleged incident at Joru Nyiama, which the witness, as noted, confusingly identified as being in the Kenema district. Based on the arguments already proffered on this issue, the case for second accused continues to be that he was not in Kailahun as alleged by the witnesses above and could not have participated in any attacks there.

iv) Freetown & the Western Area (6 January 1999 and 28 February 1999)

(1) The Prosecution Case

1051. Also, in paragraph 52 of the Indictment, it is alleged that "between 6 January 1999 and 28 February 1999, AFRC/RUF conducted armed attacks throughout the city of Freetown and the Western Area. These attacks included large scale unlawful killings of civilian men, women and children at locations throughout the city of Freetown and the Western Area, including Kissy, Wellington, and Calaba Town".

1052. It is the Prosecution's case theory that the second accused, *inter alia*, 'held a position of responsibility and command within the AFRC/RUF hierarchy'; that he was present at an AFRC/RUF planning meeting in Kailahun District in December 1998 where senior members of the AFRC/RUF hierarchy planned various attacks on Koidu and Makeni as precursors to the invasion of Freetown; that in late 1998, he gave Sam Bockarie diamonds to purchase arms and ammunitions for the Freetown invasion; that he arrived in Freetown during the 1999 invasion with arms and reinforcements on the directions of Sam Bockarie; that he participated in a meeting in Waterloo in the Western Area with "Alex Tamba Brima, Ibrahim Bazzy Kamara and Issa Hassan Sesay as a result of which the AFRC/RUF forces regrouped and attacked Hastings and Tombu in the Western Area"; that he led the offensive that successfully took over Koidu and Makeni and then "subsequently [led] a large group of reinforcements to Freetown and the Western Area after the initial AFRC/RUF force had already entered the

[1483] Id., p.46, line 28 to p.47, line 1.

city"; and that he was a "superior to the AFRC/RUF subordinates [who] engaged in the unlawful killings [in Freetown and the Western Area] and had effective control over [them]".[1484] For these reasons, the Prosecution holds that the second accused bears liability under Articles 6(1) and 6(3) of the Statute for the crimes alleged in Freetown and the Western Area "between 6 January 1999 and 28 February 1999".

1053. The Defence for the second accused notes that the Court in its oral Decision on the RUF Motions for Judgment of Acquittal pursuant to Rule 98, mentioned, *inter alia*, the evidence of Prosecution witnesses: TF1-334, 021, 101, 331, 325, 029 and 093 about various alleged killings of civilians in Freetown and the Western Area during the 6th January 1999 attack on Freetown.[1485]

(2) The Evidence

1054. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 3 to 5 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Freetown and the Western Area "between 6 January 1999 and 28 February 1999". In particular, the Prosecution failed to lead any evidence to substantiate the specific allegations outlined in its case theory aforesaid against the second accused, including the allegation that he was involved in a planning meeting and joint criminal enterprise with AFRC/RUF forces to invade and commit crimes in Freetown and the Western Area within the specified timeframe.

1055. Prosecution witness TF1-360, an RUF radio operator [redacted], debunked nearly all the allegations contained in the Prosecution's case theory against the second accused. Firstly, the witness confirmed that the second accused was never present at the meeting held in Buedu in Kailahun district between Superman and Sam Bockarie to plan the re-attack on previous areas that the AFRC and RUF had occupied, including Freetown;[1486] which occurred sometime in 1998 during or after the rainy season.[1487] The witness said that the said war-planning meeting took place at Sam Bockarie's residence and confirmed that he was present at the meeting, which lasted from 10am to 2pm.[1488] The witness also testified that

[1484] The Prosecution's Supplemental Pre-Trial Brief, para. 353, supra; see also paras. 352-357 generally.
[1485] Transcript of 25 October 2006, p.20, lines 7-18.
[1486] Transcript of 26 July 2005, p.38, lines 16-19, and Transcript of 20 July 2005, p.48, lines 8-19.
[1487] Transcript of 20 July 2005, p.45 line 10-13.
[1488] Id., p.48, line 23 to p.49, line 8.

Sam Bockarie, alias Mosquito, supplied Superman with ammunition before they left Buedu after the said meeting, which included a private meeting that Sam Bockarie had with Superman.[1489]

1056. Secondly, the witness testified that it was Issa Sesay and Sam Bockarie who took diamonds from JPK after the latter's arrival in Kangama, Kailahun district,[1490] and that Issa Sesay took the diamonds to Liberia to secure support for the RUF from Charles Taylor but Sesay, however, returned with a story that the diamonds were stolen. The witness said that Sam Bockarie reported this incident in a letter to Superman before the war-planning meeting in Buedu, which was in fact one of the reasons why Superman was summoned by Bockarie to Buedu.[1491] Sam Bockarie grew angry over the missing diamonds and then punished Issa Sesay for the loss by posting him to Pendembu.[1492]

1057. And thirdly, the witness also confirmed, under cross-examination, that the second accused was not among the fighting forces that were moving and attacking various locations in the North of Sierra Leone in 1998 and that he was also not present or among the fighting forces that invaded Freetown in 1999.[1493]

1058. Regarding the second accused's alleged role in the execution of the war-plan, the witness admitted under cross-examination that the second accused merely acted under orders when he allegedly promoted him to Captain in Kono and then posted him to Rosos in the North.[1494] Also, though the witness had earlier alleged that the second accused, Issa Sesay and other RUF officers traveled to Waterloo and held a meeting there with senior SLA commanders in order to reinforce the soldiers to re-attack Freetown after its earlier invasion by Gullit (Alex Tamba Brima) and other SLA soldiers,[1495] the witness proceeded to confirm his earlier statement to the Prosecution below as 'his first and more truthful account of what he saw at Waterloo' at that time:

> "Mosquito ordered us to retreat to Waterloo so we could reorganize in order to launch a further attack on Freetown. Things had become completely disorganized at this stage with people looting, burning and killing at random. Rambo also had some form of dispute with Superman. When we arrived in Waterloo there was still no effective command and we stayed there for some time. Morris Kallon and Issa Sesay were in Makeni during the attack on Freetown. Morris Kallon came to Waterloo to fight at one

[1489] Transcript 25 July 2005, p.24 line 9-13.
[1490] Transcript of 20 July 2005, p.46 line 25 to p.47 line11.
[1491] Id., p.47 line 20 to p.48 line 5.
[1492] Id., p.48, lines 18-22.
[1493] Transcript of 26 July 2005, p.46 lines 6-11.
[1494] Transcript 25 July 2005, p.100 line 1 to p.101, line13.
[1495] Transcript of 21 July 2005, p.45, lines 2-28.

stage before returning to Makeni. I saw him there. I later withdrew to Lunsar with Superman." [1496]

1059. Presuming without admitting that the above account is true and correct, it is unclear as to what stage the second accused allegedly came to Waterloo to fight before returning to Makeni as alleged, because the witness had in fact only alluded to the second accused attending a meeting in Waterloo, and not to him engaging in a fight as this statement now portrays. The statement, if believed, also illustrates that the second accused may have come to Waterloo after the fact, to wit, after the alleged crimes had occurred in Freetown, since the witness was on the retreat. The statement thus debunks the Prosecution's theory that the second accused led the offensive that successfully took over Koidu and Makeni and "subsequently [led] a large group of reinforcements to Freetown and the Western Area after the initial AFRC/RUF force had already entered the city". As said, the statement illustrates that the combatants were on the retreat when the witness allegedly 'once saw the second accused fighting in Waterloo'; the witness was himself on the retreat to Lunsar with Superman, as the statement implies. Finally, the statement indicates that the witness and his RUF colleagues who were allegedly on the Freetown mission acted under the command and control of Sam Bockarie, alias, Mosquito and not the second accused.

1060. Another issue of interest is the fact that the above witness (TF1-360)'s testimony to the Court throws serious doubts into the Prosecution's case of joint criminal enterprise involving the second accused and the AFRC/SLA soldiers who attacked Freetown and the Western Area. Apart from the fact that the said AFRC/SLA soldiers dealt directly with Sam Bockarie on radio and Superman on the ground, there is a plethora of evidence from this witness and several other witnesses to show that there was no joint criminal enterprise between the second accused and the AFRC/SLA soldiers that attacked Freetown and the Western Area. The witness himself testified from the onset that when he saw Gullit and Five-Five together in Kono in March 1998, they were preparing to open their own jungle at Rosos in Bombali District, Northern Province and that they subsequently went there because they no longer wanted to work with the second accused so as to avoid additional problems.[1497]

1061. TF1-360 also testified that it was Superman, and not the second accused, who left Kono for Koinadugu in order to join SAJ Musa, an SLA, in furtherance of Sam Bockarie's plan to attack Freetown; and that it was after Superman's departure for Koinadugu that Sam Bockarie gave instructions for the witness to leave Kono and join the troops at Rosos in

[1496] Transcript of 25 July 2005, p.49 lines 13-26; see also page 10014 of the statements 12 June 2004.
[1497] Transcript of 20 July 2005, p.44 line 16 to p.45 line 8.

pursuit of the mission.[1498] The witness also said that the AFRC leader in Koinadugu District at that time was SAJ Musa whilst the RUF's leader there was Superman, and that the STFs from Liberia, who were also based in Koinadugu District with the SLAs and RUF then, were led by General Bropleh.[1499]

1062. However, TF1-360 testified further that the alleged joint enterprise between Sam Bockarie/Superman and SAJ Musa was impaired by a number of counter-intentions and strategies by the parties. According to the witness, and through his knowledge as radio operator, Superman's trip to Koinadugu was to force SAJ Musa to work under the instructions of Sam Bockarie and Superman.[1500] Similarly, the witness also admitted that SAJ Musa followed his own plan when he was moving towards Freetown and that he decided to break away from the RUF and followed his own plans after an infight he had with Superman.[1501] The witness testified that in furtherance of his plan on Freetown, when SAJ Musa arrived at Eddie Town in the North, he convened a meeting immediately and stated that he was now the overall commander and commander-in-chief and that nothing should be done without his knowledge or approval, for instance, no radio message was to be sent to Superman or Sam Bockarie in Buedu. According to the witness, SAJ Musa gave warning letters to that effect to all RUF personnel who were attached to radios, including himself, Alfred Brown - who was the senior RUF radio operator at Eddie Town, and Sheku.[1502]

1063. Furthermore, witness TF1-360 testified that after the death of SAJ Musa, Gullit (Alex Tamba Brima) who took over the AFRC/SLA troops decided to do things his own way by, for example, attacking Freetown in lieu of waiting as instructed by Sam Bockarie; Bockarie was thus unhappy about this failure to obey instructions/advise.[1503] What is more, the witness confirmed under cross-examination that when Gullit succeeded in getting to Freetown and was at State House, the witness himself informed Sam Bockarie that Gullit and his colleagues had made appointments without any provisions for the RUF.[1504]

1064. Of crucial note to TF1-360's account is the fact that he testified that orders to kill, amputate, burn, loot and destroy lives and property in Freetown and its environs came directly from Gullit and his assistants in Freetown at that time, namely, Ibrahim Bazzy Kamara, Santigie Bobor Kanu (alias Five-Five) and Rambo 'Red Goat', who was an AFRC/SLA

[1498] Transcript 21 July 2005, p.5 line 29 to p.7 line 5; and Transcript of 25 July 2005, p.24, line 28 to p.25 line 5.
[1499] Transcript of 21 July 2005, p.10 lines 1-5.
[1500] Transcript of 25 July 2005, p.28 lines 14-19.
[1501] Id., p.28 line 20-25.
[1502] Transcript of 21 July 2005, p.22 lines 7-17.
[1503] Id., p.34 line 25 to p.35 line 10.
[1504] Transcript of 26 July 2005, p.50 lines 11-15.

soldier, among others.[1505] This conduct was clearly contrary to the key objective of both the AFRC and RUF. The witness agreed, under cross-examination by Counsel for the second accused, that 'although there was some mistrust and cracks between the RUF and the AFRC, their ultimate goal remained the same, that is, to seize power and rule Sierra Leone'.[1506]

1065. Consequently, the Defence for the second accused again urges the Court to be persuaded by the Decision of the Appeals Chamber of the Special Court in *The Prosecutor -v- Alex Tamba Brima et al*,[1507] concerning the culpability of the first and second appellants (now convicts) therein for the crimes committed in Freetown and the Western Area between 6 January 1999 and 28 February 1999. As noted already, the Appeals Chamber recognized and accepted that the first and second appellants (now convicts) were "convicted and sentenced to terms of imprisonment of fifty (50) years and forty-five (45) years for crimes committed under Article 6(1) or Article 6(3) of the Statute in Bombali District and in the Western Area".[1508](Emphasis added).

1066. Additionally, the Appeals Chamber, as noted, also held that "(...) in perusing the Judgment of the Trial Chamber, [the Appeals Chamber found] that the Trial Chamber had made appropriate legal and factual findings upon which it based its conclusion that [the first appellant/convict] was responsible as a superior under Article 6(3)" for the crimes committed by his subordinates in, *inter alia*, Freetown and other parts of the Western Area during the period of the Indictment.[1509] In the case of the second appellant/convict, the Appeals Chamber also endorsed the Trial Chamber's findings that "there was evidence that [he] participated in the attack on Fourah Bay in which civilians were killed and houses burnt" and that as "deputy commander of the troops, his presence at the scene gave moral support to the perpetrators and that (...) [he] was aware of the substantial likelihood that his presence would assist the commission of the crime by the perpetrators".[1510]

1067. In view of the foregoing account by Prosecution witness TF1-360, who is perhaps the Prosecution's major insider witness on, *inter alia*, issues of alleged joint criminal enterprise between the second accused and the AFRC/SLAs, the contention of the Prosecution that the second accused bears liability under Articles 6(1) and 6(3) of the Statute for the crimes

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[1505] Transcript 21 July 2005, p.35 line 11-25, and p.45 lines 8-11; Transcript 25 July 2005, p.55 line 23 to p.56 line 8.
[1506] Transcript of 26 July 2005, p.48 line 21 to p.49 line 23.
[1507] SCSL-2004-16-A, Judgement of the Appeals Chamber, 22 February 2008, supra.
[1508] Id., para. 169.
[1509] Id., para. 229.
[1510] Id., paras. 246-247.

alleged in Freetown and the Western Area "between 6 January 1999 and 28 February 1999" is robustly challenged and denied by the Defence.

1068. In fact, the above narrative of witness TF1-360 when closely placed alongside the testimonies of witnesses: TF1-366, 371 and 361, who variously gave their respective versions of events concerning the march on Freetown and other parts of the Western Area, unveils glaring inconsistencies. To start with, contrary to witness TF1-360's account that Superman left Kono for Koinadugu on account of Sam Bockarie's plan to attack Freetown together with the AFRC/SLAs, witness TF1-366, for example, explained that Superman left Kono together with 200 armed men and 200 guns because he felt that the second accused and Sam Bockarie were lenient with Issa Sesay for the missing/stolen diamonds.

1069. Witness TF1-366 said that after quarreling very seriously with the second accused, Superman then "got up and summoned all the armed men in the Joe Bush. That he was going to Kurubonla to SAJ Musa, that he was not going to work with us." The witness said that Superman's withdrawal force included commanders like CO Nyaa, a signaler and a vanguard.[1511] The witness also gave the impression that those who went with Superman, including Alfred Brown, went on their own, without any order or instruction from Sam Bockarie or anyone.[1512] This undercuts the account by TF1-360 that Superman's trip to Koinadugu district was part of an organized plan by the RUF and AFRC/SLAs to attack and take over Freetown and its surroundings.

1070. Another contradiction between the accounts of witness TF1-360 and 366 is that, contrary to the former's testimony that Sam Bockarie summoned Superman in Buedu and gave him ammunition and materials to commence the Freetown-attack plan, the latter witness testified that after Bockarie's trips to Libya and Burkina Fasso, he started his mission by summoning Issa Sesay from detention and then giving him the logistics and support to proceed to Kono and commence the grand assault from there.[1513] Witness TF1-366 confirmed as well that Superman and SAJ Musa had a fight and breakaway, killing members of each other's troops.[1514] However, unlike witness TF1-360, TF1-366 testified that they communicated with SAJ Musa freely about the plan to attack Kono and then proceed to Freetown.[1515]

[1511] Transcript of 8 November 2005, p.82, line 21 to p.83, lines 26.
[1512] Id., p.84 line 29 to p.85, line 9.
[1513] Id., p.88, lines 19-28.
[1514] Id., p.89, lines 17-21.
[1515] Id., p.89, lines 22-29.

1071. Another point of divergence between the two witnesses is on the issue of joint enterprise between the AFRC/SLAs and the RUF. Witness TF1-360 acknowledged that at some point in Eddie Town there was a total break in the relationship between SAJ Musa and the RUF leaders, in particular Superman and Sam Bockarie. Witness TF1-366, to the contrary, maintained in a rather confusing and evasive manner that there was peace, tranquility and cooperation between SAJ Musa and the RUF.[1516] Similarly, the witness did not agree that Gullit was angry with the RUF and break away from them during the Freetown invasion, contrary to TF1-360's account.[1517]

1072. Other areas of divergence had to do with witness TF1-366's account that the second accused fought in Waterloo and beyond, including areas like Hastings and Jui; that he commanded troops and regularly communicated with the AFRC Commanders in Freetown via radio; and that the second accused participated in receiving AFRC personnel around the Benguema area and subsequently setting up a defensive position between Waterloo and Tombo, where crimes like looting and killings occurred.[1518] Apart from the fact that witness TF1-360 made no mention of such account in his testimony, save that the second accused was at one stage in Waterloo fighting and/or attending a meeting, witness TF1-366's narrative on the foregoing issues could not be corroborated. It was only sustained by the said witness's established inclination to carry the second accused on every alleged crime voyage he went on, without any credible evidence to prove the voyages or the crimes. As stated earlier in this Brief, witness 366's flare for exaggerations and self-contradictions marred his narratives.

1073. In spite of the above, witness TF1-366, like TF1-360, agreed with Counsel for the second accused under cross-examination that the second accused did not go to Freetown in 1999;[1519] this was, however, after several vain, confusing and falsified attempts at giving the impression that the second accused had come to Freetown. In fact, witness TF1-366's demeanour and unfounded zeal to implicate the second accused at every stage of his account urged Counsel for the second accused to remark as follows: "*It is very good that he behaves this way. At least the Court will watch his demeanour and the sort of witness we have*".[1520]

1074. Prosecution Witnesses: TF1-371 and 361 respectively gave a twist to several of the accounts by both witnesses TF1-360 and 366 regarding the so-called plan to attack and actual on attack Freetown. Witness TF1-371 testified that a strategic planning meeting was

[1516] Transcript of 14 November 2005, p.125, line 27 to p.127, line 6.
[1517] Transcript of 15 November 2005, p.25, lines 19-26.
[1518] Transcript of 9 November 2005, p.25, line 10 through to p.29, line 28; p.31, lines 25-29; p.32, lines 17-27; p.33, lines 4-8.
[1519] Transcript of 17 November 2005, p.12, line 9.
[1520] Id., p.12, lines 4-6.

summoned by Sam Bockarie in Buedu in Kailahun district in December 1998, and that the meeting was attended by senior RUF commanders and some AFRC officers, including Sam Bockarie himself, the witness, Denis Mingo, Isaac Mongor, the second accused, Augustine Gbao, Peter Vandi and Issa Sesay (all of whom were RUF) and Akim Turay, Gullit, Idriss Kamara alias Leather Boot and Eddie Kanneh (all of whom were AFRC).

1075. Witness TF1-371 explained that the purpose of the strategic planning meeting aforesaid was as follows: i) for Sam Bockarie to give a debriefing, ii) to plan a strategy in response to the ECOMOG attack on Kono, and iii) to plan the recapture of Freetown.[1521] The witness said that later in the lunch period, Sam Bockarie called a smaller meeting in his bedroom in which the witness was present along with select 'inner commanders,' and that Bockarie told them about his trip to Liberia and Burkina Fasso. The witness stated that Sam Bockarie's plan was to attack Freetown using two flanks and he code-named the plan: 'Operation No Living Thing', meaning that commanders were not to take prisoners of war, and that human obstacles to the operation were to be exterminated. The witness also attested to massive movement of troops and logistics to operational areas to put the plan into effect.[1522]

1076. Apart from the fact that this so-called 'strategic planning meeting between the RUF and the AFRC/SLAs' was not corroborated by witnesses: TF1-366, 361 and 360 or any one else, the witness (TF1-371) insisted under cross-examination that Gullit and Superman attended the said planning meeting; he denied that Gullit had left Kailahun within a few weeks of March 1998 after he arrived there with JPK. He also denied that in December 1998, Gullit was in Camp Rosos and Superman was in Koinadugu; emphasizing, to the contrary, that he saw Gullit regularly in Kailahun during that period.[1523]

1077. The above account clearly conflicts with the testimony of witness TF1-361, who stated that during the second week of his stay in Koidu town (which was in 1998 but long before December), Gullit returned from Kailahun to Kono, collected some SLAs, including Marouf, and headed North to SAJ Musa; noting that shortly after Gullit's said departure, the SLAs under Gullit and SAJ Musa blocked communications with the RUF. According to witness TF1-361, Gullit left Kailahun because of the ill-treatment meted out to JPK by Sam Bockarie at Kangama and Buedu in the Kailahun district.[1524] What is more, witness TF1-371 himself admitted that in the Kailahun district, both Gullit and JPK were stripped of diamonds

[1521] Transcript of 21 July 2006, p.42 line 1 through to p.43 line 3.
[1522] Id., p.44 line 15 to p.45 line 25.
[1523] Transcript of 31 July 2006, p.47 line 21 to p.49 line 12.
[1524] Transcript of 15 July 2005, p.26 lines 4-25; p.30 lines 17-28; and p.96 lines 2-10.

by the RUF, which were used by Sam Bockarie to purchase ammunitions for the RUF.[1525] TF1-361 also confirms JPK's mistreatment at Kangama in Kailahun district, noting as well that diamonds and foreign currencies were taken from JPK's wife by Sam Bockarie and Issa Sesay after roughing her up.[1526]

1078. Witness TF1-371 similarly corroborates TF1-360's account that Superman was recalled by Sam Bockarie towards the end of 1998 though for a different reason. TF1-360 had said it was to prepare Superman for the Freetown onslaught, whilst TF1-371 testified that it was to restore a strained relationship between Superman and Bockarie about the former's lethargy at the battlefront because of a lady he was dating, and that it was after this reconciliation that the strategic planning meeting for the commanders was called by Bockarie.[1527] It is averred that in view of TF1-371's seriously doubtful reference to the presence of Gullit and other AFRC/SLAs at the strategic planning meeting as alleged, the witness's account of this meeting and the second accused's alleged presence in it should be dismissed as lacking in truth and substance.

1079. Besides, TF1-361 testified that Superman appointed his bodyguards, himself and [redacted] to join him on the trip to Buedu in late December 1998 after Superman had been summoned via radio communication by both Sam Bockarie and Issa Sesay for a military briefing in Buedu. When they arrived at Buedu, they went to Bockarie and Sesay's residences where Superman entered a room to have a meeting with Sesay and Bockarie. After the meeting, Superman told the witness, [redacted] and his bodyguards that: **i)** "they had instructed him and had given good information"; **ii)** that Mosquito had some ammunitions for them; **iii)** that Mosquito informed him that Charles Taylor had sent a herbalist to make all the fighters impervious to bullets; and **iv)** that they should go to SAJ Musa at Krubola in the North to force him to operate with RUF.[1528]

1080. Corroborating TF1-360 further, TF1-361 said that Superman was sent by Sesay and Bockarie to go to SAJ Musa because "any plans that SAJ Musa could take, he would prevent them from happening." The witness stated that after the ammunitions promised by Sam Bockarie had arrived, Superman asked him to take the radio set and join Superman's bodyguards, the Cobra Unit, and some other fighters in order that they can all proceed to SAJ Musa at Krubola. He said that at least four radio operators went, [redacted], Ngo Jo,

[1525] Transcript of 20 July 2006, p.72 line 24 to p.74 line 17.
[1526] Transcript of 12 July 2005, p.29 line 22 to p.30 line 23.
[1527] Transcript of 21 July 2006, p.38 line 25 through to p.40 line 4.
[1528] Transcript of 12 July 2005, p.24 line 2 through to p.28 line 12.

Keifala and Alice Pine. However, according to the witness, a certain Brigadier Morrison Kallon, who was in Kono, remained at Kono.[1529]

1081. TF1-361 testified further that when they arrived at Krubola, they met various commanders there, including SAJ Musa, General Bropleh – who was a Liberian and head of the STF at Koinadugu, Brigadier Mani – who commanded the SLAs, and Colonel Tee, another SLA.[1530] The witness said that Superman did not regard himself as being under the command of SAJ Musa and that the commanders at Koinadugu did not regard themselves as subordinate to each other, nor did they take orders from each other. The fighters, however, took command from all the commanders there.[1531] The witness also stated that communications between Superman and Bockarie and Sesay in Buedu was cordial in the first week of their arrival at Krubola but that things went bad when Bockarie/Mosquito communicated with them again accusing Superman of lethargy at the battlefront because he had a white woman, and consequently instructed that all RUF stations should stop communicating with Superman's station. This marked the break in the relationship between Superman and Bockarie/Issa Sesay.[1532] At one point during their stay in Koinadugu district, Superman had dispatched three radio operators sent by Mosquito from Kono to Krubola, including Alfred Brown, Sheku [redacted], to join Gullit at Okra Hill, where Gullit was based.[1533]

1082. Also, TF1-361 said that, after Sam Bockarie had banned Superman from communicating with RUF stations, there was a fight between Superman and SAJ Musa over money to buy a satellite phone and that that led to SAJ Musa fleeing to Gullit at Okra Hill, promising never to fight alongside the RUF.[1534] The witness confirmed that upon SAJ Musa's arrival at Gullit's base, he stopped the RUF radio operators, [redacted] from communicating with Superman and the RUF.[1535]

1083. The relevance of recounting the above narrative by TF1-361 is to show that it corroborates the account of TF1-360 about Mosquito's alleged strategic plan to attack Freetown only to the extent of the events that unfolded between Superman and Bockarie/Sesay at Buedu leading to the former's arrival at Krubola on the one hand, and the events that occurred between Superman and SAJ Musa at Krubola on the other hand. The two

[1529] Id., p.31 lines 5-9; p.41 line 28 to p.42 line 21.
[1530] Id., p.43 line 16 to p.44 line 26.
[1531] Transcript of 18 July 2005, p.20 lines 12 to p.21 line 14.
[1532] Transcript of 12 July 2005, p.56 line 8 to p.57 line 6.
[1533] Transcript of 12 July 2005, p.63 lines 17-29; & Transcript of 18 July 2005, p.48 line 21 to p.49 line 5.
[1534] Id., Transcript of 12 July p.70 line 20 through to p.72 line 2.
[1535] Transcript of 18 July 2005, p.46 lines 24-27.

accounts, however, diverge on the following issues: **i)** that there was a total breakdown in relationship and communication between Superman and Bockarie/Sesay whilst the former was still at Koinadugu; and **ii)** that, in the testimony of TF1-361 [redacted] Superman did not proceed to Waterloo or Freetown as part of a common plan with Bockarie and SAJ Musa to attack and take over the city, assuming without admitting that Superman came to Waterloo after the attack on Freetown. Rather, TF1-361 testified that Superman fought his way from Koinadugu through Fulawa, Alikalia (Koranko London), Bumbuna, Binkolo and, after a retreat, eventually landed in Makeni on 25 December 1998, where he later had an infight with Issa Sesay and the second accused and then escaped to Binkolo.[1536]

1084. Commenting on the second accused's role in the relationships between or among Superman, Bockarie and Sesay, witness TF1-361 testified that the second accused was "the junior man that was working with all of them. He was not encountering any problem with them. That is the reason why we gave him the code name as Sparrow or Friend."[1537] Even the witness's reference to a certain Brigadier Morrison Kallon in Kono when Superman proceeded to Krubola, showed that that Kallon stayed in Kono.

1085. Regarding the AFRC/SLA insider witnesses for the Prosecution, one of them: witness TF1-167, testified that the final meeting for the attack on Freetown took place at Orugu Bridge on the outskirt of Freetown on 4th January 1999, and that Alex Tamba Brima, alias Gullit, as field commander of the troops, made decisions that "Nigerians civilians should be targeted, policemen and women should be targeted, and all collaborators of the SLPP government also should be targeted. And [that] all assignment given to each battalion of their area of responsibility was known to all battalion commanders." He said that Gullit's order was that those targeted were to be killed.[1538] Though the witness also stated that there were communications between Alex Tamba Brima and Sam Bockarie on SLA troop movement into the city and about Sam Bockarie promising to send troops headed by Superman to reinforce the SLAs in Freetown, the witness testified that the said RUF troop reinforcement, which included the second accused, came from Lunsar but stopped at Waterloo, refusing to join the SLA troops at Foamex factory in Freetown.[1539] Rather, the witness testified that in a subsequent communication during the troop retreat from Freetown, Sam Bockarie sent a message to Gullit that all high-profile politicians, including ex-President Joseph Momoh,

[1536] Transcript of 12 July 2005, p.74 line 1 to p.97, line 22; See also p.102 lines 27 to p.103 line 2.
[1537] Id., p.93 lines 8-11.
[1538] Transcript 18 October 2004, p.36 line 24 to p.37, line 20.
[1539] Id., p.57 line 26 to p.59, line 17. Transcript of 19 October 2004, p.73 lines 16-29; & p.74 lines 1-2.

Victor Foh and Steve Bio and some other senior SLA officers and Chief Dura were to be handed over to Issa Sesay upon the RUF's arrival at Waterloo. The witness confirmed that this order was carried out and that the men were taken to Waterloo, handed over to Issa Sesay, who then took them to Makeni.[1540]

1086. TF1-167 said that the RUF officials in Waterloo held a meeting at Lumpa with the retreating SLA Commanders from Freetown about the need to regroup and re-attack Freetown; according to the witness, the second accused and other fighters were to take the Tombo road, whilst others were to head for Hastings.[1541] However, the witness explained that the said plan failed to materialize because the RUF soldiers that they met at Waterloo were harassing fighters who came from Freetown for goods. Thereafter, Issa Sesay had to pull back to Makeni, whilst Superman pulled out to Lunsar and the second accused withdrew to Magburaka. Alex Tamba Brima, Santigie Kanu, and other senior commanders pulled out to Makeni, whilst Ibrahim Bazzy Kamara and other mid-level commanders stayed at the Four Mile Highway.[1542]

1087. TF1-334, another AFRC/SLA insider witness for the Prosecution, also confirmed that it was the SLAs, assisted by a few RUF fighters, that launched the attack on Hastings on 4th January 1999 before proceeding to Freetown, and that Gullit (Alex Tamba Brima) gave the orders.[1543] The witness confirmed that Rambo had told them that the RUF refused to come to Freetown because they did not believe that SAJ Musa was dead, so that was why they did not come to reinforce the SLAs in Freetown.[1544] He stated that the first meeting between SLAs from Freetown and the RUF took place at Waterloo; and that upon the SLAs retreat to Waterloo, they met Superman and some RUF fighters based there.[1545] Of crucial significance to the case of the second accused is the fact that this witness testified that they did not meet the second accused at Waterloo upon retreating; the second accused only came later to Benguema with Issa Sesay and Rambo on a mission to arrest Superman. The witness said that the mission was unsuccessful, so the second accused and the others had to withdraw to Makeni.[1546] Ibrahim Bazzy Kamara then opened the Westside Base shortly afterwards,[1547] in Port Loko District.

[1540] Transcript of 18 October 2004, p.61 lines 1-14; & p.62 lines 13-22.
[1541] Id., p.79 lines 2-23.
[1542] Id., p.80 lines 11-26.
[1543] Transcript of 7 July 2006, p.39 line 26 to p.40, 15.
[1544] Id., p.42, lines 22-27.
[1545] Id., p.47, lines 7-13; p.47, lines 22-25; p.48, lines 3-11.
[1546] Id., p.85 line 6 to p.86, line 4.
[1547] Id., p.86 lines 5-7.

1088. Notwithstanding the varying inconsistencies in the testimonies of the above witnesses, certain common strands ran through their evidence, to wit, **i)** that the second accused never came to Freetown nor did he participate in or support any criminal conduct perpetrated by the combatants in Freetown; and **ii)** that the second accused was not the commander that led troop reinforcement in any shape or form to Waterloo, contrary to the Prosecution's Supplemental Pre-Trial Brief aforementioned.

1089. The second accused's case on his visit to Waterloo in fact fits into the account of TF1-167 (being an AFRC/SLA core insider witness) in the sense that the second accused testified that he came with Issa Sesay to Waterloo to receive and take certain high-profile politicians to a safe zone - Makeni, upon the orders of Sam Bockarie, and not to fight or participate in any joint criminal conduct at Waterloo, Freetown or anywhere in the Western Area.[1548] In this regard, the Defence for the second accused submits that all allegations by the Prosecution against the second accused in respect of Freetown and the Western Area within the period specified in the Indictment must fail and should be dismissed for lacking in evidence beyond reasonable doubt.

v) Port Loko District ("about" February 1999 to April 1999)

(1) The Prosecution Case

1090. In paragraph 53 of the Indictment, it is alleged that "between about February 1999 and April 1999, members of AFRC/RUF unlawfully killed an unknown number of civilians in various locations in Port Loko District, including Manaarma, Tendakum and Nonkoba."

1091. It is submitted that the Prosecution's case theory failed to specifically mention the second accused in its allegations under Article 6(1) of the Statute relevant to Port Loko District.[1549] Not having sufficient and reasonable evidence to prove Article 6(1) responsibility, the Prosecution then proceeded to allege that the second accused's liability was to be found in a "common plan" to be inferred from i) his alleged position of responsibility and command within the AFRC/RUF hierarchy; ii) his alleged participation in the attack on Lunsar; iii) the alleged radio communication between him and other senior AFRC/RUF commanders; iv) that he, together with Alex Tamba Brima and others, allegedly attacked the surrounding villages of Port Loko; v) his alleged presence in Lunsar with other commanders;

[1548] Court Transcript of 15 April 2008, p.8, line 7 through to p.10, line 7; and p.15, line 25 to p.16, line 23.
[1549] Supplemental Pre-Trial Brief, para. 360.

vi) any evidence disclosing a joint criminal enterprise. Similar allegations were repeated to establish Article 6(3) responsibility against the second accused in the Prosecution's Brief,[1550] as well as that he failed to take measures to prevent or stop the alleged crimes herein.

1092. The Defence for the second accused again notes that the Court, in its oral Decision on the RUF Motions for Judgment of Acquittal, mentioned the evidence of Prosecution witnesses: TF1-253, 255, 345 and 256 about various alleged killings in outlined locations in Port Loko district between February 1999 and April 1999.[1551]

(2) The Evidence

1093. It is the case for the Second Accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 3 to 5 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Port Loko District between February 1999 and April 1999. Essentially, the Prosecution failed to lead any evidence to prove the allegations outlined in its case theory against the second accused within the specified timeframe.

1094. As noted already by Prosecution witnesses TF1-334 and 167 (both being core AFRC/SLA insider witnesses), the second accused withdrew to Makeni after the RUF Waterloo mission, namely, to receive and carry AFRC politicians from Waterloo to Makeni – which was successful (according to TF1-167), or to arrest Superman in Waterloo – which was unsuccessful (according to TF1-334). In fact, as already stated herein by TF1-334, Ibrahim Bazzy Kamara, alias Bazzy, opened the Westside Base shortly after the second accused and some RUF commanders had withdrawn to Makeni.[1552] The said SLA command base was established in Port Loko district, and the witness confirmed that Bazzy was in charge of its radio communications as commander.[1553] In fact, even before the establishment of the Westside Base, witness TF1-167 testified that Bazzy commanded and controlled troops in Mamamah in Port Loko district to kill and burn civilians alive in the village in order to 'make the area fearful'.[1554] By this time, the second accused had withdrawn with the ex-politicians to Makeni. Besides, the Appeals Chamber of the Special Court recognized the fact that the Trial

[1550] Supplemental Pre-Trial Brief, paras. 361-365.
[1551] Transcript 25 October 2006, p.20, lines 19-24.
[1552] Transcript 7 July 2006, p.86 lines 5-7.
[1553] Transcript 7 July 2006, p.86, lines 10-16
[1554] Transcript 18 October 2004, p.81 lines 23-29; and p.82 lines 1-22.

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Chamber had found Bazzy responsible under Article 6(3) of the Statute for unlawful killings in Manaarma, one of the crime locations in the Indictment.[1555]

1095. Regarding the second accused's presence at Lunsar, which was not specifically pleaded in the Indictment, witness TF1-360 testified that Superman was based at Lunsar sometime in 1999, and that a problem occurred between him on the one hand and Issa Sesay and a certain Morrison Kallon on the other hand, leading to infights, and counter-attacks between loyal groups of fighters in Lunsar. This further led to the death of RUF's Rambo.[1556] The witness's account, however, made no mention of the said attacks causing or leading to unlawful civilian deaths, as the Prosecution's case theory suggests, nor was the account clear about the timeframe of the said attacks.

1096. It is the case for the second accused that around February to March 1999, he was in Makeni, keeping law and order there together with Issa Sesay, and that things continued to be peaceful and orderly until the arrival of Superman in Makeni from his Koinadugu trip, when clashes occurred in the town between him and Issa Sesay. Superman's presence in Makeni also led to the commission of crimes like house-breaking.[1557] From Makeni, the second accused left for Magburaka in March 1999 as there was serious infight between Superman and Issa Sesay in Makeni which led to Superman eventually taking charge of the town.[1558] The second accused was based in Magburaka until October 1999 when Makeni was retaken from Superman and the second accused and Issa Sesay were reconciled with him. During the period of March to October 1999, the second accused continued to ply the route between Magburaka and Makeni, though he was still resident at Magburaka in the Tonkolili District.[1559]

1097. Defence witness DMK-116 confirmed that the second accused was based at Masingbi during the 1999 attack on Freetown, and testified thus: "....I cannot tell the exact place where he was, but he wasn't with us either in Magburaka or Makeni. Morris Kallon came to Magburaka later on during the cease fire after the Accord."[1560]

1098. Consequently, the Defence for the second accused submits that the second accused was not, at any time, in any of the crime locations listed under Port Loko district; rather the second accused was between Magburaka (Tonkolili district) and Makeni (Bombali district)

[1555] *Prosecutor -v- Alex Tamba Brima et al*, Judgement of the Appeals Chamber, 22 February 2008, paras. 167(i) and 169, supra.
[1556] Transcript 21 July 2005, p.48 lines 12-19.
[1557] Transcript 17 April 2008, p.5, lines 19-23; and p.6, line 11; p.7, line 9
[1558] Transcript 17 April 2008, p.7 line 27; p.8, line 4
[1559] Transcript 17 April 2008, p.8, lines 9-16.
[1560] Transcript 5 May 2008, p.71 lines 18-27.

during February and April 1999, which is the Indictment timeframe for Port Loko district. Similarly, it is submitted that none of the witnesses who testified about the alleged crimes in Port Loko district, including TF1-253, 255 and 345, mentioned the second accused at all, whether directly or by implication. In view of evidence available to the Court that relationship had further soared between the AFRC/SLAs and the RUF after the January 6th invasion of Freetown, due to the latter's failure to cooperate with the former in the Freetown mission, it is averred that the inference by the Prosecution of a joint criminal enterprise between these groups and their fighters carries no probative value. The second accused consequently bears no responsibility under Articles 6(1) and (3) of the SCSL Statute for any of the crimes alleged in Port Loko District.

1099. For the reasons above stated, the Defence for the second accused respectfully urges the Court to wholesomely dismiss Counts 3 to 5 against the second accused.

4) ANALYSIS OF COUNTS 6 TO 9

a) LEGAL ELEMENTS

i) Count 6: Rape as a Crime Against Humanity

1100. Count 6 alleges "rape" as a form of "sexual violence" and a crime against humanity punishable under Article 2.g of the Statute. In its oral Decision on the RUF Motions for Acquittal made pursuant to Rule 98 of the SCSL's Rules of Procedure and Evidence, the Court outlined the "constitutive elements" of "rape" as a crime in the following terms: i) *that the accused invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim of the accused with a sexual organ, or of the anal or genital opening of a victim with any object or any other part of the body*; ii) *that the invasion was committed by force or by any threat of force, or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person, or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent*; iii) *[that] the accused intended to effect the sexual penetration or acted in the reasonable knowledge that this was likely to occur*; and iv) *[that] the accused knew or had reason to know that the victim did not*

consent.[1561] These definitional requirements of the crime of rape are largely in tune with the requirements set out by the ICTY's Appeal Chamber in the *Prosecution v. Kunarac et al*[1562]. Also, as a crime against humanity, the rape must be committed as part of a "widespread or systematic attack against any civilian population".

ii) Count 7: Sexual Slavery and Any Other Form of Sexual Violence as a Crime Against Humanity

(1) Sexual Slavery

1101. Count 7 alleges the double crimes of: i) "sexual slavery" (a form of "sexual violence") and ii) "any other form of sexual violence" as crimes against humanity punishable under Article 2.g of the Statute. Again, in its Rule 98 Decision, the Court indicated that in order to prove the first limb of Count 7, to wit, the crime of "sexual slavery" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 2.g of the Statute as follows: i) *that the accused 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*; ii) *[that] the accused caused such person or persons to engage in one or more acts of a sexual nature*; iii) *[that] the accused intended to exercise the act of sexual slavery, or acted in the reasonable knowledge that this was likely to occur.*[1563] Again, as a crime against humanity, the rape must be committed as part of a "widespread or systematic attack against any civilian population".

(2) 'Any Other Form of Sexual Violence'

1102. Additionally, the Court stated the elements of "any other form of sexual violence" as a crime against humanity punishable under Article 2.g of the Statute thus: i) *[that] the accused committed an act of a sexual nature against one or more persons, or caused such persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression, or abuse of power against such person or persons, or another person, or by taking advantage of a*

[1561] Transcript 25 October 2006, p.21 line16; p.22 line 2
[1562] ICTY IT-96-23-A Judgment, Appeals Chamber, 15 June 2002, [*Kunarac* Appeals Chamber Judgment], para. 127.
[1563] Transcript 25 October 2006, p.22 lines 3-12.

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coercive environment or of such person or persons' in capacity [sic] to give genuine consent; ii) *[that] the conduct was of similar seriousness to the other acts enumerated in Article 2.g of the Statute*; iii) *[that] the accused intended to commit the act of sexual violence or acted in the reasonable knowledge that this was likely to occur.*[1564] Furthermore, as a crime against humanity, it must be shown that the said conduct was perpetrated as part of a "widespread or systematic attack against any civilian population". Besides, the conclusion reached by the ICTY Trial Chamber in the *Prosecutor v. Kvocka*[1565] is worth noting, namely, that "sexual violence is broader than rape and includes such crimes as sexual slavery or molestation (...) sexual mutilation, forced marriage, and forced abortion..."

1103. However, before delving into the evidential value of the Prosecution's case before the Court vis-à-vis the Indictment and its Supplemental Pre-Trial Brief, the Defence for the second accused submits that the present Count as charged in the Indictment is defective, and violates the rule against duplicity, and should be wholesomely dismissed for the said reasons. *Ex facie*, Count 7 charges the accused with one crime against humanity stipulated as "*Sexual Slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute*". Legally speaking, however, two separate and distinct crimes are charged as one in Count 7, namely, i) the crime against humanity of 'sexual slavery', and ii) the crime against humanity of 'any other form of sexual violence'. It is respectfully submitted that this Prosecutorial endeavour in charging two distinct crimes against humanity as one count violates the rule against multiplicity, duplicity or vagueness.

1104. In the case of the <u>*Prosecutor v. Karemera,*</u>[1566] the Trial Chamber in, *inter alia*, considering issues of defects in the form of the Indictment against the accused, noted that "allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him"[1567]. In this regard, the Defence submits that Count 7 in its current state has made it difficult for the second accused to "fully understand the nature and the cause of the charges brought against him" and, therefore, ought not to be *sustained* as part of the Indictment. Much as the Prosecution would have found it duplex and objectionable to charge the second accused with "sexual slavery" and "rape" or "other inhumane act" together,

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[1564] Transcript 25 October 2006, p.22 lines 13-26.
[1565] *Prosecutor v. Kvocka* ICTY IT-98-30/I-T, Trial Chamber Judgment, para. 180.
[1566] Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, *inter alia*, lack of jurisdiction and defects in the form of the Indictment, 25 April, 2001.
[1567] Id. para 16.

so must it find it objectionable to charge "sexual slavery" and "sexual violence" together. It is averred that this Court had earlier dealt with issues of this nature in its "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence" in the *Prosecutor v. Sam Hinga Norman* [1568].

1105. Notwithstanding the foregoing objection to the form of the Indictment, the Defence for the second accused alternatively submits that even in its current defective form, Count 7 as charged lacks evidential merit and should be dismissed by the Court. The factual analysis below, done on an event-to-event basis, shall illustrate this demerit in the case of the Prosecution.

iii) Count 8: Other Inhumane Act as a Crime Against Humanity

1106. Count 8 alleges the crime of "other inhumane act" as another form of "sexual violence" and a crime against humanity punishable under Article 2.i of the Statute. Before proceeding with its legal requirements, the Defence for the second accused notes that this Count is charged twice, firstly, as a form of 'sexual violence' as charged herein (Count 8), and secondly, as a form of 'physical violence' as charged in Count 11 of the Indictment. The fact that the Court, in its Rule 98 oral Decision aforesaid, chose not to restate the elements of this crime in its analysis of Count 11[1569] tells it all. The Defence submits that Counts 8 and 11 as charged are duplicitous and puts the second accused in the difficult and unfair situation of having to plead and answer to the same offence twice. It is further averred that one of these two Counts ought to be declared redundant, and in that respect, the Indictment as defective for violating the rule against duplicity of charges based on the same legal requirements. This is particularly in view of the fact that the phrase "other inhumane acts" operates at international humanitarian law as a residual category of crimes against humanity; it operates to include that which was not expressed.

1107. Alternatively, the Defence for the second accused submits that even if the Court were to uphold Count 8 in its present form, the Count, as demonstrated below, lacks evidential merit and cannot be factually sustained. In fact, only one unknown or unstated "other inhumane *act*" is charged, unlike Count 11, which is in the plural.

1108. For the purposes of evidence, the Court's definition of "other inhumane act(s)" in Count 8 is to the effect that the Prosecution should lead evidence to prove the elements of the

[1568] *Prosecutor v. Sam Hinga Norman,* Trial Chamber (SCSL) Decision, 24 May 2005, para. 19.
[1569] Transcript 25 October 2006, p.27 lines 1-3.

offence within the meaning of Article 2.i of the Statute as follows: i) *[that there was] the occurrence of an act or omission of similar seriousness to the act or other acts enumerated in Article 2 of the Statute*; ii) *[that] the act or omission caused serious mental or physical suffering, or injury, or constituted a serious attack on human dignity*; and iii) *[that] the accused, at the time of the act or omission, had the intention to commit the inhumane act or acted in reasonable knowledge that this was likely to occur.*[1570] However, it is submitted that this Count lacks evidential merit as demonstrated below.

iv) Count 9: Outrage upon Personal Dignity as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

1109. Count 9 alleges the crime of "outrages upon personal dignity" as a form of "sexual violence" and a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e of the Statute. In its Rule 98 Decision, the Court indicated that in order prove the crime of "outrages upon personal dignity" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 3.e of the Statute as follows: i) *that the accused humiliated, degraded or otherwise violated the dignity of one or more persons*; ii) *that the severity of the humiliation, degradation or other violation was of such a degree as to be generally recognized as an outrage upon personal dignity*; iii) *[that] 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*; and iv) *[that] the accused knew, or had reason to know that the person was not taking a direct part in the hostilities.*[1571] "Rape" and "any form of indecent assault" are examples of "outrage upon personal dignity" provided in Article 3.e of the Statute.

b) EVIDENTIAL ANALYSIS

1110. In order to substantiate the foregoing charges in Counts 6 to 9, the Prosecution alleges that the second accused, by his "acts" or "omissions", is individually criminally liable for the crimes alleged in paragraphs 54 to 60 of the Indictment, pursuant to Article 6.1 and/or Article 6.3 of the Statute of the SCSL. The said allegations concern six set of occurrences in the Districts of Kono, Koinadugu, Bombali, Kailahun, Freetown and the Western Area, and Port

[1570] Transcript 25 October 2006, p.22 line 27 to p.23 line 7.
[1571] Transcript 25 October 2006, p.23 lines 10-24.

Loko. The Indictment alleges that members of the AFRC/RUF, including the second accused, committed "widespread sexual violence" against "civilian women and girls" and that the said sexual violence included 'brutal rapes' and 'forced marriages'. The said crimes are said to have occurred on diverse periods, including the periods between "14 February 1998 and 30 June 1998" for Kono District; between "14 February 1998 and 30 September 1998" for Koinadugu District; between "1 May 1998 and 31 (*sic*) November 1998" for Bombali District; "at all times relevant to the Indictment" for Kailahun District; between "6 January 1999 and 28 February 1999" for Freetown and the Western Area; and between "February 1999 and April 1999" for Port Loko District. The factual analysis below takes each alleged event on its merits vis-à-vis the evidence available to the Court.

i) Prosecution Expert on Forced Marriages

1111. It is submitted that the Prosecution's concept of "Forced Marriage" through the eyes of its witness, TF1-369, is confused, uncertain and vague. Though the witness testified as an expert on women's rights issues,[1572] including forced marriage issues, she clearly could not tell the distinction between "forced" and "arranged" marriages, if any. The witness distinguished forced marriage from arranged marriage by saying that 'forced marriage' was "where the girl is uprooted from her home, from her family, where she has to do it under gunpoint, where her entire life is disrupted"[1573]. She then identifies 'arranged marriage' as a situation where 'you go and tell your family that you want to marry somebody and the family consents, proceeds on your behalf to meet the other family and then both families meet and consent to the marriage on behalf of the parties.'[1574] The witness also confirmed, under cross-examination, that a forced marriage depends on how the consent of the girl is vitiated or supplanted. If the marriage is supplanted by the parents' consent, such is not forced marriage, it is arranged; if it is supplanted by circumstances arising from war, then the marriage is forced even if the parents consent[1575]. Unclear as to whether a marriage can be termed 'forced' where the party's consent is absent and is superimposed by parental consent, the witness stated that a situation in which a girl is given into marriage without her consent could be referred to as an 'arranged marriage' rather than forced marriage.[1576] According to the

[1572] Transcript 25 July 2006, p.58 line 28 to p.59, line 2
[1573] Transcript 26 July 2006, p.6 lines 19-26.
[1574] Transcript 25 July 2006, p.70 lines 9-23.
[1575] Transcript 26 July 2006, p.20 line 10 to p.22 line 4.
[1576] Transcript 26 July 2006, p.89 lines 11-14.

witness, a girl's consent to marriage is important but not essential in the Sierra Leonean context.[1577] The witness's dearth of knowledge on the subject is portrayed in her admission that she has never made any presentation on forced marriages and bush wives.[1578]

1112. The Defence is thus practically unclear about what legal or professional yardsticks the Prosecution relied upon in pleading "forced marriage" in Counts 6 to 9. Since marriage is meant to be a social contract between mostly members of the opposing sexes, it is submitted that where consent is not given, then there is no marriage; at best such relationships can be clearly illegal, especially if violently obtained, but they cannot be lawful (as in marriages) and at the same time unlawful (as with the use of force to obtain them). In the realm of consent, a given social relationship may be forced or arranged (a form of 'forced cohabitation' in the war situation, for example, as suggested by Defence Counsel); but not with marriage, which loses its nomenclature when impaired or vitiated from onset. Little wonder that the witness grappled with defining so-called "bush wives" in the context of conflicts. She said that forced marriage in the conflict involved situations where the girls described themselves as "jungle wife", "I was their bush wife, he was my bush husband"; noting that the word 'forced', in that context, meant that the marriage was not real and was done against the consent of the affected women.[1579] The witness confirms her definition of 'a bush or rebel wife', in line with a report submitted by her, as 'a young girl or woman who was abducted by a rebel and in most cases, coerced and terrorised into living with that rebel as a wife'.[1580] It is submitted that no criminality ought to lie from this type of analysis by a supposed expert on forced marriage, which is pleaded in the Indictment as a form of sexual violence.

ii) Kono District (14 February 1998 and 30 June 1998)

(1) The Prosecution Case

1113. Paragraph 55 of the Indictment alleges rape and abduction of an unknown number of women and girls by members of the AFRC/RUF from various locations within Kono District, including Koidu, Tombodu, Kissi Town, Foendu, Tomendeh, Fokoiya, Wondedu and various AFRC/RUF camps. It also alleges that the said women and girls were used as sex slaves and/or forced into marriages, and it limits the timeframe for these alleged conducts to

[1577] Transcript 26 July 2006, p.20 lines 1-2.
[1578] Transcript 27 July 2006, p.65 lines 26-29.
[1579] Transcript 27 July 2006, p.42, lines 5-13.
[1580] Transcript 26 July 2006, p.94, line 18 to p.95, line 1.

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"between about 14 February 1998 and 30 June 1998". It is submitted that the Indictment is, in this respect, vague about both the time and the number of women and girls allegedly involved in the said incidents, if any. The Prosecution has conceded that there is no evidence of "sexual violence" in Fokoiya, Tomendeh and "Superman Camp".[1581]

1114. To prove the alleged offences, the Prosecution elicited evidence from various witnesses, including TF1-141, 064, 016, 071 and 305.[1582] It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 6 to 9 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Kono District between 14 February 1998 and 30 June 1998. Accordingly, the Defence reiterates its arguments and adopts its submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any combatant in Kono District within the above timeframe; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes specified hereunder; and thirdly, that the second accused was never involved in any criminal enterprise with anyone and/or group(s) of combatants to perpetrate the said crimes.

(2) The Evidence

1115. Witness TF1-141 testified that when himself and other combatants went on food finding missions "some men raped [the captured women] where we would capture them. Some men took them as their wives after we have brought them into town. The women would cook for us, for the men." [1583] Furthermore, the witness stated that when they went on the said missions "we would bring so many women – sometimes it was not just him, there were other commanders, but in particular Morris Kallon. At one time he took one of the women as his wife."[1584] He then said that the captured women were from the surrounding villages and that some were captured from the middle of the forest.[1585] He described the woman allegedly taken by the second accused as wife at Superman Ground as "a young girl" but said that he did not know her age.[1586]

[1581] Rule 98 Oral Decision, Transcript 25 October 2006, p. 23 lines 28-29
[1582] Transcript 25 October 2006, p.24 lines 5-16.
[1583] Transcript 11 April 2005, p.93, lines 7-14.
[1584] Transcript 11 April 2005, p.93, lines 23-26.
[1585] Transcript 11 April 2005, p.94, lines 28-29.
[1586] Transcript 11 April 2005, p.95, lines 2-3, 5-7.

1116. In view of the arguments already proffered in Counts 3 to 5 above against the credibility of TF1-141, including his deliberate falsification of his age to benefit from the disarmament and demobilization package after the conflict as well as his insistence under cross-examination that the second accused was the RUF Battle Field Commander in 1999 contrary to the Indictment[1587], it is averred that the foregoing account of the witness equally lacks credibility. Besides, under cross-examination by Counsel for the second accused, the witness accepted that he did not fully know what was going on in the second accused's house and admitted that he did not also know about the second accused's private matters, but said that he knew that his house was overcrowded with members of his family who may have been over 40 in number.[1588] The witness also testified that he does not know the name of the woman that the second accused had as wife in Kono.[1589]

1117. To the contrary, the second accused himself testified that he knew about food-finding missions organized by Superman in Kono, but that he did not know about RUF combatants forcing captured women to become their wives, and indicated that even TF1-361 had testified that at Superman Ground, it was illegal for a combatant to force any woman into marriage. The second accused also denied forcing any woman to be his wife at Superman Ground or having combatants under the age of 15 in his command and control in Kono.[1590] The Defence avers that the second accused was wedded and had a large family of women, children and the elderly with him in Kono. Thus, in the circumstance, he could not have engaged in forcible marriages in Kono.

1118. Witness TF1-366, in his usual unfounded haste in placing the second accused in every crime everywhere, testified that the second accused was the first person to take women to the front line; saying further that "Morris Kallon took them to the front line and placed them at the checkpoint, forcefully (...) where many of them died. That was their own job. We called them "wives.""[1591] The witness stated further that when they went to fight, they captured women and these women were forcefully married. He said that he would also order his boys to capture women, and when the women were brought to him, he would give them to the second accused, who would then sleep with them. Characteristically, the witness testified that these alleged events occurred almost everywhere: Kailahun, Pendembu, Kono, Makeni, and even in unpleaded areas like Magburaka, Lokomassama and Lungi; he also indicated that the

[1587] Transcript 15 April 2005, p.99, lines 1-5.
[1588] Transcript 18 April 2005, p.55, line 17 to p.56, line 8.
[1589] Transcript 18 April 2005, p.59, lines 19-21.
[1590] Transcript 18 April 2008, p.50 lines 1-18.
[1591] Transcript 8 November 2005, p.71, lines 7-10.

second accused's alleged conduct started from 1991 up to 2002,[1592] which is long after the disarmament period.

1119. Witness TFI-071 also stated that he witnessed the abduction of women in 1998 in Kono District.[1593] However, the witness, who was unable to indicate the number of abductions and the specific periods they occurred, stated that women were abducted in "every village that have been occupied by the fighters during the war and even for food-finding". He explained that "some of these women were used for cooking, some of them were used for forced marriages, some were claimed to have been raped". [1594] Besides, witness TFI-015 testified about rapes and forced marriages at Wundedu in Kono District. He said that there were many commanders there and that though he did not know all of them, he knew that commanders like Major Rocky, CO Pepe, who "was an SBU commander" and Rebel Father, were there.[1595]

1120. Witness TFI-195 also testified about being raped by several men having guns and a stick at different intervals.[1596] The witness, who also testified about various acts of sexual violence against women in Kono, said that the incidents occurred during the "intervention period", referring to "the time the people's army were removed from [Freetown] and they went up to Kono." [1597] Another witness, TF1-016, testified about acts of forced marriages and rape in Kissy Town and Njagbema in Kono District involving her, her daughter and other women, and said that the head of the rebels was called Alpha.[1598] Also, witness TF1-218 testified extensively about witnessing acts of sexual violence and about being raped herself by rebels she could not identify [redacted].[1599] The said location was, however, not pleaded.

1121. Witness, TF1-197 also testified about how he witnessed Staff Alhaji rape a woman in Tombodu, among other things.[1600] Similarly, witness TFI-217 testified that in April 1998 junta forces, led by Staff Alhaji Bayoh (an SLA),[1601] encircled Penduma (an unpleaded location in the Indictment) and separated the women from the men. The witness alleged that some of the women were taken away and raped.[1602] According to the witness, his wife was raped by eight of "Staff Alhaji's boys".[1603] He identified two of the eight as "Junior, and T.

[1592] Transcript 8 November 2005, p.72, line 21 through to p.74, line 13.
[1593] Transcript 19 January 2005 pp.38, line 29
[1594] Transcript 19 January 2005 p.37, line 27 to p.39 line 20.
[1595] Transcript 28 January 2005, p.8, line 1 to p.9, line 22.
[1596] Transcript 1 February 2005, p.10, line 11 through to p.14, line 14.
[1597] Transcript 1 February 2005, p.28, lines 16-22.
[1598] Transcript 21 October 2004, p.14 lines 1-29; p.19 lines 2-29; p.20 lines 1-29.
[1599] Transcript 1 February 2005, p.84, lines 2-25; and p.85, line 12 to p.86, line 5.
[1600] Transcript 21 October 2004, p.87 lines 1-14.
[1601] Transcript 22 July 2004, p.16, line 5; and pg 30, lines 14-18
[1602] Transcript 22 July 2004, p.16, lines 21 - 24
[1603] Transcript 22 July 2004, p. 24, line 18; pg 17, line 29

Joe, Tamba Joe".[1604] He gave evidence that Staff Alhaji "gave the orders" for the rape.[1605] The witness testified that the perpetrators of the events in Penduma were junta soldiers, and that Staff Alhaji "was in full control" of the perpetrators.[1606] [redacted] The group asserted that they wanted a military government, and identified Johnny Paul Koroma (JPK) as "their head".[1608]

1122. Several other witnesses, including TF1-305, testified about various acts of sexual violence perpetrated in Kono District but all of them, including the witnesses cited herein, failed to present any credible evidence, beyond reasonable doubt, to show that the second accused committed, ordered, planned, instigated, aided and abetted, or conspired with anyone in a criminal enterprise to commit the offences outlined in Counts 6 to 9 of the Indictment.

1123. In fact, according to witness TFI-361, who corroborated the second accused's account about the alleged offences herein, the captured civilians in Superman Ground were helping the commanders to do some work. The witness said that some civilians helped in cooking food for the "ambush people and some, they love making friendship with soldiers, but there was strong love, because a soldier cannot take a woman like that, except when the woman desires you. So if that's happened, you go to the authority and the authority gives you the woman. You cannot just use force to rape a woman. You will be killed. That was the law."[1609]

1124. Also, witness TFI-078 agreed, under cross-examination, that there was a friendly atmosphere in the civilian camps in Kono, including Kunduma and Wondedu camps, and that the two rules of the camps, not to rape or steal, applied both to civilians and combatants.[1610] He agreed that rebels were aware that they would be punished if they did unacceptable acts such as rape.[1611] The witness further stated that the second accused's 'relationship with civilians was very good',[1612] and that the second accused once visited Kaidu and 'advised Major Rocky [that] they should be very much friendly with the civilians; they should not be hostile with the civilians.'[1613] He also testified that Captain Rocky told the civilians of the consequences of disobeying the rules, such as that no combatant should commit rape and that

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[1604] Transcript 22 July 2004, p. 18, line 2
[1605] Transcript 22 July 2004, p. 20, line 23
[1606] Transcript 22 July 2004, p. 31, line 5 - 7; p.16, lines 27 - 31; pg 20, line 22 and lines 27 - 28;
[1607] Transcript 22 July 2004, p. 31, lines 13 - 14 and p. 35, line 19
[1608] Transcript 22 July 2004, p. 37, line 15.
[1609] Transcript 12 July 2005, p.20 lines 9-16.
[1610] Transcript 25 October 2004, p.64, line 24 to p.65 line 14.
[1611] Transcript 27 October 2004, p.6, lines 20-24.
[1612] Transcript 26 October 2004, p.21, lines 14-15.
[1613] Transcript 22 October p.74, lines 21-24.

if they do, they should be executed.[1614] When asked if there were abductions in the Kono area from February 1998 to June 1998, the witness said that 'All I knew was that civilians were abducted and brought to a safer place when the war was going on', and confirmed that civilians were captured and brought to a safer place and handed over to the G5s, who headed the social welfare unit of the RUF.[1615]

1125. Defence witness DMK-039, an RUF combat medic, testified that throughout the period she was in the jungle, she did not see any RUF combatant forcing women into marriage; she did not also see them rape women.[1616] Also, she testified that at Yomandu in Kono [redacted] she did not see or hear that any woman has been forcefully taken into marriage by an RUF combatant; nor did she hear that any woman had been raped.[1617] Also, Defence witness DMK-087, who was an RUF G5 officer responsible for the welfare of civilians in Kono, testified that, between February 1998 and December 1998, he heard or received no report of forced marriage in Kono District.[1618] He stated further that he did not hear or receive reports that during that period women civilians were captured and raped or that some were brought and made wives of soldiers at the Guinea Highway as alleged by TF1-141.[1619] Witness DMK-087 also said that if any soldier or commander wanted to take a civilian, they, as G-5 officers, must know about it and that commanders and soldiers would not just take women and make them wives unbeknown to the G-5s. He stated that if that happened, it would have been a crime against the soldier or commander.[1620]

1126. In fact both Defence witnesses: DMK-039 and DMK-087 are corroborated in their accounts by Prosecution witness TF1-167 who testified that on their arrival in Kono, after the AFRC retreat from Freetown in 1998, no instructions were given for abductions or rape by their superior commanders.[1621] Also, witness DIS-214, Defence witness for Issa Sesay, stated that he did not hear of any incident in Kono District or elsewhere where the second accused forced a woman to marry him. He said that the second accused had a wife and that that was the only wife staying with him at Meiyor in Kono.[1622] The witness testified that he would have known if the second accused had forced a woman to marry him in Kono, because the

[1614] Transcript 22 October, p.75, lines 20-27.
[1615] Transcript 26 October 2004, p.18, lines 14-24.
[1616] Transcript 25 April 2008, p.23, lines 19-26.
[1617] Transcript 25 April 2008, p.25 lines 4-8.
[1618] Transcript 22 April 2008, p.108 lines 13-22.
[1619] Transcript 24 April 2008, p.6, lines 13-24.
[1620] Transcript 24 April 2008, p.6 line 25; p.7, line 5
[1621] Transcript 20 October 2004, p.18 lines 11-18.
[1622] Transcript 17 January 2007, p.70 lines 4-29.

second accused's base was very close to where he was and people would have talked about it if it had happened.[1623]

1127. For the reasons above stated, it is submitted that the Prosecution has, firstly, failed beyond reasonable doubt to link the second accused up with the offences contained in Counts 6 to 9 of the Indictment; and secondly, that it has also failed to prove the elements of the said offences in a manner that will infer that the second accused was responsible for their occurrences. The Prosecution particularly failed to show that the second accused *knew, or had reason to know*, that the said offences were being committed and that they were committed by fighters controlled by the second accused

iii) Koinadugu District (14 February 1998 and 30 September 1998)

1128. Also, paragraph 56 of the Indictment alleges rape and abduction of an unknown number of women and girls by members of the AFRC/RUF from various locations within Koinadugu District, including Kabala, Koinadugu, Heremakono and Fadugu. The Indictment also alleges that the said women and girls were used as sex slaves and/or forced into marriages or subjected to other forms of sexual violence, and then confined the alleged crimes to the timeframe of "between about 14 February 1998 and 30 September 1998". The Indictment is, in this respect, clearly vague about both the time and the number of women and girls allegedly involved in the said incidents.

1129. As already noted in this Brief, on 5 May 2007, the Prosecution agreed with the Defence for the second accused that: i) the second accused "did not form part of the group who (*sic*) travelled from Kono to Koinadugu to Camp Rosos with Gullit and others"; and ii) that "between about 14 February 1998 and about 30 September 1998, [the second accused] was not an RUF and/or AFRC field commander in any location in Koinadugu district, and did not reside there".[1624] In addition, the Prosecution has conceded that there is no evidence of sexual violence in Heremakono, Fadugu and Kabala.[1625]

1130. In view of the foregoing admission, the Defence inclines the Court to respectfully discountenance every allegation made by the Prosecution against the second accused under the Indictment in respect of Koinadugu District. The Defence submits that no evidence was led, beyond reasonable doubt, by the Prosecution against the second accused to establish any

[1623] Transcript 17 January 2007, p.72 lines 1-24.
[1624] See the "Agreed Statement of Facts between the Second Accused and the Prosecution in Compliance with Order 3 of the Scheduling Order", Annex H, 5 March 2007, at paras. 5 & 9.
[1625] Rule 98 Oral Decision, Transcript 25 October 2006, p. 23 line 29

criminal liability, whether individually or through a superior-subordinate relationship or a joint criminal enterprise, for any of the crimes alleged in Koinadugu District. The charges/counts under this location must thus be dismissed. The evidence of witnesses TF1-212 and TF1-213 about alleged sexual violence in Koinadugu, which the Court notes in its Rule 98 Decision,[1626] must therefore fail against the second accused.

iv) Bombali District (1 May 1998 to 30 November 1998)

1131. Moreover, paragraph 57 of the Indictment also alleges rape and abduction of an unknown number of women and girls by members of the AFRC/RUF from various locations within Bombali District, including Mandaha and Rosos. It also alleges that the said women and girls were used as sex slaves and/or forced into marriages or subjected to other forms of sexual violence, and then confined the alleged crimes to the timeframe of "between about May 1998 and 31 *(sic)* November 1998". Again, the Indictment is, in the above respect, vague and imprecise about time and the number of the allegedly affected women and girls. There is also no date as "31 November 1998".

1132. It is submitted that the Prosecution's initial case theory about the second accused concerning this alleged crime base/location, in the sense that the second accused "held a position, individually or in concert with other AFRC/RUF superiors, superior to the AFRC/RUF subordinates engaged in sexual violence [as alleged in Bombali District] and had effective control over the subordinates",[1627] was also abandoned on 5th March 2007 when the Prosecution agreed with the Defence for the second accused that "between about 1 May 1998 and 30 November 1998, [the second accused] was not a (*sic*) RUF and/or AFRC Field Commander in any location in Bombali district, and did not reside there".[1628]

1133. In view of the foregoing admission, the Defence again requests the Court to dismiss every allegation made by the Prosecution against the second accused in the Indictment in respect of Bombali District. The Defence submits that no evidence was led beyond reasonable doubt by the Prosecution against the second accused to establish any criminal liability, whether through a superior-subordinate relationship or individually (inclusive of a joint criminal enterprise), for any of the crimes alleged in Bombali District. This covers the Court's

[1626] Transcript 25 October 2006, p.24, lines 17-24.
[1627] Prosecution's Supplemental Pre-Trial Brief, para. 387.
[1628] See the "Agreed Statement of Facts between the Second Accused and the Prosecution" aforementioned, Annex H, 5 March 2007, at para. 10.

reference in its oral Decision on the RUF Motions for Acquittal aforementioned[1629] to the evidence of witnesses TF1-301 about Mandaha, TF1-167 on Rosos and Mansofinia, TF1-334 on rape in Karina and TF1-196 about being raped in a bush near Malama. It is thus respectfully requested that the charges under these locations be dismissed.

1134. The Defence for the second accused reiterates that the second accused, at all times material to the Indictment, was not involved in any joint criminal enterprise with the first and second appellants/convicts aforesaid or with anyone under their command and control or in their organization or group, nor did the second accused plan with, instigate, aid or abet or conspire in any manner with any of the appellants/convicts or with anyone in the RUF as well to commit the crimes outlined in Bombali District.

v) Kailahun District ("At all times relevant to the Indictment")

(1) The Prosecution Case

1135. Paragraph 58 of the Indictment alleges that 'at all times relevant to the Indictment' an 'unknown number' of captured women and girls were subjected to sexual violence in the Kailahun District by being brought to alleged AFRC/RUF camps in the District and then used as sex slaves and/or forced into marriages. Incidentally, the Prosecution does not allege under this location that it was *members of the AFRC/RUF* that: **i)** captured the said women and girls; **ii)** brought the women and girls to alleged AFRC/RUF camps in Kailahun District; and **iii)** used them as sex slaves and/or forced them into marriages in the said District.

(2) Relationship to the Indictment and Notice

1136. It is thus submitted that paragraph 58 of the Indictment is not only vague and imprecise as to time and the number of women and girls affected by the sexual violence as alleged, but that it also fails to specifically indict the second accused, or anyone for that matter, in Kailahun District for an offence. Paragraph 58 merely gives a narrative of an event or events that allegedly occurred in AFRC/RUF camps in Kailahun District; it does not say who perpetrated the crimes alleged, unlike the previous or subsequent locations in the Indictment, in which it is claimed that it was "members of the AFRC/RUF" that perpetrated the crimes as alleged. Assuming *arguendo*, that the affected women and girls were brought to

[1629] Transcript 25 October 2006, p.24, line 25 to p.25, line 6.

AFRC/RUF camps in the District, which is denied, it is contended that merely being in the camps does not create the offence of sexual violence per se as that offence is not charged under the Indictment as a status offence; rather, the offence of sexual violence, or the offences thereunder, are distinctly charged as substantive offences known to and recognized under international criminal and humanitarian laws.

1137. The above pleading was even confused further in the Prosecution's Supplemental Pre-Trial Brief by the fact that the Prosecution repeatedly stated that the alleged conduct (not being an offence in the Defence's repeated submission) was 'routine' and "not limited to any one District",[1630] even though it was specifically charged under Kailahun District. It is submitted that this form of pleading puts the second accused every where at the same time, whilst simultaneously confining him and his perceived subordinates to one District within the Indictment period. It is averred that nothing can be more hazy and difficult to respond to than this manner of pleading, and to this extent, the Counts 6 to 9 under Kailahun District ought to be dismissed.

(3) The Evidence

1138. Notwithstanding that paragraph 58 above lacks any criminal allegation to which the second accused was expected to plead, the Prosecution proceeded to elicit evidence from various witnesses, including TF1-114, 108, 113 and 371, among others,[1631] to prove a non-offence. Thus, even without conceding that there is an offence or offences created by paragraph 58 of the Indictment above, it is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in the crimes outlined in Counts 6 to 9 of the Indictment under Articles 6(1) and 6(3) of the Statute in Kailahun District. In this regard, the Defence repeats its arguments and adopts its submissions made in this Brief to demonstrate that the second accused was firstly, not in any command position in Kailahun District, nor did he command or control any combatant in the District within the timeframe of the Indictment; secondly, that he did not himself commit, plan, instigate, aid and abet or conspire with anyone to commit any of the crimes listed herein; and thirdly, that the second accused was never engaged in any criminal enterprise with anyone and/or group(s) of combatants to perpetrate the said crimes.

[1630] Prosecution's Supplemental Pre-Trial Brief, paras. 393(a) and 397(a).
[1631] Transcript 25 October 2006, p.25 lines 7-16.

1139. As already noted in this Brief and contrary to the Prosecution's case theory in its Supplemental Pre-Trial Brief, the second accused was never a member of the RUF 'High Command' or Decision-making Body that was based in Kailahun, at Buedu to be precise. The said high command comprised Sam Bockarie and other senior RUF Commanders who were all members of the RUF War Council. It can be especially recalled that Prosecution witness TF1-360 emphatically testified that the second accused, being a junior RUF officer, can "never – never – issue out orders if not authorized to do so by his superiors in Buedu", which was the RUF's "seat of power and authority."[1632] To this extent, the second accused, who was for the better part of the Indictment an RUF Major without a command assignment and based outside of Kailahun District, cannot be held responsible for any crime committed by or under the orders and control of his superiors in Kailahun in particular, and Sierra Leone at large, as he had no command authority over such superiors.

1140. Witness TF1-114 (Dennis Koker), who was the RUF MP Adjutant in Kailahun District in 1998, testified that commanders took women as wives when villages were attacked and women captured. He said that, as MP Adjutant, he knew that most of the women were taken to the commanders' houses and used as 'unlawful wives', and that some commanders had 5 or 6 wives.[1633] The witness did not, however, mention or relate the said alleged acts or incidents to the second accused, save that he alleged that the second accused twice brought people to Kailahun for training. It is submitted that the second accused was based in Kono in 1998 and that the witness's testimony to the Court was thrown into substantial doubt when he, *inter alia*, insisted under cross-examination that the second accused was both Battlefield Commander and Colonel in 1998,[1634] contrary to both the Indictment and the accounts of other witnesses earlier mentioned in this Brief. Strangely too, the witness showed a lack of knowledge about the operations of other units in the RUF, such as the G-1 and G-5 units.[1635]

1141. Furthermore, witness TF1-371 testified that as a result of combat activities, some civilians found themselves behind rebel lines and that such civilians, including girls or women, became 'abducted' from that moment. He said that some of the abducted women also became the wives of commanders, and that he later discovered that the wives of Sam Bockarie and the second accused were respectively abducted, claiming that the second accused had abducted his wife in an operation in Bo District.[1636] The witness, however, failed

[1632] Transcript 26 July 2005, p.38, line 16 to p.39, line 19.
[1633] Transcript 28 April 2005, p.63 line 14 to p.64 line 14.
[1634] Transcript 29 April 2005, p.23 line 4 to p.24 line 15.
[1635] Transcript 29 April 2005, p.26 line 5-16
[1636] Transcript 21 July 2006, p.66 line 3 to p.69 line 1.

to show how he came by the knowledge that the wife of the second accused was abducted in Bo and then made wife. In view of the testimonies of the second accused himself, DMK-039, DMK-087, DIS-214 and TF1-167 aforesaid, it is submitted that the above account of TF1-371 cannot be verified or substantiated.

1142. Consequently, it is submitted that the Prosecution has not only failed to allege an offence in paragraph 58 of the Indictment, but has equally failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any purported crime or incident outlined in Counts 6 to 9 of the Indictment for Kailahun District. In this regard, the Defence for the second accused respectfully re-submits that any semblance of an allegation levelled against the second accused concerning Counts 6 to 9 in respect of Kailahun District above be dismissed.

vi) Freetown and the Western Area (6 January 1999 to 28 February 1999)

(1) The Prosecution Case

1143. Additionally, paragraph 59 of the Indictment alleges as well the abduction and rape of an imprecise number of women and girls by members of the AFRC/RUF "throughout the city of Freetown and the Western Area". It also alleges that the said women and girls were used as sex slaves and/or forced into marriages or subjected to other forms of sexual violence, and it then confined the alleged crimes to the timeframe of "between 6 January 1999 and 28 February 1999". Again, it is submitted that the Indictment is, in the above respect, vague and imprecise about time, the number of allegedly affected victims and the specific locations in Freetown and the Western Area to which the alleged crimes are referable.

1144. In response to the allegations contained in paragraph 59 of the Indictment as well as the Prosecution's case theory about the second accused concerning the above locations in its Supplemental Pre-Trial Brief, the Defence repeats its arguments and adopts its submissions made in this Brief under the said locations (especially at Counts 3 to 5) to illustrate that the second accused was firstly, not in any command position in Freetown or any part of the Western Area of Sierra Leone, nor did he command and/or control any combatant in the said places within the timeframe of the Indictment; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes listed in

paragraph 59 of the Indictment; and thirdly, that the second accused was never engaged in any criminal enterprise with anyone and/or group(s) of fighters to commit the said crimes.

(2) The Evidence

1145. In order to prove the alleged offences in Freetown and the Western Area, the Prosecution elicited evidence from various witnesses, including among others TF1-022, 023, 029, 081 and 334.[1637] Again, it is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 6 to 9 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Freetown and the Western Area between 6 January 1999 and 28 February 1999.

1146. Apart from the fact that none of the witnesses who testified about these alleged crime bases never mentioned or identified the second accused, directly or remotely, in the perpetration of the sexual offences that they witnessed, heard of and/or experienced there, it has been exhaustively argued under Counts 3 to 5 that the second accused was not only absent from the Freetown and Western Area crime scene at the time of the crimes, but that he never planned (with), instigate, aid or abet, or conspire with anyone or any group of combatants to commit the crimes claimed in those locations. Similarly, in adopting the arguments in Counts 3 to 5 above, it is also submitted that the second accused was not involved in any joint criminal enterprise with any combatant or group of people to put the said offences into operation, nor did the second accused exercise any form of command and control authority over any combatant who committed the crimes in Freetown and Western Area.

1147. Witness TF1-334, one of the witnesses that testified about 'abductions and raping' in Freetown,[1638] himself confirmed that Rambo had told SLAs that the RUF refused to come to Freetown because the RUF did not believe that SAJ Musa was dead, so that was why they did not come to reinforce the SLAs in Freetown.[1639] He stated that the first meeting between SLAs from Freetown and the RUF took place at Waterloo; and that upon the SLAs retreat to Waterloo, they only met Superman and some RUF fighters there.[1640] In particular, the witness testified that they did not meet the second accused at Waterloo upon retreating; and that the second accused only came later to Benguema with Issa Sesay and Rambo on a mission to

[1637] Transcript 25 October 2006, p.25 lines 17-25.
[1638] Transcript 25 October 2006, p.25 lines 24-25.
[1639] Transcript 7 July 2006, p.42, lines 22-27.
[1640] Transcript 7 July 2006, p.47, lines 7-13; p.47, lines 22-25; p.48, lines 3-11.

arrest Superman. The witness testified that the said mission was futile, so the second accused and the others had to withdraw to Makeni.[1641] This clearly exonerates the second accused from the crimes.

1148. In the foregoing regard, the Defence for the second accused respectfully submits that the unfounded and unproved allegations levelled against the second accused in respect of Counts 6 to 9 concerning Freetown and the Western Area be dismissed.

vii) Port Loko District (February 1999 to April 1999)

1149. Paragraph 60 of the Indictment alleges, as usual, the abduction and rape of an 'unknown number' of women and girls by members of the AFRC/RUF in various unknown locations in the Port Loko District. It also alleges that the said vague number of women and girls were used as sex slaves and/or forced into marriages or subjected to other forms of sexual violence, and it then restricted the alleged crimes to the imprecise timeframe of "between February 1999 and 30 April 1999". Again, it is submitted that the Indictment is, in the above respects, uncertain.

1150. In response to the allegations contained in paragraph 60 of the Indictment as well as the Prosecution's case theory about the second accused concerning Port Loko District in its Supplemental Pre-Trial Brief, the Defence repeats its arguments and adopts its submissions made in this Brief under the said district (especially at Counts 3 to 5) to show that firstly, the second accused did not hold any command position in Port Loko District, nor did he command and/or control any combatant in the district within the timeframe of the Indictment; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes outlined in paragraph 60 or in part of the Indictment; and thirdly, that the second accused was never engaged in any criminal enterprise with anyone and/or group(s) of combatants to commit the said crimes alleged in the district.

1151. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt indicting the second accused in any crime, including the crimes outlined in Counts 6 to 9 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Port Loko District between February 1999 and 30 April 1999. Apart from the fact that none of the witnesses who testified about these alleged crime bases never mentioned or implicated the second accused, directly or indirectly, in the perpetration of the sexual offences that they

[1641] Transcript 7 July 2006, p.85 line 6 to p.86, line 4

witnessed, heard of and/or experienced, it has been adequately contended under Counts 3 to 5 of the Indictment that the second accused was not only absent from the Port Loko District crime scene at the material period of the alleged crimes, but that he never planned (with), instigate, aid or abet, or conspire with anyone or any group of combatants to commit the crimes claimed in those locations. Similarly, in adopting the arguments in Counts 3 to 5 above, it is submitted that the second accused was not involved in any joint criminal enterprise with any combatant or group of fighters to perpetrate the said offences, nor did the second accused exercise any form of command and control authority over any combatant that committed crimes in the Port Loko District.

1152. In the foregoing regard, the Defence for the second accused respectfully submits that the unfounded and unproved allegations levelled against the second accused in respect of Counts 6 to 9 concerning Port Loko District be similarly dismissed.

1153. Another issue of interest to the Defence for the second accused is the failure by the Prosecution to adequately prove, beyond reasonable doubt, the elements of the crimes of rape, sexual slavery, other inhumane acts, outrages upon personal dignity and any other form of sexual violence pleaded in Counts 6 to 9 in relation to the second accused. It is submitted that absenting evidence that the second accused took part in any crime – whether directly as an individual or indirectly as a superior without any outlined command and control authority – the second accused's alleged physical and mental responsibilities for the sexual offences alleged will be difficult to place within the confines of proof of guilt at international criminal law. Consequently, the liabilities alleged under Articles 6(1) and 6(3) of the Statute fail.

viii) Districts Not Pleaded

(1) The Prosecution Case

1154. The Prosecution led evidence through TFI 371 and TFI 366 of sexual violence in Bo District and Tonkolili District, respectively. The Indictment does not allege sexual violence in those districts.

(2) The Evidence

(a) Bo District

1155. Prosecution witness TFI 371 testified that "the wife of Morris Kallon was...abducted in an operation in Bo District."[1642] He gave this as an example of how senior commanders "had wives that were acquired during the combat situation." He said that thousands of women could have been abducted in this way.[1643] No timeframe was elicited by the Prosecution for this allegation and the name of the woman was not specified.

(b) Tonkolili District

1156. Prosecution witness TFI 366, an RUF insider, testified that from "1991 to 2002" he received orders from Mr Kallon to capture women and that Mr Kallon would "sleep with them." He said that this happened in Kailahun, Kono, Makeni, Pendembu, Magburaka, Lungi and Lokomassama. He said that the victims were called "wives."[1644]

1157. These sweeping allegations were made by a single witness who displayed ample motivation to mislead the Court and implicated the Accused at every opportunity, often unprompted by questioning. His lack of credibility was exposed under cross-examination and is clearly demonstrated, *supra*. Furthermore, it is inconsistent with the body of evidence on the record.

1158. In response to questioning about this allegation, DMK 161 stated "My Lords, this kind of information never existed. Amara Peleto never took command from Morris Kallon." [1645]

5) ANALYSIS OF COUNTS 10 AND 11 OF THE INDICTMENT:

a) LEGAL ELEMENTS

i) Count 10: Violence to Life, Health and Physical or Mental Well-being of Persons, in Particular Mutilation as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

1159. Count 10 alleges the crime of "violence to life, health and physical or mental well-being of persons, in particular *mutilation*", a form of "physical violence" and a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under

[1642] Transcript 21 July 2006, pg 68, line 28; pg 69, line 1.
[1643] Transcript 21 July 2006, pg 68, line 13-25.
[1644] Transcript 8 November 2005, pg 71, line 7 – pg 74, line 2.
[1645] Transcript 22 April 2008, pg 27, line 20-21.

Article 3.a of the Statute. In its oral Decision on the RUF Motions for Acquittal made pursuant to Rule 98 of the SCSL's Rules of Procedure and Evidence, the Court indicated that in order prove to the crime of "mutilation" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 3.a of the Statute as follows: firstly, that *"the accused persons subjected one or more persons to mutilation, in particular by permanently disfiguring the person or persons, or by permanently disabling or removing an organ or appendage [of the person or persons concerned]"*; secondly, that *"[the accused's] conduct was neither justified by medical, dental or hospital treatment of the person or persons concerned, or carried out on such person or person's interest"*; thirdly, that *"the accused intended to subject the person or persons to mutilation or acted in reasonable knowledge that this was likely to occur"*; and fourthly, that *"the accused knew or had reason to know that the person was not taking a direct part in the hostilities"*,[1646] in other words, that the victim was a person protected under one or more of the Geneva Conventions of 1949. Other issues of consideration to establish the crime includes, i) finding that the violation took place in the context of and was associated with an armed conflict; and ii) that the accused was aware of the factual circumstances that established the protected status of the victim.

ii) Count 11: Other Inhumane Acts as a Crime Against Humanity

1160. The offence of "other inhumane acts" as a crime against humanity punishable under Article 2.i of the Statute has already been extensively discussed under analysis of Count 8 of the Indictment, save within the context of a different factual situation. Thus, unlike Count 8, Count 11, like Count 10, defines "other inhumane acts" as a form of "physical violence" alleged to have been carried out in various locations in Sierra Leone, including the Districts of Kono, Kenema, Koinadugu, Bombali, Freetown and the Western Area, and Port Loko. For the purposes of the legal requirements of this crime, the Defence for the second accused refers the Court to the analysis under Count 8 of this Brief, as the analysis below is meant to illustrate that the evidence available to the Court does not substantiate that the second accused is individually criminally responsible, under both Articles 6(1) and 6(3) of the Statute, for the offence of "other inhumane acts" as alleged in Count 11 of the Indictment.

1161. The analysis below, done on an event-to-event basis, shows that both Counts 10 and 11 lack evidential merit against the second accused and should be thus dismissed.

[1646] Transcript 25 October 2006, p.26 lines 12-29.

b) EVIDENTIAL ANALYSIS

1162. In order to prove the above Counts, the Prosecution again alleges that the second accused, by his "acts" or "omissions", is individually criminally liable for the crimes alleged in paragraphs 61 to 67 of the Indictment, pursuant to Articles 6(1) and 6(3) of the Statute. The said allegations involve six set of events at various locations, including the Districts of Kono, Kenema, Koinadugu, Bombali, Freetown and the Western Area, and Port Loko. The crimes are said to have, *inter alia*, occurred at various periods between 25 May 1997 and April 1999, including in particular the periods between "14 February 1998 and 30 June 1998" in Kono; "25 May 1997 and 19 February 1998" in Kenema; "14 February 1998 and 30 September 1998" in Koinadugu; "1 May 1998 and 31 (*sic*) November 1998" in Bombali; "6 January 1999 and 28 February 1999" in Freetown and the Western Area; and between "February 1999 and April 1999" in Port Loko. Also, the Indictment alleges that members of AFRC/RUF, including the second accused, committed "widespread physical violence, including mutilations (...) against civilians". The said mutilations and other inhumane acts were mostly in the alleged forms of limb-cutting and carving of "AFRC" and "RUF" marks on the bodies of civilians. Physical violence also included "beatings and ill-treatment" as alleged, for example, in Kenema District.

i) Kono District (14 February 1998 to 30 June 1998)

(1) Prosecution Case

1163. Paragraph 62 of the Indictment alleges the mutilation of an unknown number of civilians by members of the AFRC/RUF at various locations in Kono District, including Tombodu, Kaima (or Kayima) and Wondedu within the period "between about 14 February 1998 and 30 June 1998". It is submitted that the Indictment is, in this respect, vague about both the time and number of civilians allegedly mutilated.

1164. To prove the alleged offence of mutilation, the Prosecution elicited evidence from various witnesses, including TF1-167, 074, 015, 272 and 078 (as highlighted in the Court's oral Decision on RUF's Rule 98 Motions)[1647] as well as TF1-197, 195, 192, 218, 272, 212,

[1647] Transcript 25 October 2006, p.27 lines 13-24.

064, 077, 217, 016, 071 and 360, all of whom, *inter alia*, testified generally about mutilations in various locations in Kono District without particularly mentioning and/or implicating the second accused in the said conduct.

1165. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the amputation of many civilians throughout Kono District, including the amputation of 6 men captured from Sawa, which was observed by a captured woman; the marking of the letters: 'RUF/AFRC' on 15 captives in Yomandu by using swords, as well as the marking of the letters 'RUF' on 10 to 15 civilians in Tombudu with razor blades. The Prosecution based the second accused's alleged responsibility for the said crimes on the following issues, among other things: i) that he occupied a command position within the AFRC/RUF hierarchy, ii) that he was present in Kono and military training camps in the District whilst these acts were perpetrated, and iii) such other matters arising from the disclosed evidence showing his specific participation in a joint criminal enterprise with others fighters;[1648] and that he failed to take measures to prevent or stop the alleged crimes.

(2) The Evidence

1166. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 10 and 11 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Kono District within the relevant timeframe. In this regard, the Defence accordingly adopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any combatant in Kono District within the relevant period of the Indictment; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 10 and 11; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of fighters to commit such crimes.

1167. To start with, it is submitted that the testimonies of both witnesses: TF1-167 (George Johnson) about "civilians being flogged over 200 times [in Tombodu] for refusing to follow orders" and TF1-078 about "being beaten by the rebels with his wife and four others while in

[1648] Prosecution's Supplemental Pre-Trial Brief, paras. 416-423, supra.

hiding in the bush along the Moinde River"[1649] do not constitute the crime of "mutilation", to which the pleading under Kono District in paragraph 62 of the Indictment is strictly confined. Whilst it is conceded that such acts may constitute forms of 'other inhumane acts' under Count 11 herein, it is the Defence's contention that the particulars of paragraph 62 of the Indictment are strictly confined to "mutilations" only, which are further described therein to include "cutting off limbs and carving "AFRC" and "RUF" on the bodies of the civilians".

1168. In the testimony of TF1-360 about the attack on Bumpeh, which has already been mentioned and analyzed in this Brief, the witness testified that Major Rocky, other combatants and himself were sent by a certain Morrison Kallon in the rainy season of 1998 to attack Bumpeh. The witness alleged that in addition to the killings committed by them in Bumpeh, they amputated many people in the town during the attack.[1650] Apart from the fact that Bumpeh was never pleaded in the Indictment, the Defence for the second accused wholesomely adopts the arguments in this Brief under Counts 3 to 5 above concerning the contradictory and unreliable accounts of witnesses: TF1-360 and 366 in respect of the alleged attack and incidents at Bumpeh. In this regard, the Defence resubmits that both accounts of witnesses: TF1-360 and 366 put together lays to rest the following issues: **i)** that the attacks on Bumpeh and Nimikoro referred to in the testimonies of both witnesses were military in objective and nature; **ii)** that the second accused was not at Bumpeh and Nimikoro during the said attacks; **iii)** that the order for the said attacks came from the second accused's superiors, hence the reason why the second accused was himself militarily deployed, according to TF1-366; **iv)** that the second accused could not have ordered such attacks as a junior officer; and **v)** that TF1-366's account reads into the testimony of TF1-167 and Exhibit 9 of the Court Exhibits that the second accused was, in 1998, assigned to create obstacles on the Kono highway to Guinea against ECOMOG troop movement, which was, to all intents and purposes, a military task.

1169. Witness TFI-071, a senior RUF insider, also testified that whilst he was in Koidu, after "three weeks, serious reports [came] from all angles saying that people were killed, houses were burned in the surrounding villages. Peoples' hands were cut off and so on in the villages."[1651] He said that reports of "hand-cutting" in the surrounding villages was 'most serious and intense' in Tombodu village.[1652] He stated that some of the commanders he saw in Kono at that time (March 1998) included Superman, Rambo, Issa Sesay and the second

[1649] Prosecution's Supplemental Pre-Trial Brief, paras. 416-423, supra.
[1650] Transcript 20 July 2005, p.57, line 12 to p.58, line 8.
[1651] Transcript 19 January 2005 p.45, lines 11-15.
[1652] Transcript 19 January 2005 p.46, lines 3-10.

accused,[1653] but that the overall commander in Koidu was Superman who in fact called a meeting of former juntas and RUF forces at Tankoro police station to talk about the crimes that were being perpetrated in the surrounding villages.[1654] Superman then subsequently set up a Task Force headed by Amara Salia alias 'Peleto' [redacted] to monitor and respond to complaints from civilians about burnings, killings and so forth alleged against combatants in Kono District.[1655]

1170. Apart from mentioning Superman as 'the commander of Koidu', the witness also testified that they were "in Koidu waiting for instruction from Sam Bockarie"[1656], who was then in Kailahun. Even more crucial is the fact that the witness, as earlier noted, testified that Major Rocky and the second accused "were just ordinary colleagues"[1657] and that everybody, including the second accused, was reporting to Superman who was the RUF Battle Group Commander then.[1658] This narrative explains clearly the command structure in Kono district at that time, putting Sam Bockarie and Superman on a higher command and control pedestal as against Rocky CO and the second accused, who were mere equals, on a lower plane. It also fails to situate the second accused in any position of responsibility or authority to command and/or control other combatants in Kono at that time. By similar stretch, the foregoing averments as well accommodate the efforts made by Superman to curb criminal and violent excesses in Kono district in March 1998 and after, considering that the Task Force headed by Peleto continued as a standing unit.

1171. Additionally, witness TFI-272, [redacted] testified that many patients had been amputated, lacerated, shot or otherwise seriously injured. The witness described how she received patients from Koidu, Sewafe, Alikalia, Yifin, Kabala and Fadugu, over a six weeks period from April to mid-May 1998. These included 58 patients from the Sewafe/Koidu area and another set of six injured women and a six year old girl from Kabala, the latter set of people having their left arms amputated.[1659] However, the witness's knowledge of what happened to the said victims was based firstly, on their physical conditions after the attacks on them; and secondly, on the hearsay evidence that she received from some of them during their meetings.

[1653] Transcript 19 January 2005 p.42, lines 4-7.
[1654] Transcript 19 January 2005 p.46, line 18 to p.48, line 1.
[1655] Transcript 19 January 2005 p.48, line 16 to 49 line 1.
[1656] Transcript 19 January 2005 p.49, line 27 to 50 line 1.
[1657] Transcript 21 January 2005 p.71, lines 1-4.
[1658] Transcript 21 January 2005 p.70, lines 10-27.
[1659] Transcript, 5 July 2005 p.55 line 13 to p.57, line 11.

1172. In view of the fact that witness TFI-272 dealt with hundreds of patients who may have given her different versions of events and incidents as they occurred, it was difficult, and in many cases impossible, for her to attach a specific perpetrator or set of perpetrators to a patient's case. In particular, no mention was made of the second accused as being involved in the commission of the amputations and injuries that the witness made reference to in her testimony. Besides, both Sewafe and Koidu in Kono were not pleaded in paragraph 62 of the Indictment.

1173. Furthermore, witness TFI-212 testified that she saw Staff Alhaji in Kono in April 1998, and observed him cutting off the hands of a number of civilians.[1660] The witness claimed that her sister had an RUF mark cut into her chest by rebels.[1661] Also, witness TFI-217 testified that he was in Penduma, an unpleaded location in the Indictment, in April 1998 when Staff Alhaji amputated his left hand, stabbed him and amputated the limbs of several other people in his presence. Many other people, including the witness's wife, were also publicly raped and/or killed.[1662]

1174. Several other witnesses testified about various forms of mutilations and amputations in parts of Kono district, including witness TFI-016, who testified, *inter alia*, that an RUF rebel called Soh carved out the letters 'RUF' on the bodies of some men in Tomandu, Lei Chiefdom, which is another unpleaded area in the Indictment;[1663] Witness TFI-195 who testified that a boy younger than 14 years of age, used a cutlass in Sawoa village, which is also unpleaded in the Indictment, to cut off the right hands of five male civilians.[1664] The boy also cut the witness's upper right arm.[1665] None of these witnesses, however, mentioned the second accused, whether directly or otherwise, of any involvement in the said crimes which mostly occurred in Tombodu and its surroundings by Staff Alhaji, Savage and their subordinates who, like their commanders, were mostly SLA soldiers.

1175. Incidentally, both witnesses TF1-334 and TF1-167 testified, and agreed under respective cross-examinations, that Savage was the commander at Tombodu;[1666] that Savage took orders and instructions from those above him, including Superman[1667] and Ibrahim Bazzy Kamara;[1668] that Staff Alhaji worked with Savage as his deputy battalion commander;

[1660] Transcript 8 July 2005 p.96 line 25 to p.98 line 9.
[1661] Transcript 8 July 2005 p.107, lines 22-26.
[1662] Transcript 22 July 2004, p.22 line 3 to p.24 line 23.
[1663] Transcript 23 October 2004, p.10, lines 23
[1664] Transcript 1 February 2005, p.21 line 19 to p.22 line 22.
[1665] Transcript 1 February 2005, p.23, lines 5-14.
[1666] Transcript 7 July 2006, p.34, lines 4-24; Transcript 14 October 2004, p.78 lines 25-29; p.79 lines 1-17.
[1667] Transcript 18 October 2004 p. 127 lines 9-29; p. 128 lines 1-11.
[1668] Transcript 7 July 2006 p74, lines 28-29; p75, lines 1-2

and that both Savage and Staff Alhaji were particularly vicious commanders.[1669] It has also been noted in this Brief that Savage was uncontrollable.[1670] And as stated in Counts 3 to 5 herein, Defence witness DMK-087 testified that he received reports regarding the treatment of civilians in Tombodu and that Captain Savage was the commander in Tombodu between March and June 1998.[1671] In particular, the witness testified that Savage started misbehaving, after they had investigated the bank robbery in Kono and some AFRC soldiers were arrested; thereafter, when Savage went to Tombodu, he refused to receive and obey orders from his commanders.[1672] Savage grew so angry about the stolen money being taken to Sam Bockarie that he refused to take orders from Superman.[1673]

1176. In view of the foregoing, the Defence again adopts the arguments in Counts 3 to 5 of this Brief to refute any and all allegations of mutilations, amputations or other inhumane treatments leveled against the second accused by the Prosecution, including the unpleaded Sunna Mosque/Igbaleh amputations and killings in Koidu. For the same reason, it is submitted that the second accused does not bear any responsibility under both Articles 6(1) and 6(3) of the Statute for the crimes alleged in Counts 10 and 11 of the Indictment.

1177. It is also noted by the Defence for the second accused as follows: **i)** that none of the allegations stated in this section were pleaded in the Indictment or (Supplemental) Pre-Trial Brief; **ii)** that none of the material facts given in evidence regarding Counts 10 to 11 were brought to the Defence's knowledge or notice through the Indictment or (Supplemental) Pre-Trial Brief; **iii)** that all evidence of physical violence in Kono District pertains to locations which were not pleaded in the Indictment; **iv)** that the allegations made by several of the Prosecution's witnesses, including TFI-061, bears no evidence of a timeframe. It is thus submitted that paragraph 62 of the Indictment be disregarded in its entirety.

ii) <u>Kenema District (25 May 1997 to 19 February 1998)</u>

(1) The Prosecution Case

1178. Paragraph 63 of the Indictment only alleges "beatings and ill-treatment of a number of civilians who were in custody" by members of AFRC/RUF in locations in Kenema District, including Kenema town, between 'about 25 May 1997 and 19 February 1998'. It is submitted

[1669] Transcript 18 October 2004 p. 135 lines 6-12.
[1670] See Counts 3-5 on Tombodu.
[1671] Transcript 24 April 2008, p.5 lines 16-25
[1672] Transcript 24 April 2008 p.70 lines 21-29
[1673] Transcript 24 April 2008 p.71 lines 1-10

that the Indictment is, in this respect, vague about both the time and number of civilians allegedly beaten and ill-treated in custody.

1179. To prove the alleged offence of mainly 'other inhumane acts', the Prosecution elicited evidence from various witnesses, including, *inter alia*, TF1-071, 125, 122, and 129 (as portrayed in the Court's oral Decision on RUF's Rule 98 Motions).[1674] The Court especially noted that the foregoing witnesses, *inter alia*, "testified about Sam Bockarie interrogating and beating BS Massaquoi and others". It is submitted that, like paragraph 62 of the Indictment which deals with 'mutilations' only, paragraph 63 herein deals with 'other inhumane acts' only. The Defence also notes that, within the strict confines of paragraph 63 of the Indictment, only civilians who were 'ill-treated in custody' during the relevant period can benefit from the pleading.

1180. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the inhumane acts perpetrated in Kenema District, including the torturing of civilian captives in Kenema Town which was carried out on the orders of Sam Bockarie as well as the beating and punishing of civilians at Cyborg Mining Pit in Tongo.[1675] The Prosecution based the second accused's alleged responsibility for the said crimes on, *inter alia*, the following issues: i) that his 'subordinates' were in regular communication with the AFRC/RUF leadership during the commission of the crimes alleged; ii) that he allegedly visited Sam Bockarie and the AFRC Secretariat in Kenema Town, iii) that he reported to Sam Bockarie as the *de facto* RUF Commander, and iv) that he visited Cyborg Pit and Tongo Fields and at times went together with "other prominent high level AFRC/RUF commanders";[1676] and that he failed to take measures to prevent or stop the alleged crimes in Kenema.

(2) The Evidence

1181. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Counts 10 and 11 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Kono District within the relevant timeframe. In this regard, the Defence accordingly adopts the arguments and submissions made in this Brief, particularly in Counts 3

[1674] Transcript 25 October 2006, p.27 line 25 to p.28 line 1.
[1675] Prosecution Supplemental Pre-Trial Brief, paras. 424-431, especially at para. 425.
[1676] Prosecution's Supplemental Pre-Trial Brief, para. 430, supra.

to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any combatant in Kenema District within the relevant period of the Indictment; secondly, that he went to Kenema only once during this period and did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 10 and 11; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of fighters to commit such crimes.

1182. Prosecution Witnesses: TFI-060, 361, 125 367 and 071, who were in Kenema during the period alleged in the Indictment, did not mention the second accused in Kenema.[1677] Although the second accused in his testimony stated that he went to Kenema once, he denied going to Tongo[1678] or to Cyborg Pit or killing any civilians.[1679] The second accused also denied that he deputized Sam Bockarie regarding mining operations at Cyborg Pit, and stated that TF1-045 [redacted] did not mention him in his testimony, neither did TF1-367,[1680] who was also a core RUF insider witness, place the second accused in Tongo.

1183. The second accused testified further that he was not aware at that time that civilians were forced to mine for the RUF[1681] as he was based in Makeni from June until August 1997, when Sam Bockarie sent the second accused to Bo so that he would report to him in Kenema about events in Bo.[1682] The second accused, as a witness of truth and fact, indeed admitted that on one occasion in September 1997, he went to Kenema to see Sam Bockarie.[1683] This conduct must not, however, be taken out of context since the second accused was not the only less senior RUF officer that visited Bockarie. It must be understood that the second accused's visit was within the context of reporting on Bo, where he was assigned by Bockarie in August 1997, and not on Kenema where he had no authority.

1184. In addition to the foregoing, several witnesses, mostly Prosecution witnesses, corroborated the second accused's account about his non-activity in Kenema District, including Tongo Field. As noted in the analysis in this Brief on Counts 3 to 5, which is wholesomely adopted for Counts 10 to 11 of the Indictment as well, witness TF1-071 was clearly categorical about the second accused not being in Kenema at all, saying, "Not at all. I

[1677] Transcript 29 April 2005, pp75 line 8-11
[1678] Transcript 18 April 2008 p.37 lines 1-19
[1679] Transcript 18 April 2008 p.39 line 4-8
1680 Transcript 18 April 2008 p.39 lines 19-26
1681 Transcript 18 April 2008 p.39 line 27 to p.40 line 15
1682 Transcript , 4 May 2007 pp 91 line 20-23
[1683] Transcript 14 April 2008 p.107 lines 8-10

did not see him in Kenema." (...) "Morris Kallon was not in Kenema".[1684] Similarly, witness TF1-367 who was under Bockarie's direct control,[1685] testified that he went to Kenema and Tongo during the relevant Indictment period but unwaveringly confirmed that the second accused "was not even close to" Tongo and Kenema during that period, nor was he a commander in those locations.[1686] Witness DMK-047, [redacted] testified that from August 1997 to December 1997, he was in Kenema [redacted] He stated that between May 1997 and February 1998, he did not see the second accused in Kenema.[1687] Also, as noted in Counts 3 to 5 of this Brief, even witness TF1-035, who singularly attempted at placing the second accused in Tongo as Sam Bockarie's deputy during that period, made an unconvincing hearsay narrative to the Court.

1185. In view of the fact that the "Agreed Statement of Facts between the Second Accused and the Prosecution" already referred to in this Brief states as well that "during the latter part of 1997 and early part of 1998, Mosquito resided in Kenema and was the most senior RUF commander in that district",[1688] the Defence submits that the second accused bears no criminal liability both under Articles 6(1) and 6(3) of the Statute for any alleged inhumane treatment or mutilation of civilians in any part of Kenema District at any time. There is no credible evidence that the second accused aided and abetted or conspired in any manner with Sam Bockarie in the said crimes; to the contrary, when the second accused had a sudden opportunity to stop crime, such as the pillage on the woman in Kenema, he intervened at once to address it.[1689]

iii) Koinadugu District (14 February 1998 to 30 September 1998)

1186. Paragraph 64 of the Indictment only alleges "mutilations" of "an unknown number of civilians" by members of AFRC/RUF in locations in Koinadugu District, including Kabala and Konkoba or Kontoba,[1690] between 'about 14 February 1998 and 30 September 1998'. It is submitted that the Indictment is, in this respect, vague about both the time and number of civilians allegedly mutilated in the said locations.

[1684] Transcript 26 January 2005, p.19, lines 18-21; p.20, lines 1-11
[1685] Transcript 26 June 2006, p17, lines 1-10.
[1686] Transcript 26 June 2006, p.23, lines 4-10.
[1687] Transcript 25 April 2008, p.54 lines 27-29
[1688] Para. 7, dated 5th March 2007.
[1689] Transcript 8 July 2005, p.93, line 29 to p.94, line 11.
[1690] The Prosecution conceded that it did not adduce evidence in Konkoba or Kontoba foresaid, Transcript 25 October 2006, p.27 lines 4-7.

1187. For the purposes of Koinadugu District, the Defence adopts entirely its arguments and submissions in this Brief as contained in the analyses of Counts 3 to 5 in particular and the rest of the Brief in general and states that the second accused bears no responsibility, whether directly under Article 6(1) or indirectly under Article 6(3) of the Statute, for the crimes (mutilations) alleged in Koinadugu District under Counts 10 and 11. No (credible) evidence was especially led, beyond reasonable doubt, to convict the second accused.

1188. Again, it is submitted that the Prosecution's initial case theory about the second accused concerning Koinadugu District, was abandoned on 5th March 2007 when the Prosecution agreed with the Defence for the second accused that: **i)** the second accused "did not form part of the group who (*sic*) traveled from Kono to Koinadugu to Camp Rosos with Gullit and others"; and **ii)** that "between about 14 February 1998 and about 30 September 1998, [the second accused] was not an RUF and/or AFRC field commander in any location in Koinadugu district, and did not reside there".[1691]

1189. In view of the foregoing, the Defence urges the Court to disregard all allegations made by the Prosecution in the Indictment against the second accused in respect of Koinadugu District. The charges/counts under this location should thus be dismissed.

iv) Bombali District (1 May 1998 to 30 November 1998)

1190. Also, paragraph 65 of the Indictment only alleges "mutilations" of "an unknown number of civilians" by members of AFRC/RUF in various locations in Bombali District, including Lohondi, Malama, Mamaka[1692] and Rosos, between 'about 1 May 1998 and 31 (*sic*) November 1998'. It is submitted that the Indictment, as pleaded, is vague about both the time and number of civilians who were allegedly mutilated.

1191. For the purposes of Bombali District, the Defence readopts entirely the arguments and submissions in this Brief as contained in the analyses of Counts 3 to 5 in particular and the rest of the Brief in general and avers that the second accused bears no responsibility, whether directly under Article 6(1) or indirectly under Article 6(3) of the Statute, for the crimes (mutilations) alleged in Bombali District under Counts 10 and 11 of the Indictment. No (credible) evidence was also led by the Prosecution against the second accused to convict him beyond reasonable doubt for the offences.

[1691] See the "Agreed Statement of Facts between the Second Accused and the Prosecution in Compliance with Order 3 of the Scheduling Order", Annex H, 5 March 2007, at paras. 5 & 9.
[1692] Transcript 25 October 2006, p.27 lines 4-8.

1192. Again, it is submitted that the Prosecution's initial case theory about the second accused concerning Bombali District, was abandoned on 5th March 2007 when the Prosecution agreed with the Defence that: "between about 1 May 1998 and 30 November 1998, [the second accused] was not a (*sic*) RUF and/or AFRC Field Commander in any location in Bombali district, and did not reside there".[1693]

1193. In view of the foregoing admission and lack of evidence, the Defence inclines the Court to disregard all allegations made by the Prosecution in the Indictment against the second accused under Bombali District. The charges/counts under this location must thus be dismissed and a verdict returned in favour of the second accused.

v) Freetown & the Western Area (6 January 1999 to 28 February 1999)

(1) The Prosecution Case

1194. Again, paragraph 66 of the Indictment only alleges "mutilations" of "an unknown number of civilians" by members of AFRC/RUF in various locations in Freetown and the Western Area, including Kissy, Wellington and Calaba Town, between 'about 6 January 1999 and 28 February 1999'. It is submitted that the Indictment is, in this respect, vague about both the time and number of civilians allegedly mutilated.

1195. To prove the alleged "mutilations", the Prosecution elicited evidence from various witnesses, including, *inter alia*, TF1-093, 022, 331, and 093 (as stated in the Court's oral Decision on RUF's Rule 98 Motions).[1694] The Court especially noted that TF1-093 testified, *inter alia*, that "in Kissy during the retreat, Five-Five gave the order to amputate 200 civilians and send them into Freetown".[1695]

1196. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the mutilations allegedly perpetrated in Freetown and the Western Area due to, *inter alia*, unproven claims that the second accused had radio communications with Alex Tamba Brima/Gullit and Sam Bockarie/Mosquito during the attack on Freetown and that he brought RUF arms and reinforcements and engaged them in the overall onslaught on

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[1693] See the "Agreed Statement of Facts between the Second Accused and the Prosecution" aforementioned, Annex H, 5 March 2007, at para. 10.
[1694] Transcript 25 October 2006, p.28 lines 13-23.
[1695] Transcript 25 October 2006, p.28, lines 15-17.

Freetown and the Western Area;[1696] and that he failed to take measures to prevent or stop the alleged crimes.

(2) The Evidence

1197. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Counts 10 and 11 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Freetown and the Western Area within the relevant timeframe. In this regard, the Defence accordingly readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (SLA soldiers) who attacked and committed crimes in Freetown and the Western Area within the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 10 and 11 in Freetown and the Western Area or anywhere; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of fighters to commit such crimes.

1198. Consequently, the Defence respectfully urges the Court to dismiss all allegations made by the Prosecution in the Indictment against the second accused concerning Freetown and the Western Area. The charges/counts under these locations should thus be dismissed and a verdict returned in favour of the second accused.

vi) Port Loko District (February 1999 to April 1999)

1199. Similarly, paragraph 67 of the Indictment only alleges the "mutilations" of "an unknown number of civilians" by members of AFRC/RUF in various undisclosed locations in Port Loko District between 'February 1999 and April 1999'. It is again submitted that the Indictment, as pleaded, is vague about timeframe and number of civilians allegedly mutilated.

1200. In order to prove the alleged "mutilations", the Prosecution elicited evidence from various witnesses, including, *inter alia*, TF1-255, 253 and 256 (as stated in the Court's oral Decision on RUF's Rule 98 Motions). The witnesses mainly testified about mutilations and amputations in Manaarma and Rochendekom or Tendakum.[1697]

[1696] Prosecution Supplemental Pre-Trial Brief, para. 454.
[1697] Transcript 25 October 2006, p.28 line 24 to p.29 line 1.

1201. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the mutilations allegedly perpetrated in Port Loko District because of unproven claims, *inter alia*, that purported subordinates of the second accused had radio communications with the AFRC/RUF leadership during the attacks on the said locations in Port Loko District; that the second accused was present and participated in an attack on Lunsar; and that he failed to take measures to prevent or stop the alleged crimes.[1698] Essentially, the Defence for the second accused notes that the Prosecution, in its confused haste to prefer unfounded allegations against the second accused, alleged in paragraphs 458 to 460 of its Supplemental Pre-Trial Brief that it is "Issa Hassan Sesay" that bears Article 6(1) responsibility for the crimes alleged in Port Loko District, and not the second accused.

1202. That aside, it is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Counts 10 and 11 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Port Loko District within the relevant period. Consequently, the Defence readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (mostly SLA soldiers) who attacked and committed crimes in Port Loko District within the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 10 and 11 in any part of Port Loko District or anywhere at all; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of combatants to commit such crimes.

1203. In view of the above, the Defence respectfully requests the Court to dismiss all allegations made by the Prosecution in the Indictment against the second accused concerning Port Loko District. The charges/counts under these locations should thus be dismissed and a verdict returned in favour of the second accused.

6) COUNT 12

a) THE PROSECUTION CASE

[1698] Prosecution's Supplemental Pre-Trial Brief, paras. 462-463.

1204. Paragraph 68 of the Indictment alleges that "at all times relevant to [the] Indictment, throughout the Republic of Sierra Leone, AFRC/RUF routinely conscripted, enlisted and/or used boys and girls under the age of 15 to participate in active hostilities". It alleges further that the said children were firstly "abducted", and then "trained in various AFRC/RUF camps in various locations throughout the country", and thereafter "used as fighters". It is crucial to note that the Prosecution conceded that no evidence was adduced in respect of the conscripting, enlistment or use of child soldiers in Bonthe, Moyamba, Pujehun, Bo and Tonkolili Districts, and the Court so found,[1699] thus restricting the charge to "Bombali, Kenema, Kono, Kailahun, Freetown, Kambia, Koinadugu and Port Loko, and not throughout the Republic of Sierra Leone".[1700]

1205. As an introductory comment on this Count, it is submitted that no conviction can be entered against the second accused under Count 12 for the following reasons: **i)** the Prosecution's case has been defectively pleaded in the sense that the allegations made against the second accused in this Count have not been sufficiently particularized in order to make a finding of guilt beyond a reasonable doubt within the confines of international criminal law; **ii)** that the Prosecution's case is characterized by evidence which either fails to allege that the victims were under 15 years of age or which does allege victims to be under 15 years, but nonetheless relies on inaccurate methods for making such assertions; **iii)** that the Prosecution's case relies on witnesses who are mostly incredible and ought not to be believed; and **iv)** that the Prosecution's case has been effectively refuted by the Defence for the second accused. The analysis below, done on a witness-to-witness and event-to-event basis, demonstrates that Count 12 lacks evidential merit against the second accused and should be entirely dismissed.

b) RELATIONSHIP TO THE INDICTMENT AND NOTICE

1206. Another issue of concern to the Defence is that the second accused was never put on sufficient notice about the specific allegations that he was to plead to and defend as well as the manner in which the charge herein was to be prosecuted. In essence, the allegation of the use of child soldiers, as noted above, has been pleaded *en bloc* and without specificity in the Indictment, Pre-Trial Brief and Supplemental Pre-Trial Brief. It is submitted that paragraph 68 of the Indictment, being the *only* paragraph that seeks to put the second accused on notice

[1699] Id., p.29, line 28 to p.30 line 3.
[1700] Id., p.30 lines 17-25.

of all allegations involving child combatants, is a broadly termed allegation that endeavors to cover "all times relevant to the Indictment" and "various locations throughout Sierra Leone."

1207. Besides, the evidence elicited from almost all the witnesses led by the Prosecution tried to establish that the second accused, in many cases, personally and physically perpetrated crimes, including conscripting or enlisting and using children as soldiers. However, the Indictment as it is does not plead a case of physical and/or personal perpetration of crimes against the second accused. Thus, for this reason alone, it is submitted that the said evidence ought to be disregarded by the Court. An Indictment which is defective to the extent that it fails to plead the physical and personal perpetration of crimes cannot be cured. Notwithstanding, neither the Pre-Trial Brief nor the Supplemental Pre-Trial Brief supplies anything that meets the details required to effectively cure the said defect. It is averred that in lieu of clarifying and shedding light on hazy pleading, both the Pre-Trial and Supplemental Pre-Trial Briefs alluded to the conscription of child soldiers in broad and general terms, completely devoid of material and relevant facts. For example, paragraphs 133 and 135 of the Pre-Trial Brief make fleeting references to the use of child combatants without providing any particulars like names of the children, their dates of birth or places of capture. Also, the locations described are no more specific than "throughout the District."

1208. Consequently, it is submitted that paragraph 68, as pleaded, seeks to keep open to the Prosecution the ability to introduce fresh evidence of the use of child soldiers at any time and in any location in Sierra Leone. This clearly defeats the very essence of pleadings at criminal trials. Of persuasive notice to the Court is the fact that the SCSL Trial Chamber II failed to rule on the pleading of "continuous crimes" in the case of *Prosecution v. Alex Tamba Brima et al* because no objections were made on to them at the trial.[1701] This finding of the Chamber also went unchallenged by the Parties on Appeal. Consequently, the Appeals Chamber noted that the reason why the said "continuous crimes" were not found to be defectively pleaded with regard to alleged locations was because no relevant objections were specifically recorded.[1702]

c) THE EVIDENCE

i) Prosecution Expert TF1 296

[1701] See the AFRC Trial Judgment, at paras. 40-41.
[1702] See the AFRC Appeals Judgment, at para 49.

1209. Witness TF1-296 [redacted].[1703] Under cross-examination about her expertise and background, the witness said that she did not regard herself as one of the foremost experts globally in the field of children affected by armed conflicts, but said that she is a practitioner working on programs concerning children; the witness could not name any individual considered a high-ranking expert on child soldiers.[1704] Similarly, the witness said that she did not consider herself an expert in child psychology or child sociology. She is only a practitioner in social work, but not an expert at that as well.[1705]

1210. Additionally, the witness said she did not consider herself as having *formal expertise in interviewing techniques relating to children*, but had only practical expertise. When asked whether she thought she was appropriately qualified to carry out specialized training in interviewing techniques concerning children affected by armed conflicts, the witness again said that she thought she had practical qualifications to do so.[1706] Besides, the witness acknowledged that she had not published any academic articles on the issue of child soldiers or age verification, and said that she had prepared papers for UNICEF;[1707] She noted that her experience of dealing with child soldiers spanned for a total of 6 years in the Democratic Republic of Congo (DRC)/Zaire and in Sierra Leone, and stated she had not taken part directly in age verification in DRC/Zaire.[1708]

1211. On *age verification*, the witness confirmed that she had no formal training in age verification and denied that her first experience on age verification was in Sierra Leone.[1709] The witness also agreed that one of the reasons she did not personally involve herself in the teeth test, for example, was because it involved a degree of skill and experience, which she lacked.[1710] Similarly, she admitted that she was not involved in the interviewing of children to determine their ages because though she knew the practical techniques of child interviewing, she lacked both the relevant knowledge about the conflict and the required skill and experience to make the necessary determination.[1711] It is thus submitted that the witness's so-called 'practical expertise' on the subject served no useful purpose.

[1703] Transcript of 14 July 2006, p12, lines 27-29; p13, lines 1-3 & 21-23.
[1704] Transcript of 14 July 2006, p21, line 21 to p22, line 11.
[1705] Transcript of 14 July 2006, p25 line 28 to p26, line 7.
[1706] Transcript of 14 July 2006, p27, lines 1-3, & lines 18-21.
[1707] Transcript of 14 July 2006, p14, lines 3-7.
[1708] Transcript of 14 July 2006, p11, lines 17-26; p12, lines 8-15.
[1709] Transcript of 14 July 2006, p12 lines 16-22.
[1710] Transcript of 14 July 2006, p56, lines 15-19.
[1711] Transcript of 14 July 2006, p56, line 20 to p57, line 15.

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1212. On the *'teeth verification process'*, the witness testified that the Ministry of Social Welfare used a methodology called 'teeth verification' coupled with extensive interviews to ascertain age. The teeth verification was a way of determining a certain age group that a given child belonged to. However, the witness explained that teeth verification did not happen in all cases and was predominantly done for the older children, to determine whether they were over 15 or over 18; for the younger children, it was not an issue.[1712]

1213. The Defence submits further that even for practical purposes, the witness's role in the interviewing and age verification of the affected children was unhelpful. The witness confirmed that, in terms of the assessment process of child combatants, her role in personal interviewing was limited;[1713] she would interview children as part of an overall interviewing process but she did not complete the forms or determined whether the child was a combatant or what his/her age was.[1714] Moreover, when questioned about her experience in the area of the enlistment process of children who were with the RUF, the witness said that her knowledge on that was based on what was *reported* to her as well as her experiences from 1998 to 2002 in Sierra Leone.[1715]

1214. On her *Report* to the Court on child soldiers, the witness stated that the Prosecution asked her to write a report about her experiences in Sierra Leone, with particular reference to child soldiers; about any negotiations that may have taken place that she was aware of or participated in; and to ascertain the of age verification of children in the DDR program.[1716] She testified that her work was not to address specific pleadings in the Indictment, but understood it to be a general report covering the different fighting factions; the report was geared to her own personal experiences only.[1717] In this regard, the witness stated that there was not an overall breakdown of the age of children associated with the fighting forces per group, but there were certain parts of her Report that mentioned groups under 15 and that some children were as young as seven.[1718] Also, when asked what percentage of children in the Report were between the ages of 15 to 18, the witness stated that she did not have a breakdown, but guessed it would be around 35-40%.[1719]

[1712] Transcript of 14 July 2006, p89, lines 22-25; p93, lines 17-21; p95, lines 3-10.
[1713] Transcript of 14 July 2006, p47, lines 7-10.
[1714] Transcript of 14 July 2006, p54, lines 16-19; p55, lines 4-7.
[1715] Transcript of 12 July 2006, p3, lines 20-28.
[1716] Transcript of 13 July 2006, p3, lines 20-28.
[1717] Transcript of 13 July 2006, p4, lines 11-20.
[1718] Transcript of 13 July 2006, p135, lines 8-16.
[1719] Transcript of 13 July 2006, p128, line 21 to p129, line 10.

1215. Given that the witness herself minimally participated in or contributed to the interviewing and age verification process, her Report is called into significant doubt. This is strengthened by the fact that she could as well not determine the level of training and qualifications of those who were practically and actually involved in the process itself, including the social workers from the Ministry of Social Welfare and the associated NGOs and the verifiers from the DDR office.[1720]

1216. Besides, evidence available to the Court showed that a certain Marianne Samu, a DDR Field Worker at the Lungi DDR Center from March 2000 to March 2003 whom the witness did not surprisingly know, had indicated that "the age verification process would involve an interview and physical examination. You would use your own judgment and ask them questions such as when and where were you captured. How did you join. How old were you when you joined".[1721] This worries the outcome of the research by the witness, considering that child soldiers like TF1-141, as illustrated in this Brief, could easily give false or incorrect accounts of their ages. In fact, when asked to confirm the proposition that when children are faced with extraordinary circumstances they have the tendency to exaggerate their accounts than adults, the witness stated that, in the context of Sierra Leone, the children were more likely to be silent than to exaggerate, to withhold information to themselves.[1722]

1217. Finally, in relating her Report and account to the second accused, the witness stated that, in terms of negotiating the movement of children from Makeni to Freetown and Lunsar, the "focal point" was the second accused, and not the Organisation for the Survival of Mankind (OSM) as suggested by Counsel. The witness said that this had been reported to her by Caritas Makeni, an NGO working with the children. She said that she could not confirm whether she had any dealing with the second accused. The witness also admitted that the information that the second accused rejected further plans to move children out of Makeni came from Caritas, but was not independently verified. She confirmed that approval for the movement of the child soldiers was sought from Foday Sankoh directly and she saw a letter from him which she said was obeyed by other commanders in the RUF.[1723]

1218. It is significant to note here that there is strong evidence to show that it was not the second accused who served as focal person between the RUF and NGOs like Caritas and UNICEF, and therefore could not have even attempted to stop the transfer of the child soldiers to the Interim Care Centers as alleged. DIS 188, an RUF MP and insider witness for Issa

[1720] Transcript of 14 July 2006, p.10 line 19 to p11, line 16.
[1721] Transcript of 13 July 2006, p.71 lines 5-14.
[1722] Transcript of 14 July 2006, p49, lines 15-22; p50, lines 27-29.
[1723] Transcript of 13 July 2006, p139, line 6 to p141, line 8.

Sesay, testified that Miloskie Kallon, alias Gugumeh, was in charge of the demobilization process for child combatants, and not the second accused. The witness also testified that prior to Miloskie taking the task, Augustine Gbao was in charge of the process; both Miloskie and Gbao worked hand-in-hand. The witness also said that Gbao was "very closely involved" with the establishment of the Organisation for the Survival of Mankind aforesaid in Makeni after October 1999,[1724] which operated as an NGO closely related with the demobilization process. Also in TF1-165, Brigadier Ngondi,'s statement to the Prosecution of 21st June 2004 at page 17733, which the witness confirmed, the witness had stated that "[he] also brought up the situation of RUF not allowing Caritas to move child soldiers back home. Sesay told [him] to talk with Augustine Gbao on this matter. When "[he] spoke with Gbao in the presence of Caritas representatives, [Gbao] said they did not understand the program but would consider it. [The witness] believe they later allowed Caritas vehicle's movement."[1725] It is therefore submitted that a case of mistaken identity, consistent with the testimonies of both DIS-188 and Brigadier Ngondi, may have arisen between Miloskie Kallon and the second accused.

1219. In view of the foregoing, it is submitted that the Report and account of witness TF1-296 herein is bereft of professional and evidential merit, and cannot consequently sustain a conviction for the offence alleged in Count 12 of the Indictment. It should therefore be dismissed.

ii) Challenging the Rest of the Evidence

1220. In proof of Count 12, Prosecution witness TF1-371 testified that the second accused personally had Small Boy Units ("SBUs") during the period from 1997 to 2002.[1726] Firstly, it is submitted that TFI-371 is not a credible witness and that his evidence cannot form the basis of any conviction against the accused.[1727] The second accused not only denied this specific allegation,[1728] but also testified that TFI-371 was one of the officers in the RUF who, along with Superman and Gibril Massaquoi, used child soldiers in breach of RUF laws laid down by Foday Sankoh.[1729] Besides, it is submitted that the witness failed to establish beyond reasonable doubt that some or all of the alleged SBUs who were with the second accused were under the age of 15. This was evidenced by the witness's own definition of an SBU

[1724] Transcript of 2 November 2007, p.58 line 1 to p.59 line 18.
[1725] Transcript of 29 March 2006, p.91 lines 14-23 & p.92 line 8 to p.93 line 1.
[1726] Transcript. 21/07/06, pg 64, lines 14–17.
[1727] See the Analysis on the Credibility of Witnesses contained in this Brief.
[1728] Transcript 14/04/08, pg 87, line 27 – pg 88, line 1.
[1729] Transcript 14/04/08, pg 115, line 3-10.

member as a child between the ages of 12 and 18.[1730] When asked whether he knew the age of the SBU that he alleged he saw Mr Kallon with, the witness replied as follows:

> "One of them, that I can remember, should have been 15 years of age."[1731]

1221. In this regard, the Prosecution failed to establish through this witness that the second accused conscripted or used child soldiers *under* the age of 15.

1222. Also, witness TF1-263 testified that he was taken to Banya Ground, Kono District on an unspecified date in 1998. He stated that he met a 15 year old "bodyguard" of "Morris Kallon" and that such bodyguards were used in combat.[1732] He also gave evidence that "Morris Kallon" selected civilians for training to be received in Buedu, Kailahun District and alleged that among those that were selected were himself and other boys of his age "who were fit enough."[1733] It is averred that the alleged bodyguard who was aged 15 as alleged by TFI-263 cannot qualify for the definition of "child soldier" in Count 12 of the Indictment as he/she is not *under* the age of 15. Additionally, the witness confirmed that he did not inquire about the ages of the other alleged bodyguards.[1734] His description that "they all had similar heights like me"[1735] cannot be relied upon per se as an accurate indication that the alleged bodyguards were in fact under 15, as stunted growth is a glaring feature of many Sierra Leonean communities. In respect of the witness's allegation that the second accused selected "boys of his age" to receive training, the witness merely describes those selected as being from his age group, which is a mere conjecture, considering that the witness used height as his yardstick for measuring age; he testified, for example, that some of the boys were taller than him.[1736] Similarly, it is the case for the second accused that the Prosecution failed to establish through this witness that the second accused conscripted or used child soldiers *under* the age of 15. Indeed, the witness did not identify the second accused as the person he testified against.

1223. Besides, witness TF1-036 testified that he saw "senior commanders", including the second accused, with SBUs in Buedu in the period "1998, 1999."[1737] The Defence submits that the evidence provided by this witness does not establish beyond reasonable doubt that the

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[1730] Transcript 21/07/06, pg 63, lines 11–13.
[1731] Transcript 21/07/06, pg 64, lines 21-22.
[1732] Transcript 6/04/05, pg 26, lines 1–26.
[1733] Transcript 6/04/05, pg 29, lines 5–15.
[1734] Transcript 6/04/05, pg 26, line 7.
[1735] Transcript 6/04/05, pg 26, line 7.
[1736] Transcript 6/04/05, pg 29, line 15; pg 30, line 17–18.
[1737] Transcript 28/07/05, pg 17, line 23—pg 18, line 7.

second accused was associated with SBUs in Buedu during the said period. The following is offered in support of this proposition:

a. The allegation is a sweeping generalization, devoid of particulars, such as a name or description of any specific SBU member allegedly associated with the second accused. It is submitted that such evidence is not probative enough to posit criminal conduct.

b. The witness only alleged that the second accused used "SBUs", he was not asked to expand on his understanding of the meaning thereof. Therefore, it is impossible to verify whether the allegation falls within the scope of Count 12. The onus is on the Prosecution to prove its case beyond a reasonable doubt. It is submitted that such evidence cannot be said to support the Indictment.

c. The witness readily mistook children from the second accused's own family, including children of his extended family, for SBU members. The second accused testified that he kept with him in Buedu, and in places to which he later relocated, a large contingent of his family members to ensure their safety and protection. This included many children *under* the age of 15 at the material time of the Indictment.[1738] Prosecution witness TF1-045 also confirm this evidence, testifying that he saw the second accused living in Buedu in 1998 with many family members, including children, none of whom he identified as being members of the SBU.[1739]

1224. In the light of the foregoing, it is submitted that witness TF1-036's evidence herein is incapable of sustaining a conviction.

1225. Witness TF1-114, who was an RUF MP Adjutant in Buedu, gave evidence that the second accused "had a lot of children" with him in Koidu Town, Kono District at an unspecified date sometime after the intervention.[1740] He also testified that the second accused brought civilians, including children under the age of 15, to the MP office in Buedu to receive military training.[1741] These civilians were allegedly sent to Bunumbu Camp for the training. The timeframe provided by the witness is also sometime after the intervention, and nothing more; he also failed to establish the ages of the said children as well as to identify them as members of the SBU. In refuting the witness's allegations against him, the second accused testified that the children that TFI-114 saw with him, if at all, were members of his family. The second accused testified as follows:

[1738] Transcript 14/04/08, pg 87, line 29—pg 88, line 4, 13–15; pg 89, lines 3–8; pg 113, lines 27–29—pg 114, line 1, 19–21, 25–27; pg 115, line 20—pg 116, line 2.
[1739] Transcript 25/11/05, pg 16, lines 24–26; pg 17, lines 8–22.
[1740] Transcript 28/04/05, pg 46, line 28—pg 47, line 3.
[1741] Transcript 28/04/05, pg 66, lines 3–19.

> "It is not true. As I say, in May, when my report went to Sam Bockarie, I went with my family. These were the family [TFI 114] saw with me, and I have based them in Buedu."[1742]

1226. In particular, it is further submitted that the witness failed to satisfy the requisite standard of proof in respect of the ages of the children alleged to have been sent for training. At no point during his examination-in-chief did the witness indicate that he or his colleagues specifically questioned the children on their ages. Additionally, though the witness indicated that he knew "how to allocate ages" because he had been "trained" to do so,[1743] he did not reveal the particulars of his alleged training and, as such, his methods of age verification are themselves not verifiable. Therefore, his assertion cannot be relied upon as credible evidence of the alleged ages of the children. In the light of these contentions, it is submitted that the witness's evidence is incapable of sustaining a conviction. His reference to the phrase: "after the intervention" as the timeframe of the alleged incidents is vague and unreliable. TF1-114 is also an insider-accomplice whose testimony must be treated with caution.

1227. Furthermore, witness TF1-288 testified that he was ambushed by RUF forces in Moria, Bombali District, on 3rd May 2000. He gave evidence that among the soldiers were children as young as 10 years old.[1744] He further testified that he was held captive at Yengema [redacted] for a period of 23 days.[1745] Whilst there, he said that the second accused came to the location where he was being held captive, accompanied by a "protection party" which was "heavily-armed" and that "about 10 or 12 [members of the party] could be child soldiers."[1746] However, in his testimony before the Court, the second accused denied these allegations. He said that he did not go to Yengema at all at that time, and that if he had, [redacted].[1747] TF1-362 did not also mention any visits made by the second accused to Yengema, as alleged herein by TFI-288. Also, [redacted], failed to corroborate TFI-288 on this allegation and in fact extensively contradicted TFI-288 on the incriminating evidence that he made against the

[1742] Transcript 14/04/08, pg 114, line 18-21.
[1743] Transcript 28/04/05, pg 66, lines 21–22.
[1744] Transcript 22/03/06, pg 18, lines 3–19.
[1745] Transcript 22/03/06, pg 26, line 24 – pg 27, line 3.
[1746] Transcript 22/03/06, pg 28, lines 1–21.
[1747] Transcript 14/04/08, pg 118, lines 8-18.

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second accused. Besides, the second accused failed to see the logic of using children as combatants in a war situation, given their vulnerabilities and lack of maturity.[1748]

1228. The foregoing aside, the Court heard compelling alibi evidence which showed that the second accused was not in Moria on 3rd May 2000 as claimed by TF1-288 in his testimony. The evidence is described, *infra*, in relation to Counts 15-18. The discussion in the said Counts 15-18 also highlights the lack of credibility of this witness and presents cogent arguments that the commander responsible for the attacks against UNAMSIL at Moria were Komba Gbundema and Miloskie Kallon, who was the RUF 5th Brigade Commander in Lunsar, and not the second accused. In any case, it is submitted that the witness failed to establish beyond reasonable doubt that the alleged 'ambush and protection parties' included children under 15 years of age. His evidence is a mere conjecture made in passing, without any attempt to offer a firm basis upon which his opinion was formed; such evidence cannot in itself be relied upon as an accurate reflection of the actual ages of the children. In this regard, it is submitted that the foregoing evidence is incapable of sustaining a conviction.

1229. Moreover, witness TF1-015 testified that child soldiers carried out an amputation at Igbalah in Koidu Town in April 1998.[1749] It is submitted that by virtue of the analysis contained in this Brief about TFI-015, he is not a credible witness and his evidence cannot therefore form the basis of any conviction against the accused. In any event, the witness did not allege the direct involvement of the second accused in the amputation. It can be reasonably inferred from the evidence that Rocky and Rambo were the commanders at the scene of the alleged crime. The evidence of TFI-078 established that Rambo was superior to the second accused at the time; whilst the evidence of TFI-071 established that Rocky and the second accused were 'colleagues' who carried equivalent ranks in the command hierarchy at the time in Kono; TFI-071 stated that Rocky was beyond the control of the second accused. The witness did not also establish beyond reasonable doubt that the alleged child soldiers included those below the ages of 15. It is submitted that his evidence is thus a mere fabrication without any attempt to offer a firm basis upon which his opinion was formed. Such opinion in itself cannot be relied upon as an accurate representation of the true ages of the children that TF1-015 referred to in his account. It is submitted that this evidence should be dismissed as incapable of sustaining a conviction. The witness did not identify the second accused as the person he testified about.

[1748] Transcript 14/04/08, pg 118, lines 18-23.
[1749] Transcript 27/01/05 (unredacted), pg 129, lines 15–22.

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1230. Additionally, witness TFI-035 testified that during the mining operations in Tongo Field, Mosquito used "small boys, from ten, 12. He used to call them SBUs." According to the witness, one of the SBUs called Mustapha, had identified the second accused as his commander, saying "[t]hat is the Colonel Morris Kallon. I will go and meet him. He's my boss."[1750] TFI-035 testified that the AFRC/RUF were in Tongo from August to "November ending until December", 1997. Since the allegation bears no more detail as to dates than that, by implication, they may have occurred within this period, if at all. As recounted in this Brief, it is the Defence's case that TFI-035 is not a credible witness and that his evidence cannot form the basis of any conviction against the Accused as it was built on both hearsay and a total lack of knowledge of the identity of the second accused. Besides, the Court has heard cogent evidence that establishes that the second accused was not present in Kenema District at the time of the allegations made by TFI-035. In this light, it is submitted that the evidence herein is incapable of sustaining a conviction.

1231. Also, witness TF1-045 testified that he saw the second accused with child soldiers in 1994 in Camp Zogoda, in 1997 in Freetown and Buedu, and in 1999-2000 in Makeni.[1751] He said that the SBUs that he saw with the second accused were "[f]rom 13 to 17, 18 upwards".[1752] However, under cross-examination by Counsel for the second accused, the witness agreed that the young persons he saw with the second accused in Buedu were the second accused's family members, stating that he did see the second accused's wife and other members of his family in Buedu at that time:

> "Well, it might be so, because I don't know most of his family members. But I saw young boys, children, women. I saw his wife herself. I saw his mother-in-law. But I wouldn't say if all the rest of the people that were with him were members of the same family."[1753]

1232. The second accused corroborated the above account.[1754] He testified that members of his family were with him in Makeni in 2000.[1755] Also, DMK-108 testified that she was present in Makeni when hostilities erupted there between the RUF and the SLAs in December 1998.[1756] She said that child combatants were not used by the RUF.[1757] When specifically questioned about the second accused's involvement in the use of child combatants, the

[1750] Transcript 05/07/05, pg 92, lines 12-13.
[1751] Transcript 21/11/05, pg 39, lines 6-26.
[1752] Transcript 21/11/05, pg 39, lines 27-28.
[1753] Transcript 25/11/05, pg 17, lines 18-22.
[1754] Transcript 14/04/08, pg 114, lines 19-21.
[1755] Transcript 14/04/08, pg 113, lines 26 – pg 114, line 2.
[1756] Transcript 29/04/08, pg 58, lines 11 – pg 59, line 8.
[1757] Transcript 29/04/08, pg 77, lines 22-24.

witness testified that she did not see any children among his bodyguards and that, on occasions when she visited him at his house, she saw only a large family with him, none of whom were armed.[1758] The witness identified the second accused in Court.[1759] In any case, witness TF1-045 did not establish beyond reasonable doubt how he came to the conclusion that the alleged child soldiers were from the ages of 13 upwards. It is submitted that his evidence in this regard is a mere conjecture without any attempt to offer a firm basis upon which his opinion was made. His evidence cannot therefore be relied upon as an accurate representation of the true ages of the said children. In this regard, it is submitted that his evidence is incapable of sustaining a conviction against the second accused.

1233. Furthermore, witness TF1-366 testified that the second accused gave orders for "young boys" to be sent to Bunumbu in Kailahun District for training. He alleged that many of the boys were below 15. He said that some "became farmers for RUF through force" and that they also received military training. He testified that "[t]hey made farms for all the commanders."[1760] The witness further testified as follows: "Morris Kallon had SBUs in Freetown. He had SBUs in Makeni, Magburaka, Kono, Guinea Highway, Kailahun, Peyama and in Northern Jungle." He said that he saw SBUs with the second accused in "'97, '94, '98, up to 2002" and that many of these SBU were under the age of fifteen.[1761] The witness also testified that SBUs were used in an attack on Makeni on an unspecified date. He alleged that the second accused also participated in that attack.[1762] It has already been amply demonstrated in this Brief that TFI 366 is not a credible witness. It is submitted that the allegations herein should be disregarded on that basis. The sweeping and generalized allegations made by TFI-366 that the second accused used child soldiers in 'Makeni, Magburaka, Kono, Guinea Highway, Kailahun, Peyama etc.' in "'97, '94, '98, up to 2002", precisely exemplify the unreliable nature of his testimony.

1234. In reply to the witness's desperate falsehood, the second accused vigorously denied the allegations and testified that he rarely was together with TFI-366 in the same location.[1763] It was therefore impossible for him to have seen the second accused with SBUs almost everwhere. Also, it is averred that the allegation that the second accused sent boys for training in Bunumbu lacks a rational and credible basis. As the second accused explained to the Court, in the RUF, G1 personnel were responsible for recruitment, whilst G5 personnel were

[1758] Transcript 29/04/08, pg 78, lines 24 – pg 79, line 15.
[1759] Transcript 29/04/08, pg 62, lines 5-25.
[1760] Transcript 08/11/05, pg 67, lines 8 – pg 68, line 6.
[1761] Transcript 08/11/05, pg 69, lines 29 – pg 70, line 17.
[1762] Transcript 09/11/05, pg 39, lines 14-17.
[1763] Transcript 14/04/08, pg 113, lines 16-25.

responsible for gathering civilians and addressing their welfare.[1764] The second accused held neither of those positions, nor was he a mining commander or the commanding officer of Kono at any time.[1765] Further, in relation to the allegation that the second accused had child soldiers in Makeni, the Defence notes the evidence of both the second accused and DMK 108,[1766] who testified that the second accused kept his family in close proximity to him, including during hostilities in Makeni in 1998 and 2000. It is thus submitted that any children sighted with the second accused in Makeni during those periods could have been members of his family only. Witness TF1-366's account in this respect must be dismissed with the same haste that he uses to indulge in untruths.

1235. Witness TF1-141 on his part gave evidence that on an unspecified date in 1998 he was captured by the RUF in Koidu as a 12 year old boy. He went on to give ambiguous testimony of an encounter with the second accused. Shortly after that, he testified thus:

> "I was at Opera. I had already been captured. I was with the men. In fact, I was with Morris Kallon – with one of Morris Kallon's men. I was with the men when they captured me."[1767]

1236. The witness alleged that he was subsequently taken to Guinea Highway with other SBUs, where he stayed with the second accused.[1768] He said that SBUs were instructed to go on "food finding missions", carry out domestic jobs and, at times, some of them "took active parts at the battlefront."[1769] According to the witness, SBUs also forced civilians to carry loads, under threat of death, and to facilitate rape and forced marriages.[1770] He also alleged that SBUs were involved in an attack on SLAs, from whom they captured the bank at Koidu and that the second accused was present.[1771]

1237. In his testimony before the Court, the second accused denied the above allegations.[1772] As already illustrated in this Brief, TF1-141 is not a credible witness; among other things, he admittedly gave false testimony about his age to DDR officials in order to secure DDR benefits.[1773] This is in addition to the many inconsistencies contained in his testimony. It is thus averred that TFI-141's evidence cannot form the basis of any conviction against the second accused. Besides, DMK-087, who was the RUF Deputy G5 Brigade Commander in

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[1764] Transcript 14/04/08, pg 112, lines 10-12.
[1765] Transcript 14/04/08, pg 112, lines 12-15.
[1766] See the allegation made by TFI 045, *supra.*
[1767] Transcript 11/04/05, pg 84, lines 21-23.
[1768] Transcript 11/04/05, pg 90, lines 24 to pg 91, line 19.
[1769] Transcript 11/04/05, pg 92, lines 7-19.
[1770] Transcript 11/04/05, pg 92, lines 17-29.
[1771] Transcript 11/04/05, pg 95, lines 17 - pg 96, line 19.
[1772] Transcript 15/04/08, pg 5, lines 3-6.
[1773] Transcript of 14 April 2005, p.23, line 18 to p.24, line 6.

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Kono in 1998, denied any knowledge of this specific allegation.[1774] It is submitted that because of the witness's position within the G5 movement, it can be reasonably inferred that he would have known about the alleged abduction and use of TF1-141 as claimed. Consequently, it is submitted that the evidence herein cannot sustain a conviction.

1238. Finally, and among other witnesses, Prosecution witness TFI-117 testified that he was captured, trained and used in combat as a child of under 15. [redacted] This resulted in the boys taking up arms and 'looting the Kenyan people and attacking their camps where they were' in Mabanta, Mankneh and Makump.[1775] The witness also testified that he had received combat training on a previous occasion in Kono, along with others of his age group.[1776] He stated that, together with other SBUs, he participated in attacks on Kenema, Tongo, Pondoru, Panguma, Dodo and Pujehun. He alleged that, at that time, he was based in Kailahun and that the second accused was one of his commanders.[1777] He also said that the Morris Kallon was, *inter alia*, present when his group of combatants moved to Makeni.[1778]

1239. To the contrary, the second accused denied his involvement in attacks against UNAMSIL personnel in Mobanta and Mankneh.[1779] Though the witness alleged that Kallon was one of his commanders in Kailahun, he was unable to correctly identify the second accused in Court. Instead, he mistakenly identified the third accused as the second accused and the second accused as Augustine Gbao.[1780] Therefore, it is submitted that his testimony is unreliable and cannot sustain a conviction against the second accused.

1240. To conclude on this Count, it is submitted that the second accused never conscripted, enlisted and/or used children as soldiers in any manner or form. Apart from vehemently denying the use of child soldiers,[1781] the second accused, as noted, explained to the Court that he had with him in Kono in 1998 a large family, which included "up to 12 children", with whom he travelled everywhere he went in order to protect them. The second accused testified as thus:

[1774] Transcript 22/04/08, pg 116, lines 2-22.
[1775] Transcript 30/06/06, pg 23, lines 27 – pg 26, line 8.
[1776] Transcript 29/06/06, pg 90, lines 19 – pg 91, line 7.
[1777] Transcript 29/06/06, pg 95, line 5-12.
[1778] Transcript 29/06/06, pg 98, line 19-27.
[1779] Transcript 15/04/08, pg 73, line 20 – pg 74, line 8.
[1780] Transcript 30/06/06, pg 82, line 21-22.
[1781] Transcript. 14/04/08, pg 87, line 27 – pg 88, line 1.

"I was having my own son, my daughter, my sister's son, my wife sister son, daughter, they were with me. There were up to 14 children with me."[1782]

1241. The second accused's family moved with him to Magburaka and Makeni in 2000,[1783] as well as to Buedu from Kono, in May 1998.[1784] Besides, DMK-087 aforesaid, gave the following testimony: "In fact, Morris Kallon didn't have child combatants, apart from his own children and relatives. Since I joined the movement I never saw him with child soldiers."[1785] Also, the use of child soldiers was against RUF law, as laid down by Foday Sankoh. The second accused testified that only a few officers, including Superman, Gibril Massaquoi and witness TFI-371, violated that law.[1786] It is averred that the second accused not only adhered to the 25 standing orders of the RUF, but was, at the time of disarmament, also instrumental in opening schools and orphanages for children separated from their parents due to the war.[1787]

1242. In view of the foregoing premise, it is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the conscripting, enlisting and/or using children as soldiers under Articles 6(1) and 6(3) of the Statute, at all times relevant to the Indictment. To reinforce its submissions herein, the Defence readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any combatant to commit the crime alleged in Count 12 herein; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit the said crime in any part of Sierra Leone at any time; and thirdly, that the second accused was not involved in any criminal enterprise with any combatant and/or group(s) of combatants to commit such crime. Consequently, the Defence respectfully requests the Court to dismiss all allegations made against the second accused by the Prosecution in the Indictment and through its witnesses in respect of Count 12 herein.

7) COUNT 13:

[1782] Transcript 14/04/08, pg 88, line 13-15.
[1783] Transcript 14/04/08, pg 113, line 26 – pg 114, line 2.
[1784] Transcript. 14/04/08, pg 114, line 19-21.
[1785] Transcript 22/04/08, pg 116, line 6-9.
[1786] Transcript 14/04/08, pg 115, line 3-10.
[1787] Transcript 14/04/08, pg 117, line 20 – pg 118, line 3.

a) LEGAL DEFINITION: "Enslavement" as a Crime Against Humanity

1243. Count 13 alleges "enslavement", another crime against humanity punishable under Article 2.c of the Statute. The said enslavement, according to the Indictment, took forms of "abduction and forced labour". Like the crimes outlined above, the Court, in its Rule 98 Decision aforementioned, noted that in order to prove the crime of "enslavement" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows: firstly, that "*the accused exercised any or all of the powers attaching to the right of ownership over a person, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*";and secondly, that "*the accused intended to exercise the act of enslavement or acted in the reasonable knowledge that this was likely to occur.*" [1788] Other chapeau requirements of the crime of "enslavement" not included by the Court in its definition include the following, **i)** that "*the conduct was committed as part of a widespread or systematic attack directed against a civilian population*"; and **ii)** that "*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population*". (Emphasis added). This is in accordance with the ICTY case of *Prosecution v. Kunarac*[1789] where the Court defined the *actus reus* of enslavement to comprise "the exercise of any or all of the powers attaching to the right of ownership over a person" and the *mens rea* as "the intentional exercise of such powers"[1790].

b) KENEMA DISTRICT (1 August 1997 to 31 January 1998)

1244. Paragraph 70 of the Indictment alleges that 'between about 1 August 1997 and 31 January 1998' the AFRC/RUF forced an unknown number of civilians living in the District to mine for diamonds at Cyborg Pit in Tongo Field. It is submitted that the timeframe and number of civilians alleged in the crime are vague and imprecise.

1245. Furthermore, it is significant to indicate, by way of notice to the Court, the following: **i)** that the Indictment does not plead "abductions" in Kenema District; **ii)** that to the extent that it relates to "abductions" in Kenema District, the evidence of TFI-367 that "200 to 300"

[1788] Transcript of 25 October 2006, p.30, line 26 to p.31, line 8.
[1789] ICTY IT-96-23-T & IT-96-23/I-T, Judgment, at paras. 540-42.
[1790] Id., para. 540 *supra*.

civilians were captured "from the bush" by "RUF commanders"[1791] should be disregarded as it cannot form the basis of any conviction against the second accused. The said evidence should be similarly dismissed on the grounds that the Prosecution failed to elicit a timeframe for the witness's misplaced allegation; and **iii)** that through the evidence of TFI-014 and TFI-371 herein, the Prosecution sought to establish that the second accused personally and physically perpetrated crimes. The Indictment does not plead a case of physical and personal perpetration of crimes against the second accused. Therefore, the aforementioned evidence must be also disregarded

1246. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Count 13 above under Articles 6(1) and 6(3) of the Statute, in Kenema District within the relevant timeframe mentioned. In this regard, the Defence wholesomely readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show firstly, that the second accused, who was then based in Bo and the Kangari Hills in the North respectively, was not in any command position, nor did he control or command any combatant in Kenema District and that he only went to Kenema town once to see Sam Bockarie during the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Count 13 in Kenema District or anywhere in Sierra Leone; and thirdly, that the second accused was not involved in any criminal enterprise (joint or otherwise) with anyone and/or group of fighters to commit such crimes.

1247. To start with, witness TFI-041, an RUF G-5 officer, testified that he saw about 200 civilians mining for diamonds at gunpoint in Tongo in December 1997.[1792] He claimed that "Morris Kallon had people who were digging for diamonds,"[1793] just like several other RUF officers, such as Sam Bockarie, Manawa, Banya, Mohamed Bopleh and Mike Lamin, whose senior bodyguard: 'Augustine Mara alias OG' was leading a gang of RUFs who dug for him.[1794] In view of the fact that the witness did not allege seeing the second accused in Tongo, and failed to give a detailed account of his generalized sweeping allegation of every RUF officer having mining interests in Tongo at that time, it is submitted that his account of the second accused is not probative enough to ground a conviction.

[1791] Transcript. 21/06/06, pg 60, line 2 to pg 61, line 1.
[1792] Transcript 10/07/06, pg 19, line 25 – pg 20, line 12.
[1793] Transcript 10/07/06, pg 21, line 2-3.
[1794] Transcript of 10 July 2006, p.20, line 13 to p.21, line 6.

1248. What in fact weakens and renders TFI-041's allegation unbelievable are the accounts of other witnesses, mainly Prosecution witnesses. Thus, to the contrary, TFI 071 testified that he made two trips to Kenema District during the junta period, one of which was in "October to November" 1997 where he heard of the killing of BS Massaquoi in Kenema by Sam Bockarie. As already indicated in this Brief, TF1-071 was, however, quite categorical about the second accused not being in Kenema at all, saying, "Not at all. I did not see him in Kenema." (...) "Morris Kallon was not in Kenema".[1795] In the same vein, witness TF1-367, a senior RUF [redacted],[1796] testified that he went to Kenema and Tongo during the relevant Indictment period but unwaveringly confirmed that the second accused "was not even close to" Tongo and Kenema during that period, nor was he a commander in those locations.[1797] The witness categorically stated that at the time of the said killing, the second accused was not in Kenema.[1798] TF1-071 also confirmed that the second accused did not command any influence over events in Kenema at that time.[1799]

1249. Furthermore, TF1-122 testifed that the killing of BS Massaquoi occurred in "[l]ate January 1998"[1800] and TF1-125 said it happened "roughly about a month or two" before the end of the junta regime.[1801] Therefore, if the second accused was not in Kenema at the time of the killing of BS Massaquoi (January 1998) in the words of TF1-071 above, nor held any influence there, it is doubtful that the second accused could have engaged miners in any part of Kenema District by December 1997 without his direct or close supervision, diamonds being easy to steal. It is thus averred that the evidence of TFI 071, 367 and TFI 041 are entirely irreconcilable, and the doubt created thereby must be resolved in the accused's favour. Besides, the Defence notes the alibi evidence led in the case, which establishes that the second accused was in Bo at the time of the Tongo allegations.

1250. Also, and as noted earlier in the analysis of Counts 3 to 5 herein, Prosecution witness TF1-035 gave evidence that "AFRC Government Mining" was instituted in Tongo Field, after AFRC/RUF forces arrived there in August 1997. He described how he was forced at gunpoint to mine for diamonds in Cyborg Pit, without pay.[1802] The witness testified that Morris Kallon was a commander present at the time that mining operations continued.[1803] He also gave

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[1795] Transcript of 26 January 2005, p.19, lines 18-21; and p.20, lines 1-11.
[1796] Transcript of 26 June 2006, p17, lines 1-10.
[1797] Id., p.23, lines 4-10.
[1798] Transcript. 26/01/05 , pg 20, line 1.
[1799] Transcript 26/01/05, pg 20, line 27-29.
[1800] Transcript 07/07/05, pg 84, line 8 – pg 86, line 6.
[1801] Transcript 12/05/05, pg 104, line 21 – pg 105, line 10.
[1802] Transcript 05/07/05, pg 80, line 9 – pg 84, line 17.
[1803] The evidence is described in relation to "Article 6(3) Responsibility" and "Unlawful Killings", *supra.*

hearsay evidence that whilst he was in detention, Sam Bockarie announced "Kallon", whom the witness does not know and has never met, in a public meeting as his Deputy. The witness maintained under cross-examination that even when a certain Mustapha later tried to identify a certain Colonel Morris Kallon to him in Tongo as Mustapha's boss, he did not know or recognize the said Colonel Kallon.[1804] For the reasons of his uncorroborated hearsay and lack of knowledge of the Second Accused that the witness spoke about, it is submitted that TF1-035's account should be disregarded entirely. The Defence also adopts its arguments and submissions in the analysis of Counts 3 to 5 in this Brief.

1251. Moreover, witness TF1-060 testified, *inter alia*, about forcible mining in Cyborg Pit, under the command of Bockarie, from September up to November 1997. According to the witness, villages were raided by RUF and SLAs, and civilians were abducted for the purpose of mining.[1805] The witness did not mention the second accused and it is an admitted fact between the second accused and the Prosecution that Sam Bockarie was the overall commander of Kenema District 'between the latter part of 1997 and early part of 1998.[1806]

1252. Witness TFI-371 gave evidence that "during the Junta regime diamonds found at Tongo Field went to the RUF High Command" and the second accused, along with Sam Bockarie and Mr Sesay were "considered the High Command at that particular point in time."[1807] The witness said reports on mining were prepared and submitted to all members of the Supreme Council.[1808] It is already established in this Brief that the second accused was neither a member of the RUF "high command" in 1997/98 nor was he a member of the AFRC Supreme Council, which was glaringly different from the AFRC Council to which the second accused and many other people, including civilian AFRC members, belonged.

1253. In his testimony to the Court, the second accused denied that he deputized Sam Bockarie regarding mining operations at Cyborg Pit, and stated that TF1-045, who was deployed in Cyborg Pit at the time did not mention him about Tongo in his testimony, neither did TF1-367.[1809] Also, Defence witness: DMK-047, who was in Tongo from May of 1997 to February of 1998 [redacted], testified that the AFRC was engaged in diamond mining, but that they did not force civilians to mine diamonds for them.[1810] The witness also said that he did not see the second accused in Tongo Field between

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[1804] Court Transcript of 7 July 2005, p.35, line 25 through to p.37, line 1.
[1805] Transcript 29/04/05, pg 69, line 5 – pg 70, line 10.
[1806] Para. 7 of the Agreed Statement of Facts between the Second Accused and the Prosecution, 5/3/07, *supra*.
[1807] Transcript 20/07/06, pg 54, line 10-20.
[1808] Transcript 20/07/06, pg 54, line 24 – pg 55, line 8.
1809 Kallon, Transcript,18 April 2008 p.39 lines 19-26
[1810] Transcript 25 April 2008, p 59.

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May 1997 and February 1998, and that the second accused was never a deputy to Sam Bockarie in Tongo.[1811] It is therefore prayed that the allegations in this Count against the second accused in respect of Kenema District be entirely dismissed.

c) KONO DISTRICT (14 February 1998 to 30 January 2000)

i) The Prosecution Case

1254. Paragraph 71 of the Indictment alleges that 'between about '14 February 1998 and 30 January 2000', the AFRC/RUF abducted hundreds of civilians and took them to various locations within and outside Kono District, such as to AFRC/RUF camps, Tombodu, Koidu, Wondedu and Tomendeh. The paragraph also alleges that the said civilians were used as forced labour in the above locations, including domestic labour, and as diamond miners in the Tombodu area. It is submitted that the timeframe and number of civilians alleged in the crime are vague and imprecise.

ii) Relationship to the Indictment and Notice

1255. Furthermore, it is significant to indicate, by way of notice to the Court, the following: **i)** that the locations pleaded in the Indictment refer to allegations of forced labour only; **ii)** to the extent that it relates to "abductions", paragraph 71 of the Indictment has been defectively pleaded because it fails to plead specific locations. Therefore, it is submitted that, to the extent that it alleges "abductions" in Kono, the evidence of witnesses: TF1-367, 041, 077, 366, 263, 015 and 016 in respect of Kono District, cannot form the basis of any conviction against the second accused[1812]; **iii)** that diamond mining, as a form of "forced labour" is only pleaded in the "Tombodu area"; **iv)** that in its Supplemental Pre-Trial Brief, the Prosecution alleged that the "abductions" and forms of "forced labour" alleged were an ongoing event emanating from the alleged conduct of the AFRC/RUF and that they were not limited to any one District, even though they were charged only under the Kono District;[1813] **v)** that the Prosecution adduced evidence that mining was carried out in locations not pleaded in the Indictment or in unspecified locations, other than Tombodu as noted above. Such evidence cannot be said to

[1811] Transcript 25 April 2008, p 55.
[1812] The evidence is described below, *infra.*
[1813] Prosecution's Supplemental Pre-Trial Brief, para. 483(a), *supra.*

support the Indictment. Therefore, it is submitted that, to the extent that it alleged "forced labour" in unpleaded locations or unspecified locations, the evidence of TFI 366, TFI 071 and TFI 141 cannot form the basis of any conviction against the second accused; **vi)** that through the evidence of TF1-367, 366, 014, 071 and 114, the Prosecution sought to establish that the second accused personally and physically perpetrated crimes. However, the Indictment fails to plead a case of physical and personal perpetration of crimes against the second accused. Therefore, it is submitted that the foregoing evidence must be disregarded for that purpose; and **vii)** that no material facts were pleaded in the Indictment, the Pre-Trial Brief or the Supplemental Pre-Trial Brief that would have put the second accused on notice of the allegations identified hereunder. For example, the following material facts underpinning allegations against the second accused were not pleaded or described:

a. that civilians were ordered to carry out "food finding missions" as alleged by TF1-041 and TFI 141;

b. that orders were issued by the second accused to search villages with a view to abducting civilians, as alleged by TF1-366;

c. that the second accused owned a house where civilians were forced to mine, as alleged by TF1-367; and

d. that the identities of alleged victims and physical perpetrators, specific timeframes, specific locations, the level of involvement of the second accused and his proximity to the alleged events, in respect of all the allegations identified hereunder, were unpleaded.

1256. On the basis of the above, it is submitted that the aforementioned evidence cannot sustain a conviction against the second accused and should be dismissed.

iii) <u>The Evidence</u>

1257. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt implicating the second accused in any crime, including the crimes outlined in Count 13 above under Articles 6(1) and 6(3) of the Statute, in Kono District within the relevant timeframe mentioned. In this regard, the Defence wholesomely readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show <u>firstly</u>, that the second accused, who was only an RUF Major with no significant assignment other than being assigned the military task of working under Colonel Isaac Mongor to create obstacles against ECOMOG troops on the Guinea highway in

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Kono by his then superior – Superman (TF1-167 & Exhibit 9), did not hold any command position, nor did he control or command any combatant who may have committed crimes in Kono District within the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Count 13 in Kono District or anywhere in Sierra Leone; and thirdly, that the second accused was not involved in any criminal enterprise (joint or otherwise) with anyone and/or group of combatants to commit such crimes.

1258. In presenting its case against the second accused under this Count and location, the Prosecution led witnesses who mostly contradicted themselves *inter se* as well as in their own respective testimonies. [redacted] However, they gave inconsistent evidence about events witnessed in the course of their respective duties at that time and as to matters squarely within the purview of the G5 and thus, reasonably expected to be within the knowledge of both witnesses. For example, the Prosecution led evidence through TF1-071 that, in 1998, forced mining took place in Tuiyor, Bombodu and Tombodu.[1818] However, this was not corroborated by TF1-041. Also, TF1-071 testified about three meetings held at Tankoro Police Station after the arrival of the RUF in Koidu in April 1998.[1819] The meetings were called to discuss the amputations, killings and burnings committed in the area and supposedly perpetrated by Savage.[1820] Yet TFI-041, who said that he arrived in Koidu Town in "mid-March" 1998,[1821] and ought to have been there at the time of the meetings alleged by TF1-071, testified that he was "not aware of any meeting by any top commander at that time."[1822]

[1814] Transcript. 21/01/05 (unredacted), pg 44, line 2-18.
[1815] Transcript 21/01/05 (unredacted), pg 44, line 11-13.
[1816] Transcript 10/07/06, pg 44, line 29 – pg 45, line 3.
[1817] Transcript 10/07/06, pg 56, line 15-20.
[1818] Transcript 21/01/05, pg 118, line 27-29.
[1819] Transcript 19/01/05 (unredacted), pg 52, line 13; pg 53, line 8-10 and line 22-26.
[1820] Transcript of 19/01/05, p.46, line 26
[1821] Transcript 10/07/06, pg 44, line 29 – pg 45, line 3.
[1822] Transcript 11/07/06, pg 53, line 21-25.

1259. In particular, in testifying about the second accused, TF1-041 stated that whilst stationed in Koidu Town from mid-March to April 15, 1998 aforesaid,[1823] Superman, Rambo and the second accused, told him "to continue [his] work" of getting the civilians from "all around the villages" to engage in work, such as 'to go to Guinea and bring cows to Kono for food'.[1824] He testified that he captured civilians for that purpose.[1825] The witness, however, testified that it was the responsibility of the "S4", Papay Balah, to go out with civilians on food-finding missions.[1826] Also, the witness said that he received orders from, apparently, the second accused to "reinforce the mining unit with civilians, in order to mine the diamonds."[1827] Similarly, he testified to another occasion when he received an order from the second accused to procure civilians for mining whilst he was stationed in Makeni sometime in 1999 or 2000.[1828]

1260. The witness's account above raises a number of questions, in view of his overall account about events between mid-March to April 15, 1998, when ECOMOG, which was in hot pursuit of the retreating AFRC/RUF combatants from Freetown, entered and took Koidu.[1829] His allegations, apart from the reference to 1999 or 2000 when he was in Makeni, refer to a period of one month in Kono District. During that period, the witness himself testified that the conduct of the RUF was towards removing civilians from Koidu to remote or outlying villages, in order to protect them from the imminent attack by the advancing ECOMOG troops; in this regard, he said that he personally took civilians to Papuima, a village in Kono District, where they all stayed until the end of April 1998, and thereafter they went to Blama, another village behind Gandorhun, also in Kono District.[1830]

1261. In view of what other witnesses said to the Court as well as the circumstances at the time, it is extremely doubtful that the RUF high command in Kono, which as noted in this Brief excludes the second accused, would have engaged in mining and forced labour when intelligence showed that ECOMOG was quite close to Koidu. As illustrated below, it is submitted that there may have been an order to mine, but it is doubtful whether mining occurred in the environment of war. Moving civilians to safety, rather than mine, was a more reasonable thing to do and was done. Besides, the manner in which witness TF1-041, said he

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[1823] Transcript 10/07/06, pg 44, line 29 – pg 45, line 3.
[1824] Transcript 10/07/06, pg 48, line 8-27.
[1825] Transcript 10/07/06, pg 49, line 19-20.
[1826] Transcript 10/07/06, pg 48, line 21-27.
[1827] Transcript 10/07/06, pg 42, line 21-25.
[1828] Transcript 10/07/06, pg 63, line 3-28.
[1829] Transcript 10/07/06, pg 44, line 29 to pg 45, line 3.
[1830] Transcript of 10 July 2006, p.47, lines 2-26.

received the order from the second accused to "reinforce the mining unit with civilians" is unclear:

> "The mining unit started the operation, because we had mining unit there. They approached me, got order from Mr Morris Kallon that I should reinforce the mining unit with civilians, in order to dig diamonds. The mining commander at that time was Sheku Coomber".[1831]

1262. The ultimate question is: did the witness get the order directly? Or was it from Sheku Coomber, claiming that the second accused was allegedly authorising the witness to act, in which case it would have been a hearsay account? Incidentally, Prosecution witness TF1-167 testified that during their stay in Kono, namely, from February 1998 until they left there for Krubola towards mid-1998, there was no diamond mining in Kono as they concentrated on defending that location.[1832]

1263. Additionally, TF1-041 agreed under cross-examination that Superman was the overall commander of Kono until he left after the Fiti Fata mission, which happened sometime around the middle of the rainy season of 1998, possibly in September.[1833] He also testified that he was aware of the friction between Superman and the second accused around the period of the Fiti Fata mission and that the second accused was asked to report to Mosquito at Buedu[1834]. It is submitted that, the strained relationship between Superman and the second accused dates back to February 1998 when the second accused arrived in Koidu from Makeni. According to the second accused, upon his arrival in Kono, Superman assigned him under Colonel Isaac Mongor to create obstacles on the Guinea highway because Superman said that he was lazy and idle.[1835] Besides, another bone of contention between the second accused and Superman had to do with Superman's instructions to all officers and commanders in Kono to produce able-bodied civilians to the witness, who was then the G-5 in charge of civilians in Kono, to undertake mining activities. This instruction is contained in a letter dated 13 March 1998, which the second accused tendered to the Court as Exhibit 341[1836]. The said Exhibit 341 read further that failure to obey the instructions of Superman shall be treated as "technical sabotage" to be dealt with "militarily".[1837] Being a man with a large family of civilians in Kono at that time, the second accused refused to comply with Superman's order to release all civilians for mining; this therefore led to the beginning of the friction between them. Several

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[1831] Transcript of 10 July 2006, p.42, lines 21-25
[1832] Transcript of 14 October 2004, p. 29, lines 24-28
[1833] Transcript of 17 July 2006, p31, lines 18-29; p32, lines 1-4.
[1834] Transcript of 17 July 2006, p32, lines 12-29; p33, line 1.
[1835] See Court Transcripts of 11 April 2008, p.62 lines 5-20 and 14 April 2008, p.18 lines 4-10.
[1836] Transcript of 11 April 2008, p. 83, lines 22-27
[1837] Id., p.78 lines 17-24

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witnesses, including Prosecution witnesses like TF1-078,[1838] also testified about the said strained relationship between Superman and the second accused.

1264. It is therefore submitted that the second accused did not, and would not, have acted together with Superman to order that civilians be captured and used as forced labour to mine diamonds. Moreover, Exhibit 341 above shows that the order to gather and use civilians for mining was directly from Superman, whom as admitted by TF1-041, was the overall commander of Kono at the time. The second accused did not also conspire or engage in any joint enterprise with anyone, inclusive of Rambo, to commit the crimes alleged in Count 13 herein or any crime at all, nor did he order any combatant to force civilians to go on food-finding missions in Kono or anywhere.

1265. Also, Exhibit 259 of the Records, which is a correspondence from Brigadier Sam Bockarie titled "Orders/Instructions" and dated 23rd August 1998 addressed to "All Commanders of RUF/SL – Ops Kono", demonstrates that diamond mining was a matter of great and exclusive interest to the RUF high command in Buedu. In particular, by way of re-stamping his authority, Brigadier Sam Bockarie, the then RUF leader, wrote in Exhibit 259 above that "no one should carry out any personal mining without the knowledge of the Brigadier [i.e. Brigadier Sam Bockarie]", and that "all soldiers should go for muster parade".[1839] Paragraph 7 of the Exhibit concludes on the following note: "any soldier caught violating these orders will be militarily dealt with".

1266. On another note, it is submitted that witness TF1-041 is not a credible witness. In his testimony to the Court, the witness materially contradicted his previous statement made to the Prosecution, under the rubric of "prior inconsistency". The witness, under cross-examination, firstly confirmed making statements to the Prosecution around 16 to 24 May 2005.[1840] He, however, denied that he told the Prosecution that he was born [redacted].[1841] The witness also agreed that he told them that he was of the age of 46 and that he speaks English, Mende and Krio and gave details of his schooling, but denied [redacted]

[1838] Transcript of 26 October 2004, p.4, lines 8-20.
[1839] See paras. 2 & 3 of Exhibit 259.
[1840] Statement commencing from p.17831 shown to and accepted by the witness.
[1841] Transcript of 14 July 2006, p.125, line 21 to p.126, lines 14.
[1842] Transcript of 14 July 2006, p126, line 5 to p.127, line 5.

[redacted] In spite of all these inconsistencies, the witness confirmed that he saw the Prosecution a number of times after making his statement, and that the Prosecution reviewed his original statement with him. He admitted that he never amended or retracted the statements about his personal background.[1845] In view of the glaring nature of the internal inconsitencies between his statement and his testimony, the witness chose what he liked and dismissed the rest to suit his narrative. This shows that TFI 041 determines when to say the truth and when not to.

1267. In view of Exhibits 341, 259 and 346 (which displays a list of all civilians and soldiers to whom the said civilians wre attached at Guinea Highway in Kono, to the exclusion of the Second Accused, it is submitted that TFI 041's testimony is seriously undermined). This shaken further by the testimonies of TFI 071 and DMK 087, who was TFI 041's senior in the G5 movement.

1268. Additionally, Prosecution witness TF1-367 gave evidence that [redacted] sometime after November and that he oversaw the forced mining of diamonds by civilians.[1846] The witness alleged that the second accused had a house in Kono where civilians were forced to mine for diamonds.[1847] He said that civilians were routinely captured for the purpose of mining,[1848] and they were also forcibly used to mine diamonds at other unspecified locations in Kono District.[1849] However, in his answers to Defence questions, TF1-367 proved evasive, could not remember his previous testimony made barely two days to cross-examination, displayed tremendous inconsistencies in his testimony, and was clearly pampered by the Victims and Witness Support Unit (by virtue of Exhibit 105 kept under seal).[1850] Above all, the witness admitted that he had lied in his previous statements to the Prosecution for various motivated

[1843] Transcript of 14 July 2006 p127, lines 6-17.
[1844] Transcript of 14 July 2006, p127, lines 18-25.
[1845] Transcript of 14 July 2006, p.127, lines 26 to p.128, line 11.
[1846] Transcript 22 June 2006, pg 28, line 25 – pg 29, line 24.
[1847] Transcript 22 June 2006, pg 51, line 16-26.
[1848] Transcript 22 June 2006, pg 50, line 24-26.
[1849] Transcript 22 June 2006, pg 52, line 1 - pg 53, line 6.
[1850] Transcript 22 June 2006, p.67 lines 13-25 & p.69, lines 1-5. The witness had received Le. 880,000 allowance during the period beginning from late April to mid June as shown in Exhibit 105 under seal.

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reasons, and said thus: "that's what I've told you, that there is no truth in it".[1851] Notwithstanding his incredulity, the witness confirmed that, after retreating from Freetown, orders came from Mosquito directly to Superman and Superman was the overall commander in Kono at the time when he was there.[1852] [redacted] he also said that he did not know "'whether civilians came to Kono to mine voluntarily or whether they were forced'".[1853] He confirmed that he did not see the second accused "bring truck-loads of people to do mining in Kono".[1854] The witness's allegation that the second accused's and/or his wife was involved in mining could not be ascertained.

1269. TF1-366, whose incredulity arguably surpasses TF1-367 above, alleged as usual that the second accused was, *inter alia*, mining for diamonds at various unspecified locations in Kono and that the mining was carried out by civilians. He said that these civilians had been captured from unspecified locations. No timeframe was provided for the allegation.[1855] [redacted] alleged that civilians were forcibly used in diamond mining in various locations in Kono District from 2000, stating without proof that Mortema, Banafaye, Simbakoro, Gbeko, Bumpe, Gieya, Yengema, Number 11, Kaisambo, Kimberlite, 27 and Yellow Mosque as locations of mining.[1856] He also testified about the abduction of civilians in unspecified villages surrounding Koidu, shortly after it had been captured.[1857] The witness alleged that the second accused gave the order to search the said villages.[1858] As distinctly argued in this Brief, the witness is incredible and should not be believed by the Court at all.

1270. Also, TF1-114, an SLA/AFRC soldier, stated that sometime after the intervention, he witnessed in Koidu and Gandorhun civilians being abducted and forced into labour under the command of the second accused.[1859] For the reasons stated in this Brief with reference to this witness as well as the fact that the witness particularly testified that although he was in Kono after the retreat from Freetown he did not know senior RUF commanders like Rambo, Rocky CO, Komba Gbundema, Hindo Koroma (who was the G-5 commander), and *inter alia* Saidu

[1851] Transcript 22 June 2006, p77, lines 8-10; & p77 lines 14-25.
[1852] Transcript 22 June 2006, p17, lines 23-29.
[1853] Transcript 22 June 2006, pg 28, line 29 – pg 29, line 1; referring to the witness' statement which was tendered as Exhibit 106.
[1854] Transcript 26 June 2006, pg 28, line 10-12.
[1855] Transcript 07 November 2005, pg 75, line 24- pg 76, line 10.
[1856] Transcript 10 November 2005, pg 4, line 11- pg 5, line 5.
[1857] Transcript 08 November 2005, pg 7, line 12-15; pg 8, line 1-3.
[1858] Transcript 08 November 2005, pg 7, line 16-17.
[1859] Transcript 28 November 2005, pg 46, line 18-25.

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Kallon (who was the MP commander in Kono),[1860] his presence in Kono during the Indictment period is doubtful. His account is also vague about time and specifics.

1271. Other witnesses also gave various accounts about events in Kono District. TF1-071, *inter alia*, alleged that "Morris Kallon was having some group mining for him."[1861] However, the Prosecution failed to elicit a timeframe or a location for this location. TF1- 012 also alleged that Foday Sankoh came to Tombodu and told "Issa [Sesay], Akim [Turay], Staff Alhaji" and others said that they should mine for diamonds.[1862] TF1-077 testified that he was abducted [redacted] and, thereafter, forced to mine at Tombodu Bridge. He did not allege the involvement of the second accused.[1863]

1272. To the contrary, it is submitted that the Chamber has received evidence which is inconsistent with allegations of the second accused's involvement in forcible mining. [redacted].[1864] He further testified that he did not see or hear the second accused order Amara Peleto to abduct civilians for forcible mining at that time.[1865] Also, DMK-087, whom several Prosecution witnesses knew, [redacted][1866] During his testimony about reports of criminal conduct, he systematically denied knowledge of any criminal conduct attributable to the second accused. He also denied knowledge of the second accused being involved in forcible mining allegedly carried out by civilians.[1867] It is submitted that it is reasonably inferred from the witness' position within the G5 Brigade that he would have known about the several allegations of criminality made against the second accused concerning civilians if they had actually occurred. DMK-087, [redacted] commented on Exhibit 346 aforementioned, noting that the Second Accused was not among the soldiers to whom civilians were attached in Kono and that he did not deal with civilians.

[1860] Transcript 29 April 2005, p.15, line 16 to p.17 line 23.
[1861] Transcript 21 January 2005, pg 124, line 12-13.
[1862] Transcript 02 February 2005, pg 28, line 10-20.
[1863] The evidence is described in relation to "Unlawful Killings", *supra*.
[1864] Transcript 22 April 2008, pg 27, line 8-11.
[1865] Transcript 22 April 2008, pg 27, line 16-20.
[1866] Transcript 22 April 2008, pg 80, line 6-29. The Defence recalls the evidence of TFI 041 who testified that the role of G5 was to ensure the welfare of civilians, (Transcript 11/07/05, pg 11, line 23-26).
[1867] Transcript 24 April 2008, pg 10, line 12-15.
[1868] Transcript 22 April 2008, p 80.

1273. For the reasons above stated, it is respectfully requested that the allegations in Count 13 relevant to Kono District against the second accused be entirely dismissed.

d) BOMBALI DISTRICT (1 May 1998 to 30 November 1998)

1274. Also, Paragraph 73 of the Indictment alleges that between 'about 1 May 1998 and 31 (*sic*) November 1998' in Bombali District members of the AFRC/RUF abducted an unknown number of civilians and used them as forced labour. The Prosecution led evidence from TF1-041 aforesaid that whilst he was stationed in Makeni sometime in 1999 or 2000, he received an order from the second accused, who was then allegedly in Kono, to capture and transfer civilians to Kono for mining.[1869] This account is both outside the timeframe and vague. Not only was the second accused not in Kono in 1999/2000, but also the evidence of this witness is unsubstantiated.

e) KAILAHUN DISTRICT ("At all times relevant to this Indictment")

i) The Prosecution Case

1275. Also, paragraph 74 of the Indictment alleges that "at all times relevant to the Indictment", captured civilians were brought to various unnamed locations within Kailahun District and used as forced labour.

ii) Relationship to the Indictment and Notice

1276. It is submitted that the Indictment is, as pleaded, defective in the sense that: **i)** no locations within Kailahun District were pleaded, **ii)** the timeframe pleaded is unreasonably broad and **iii)** the number of civilians allegedly used as forced labour are unknown and indescribable. It is also prudent to note that the offence of 'abduction' was not pleaded for Kailahun District; the Indictment states that a form of the offence of abduction had already occurred before the civilians were allegedly brought to Kailahun District.

1277. Furthermore, it is significant to indicate, by way of notice to the Court, the following: **i)** that the location pleaded in the Indictment refer to allegation of forced labour only and that

[1869] Transcript 10 July 2006, pg 63, line 3-28.

the reference by the Prosecution in its Supplemental Pre-Trial Brief to 'over 200 civilians being *captured* in Pendembu (...)'[1870] is thus misplaced; **ii)** that to the extent that the overall conduct of the members of the AFRC/RUF, against whom the allegations in Count 13 were made under Kailahun District, was not limited to the said District alone as stipulated in the Prosecution's Supplemental Pre-Trial Brief,[1871] paragraph 74 of the Indictment is defectively pleaded because it is clearly ambiguous as to the specific location pleaded; it also creates the notion of an ongoing offence of enslavement that is broad and timeless; **iii)** that paragraph 74 of the Indictment makes no distinction between the types of forced labour alleged owing to the fact that the Prosecution's case theory and its witnesses allege different modes of forced labour, such as forcible farming, load carrying and mining, all of which were not pleaded, even though the Prosecution was obliged to so do; and **iv)** that through the evidence of witnesses: TF1-367, TF1-366, TF1-114 (Dennis Koker) and TF1-371, the Prosecution sought to establish that the second accused personally and physically perpetrated crimes, whereas the Indictment does not plead a case of physical and personal perpetration of crimes against second accused. On the foregoing premise, it is submitted that the Indictment is materially defective and that the allegations therein against the second accused should be dismissed.

iii) The Evidence

1278. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Count 13 herein under Articles 6(1) and 6(3) of the Statute, in Kailahun District within the stated timeframe. Accordingly, the Defence readopts the arguments and submissions made in this Brief, especially in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants who allegedly committed crimes in Kailahun District within the period of the Indictment; secondly, that the second accused did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in herein in Kailahun District or anywhere; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group to commit the said crimes.

[1870] Id., para. 506(a).
[1871] Id., para. 507(a).

1279. Prosecution witness TF1-045 testified that civilians were forced to mine diamonds in Giema, Kailahun District, on an unspecified date[1872] and that the second accused was aware of it.[1873] The witness, however, failed to show how the second accused knew about the allegation, apart from the general inference that he was, according to the witness, part of the RUF high command, which allegation has been refuted. Considering also that the witness generally alluded the same knowledge about forcible mining to Issa Sesay, Gbao, Mike Lamin and Sam Bockarie without proof, the witness's allegation against the second accused is at best fanciful; he is incredible.

1280. Also, witness TF1-367 testified that he was in Koindu from November 1997 "going to '98." He said that at that time civilians were forced to harvest coffee and cocoa in order to raise funds for the purchase of ammunition from ULIMO. He also said that this practice continued in all the small towns in the district that were occupied by the RUF and that it had been going on since the beginning of the war.[1874] The witness also alleged that civilians were forced to work on "RUF farm[s]"[1875] and that they were forced to carry loads on a journey from Buedu to Kono in November 1998.[1876] Though the witness did not mention the second accused directly, the analyses in this Brief shows that he is incredible and admitted under oath to have lied. He nonetheless testified that that there were two types of civilian labor: there were those who were forced to mine and those who could not survive on their own unless they worked for some one, and such they would work willingly.[1877]

1281. Witness TF1-141 also testified that there were only government farms in Kailahun and that he was not aware of anybody owning a personal farm in 1998.[1878] This glaringly contradicts the Prosecution's case theory as highlighted herein. However, the account of TF1-371 about state or government farms and private farms and their ownership compounds the Prosecution's case even further. TF1-371 testified that in 1998 in Kailahun district, civilians were used to perform 'government job' which meant jobs for the RUF movement, which the combatants could not do because of their engagement in combat activities. The witness stated that both for state farms and individual farms, the commanders in Kailahun used civilians for farming activities. He also said that the second accused too had a private farm.[1879]

[1872] Transcript 21 November 2005, pg 60, line 12-29.
[1873] Transcript 21 November 2005, pg 61, lines 18-23.
[1874] Transcript 22 June 2006, pg 25, line 7 – pg 26, line 20.
[1875] Transcript 22 June 2006, pg 26, line 21-25.
[1876] Transcript 22 June 2006, pg 27, line 22 – pg 28, line 3.
[1877] Transcript 23 June 2006, pp.47 to 48
[1878] Transcript 18 April 2005, p.84, lines 1-28.
[1879] Transcript 21 July 2006, p.60 line 1 to p.61 line 5.

1282. Prosecution witness TF1-366, who claimed, as noted in this Brief, [redacted] testified that the second accused forcibly used civilians to carry arms, ammunition and other supplies. He said that the civilians were sent to Kailahun to bring supplies to Kono. The Prosecution, however, failed to elicit a timeframe for this allegation.[1880] The witness also said that that the second accused gave orders for "young boys" to be sent to Bunumbu in Kailahun District for training. He said that some "became farmers for RUF through force." He testified that "[t]hey made farms for all the commanders."[1881] The Prosecution also failed to elicit a timeframe for this allegation. The witness then proceeded, in his usual unfounded and exaggerated style, to further allege that captured civilians worked in diamond mines and on farms owned by RUF commanders, including the second accused, in Kailahun District; claiming, without details, that farming continued from 1997 to 2000 and that mining continued at Yenga, Morfindo, Jojoima, Jabama and Golahun from 1996 to 2002.[1882] Apart from establishing in this Brief that TF1-366 is unbelievably incredible, it came out clearly under cross-examination by Counsel for the second accused that the witness contradicted his earlier statement in which he had said that the second accused did not have a farm. He stated that the second accused did not have a farm in 1996 and 1997, but that in 1998 and 1999 he had a farm at Buedu, even though the witness admitted that he had never been to Buedu and that the second accused and himself were at Superman Ground in Kono during the period he was testifying about.[1883]

1283. Prosecution witness TF1-114 gave evidence that he visited a farm belonging to the second accused near Buedu at an unspecified date during his stationing in Buedu as an RUF MP from 1998 to 1999. He testified, without any proof, that people there came "from all parts of the country."[1884] The witness's allegation is wholly denied and challenged. It is the case for the second accused that, in answer to TF114 and 371's allegation that the second accused had a farm in Kailahun were forced labour was used and were people from all parts of the country were, the second accused never had a farm of his own anywhere. Rather, the second accused testified that his mother and mother-in-law had a rice farm (swamp) in Buedu, which their children worked for them without any forced labour. The second accused also testified that in

[1880] Transcript 08 November 2005, pg 66, line 7 – pg 67, line 6.
[1881] Transcript 08 November 2005, pg 67, line 8 – pg 68, line 6.
[1882] Transcript 10 November 2005, pg 6, line 7 – pg 10, line 13.
[1883] Transcript 17 November 2006, p.5 line 1 to p.6 line 4.
[1884] Transcript 28 April 2005, pg 68, line 5-24.

1999, her mother and in-law did not eat from the harvest because he went and collected the rice from a certain Pa Palmer for his own use.[1885]

1284. Consequently, the Defence again respectfully urges the Court to dismiss every allegation made by the Prosecution in the Indictment against the second accused concerning enslavement and any other alleged crime in Kailahun District.

f) FREETOWN AND THE WESTERN AREA (6 January 1999 to 28 February 1999)

1285. Paragraph 75 of the Indictment alleges that between '6 January 1999 and 28 February 1999' at various locations in Freetown and the Western Area, including Peacock Farm, Kissy and Calaba Town, members of the AFRC/RUF abducted "hundreds of civilians" and used them as forced labour. It is submitted that the Indictment is, as pleaded, vague about both the time and number of civilians allegedly affected. The Court has already held that no evidence was adduced in respect of Peacock Farm.[1886].

1286. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the abductions and forced labour allegedly perpetrated in Freetown and the Western Area due to, *inter alia*, unproven claims that: i) the unknown subordinates of the second accused perpetrated the said crimes and had regular radio communications with the AFRC/RUF leadership whilst commiting the crimes, **ii)** that the second accused was "in apparent charge for the movement of civilians";[1887] and **iii)** that he failed to take reasonable and necessary measures to prevent or stop the alleged crimes.

1287. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Count 13 of the Indictment under Articles 6(1) and 6(3) of the Statute, in Freetown and the Western Area within the relevant timeframe. Accordingly, the Defence readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (SLA/AFRC soldiers) who attacked and committed crimes in Freetown and the Western Area within the period stated; secondly, that

[1885] Transcript 14 April 2008, p.116 lines 11-27.
[1886] Transcript 25 October 2006, p.44 line 8.
[1887] Prosecution Supplemental Pre-Trial Brief, para. 454.

the second accused did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Count 13 herein in Freetown and the Western Area or anywhere; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of fighters to commit such crimes, including members of the AFRC/SLA already found and convicted for these crimes.

1288. Consequently, the Defence respectfully urges the Court to dismiss all allegations made by the Prosecution in the Indictment against the second accused concerning Freetown and the Western Area. The charges/counts under these locations should thus be dismissed and a verdict returned in favour of the second accused.

g) PORT LOKO DISTRICT (February 1999 to April 1999)

1289. Similarly, paragraph 76 of the Indictment alleges, without stating any specific timeframe relevant to the crimes alleged, that at various locations in Port Loko District including, Port Loko, Lunsar and Masiaka, members of the AFRC/RUF used civilians, including those allegedly abducted from Freetown and the Western Area, as "forced labour". The paragraph also alleges that AFRC/RUF forces abducted civilians from various locations in the District, including Tendakum and Nonkoba. It is submitted that the Indictment is, as pleaded, vague about both the time and number of civilians allegedly abducted and used as forced labour. The time specified under Port Loko District, namely, "about the month of February 1999" is only referable to the period during which the AFRC/RUF allegedly fled from Freetown to various locations in the District; there is nothing contained therein about an Indictment period. The Court has already held that no evidence was led in respect of Masiaka.[1888]

1290. Besides, in its Supplemental Pre-Trial Brief, the Prosecution alleged, without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for abductions and forced labour allegedly perpetrated in Port Loko District even though the Prosecution had, *inter alia*, stated therein that Brima Bazzy Kamara gave 'the direct order for abductions in the District'.[1889]

1291. That aside, it is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Count 13 herein under Articles 6(1) and 6(3) of the Statute, in

[1888] Transcript 25 October 2006, p.44 lines 9-10.
[1889] Prosecution's Supplemental Pre-Trial Brief, para. 523(c).

Port Loko District within the relevant period. Consequently, the Defence again adopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (mostly SLA soldiers) who attacked and committed crimes in Port Loko District within the period stated; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 13 in any part of Port Loko District or anywhere at all; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of combatants to commit such crimes, including the AFRC/SLA convicts mentioned in this Brief.

1292. In view of the above, the Defence respectfully requests the Court to dismiss all allegations made by the Prosecution in the Indictment against the second accused concerning Port Loko District. The Defence avers that the second accused did not hold any of the positions capable of wielding command and enhancing control over RUF combatants; he was not the G1 in charge of recruitment, he was not the G5 responsible for civilians, he was not the mining commander in any location where mining was done, he was not also the MP Commander in charge of investigations and discipline, nor was he the commanding officer of Kono to give instructions on mining, like Superman did in Exhibit 341.

1293. For these reasons, it is submitted that Count 13 ought to be dismissed in its entirety.

8) COUNT 14

a) LEGAL DEFINITION: "Pillage"

1294. Count 14 alleges "pillage", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II and punishable under Article 3.f of the Statute. The said "pillage", according to the Indictment, took forms of "looting and burning". In its Rule 98 oral Decision, the Court stated that in order to prove the crime of "pillage" within the meaning of Article 3.f of the Statute, the Prosecution should lead evidence to prove the elements of the offence as follows: firstly, that "*the accused unlawfully appropriated the property*"; secondly, that "*the owner of the property was a person not taking a direct part in the hostilities*"; thirdly that ""*the appropriation was without the consent of the owner*"; fourthly, that "*the accused intended to unlawfully appropriate the property*"; finally, that "*the*

accused knew or had reason to know that the owner was a person not taking a direct part in the hostilities".[1890] (Emphasis added).

Pillage as Forms of Looting and Burning:

1295. Paragraph 77 of the Indictment alleges that "at all times relevant to the Indictment, AFRC/RUF engaged in widespread and unlawful taking and destruction by burning of civilian property." The Defence for the second accused submits that the elements of the offence of "Pillage" do not include the offence of "destruction by burning of civilian property" (malicious damage or arson), and that to that extent, the Indictment is materially defective. Whilst the element of 'deprivation of the owner of his property without his consent' may be common to both pillage and malicious damage, the element of 'appropriation by the taker of the property of the owner' does not avail in the offence of burning, except if the appropriation occurred before the destruction by burning. In this respect, pillage can more appropriately accommodate 'looting' as charged, than it can accommodate mere burning without any intention to take and carry. This proposition is now settled law.

1296. To start with, this Court has, in its Judgment in *Prosecutor v. Moinina Fofana & Allieu Kondewa*,[1891] analyzed the above offence of pillage. The Court held as follows:

> "Black's Law Dictionary defines appropriation as "the exercise of control over property; a taking or possession." In the act of looting, the offender unlawfully appropriates the property. Destruction of property by burning, however, does not, by itself, necessarily involve any unlawful appropriation. Thus, while both looting and burning deprive the owner of their property, the two actions are distinct, since the latter crime may be commited without appropriation *per se*. As a result, the Chamber is of the view that destruction by burning of property does not constitute pillage. The Chamber will, not therefore, take into account acts of destruction by burning for the purposes of determing the individual criminal responsibility of the Accused under Count 5".

1297. The foregoing proposition of law has now been crystallized and settled into law by the Appeals Chamber in its Appeals Judgment in the above case,[1892] where the the Chamber held as follows:

[1890] See para. 243 of the Court's Rule 98 Decision, *supra*.
[1891] Moinina Fofana & Allieu Kondewa Trial Judgment, 2 August 2007, para. 166, *supra*.

> "Taking into consideration the definition of pillage applied by the ICTY and ICTR which logically excludes acts of destruction, the distinction between the prohibitions against pillage and destruction not justified by military necessity, which is preserved throughout applicable conventional international law and the drafting history of the Statute of the Special Court, the Appeals Chamber finds that a necessary element of the crime of pillage is the unlawful appropriation of property. Consequently, burning and other acts of destruction of property not amounting to appropriation as a matter of law cannot constitute pillage under international criminal law."

1298. The Appeals Chamber also particularly noted that "[i]f pillage included wanton destruction, there would have been no reason to include the provision of the 1861 Malicious Damage Act" into the Statute of the Special Court for Sierra Leone.[1893]

b) BO DISTRICT (1 June 1997 to 30 June 1997)

1299. Paragraph 78 of the Indictment alleges that 'between 1 June 1997 and 30 June 1997' AFRC/RUF forces "looted and burned an unknown number of civilian houses in Telu, Sembehun, Mamboma and Tikonko". It is submitted that the Indictment is, as pleaded, vague about both the time and number of civilian houses allegedly looted and burnt. The Court has already held that no evidence was led in respect of Telu and Mamboma aforesaid.[1894]

1300. The Defence has already exhaustively argued and submitted on the allegations contained in this Count about Sembehun 17 and Tikonko in Bo District. In this regard, the Defence wholesomely adopts the arguments and submissions made in this Brief, especially in Counts 3 to 5 above under the analysis on "Bo District", to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (who were entirely SLA soldiers and Kamajors) that allegedly attacked and committed crimes in Sembehun 17 and Tikonko in the Bo District within the Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 13 in any part of Bo District or anywhere at all; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of combatants to commit such crimes, including the AFRC/SLA high command,

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[1892] SCSL-04-14-A *Prosecutor v. Moinina Fofana & Allieu Kondewa*, Judgement, Appeals Chamber, 28 May 2008, para. 409. [CDF Appeals Chamber Judgement].
[1893] Id., para. 408.
[1894] Transcript of 25 October 2006, p.44 lines 16-17.

such A. F. Kamara, Boysie Palmer and A. B. Kamara, as well as the Kamajors mentioned in Counts 3 to 5 of this Brief.

1301. In this vein, the evidence of witness TF1-004 that junta soldiers' dressed in military fatigues attacked Tikonko from the Bo area in June 1997,[1895] entered the town in military vehicles[1896] and burnt about 500 houses in Tikonko[1897] should be dismissed. In view of the Decision of the Appeals Chamber cited in this Count above, it is also submitted that the burning of houses, without any evidence of their appropriation by the alleged assailants, would not qualify for the offence of "pillage" under Count 14. The allegation of burning, as alleged in Bo District, therefore fails. Similarly, the allegation by witness TF1-008 that Mosquito took Le. 800,000.00 from the section chief in Sembehun 17[1898], if any, cannot also be sustained against the second accused. The accused consequently bears no responsibility under Articles 6(1) and 6(3) of the Statute for the crimes alleged in Bo District within the relevant Indictment period.

c) KONO DISTRICT (14 February 1998 to 30 June 1998)

i) The Prosecution Case

1302. Furthermore, paragraph 80 of the Indictment alleges that 'between 14 February 1998 and 30 June 1998' AFRC/RUF forces "engaged in widespread looting and burning in various locations in the District, including Tomobodu, Foindu ancd Yardu Sando, where virtually every home in the village was looted and burned."

ii) Relationship to the Indictment and Notice

1303. It is submitted that notwithstanding their alleged "widespread" nature, the offences pleaded in the Indictment are vague about both timeframe and property, which forms the subject-matter of looting and burning. Apart from Yardu Sando, where it was alleged that "virtually every home was looted and burnt", the other locations, Tombodu and Foindu, lack specifics. Incidentally, the Court ruled in its oral Decision on the RUF Acquittal Motions that

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[1895] Transcript, 7 December 2005, p.64, line 18 to p.65, line 8, & p.69, lines 12-21.
[1896] Transcript, 7 December 2005, p.73, lines 14-28, & p.76, lines 22-28.
[1897] Transcript, 8 December 2005, p.13, lines 23-24.
[1898] Court Transcript, 8 December 2005, p.35, lines 19-29.

no evidence was led in respect of Foindu and Yardu Sando.[1899] In particular, it is strange that so much could be pleaded about Yardu Sando in Count 14 of the Indictment yet no evidence could be led to prove what was zealously alleged.

1304. On the issue of Notice, the Defence highlights the following: firstly, that the evidence identified hereunder, which the Prosecution relies upon to prove its case, allege looting and/or burning in Koidu. Koidu is, however, not pleaded as a location for "looting and burning" in paragraph 80; neither do the Pre-Trial Brief and Supplemental Pre-Trial Brief plead attacks on Koidu to support Count 14. Therefore, it is submitted that the evidence below are outside the scope of the Indictment and cannot form the basis of any conviction against the second accused. Secondly, that through the evidence of, *inter alia*, TF1-141 and TF1-366, the Prosecution sought to establish that the second accused personally and physically perpetrated crimes. It is averred that the Indictment does not plead a case of physical and personal perpetration of crimes against the second accused. Therefore, it is submitted that the said evidence must be disregarded for that purpose. And thirdly, that no material facts were pleaded in the Indictment, the Pre-Trial Brief or the Supplemental Pre-Trial Brief that would have put the second accused on notice of the allegations identified hereunder. For example, the following material facts underpinning allegations against the second accused were not specifically pleaded:

a. that the commercial bank was a target for "looting", as alleged by TF1-360, TF1-114, TFI-141 and TFI-366. Notably, that the Second Accused "broke into the National Commercial Bank in Bo in 1998 and stole all the money". It does not mention the looting of a bank in Kono;

b. that the house of Pa Hassan was a target for "looting", as alleged by TFI-263;

c. that other houses in Koidu were targets for looting and burning, as alleged by TFI-360, TFI-361, TFI-114, TFI-141, TFI-041, TFI-366 and TFI-045;

d. that orders were issued by the second accused to loot and/or burn property, as alleged by TFI-360, TFI-361, TFI-041, TFI-366 and TFI-045.;[1900]

e. that the identities of the alleged victims and the physical perpetrators, specific timeframes, specific locations, the level of involvement of the second accused and his proximity to the alleged events, regarding the allegations identified hereunder, were not brought to his notice at all.

1305. On the above basis, it is submitted that the evidence herein cannot form the basis of any conviction against the second accused.

[1899] Transcript of 25 October 2006, p.44 lines 20-21.

[1900] The Supplemental Pre-Trial Brief, at para 549.

1306. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Counts 14 above under Articles 6(1) and 6(3) of the Statute, in Kono District within the relevant timeframe. In this regard, the Defence accordingly readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants that allegedly committed crimes in Kono District, in particular Tombodu village, within the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 14 in any part of Kono District or anywhere; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of combatants, including Savage, Staff Alhaji and Rocky CO who were all commanders in Tombodu respectively, to commit to loot and burn Tombodu and its outlying areas.

iii) The Evidence

(1) Locations Not Pleaded

(a) Looting of the Commercial Bank in Koidu Town

1307. Prosecution witness TF1-360 testified that at a meeting at Superman's residence, the attendees, including the second accused, discussed the possibility of robbing the Commercial Bank in Koidu.[1901] It should be noted that the evidence was admitted over a vigorous objection from all three of the accused based on non-disclosure rules, during which the Prosecution agreed that there had been no such disclosure.[1902] Also, Prosecution witness TF1-114 (Dennis Koker) testified to a bank robbery during his stay in Koidu Town, sometime after the Intervention.[1903] Furthermore, Prosecution witness TF1-141 gave evidence that, after a muster parade, the second accused took him and other members of the RUF into Koidu Town on information that the SLA forces were robbing "one Bank along Post Office Road in Koidu town". When they went, they met the SLAs robbing the bank and there was a gunfight. According to the witness this operation, which was called "Born Naked", resulted in the

[1901] Transcript 20 July 2005, pg 24, line 15-25.
[1902] Transcript 20 July 2005, pg 24, line 26 – pg 25, line 1.
[1903] Transcript 28 April 2005, pg 46, line 5-9.

taking of money from the bank.[1904] Under cross-examination by counsel for the second accused, the witness confirmed that the second accused was instructed to go to the bank to stop the SLAs from robbing it.[1905] He also confirmed that he knew that the money taken from the bank was taken to Sam Bockarie at Buedu.[1906]

1308. Prosecution witness TF1-036 testified that he knew and had seen the document tendered and admitted in Court as "Exhibit 44", specifically at pages 33 & 35. The witness stated that an investigation was held into the bank robbery at Kono[1907] and agreed that the second accused was not one of the suspects mentioned in the report of the bank robbery but says that he was a suspect.[1908] The witness also agreed with the report that it was Colonel Kennedy who took the money retrieved from the robbery to the Sam Bockarie not the second accused.[1909] Also on looting in Kono, Defence witness for Issa Sesay, DIS-214, testified that some Kamajors took over Koidu Town when the Army had left; they attacked the town and looted the goods left over by the Army.[1910] The Kamajors left properties scattered all over the place after they had looted the town.[1911]

1309. Before putting the Defence case, it is must be stated that all Prosecution witnesses who testified about burning in Kono, including the unpleaded Koidu Town, stated categorically that they burnt *buildings*, *villages* or *towns* on the alleged instructions of various RUF officers, including Sam Bockarie, Superman and, *inter alia*, the second accused. Also, none of the witnesses, as shown below, testified about appropriating the burnt items, mostly fixtures, before the actual act of burning. In essence, by virtue of the Appeals Chamber Decision in the CDF Appeals herein cited on the legal elements of "pillage", it is submitted that all acts of burning contained in the evidence led by the Prosecution against the second accused fail to meet the threshold of pillage. No evidence was led to the effect that combatants took and carried property away from their lawful owners before burning them, which is the only window of possible trial and conviction available in the settled law on pillage by the SCSL Appeals Chamber. To this extent, it is submitted that all allegations/charges of burning failing to meet the appropriation requirement of pillage must be set aside and dismissed.

[1904] Transcript 11 April 2005, pg 95, line 17 – pg 96, line 22.
[1905] Transcript 18 April 2005, p.60 lines 15-17
[1906] Transcript 18 April 2008 p.62, lines 24-26.
[1907] Transcript 3 August 2005, p.35, lines 11-14
[1908] Transcript 3 August 2005, p.35, lines 17-19, 22-24
[1909] Transcript 3 August 2005, pp.36-37, lines 20-29
[1910] Transcript 15 January 2008 p. 78 lines 17 – 29
[1911] Transcript 15 January 2008 p. 79

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1310. Some of the allegations against the second accused on burning in Kono, which are denied and challenged by the second accused, are stated as follows: Prosecution witness TF1-360 stated that the second accused was ordered by Superman *to burn down Koidu Town.* According to the witness, the second accused instructed a group of soldiers to implement the order. He alleged that this took place in late February to March 1998.[1912] It should be noted, however, that an objection was made on the Court's record by all three accused contemporaneously, leading to the introduction of evidence that there had been no disclosure of an alleged burning of Koidu in 1998.[1913] At the invitation of the Court, Defence Counsel for Sesay Defence, formally withdrew his objection, but the Defence for the second accused team did not.[1914] Also, witness TF1-366 gave joint evidence on looting and burning in Koidu Town. The witness, as usual and without stating any timeframe, wasted no time in accusing the second accused of having given the order for both the looting of villages[1915] and *the burning of Kono*, alleging that the second accused ordered that "we should *burn the entire Kono*, that we should not leave a single house in Koidu Town."[1916]

1311. Moreover, Prosecution witness TF1-361 testified that he saw "Brigadier Kallon" instructing men *to burn houses* in Koidu Town[1917] during an unspecified period sometime after the intervention.[1918] Prosecution witness TF1-114 testified as well to *the burning of houses* by the RUF and AFRC in Koidu Town sometime after the intervention. The witness placed the second accused in Koidu Town at that time. However, the Prosecution failed to elicit confirmation that the second accused gave any orders or that he was involved at all.[1919] Similarly, Prosecution witness TF1-141 testified about *the burning of houses* in Koidu, but he failed to provide a timeframe for the allegation.[1920] Furthermore, Prosecution witness TF1-041 testified that in retaliation for the ECOMOG advance on Koidu, the RUF engaged *in burning houses* and that the second accused had said that "when you take part in burning, you will be promoted."[1921] And, among other witnesses, Prosecution witness TFI 045 also gave evidence that, at a meeting in Buedu in "1998, around December", Mosquito had ordered that

[1912] Transcript 20 July 2005, pg 15, line 4 - pg 17, line 24.
[1913] Transcript 20 July 2005, pg 61, line 22 – pg 66, line 29.
[1914] Transcript 21 July 2005, pg 3, line 18-19.
[1915] Transcript 08 November 2005, pg 7, line 16-17.
[1916] Transcript 08 November 2005, pg 27, line 25-28.
[1917] Transcript 12 July 2005, pg 8, line 23-27.
[1918] Transcript 12 July 2005, pg 2, line 21-22.
[1919] Transcript 28 April 2005, pg 45, line 11 – pg 47, line 3.
[1920] Transcript 11 Arip 2005, pg 83, line 3-6.
[1921] Transcript 10 July 2006, pg 45, line 15 – pg 46, line 1.

houses be burned in Koidu, *inter alia*.[1922] Later, the witness testified that he took part *in the burning of Koidu Town* himself but alleged that the second accused gave the order to burn. He said that many houses were burnt and that he didn't know whether any people died as a result of the burning.[1923] He did not give any timeframe.

1312. Prosecution witness TF1-071 testified that "all factions occupied in the fighting in Koidu were responsible *for burning Koidu.*"[1924] In terms of the RUF involvement, the witness testified that Superman was responsible. Also, witness TF1-367 testified that it was Mosquito who sent a message to Superman in Kono, after retreating, to burn down vehicles and houses of combatants who were not prepared to go to the frontline, and that Superman passed the order to his "SBUs" to implement it. He confirmed that the second accused did not implement any such orders.[1925] Similarly, Defence witness DMK-087, whom as noted was the G5 deputy brigade commander in Kono in 1998,1926 testified that he only heard about the robbery of bank when he first arrived in Kono in March. The information he got from his friend soldiers was that the STF went and broke into the bank, including some SLA soldiers. General Mosquito had information that the bank had been broken in. Then he gave orders to the MP Commander, Major AS Kallon, to do the investigation.[1927] Witness never heard that the second accused was involved in the robbery of this bank.[1928] Witness never also heard that the second accused brought child soldiers from the Guinea Highway to assist him rob a bank in Koidu Town.[1929]

1313. Consequently, the Defence respectfully urges the Court to dismiss the allegations in respect of Count 14 made against the second accused concerning Kono District.

d) BOMBALI DISTRICT (1 May 1998 to 30 November 1998)

1314. Additionally, paragraph 81 of the Indictment alleges that 'between 1 March 1998 and 31 (*sic*) November 1998' AFRC/RUF forces "burnt an unknown number of civilian buildings in locations in Bombali District, such as Karina and Mateboi." In refutation of the aforementioned allegations, the Defence relies on the entire contents of this Brief and the Defence's submissions in relation to JCE and the Agreed Statement of Facts.

[1922] The evidence is also described in relation to "Unlawful Killings", *supra*.
[1923] Transcript 08 November 2005, pg 44, line 16 – pg 45, line 12.
1924 Transcript 25 January 2005, pg 12, line 7-10.
1925 Transcript 26 June 2006, pg 18, line 10-19.
1926 Transcript 22 April 2008, pg 80, line 6-29. The Defence recalls the evidence of TFI 041 who testified that the role of G5 was to ensure the welfare of civilians, (Transcript 11 July 2005, pg 11, line 23-26).
1927 Transcript 22 April 2008, p 113
1928 Transcript 22 April 2008, p 115
1929 Transcript 22 April 2008, p 116

e) FREETOWN AND THE WESTERN AREA (6 January 1999 to 28 February 1999

i) The Prosecution Case

1315. Paragraph 82 of the Indictment alleges that 'between 6 January 1999 and 28 February 1999' AFRC/RUF forces "engaged in widespread looting and burning throughout Freetown and the Western Area".

ii) Relationship to the Indictment and Notice

1316. It is submitted that the Indictment as as pleaded is vague about both timeframe and location, no location is, for example, mentioned in respect of the Western Area outside the city of Freetown. Also, unlike the other locations, no property is identified as being "looted"; only "the majority of houses that were destroyed" in various areas like Kissy, Wellington and Calaba town were, *inter alia*, mentioned. Besides, the alleged generalized ownership of the said houses, whether privately or publicly owned, was unpleaded in paragraph 82 of the Indictment.

iii) The Evidence

1317. To prove the alleged "looting and burning" in Freetown and the Western Area, the Prosecution elicited evidence from various witnesses, including, *inter alia*, TF1-334, 022, 023 and 362 (as stated in the Court's oral Decision on RUF's Rule 98 Motions).[1930] The Court especially noted that TF1-334 had testified, *inter alia*, that "Gullit declared that it was time to make a hasty withdrawal, and that the burnings and abductions should start again, and subsequently, as they began to wthdraw towards Kissy Mental Home, civilians were captured and houses burnt". The witness, among other things, stated that 300 civilians were abducted from Freetown and used to carry loads.[1931]

1318. Besides, and as repeatedly indicated in this Brief, the Prosecution, in its Supplemental Pre-Trial Brief, alleged without any proof beyond reasonable doubt, that the second accused is responsible under Articles 6(1) and 6(3) of the Statute for the looting and burning allegedly perpetrated in Freetown and the Western Area, due to unproven claims that the second

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[1930] Transcript 25 October 2006, p.33 lines 9-22.
[1931] Transcript 25 October 2006, p.33, lines 11-15 & lines 20-21.

accused and his unidentified "subordinates" had communications with Alex Tamba Brima/Gullit and the ARFC/RUF leadership during the Freetown invasion and, *inter alia*, that during the said invasion, he brought RUF arms and reinforcements and supported the SLAs in their overall onslaught on Freetown and the Western Area; it is also alleged that he failed to take measures to prevent or stop the alleged crimes.[1932]

1319. It is the case for the second accused that the Prosecution failed to lead any (credible) evidence beyond reasonable doubt to implicate the second accused in any crime, including the crimes outlined in Counts 14 above under Articles 6(1) and 6(3) of the Statute, in Freetown and the Western Area within the relevant timeframe. In this regard, the Defence accordingly readopts the arguments and submissions made in this Brief, particularly in Counts 3 to 5 above, to show that the second accused was firstly, not in any command position, nor did he control or command any of the combatants (SLA soldiers) who attacked and committed crimes in Freetown and the Western Area within the relevant Indictment period; secondly, that he did not himself commit, plan (with), instigate, aid and abet or conspire with anyone to commit any of the crimes alleged in Counts 14 in Freetown and the Western Area or anywhere; and thirdly, that the second accused was not involved in any criminal enterprise with anyone and/or group of fighters to commit such crimes.

1320. Consequently, the Defence respectfully urges the Court to dismiss all allegations made by the Prosecution in the Indictment against the second accused concerning Freetown and the Western Area. The charges/counts under the locations in Count 14 herein should thus be dismissed.

f) DISTRICTS NOT PLEADED

1321. As already noted herein, the Prosecution led evidence through witnesses TF1-117, TF1-366, TF1-367 and TF1-360 of looting, inclusive of "Operation Pay Yourself" in Bombali District; also through TF1-366 of looting in Port Loko District; through TF1-117 of looting in Tonkolili District; and through TF1-060 of burning in Kenema District. The Defence avers that Indictment does not allege looting in Bombali, Port Loko or Tonkolili Districts, nor does it allege burning in Kenema District.

i) Prosecution Allegations

[1932] Prosecution Supplemental Pre-Trial Brief, paras 568-569.

1322. Prosecution witness TF1-117 testified that he took part in looting in Makeni as part of "Operation Pay Yourself" at around the time that "Johnny Paul was overthrown".[1933] He said that the second accused was part of the convoy with which he had arrived in Makeni.[1934] The witness also alleged looting in Mabanta, Mankneh and Makump.

1323. Also, Prosecution witness TF1-366 testified to looting in Makeni, Bombali District, on an unspecified date, which he described as "Operation Pay Yourself." He alleged that the second accused, *inter alia*, gave the orders for the looting. He said that "Operation Pay Yourself" "started in Masiaka and continued until [the witness and others] came to Makeni and entered Kono". The witness alleged that "Operation Pay Yourself" continued in Kono District, but the only location that he specified was Koidu Town.[1935]

1324. Another Prosecution witness TF1-360 claimed that, at a meeting in the Flamingo nightclub in Makeni, the second accused told the meeting that he had looted food and other things from people on his way to Makeni from Freetown, after the fall of Freetown and he advised them to do the same before going into the jungle. He said this operation was called "operation pay yourself" and that it was ordered by Issa Sesay.[1936] The witness also said that he then participated with RUF and AFRC personnel in looting in Makeni.[1937]

1325. Moreover, Prosecution witness TF1-367 alleged that upon his arrival in Makeni, he witnessed widespread looting by RUF and SLA soldiers.[1938] He provided no timeframe for this allegation. He further alleged that civilians were captured and used as forced labour to carry the looted goods.[1939]

1326. Prosecution witnesses: TF1-044 and TFI 042 also alleged looting in their respective testimonies. It is reasonably inferred from their evidence that this alleged looting took place in Bombali or Tonkolili District. On the other hand, witness TF1-060 testified that houses were burnt by SLA and RUF combatants in three villages in Kenema District, namely, Tokpombu, Bomi and Sandeyiema, in August 1997.[1940]

ii) **Defence Refutation**

[1933] Transcript 29 June 2006, pg 99, line 25-29; and pg 104, line 9 – pg 105, line 6.
[1934] Transcript 29 June 2006, pg 103, line 25-26.
[1935] Transcript 07 November 2005, pg 108, line 5 – pg 109, line 22.
[1936] Transcript 20 July 2005, pg 10, line 15-26.
[1937] Transcript 20 July 2005, pg 11, line 7-15.
[1938] Transcript 22 June 2006, pg 11, line 5-18.
[1939] Transcript 22 June 2006, pg 12, line 17 – pg 13, line 3.
[1940] Transcript 29 April 2005, pg 60, line 1-7.

1327. The second accused testified that he did not go to Masiaka after the intervention and, on that basis, denied any involvement in "Operation Pay Yourself" as alleged by TF1-366.[1941] For the same reason, he also denied any involvement in "Operation Pay Yourself" in Makeni, as alleged by TF1-360.[1942] It is submitted that the second accused's alibi was confirmed by TF1-071, DMK-161, DMK-039, DMK-132, DMK-072 and DMK-162 all of whom were at Masiaka and Makeni respectively at the time of the above allegations, but testified that they did not see the second accused there.[1943] TF1-071 said that he identified a predominantly AFRC membership of the retreating forces, as well as RUF personnel like Superman, Mike Lamin, Issa Sesay and Colonel Isaac.[1944] In the testimony of Issa Sesay, he also confirmed that the second accused was not present in Masiaka at that time.[1945]

1328. It is submitted that the above respective allegations of the Prosecution witnesses be altogether dismissed as lacking in both legal and factual merits.

9) COUNTS 1 AND 2

1329. Evidentially, Counts 1 and 2 are entirely dependent on the allegations made out in support of Count 3 to14. In light of the foregoing analysis, it is submitted that the Prosecution has failed to establish the allegations pleaded in support of Counts 3 to 14 and, as such, that Counts 1 and 2 be dismissed. It is submitted that there exists no legal basis for convicting on Count 1, "acts of terrorism" and that the Second Accused be acquitted on that basis. In addition or in the alternative, it is submitted that the Accused be acquitted of Count 2 in that one or more of the essential elements , as described hereunder, have not been established.

a) "ACTS OF TERRORISM"

1330. Count 1 of the Indictment alleges "Acts of Terrorism" as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II and punishable under Article 3.d of the Statute. It is argued, *infra,* that Count 1 should be dismissed for lack of

[1941] Transcript 11 April 2008, pg 133, line 4-14.
[1942] Transcript 11 April 2008, pg 133, line 29 – pg 134, line 4; and Transcript 14 April 2008, pg 8, line 12-18
[1943] Transcript 22 April 2008, pg 17, line 19-22 for DMK 161; Transcript 19 January 2005, pg 26, line 13-15; and line 25-29 for TFI 071; Transcript 25 Aprill 2008, pg 23, line 8-18 for DMK 039; Transcript 29 April 2008, pg 42, line 12-14 for DMK 132, testifying that he did not see Mr Kallon in Masiaka; Transcript 01 May 2008, pg 102, line 18-22 for DMK 072; Transcript 29 April 2008, pg 93, line 25 – pg 94, line 1; and pg 95, line 5-15; and pg 96, line 19-20 for DMK 162. The evidence is also discussed in "Part 4: Joint Criminal Enterprise", *supra.*
[1944] Transcript 19 January 2005, pg 26, line 13-15; and line 25-29.
[1945] Transcript 09 May 2007, pg 24, line 14-15.

jurisdiction, as the offence, "acts of terrorism", is not adequately defined by customary international law.

b) "COLLECTIVE PUNISHMENTS"

1331. Count 2 of the Indictment also alleges "Collective Punishments" as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II and punishable under Article 3.b of the Statute. Also, in order to prove this crime as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 3.b of the Statute as follows: firstly, that "*the constitutive elements of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II*" existed at the time of the offence; secondly, that " *a punishment [was] imposed upon protected persons for acts that they have not committed* "; and thirdly, that there existed at the material time "*the intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment*".[1946] (Emphasis added).

10) COUNTS 15-18: ATTACKS ON UNAMSIL PERSONNEL (15 April 2000 to 15 September 2000)

a) THE PROSECUTION CASE

1332. The Indictment alleges that "[b]etween about 15 April 2000 and about 15 September 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL peacekeepers and humanitarian assistance workers within the Republic of Sierra Leone, including, but not limited to locations within Bombali, Kailahun, Kambia, Port Loko, and Kono Districts. These attacks included unlawful killing of UNAMSIL peacekeepers, and abducting hundreds of peacekeepers and humanitarian assistance workers who were then held hostage."[1947]

b) RELATIONSHIP TO THE INDICTMENT AND NOTICE

[1946] SCSL-2004-14-T-473, *Prosecutor v. Norman et al*, Trial Chamber Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 118.
[1947] The Indictment, at Para 83.

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1333. Paragraph 83 is the only paragraph in the Indictment cited in support of the four counts charging "attacks on UNAMSIL personnel". Therein, the Prosecution pleaded a case against the second accused, spanning five districts and a five month timeframe, but led evidence centering around attacks within a three day period and within a handful of specific locations. As such, the nature of the Prosecution case which unfolded in the evidence was not represented by the Indictment and the Accused did not receive fair notice.

1334. Paragraph 82 of the Pre-Trial Brief alleges non-descript criminal incidents committed against UNAMSIL personnel "[f]rom May 2000", without further qualification, in unspecified locations within the "Makeni/ Magburaka area". Although the allegation that "[h]ostages were delivered to senior AFRC/RUF commanders in Kono District and eventually released in Liberia", bears some semblance of the evidence of TFI 288 and DMK 147. From the reference to "hostages" the identities of the victims can be discerned as "United Nations peacekeepers and humanitarian assistance personnel". However, no further information is provided as to the identities of the victims or any other material facts.

1335. In addition, if the Chamber is minded to surmise that paragraphs 572 (c) and (d) of the Supplemental Pre-Trial Brief relate to the evidence of TFI 042, TFI 044, TFI 165 and TFI 360, it is submitted that the material facts are absent. Paragraph 572 (d) alleges "[t]hat Morris Kallon and Augustine Gbao were present when UN military observers were taken hostage, mistreated and tied together". It does not specify when or where the abductions took place, it does not even specify a district. It is silent as to who physically mistreated the abductees and who exactly they were, given the large deployment "UN military observers" present in Sierra Leone at the time. Details such as their nationality and area of deployment would have greatly assisted the Defence in preparation of its case.

1336. Furthermore, whilst the Pre-Trial Brief makes broad reference to the evidence describing as attack on the UN convoy, the Supplemental Pre-Trial Brief is silent on the matter. Likewise the Supplemental Pre-Trial Brief broadly alludes to the evidence describing the attack at the DDR camp on 1 May, but this part of the Prosecution case is not disclosed in the Pre-Trial Brief. The Accused is left guessing as to which of allegations, if any, it must respond. It is submitted that this would have been avoided had *consistent* disclosure been made to the Defence as to the nature of the Prosecution case.

1337. Finally, the evidence of allegations described in this section deals with allegations of the utmost severity. The evidence challenges the relationship between an international peacekeeping force, deployed with a mandate created under the UN Charter, and the Accused.

Four separate counts are dependent upon the factual allegations levelled herein. Thus, the imperative to provide the Accused with precise notice of the case which he must answer is clear. The jurisprudence allows for a lesser degree of precision in pleading where the crimes are of a large-scale. Even in the context of this case, given the broad scope of the body of evidence before the Chamber purportedly in support of counts 1-14, where the case against the second accused in support of four of the eighteen counts in the Indictment centres around specific incidents in a precise three day period which took place in a small number of locations, all of which were identified with precision by witnesses, it is submitted that the Prosecution was under an obligation to disclose these facts at the soonest possible opportunity to allow for full and equitable investigations and preserve the fairness of these proceedings. It is submitted that the Prosecution, calling its key witness all on or after March 2006, at the end of its case, acted in contravention of its obligations and that the criminal responsibility with which it now pretends to fix the second accused is a violation of his fair trial rights.

c) CONDITIONS PRECEDENT FOR LIABILITY

i) No Armed Conflict Existed at the Time of the Alleged Violation

1338. The Chamber has held that "international humanitarian law applies from the beginning of such armed conflicts and extends beyond the cessation of hostilities until...a peaceful settlement is reached".[1948] However, it is submitted that this does not relieve the Prosecution of its burden of proving the existence of a Protocol II type armed conflict "at the time of the alleged violation",[1949] as it must prove every element of its case it against the Accused beyond a reasonable doubt. It cannot be for the Accused to establish that a "peaceful settlement" has been reached, as such a finding would reverse the burden of proof, without basis, and the *CDF* Trial Judgment does not suggest that this is the case. Furthermore, no permeation of international humanitarian law requires to the Accused to establish a positive defence: Article 17(3) of the Statute guarantees that the innocence of the accused is presumed. Nor can it be the case that once the existence of an armed conflict is established in a territory, the reach of international humanitarian law is temporally indeterminate. Hence the clear statement of the Chamber that the Prosecution must prove, as a pre-requisite to a finding of guilt under Article 3 and 4, the existence of an armed conflict *at the time of the alleged violation.* Thus, it is

[1948] *CDF* Trial Judgment, at Para 128.
[1949] Rule 98 Oral Decision, Transcript 25th October 2006, p.15 lines 3–7.

submitted that the effect of the aforementioned finding does not diminish that requirement. Instead it lends guidance to situations where situations of armed conflict may exist.

(1) Peaceful Settlement

1339. On 7 July 1999, the Lome Peace Accord was concluded between the RUF and the Government of Sierra Leone.[1950] It engendered, *inter alia*, the immediate cessation of hostilities,[1951] the formation of the RUFP political party and the entrance into national government of RUF representatives.[1952]

1340. Whilst the conclusion of an agreement between two warring factions bears absolutely no significance unless acted upon by the respective parties, the Prosecution's failure to adduce any evidence of violence or hostilities such that would support a finding that a Protocol II type armed conflict existed, beyond that point, strongly suggests that the RUF embraced the terms of Lome, referring especially to the amnesty and political standing afforded to them therein, and had forwarded the process towards the advanced stages at which it had arrived at the time that confrontation broke out between the RUF and UNAMSIL, in May 2000.

1341. The evidence shows that after the conclusion of the Lome Peace Accord, the RUF War Council was transformed into the Peace Council. Whilst nominal changes do not inform the Chamber of the peaceful intentions of the RUF *per se*, Prosecution witness TFI 168, Philip Palmer, explained that this was more than a mere cosmetic terminological move, but instead signified that "the RUF was not prepared for war any longer, but they were now pursuing peace".[1953] The witness was a member of the RUF external delegation who negotiated the terms of the Abidjan Peace Accords[1954].

1342. TFI 041 testified to a marked change in the state of liberty of civilians, after the signing of the Lome Peace Accord, suggesting a genuine transition from war to peace: "after Lome Peace Accord, immediately civilians started their normal activities, their normal business", referring to Makeni, where he was based at the time.[1955] He also testified to a restoration of order, testifying that, as G5, he was rewarded for the elimination of civilian harassment by Mr Sesay.[1956] In his words, "[n]ormal life was back on".[1957]

[1950] See the Indictment, at Para 14.
[1951] The Lome Peace Accord, at Art. 1.
[1952] The Lome Peace Accord, at Art. III-V.
[1953] Transcript 3 April 2006, p.65 lines 10-17.
[1954] Transcript 31March 2006, p.51 lines 26 – p.52 line 19.
[1955] Transcript 11 July 2006. p.57 line 13- 22.
[1956] Transcript 11 July 2006, p.57 lines 22 – p.58, line 6.

1343. TFI 165 testified that UNAMSIL were receiving cooperation from the RUF, that they were having weekly meetings together and that there was a slow increase of activity in UNAMSIL, NGOs and humanitarian organisations,[1958] referring to the period prior to 12 April 2000.[1959]

1344. At that time also the RUF opened channels of communication with ECOMOG in order to arrange provisions for civilians, now that peace had arrived and military action was no longer the priority of belligerents.[1960] Exhibit 343 is photographs recording several such meetings between ECOMOG commander, Colonel Mnoye, and RUF commanders, including the Accused.[1961] Therein is evidenced the tangible sense of relief felt by the civilian population at the new show of unity between the former warring factions, RUF and ECOMOG.[1962]

1345. On his return from Lome, having signed the peace process, Foday Sankoh came with General Jetley, General Opande and the "ECOMOG field commander" to Makeni where they spoke about the peace process and the imminent disarmament.[1963] Subsequently, Superman disarmed in Port Loko in November to December 1999[1964] as well Segbwema and Fadugu, all prior to the planned disarmament of Makeni on 17 April 2000.[1965] In addition, the RUFP was launched by Foday Sankoh sometime before February 1999 and elections subsequently held in 2002, which the RUFP contested.[1966]

1346. DMK 444, [redacted] and General Opande, UNAMSIL force commander, were called to testify on behalf of the Second Accused. General Garba testified that during the period from December 1999 to April 2000 there was "good cooperation" between the RUF and UNAMSIL in terms of the disarmament programme[1967] and that, at time disarmament programmes were running in "almost all over the country".[1968] General Opande was questioned on his take of the progress of the disarmament programme in January 2000, although he was not yet deployed. It was put to him that 2000 RUF combatants had already disarmed at that point and DMK 130 responded

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[1957] Transcript 11 July 2006. p.58 line 28.
[1958] Transcript 30 March 2006. p.76 line 6-13.
[1959] Transcript 30 March 2006. p.75 line 9-11.
[1960] Transcript 15 April 2008. p.22 line 17 – p.23 line 4.
[1961] Exhibit 343 A-P; see also Transcript 15 April 2008, p.23 line 18 – p.31 line 14.
[1962] Transcript 15 April 2008. p.24 line 27 – p.25 line 7.
[1963] Transcript 15 April 2008. p.38 line 3-15.
[1964] Transcript 15 April 2008. p.45 line 10-11.
[1965] Transcript 15 April 2008. p.45 line 7-15.
[1966] Transcript 15 April 2008. p. 43 line 4-18.
[1967] Transcript 19 May 2008, p. 25 lines 2-5
[1968] Transcript 19 May 2008, p. 23 lines 13-15

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that, at that point, the RUF was fully committed to disarmament. He testified that "2000 out of 15000, it meant that they were prepared for disarmament."[1969]

1347. Disarmament did not materialise in Makeni on the proposed date, 17 April 2000. Furthermore, at the time of the confrontation between RUF and UNAMSIL, in May 2000, other parts of Sierra Leone were yet to disarm. However, as of the time when the Lome Peace Accord was signed, all hostilities between the former belligerents had ceased. The transition from a civil war situation to complete disarmament is a careful and time-consuming process but it is submitted that total disarmament is not necessary to show that peaceful settlement had been reached. The path towards peace had been clearly mapped out at Lome and the RUF and all parties to it were in the advanced stages of its implementation.

1348. Therefore, it is submitted that peaceful settlement had been reached and that the relationship between the RUF and the other former belligerent was not one of violently intense and protracted hostility. Indeed the Prosecution has led no evidence of hostilities between the RUF and former belligerents. In light of the foregoing, it is submitted that a Protocol II armed conflict did not subsist at the time of the acts alleged under Counts 15 to 18.

ii) Civilian Population

1349. Characterisation of UNAMSIL personnel who, through unfortunate circumstances, became the victims of attacks, as "civilians" is a prerequisite to a finding of guilt under Count 15 to 18. Count 16, charging crimes against humanity, has a legal pre-requisite that violation be part of an attack against a civilian population, *inter alia*. Whereas Counts 15, 17 and 18, charging offences under Article 3 and 4 of the Statute, have legal pre-requisites that the victim in question was a person taking no direct part in the hostilities at the time of the alleged violation.

1350. The Indictment pleads that "[t]he words civilian or civilian population used in this Indictment refer to persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities."[1970] Protocol II and Common Article 3 provide little assistance in defining the category of persons defined therein.

[1969] Transcript 11 March 2008, p. 34 lines 1-11

[1970] At para 18.

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1351. The Convention on the Safety of United Nations and Associated Personnel criminalises attacks upon United Nation's personnel and associated personnel.[1971] It criminalises much of the conduct charged in Counts 15 to 18 of the Indictment. Under Article 2(2) the protection afforded therein does not apply "to a United Nations operation authorised by the Security Council as an enforcement action under Chapter VII of the Charter of the United Nations in which any of the personnel are engaged as combatants against organised armed forces and to which the law of the international armed conflict applies."[1972] In light of the limited definition supplied in Common Article 3 and Protocol II and in the jurisprudence pertaining to crimes against humanity, it is the practice of the *ad hoc* tribunals to seek guidance from the definitions in other international treaty-based sources.[1973] The Convention on the Safety of United Nations and Associated Personnel was adopted on 9 December 1994 by the UN General Assembly. Thus, as an expression of international law governing the protection of UN personnel, it found global approval. Therefore, it is submitted that the Chamber be guided by the aforementioned definition.

1352. Consistent with the Convention on the Safety of United Nations and Associated Personnel is Protocol I.[1974] It denies *combatants* protected status, under its provisions, and defines "combatants" as follows: "Members of the armed forces of a Party to a conflict...are combatants, that is to say, they have the right to participate directly in hostilities." It also defines "armed forces" in the following manner: "the armed forces of a Party to a conflict consist of all organized armed forces, groups and units which are under a command responsible to that Party for the conduct or its subordinates, even if that Party is represented by a government or an authority not recognized by an adverse Party."[1975] On plain construction of the aforementioned provisions, it is that it is open to interpretation that troops, acting under the auspices of the international community, even those purportedly deployed for "peacekeeping" purposes, under some circumstances, can be defined as armed forces or combatants under this provision and, therefore, relinquish the protection afforded to civilians under international humanitarian law.

[1971] The Convention on the Safety of United Nations and Associated Personnel adopted by General Assembly Resolution A/RES/49/59 on 9 December 1994, at Art. 9.

[1972] The Convention on the Safety of United Nations and Associated Personnel, at Art. 2(2).

[1973] See *Tadic* Trial Judgment, at Para 638; *Akayesu* Trial Judgment, at Para 582; and *Blaskic* Appeal Judgment, at Para 113-114, all using Protocol I definition for adjudicating on crimes against humanity.

[1974] The ICTY Appeals Chamber has held that Protocol I is informative to the determination of a "civilian population" for the purposes of crimes against humanity, see *Blaskic* Appeal Judgment, at Para 113-114.

[1975] Art. 43.1 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ("Protocol I"), 8 June 1977, ratified by Sierra Leone on 21 October 1986.

1353. Under Protocol I and the Convention on the Safety of United Nations and Associated Personnel,[1976] the relevant enquiry is into the character of the population as a whole. Note that the Convention on the Safety of United Nations and Associated Personnel denies protection to a "United Nations operation", as a whole, "in which *any* of the personnel are engaged as combatants". Whilst Protocol I holds specifically that a population does not necessarily lose its civilian status when individuals within the population do not fall within the definition of civilians,[1977] the converse must also be true; that the presence of persons within the armed force or population of combatants who, on a case-by-case basis, would be deemed not to be a combatant themselves under international humanitarian law, does not alter the character of the population as a whole.

1354. Thus, it is submitted that the allegations that some of the victims of the attacks were MILOBS does not affect the Chamber's determination of whether within the UNAMSIL population does not deprive. The Defence notes that composition of UNAMSIL was, by vast majority, armed troops- it included just 260 MILOBs and 6000 military personnel.[1978]

1355. It is the Defence case that UNAMSIL had taken on the status of combatants and armed forces, as defined by Protocol I and on plain construction, inasmuch as they had militarily engaged the RUF, were participating in, rather than preventing, hostilities and that, as such, UNAMSIL had lost protected status under international humanitarian law.

1356. UNAMSIL was established under Security Council Resolution S/RES/1270 (1999), invoking Chapter VII of the Charter of the United Nations.[1979] Thus, UNAMSIL had the potential to lose the protection afforded by the Convention on the Safety of United Nations and Associated Personnel.

1357. It is also clear that the affect of the Chapter VII authority was to authorise the use of force in the discharge of its mandate. Chapter VII makes provision for the Security Counsel to "take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include...operations by air, sea, or land forces of Members of the United Nations."[1980] Pursuant to that, Security Council Resolution 1270 authorised the use of "necessary action" by UNAMSIL in discharge of its mandate.[1981]

[1976] Convention on the Safety of United Nations and Associated Personnel denies protection to a United Nations operation...in which any of the combatants are engaged

[1977] Protocol I, at Art. 50.

[1978] Security Council Resolution S/RES/1270 (1999), at Para 9.

[1979] At Para 14.

[1980] The Charter of the United Nations, at Art. 42.

[1981] At Para 14.

1358. The Chamber had the assistance of enlightening testimony from UNAMSIL personnel on the issue. Some testified that UNAMSIL was acting under "Chapter VI" authority, evidencing the clear divergence between the military and legal terminological use of "Chapter VI" and "Chapter VII", in light of Security Council Resolution 1270 which states to the contrary. Notwithstanding these testimonies, cogent evidence before the Chamber, in the form of UNAMSIL witness testimonies, contemporaneous documentary records, reports generated from UNAMSIL and eye-witness accounts of the relevant events, clearly suggest that UNAMSIL, invoking the extent of its Chapter VII mandate, was acting with force.

1359. Exhibit 302 is an operational order issued to KENBATT by UNAMSIL Force Commander Major General Jetley, dated January 2000. It authorises a deployment to Makeni and the surrounding area and the deployed personnel to "use force".[1982] In other respects it employs language ordering proactivity, such as to "create conditions of stability".[1983] Additionally, it echoes the wording of Security Council Resolution 1270 that the deployment should act under Chapter VII authority.[1984]

1360. Prosecution witness TFI 165 testified to his concerns about the way UNAMSIL were conducting the disarmament process, in as much as it was continuing without the consent of the RUF leadership which was contrary to the understanding that it was to be conducted voluntarily and in the open.[1985] TFI 288 was in command of the ZANBATT mission to Makeni on 1 May 2000. He testified that he received information about RUF roadblocks on the road between Lunsar and Makeni and "organised the convoy in such a way that it was more on the fighting convoy basis".[1986]

1361. Defence witness DMK 444, [redacted] expressed serious concerns about the manner in which disarmament was conducted by UNAMSIL personnel. Speaking about a specific incident, on the day of the disruption at the DDR camp he described the MILOBs as taking an "intransigent [sic] approach to the issue of taking the arms."[1987]

1362. A series of radio messages logged in Exhibit 33 demonstrate the aggressive stance taken by UNAMSIL. A message from Foday Sankoh to the First Accused, dated 3 April 2000, reports a statement of intent issued by the "UNAMSIL field commander" on Radio

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[1982] Exhibit 302, at p. R0003415, see Para 45(g)
[1983] Exhibit 302, at p. R0003409, see Para 21
[1984] Exhibit 302, at p. R0003405, see Para 9(m) and (n)
[1985] Transcript 30 March 2006, p. 100 line 13 – p. 101 line 9
[1986] Transcript 22 March 2006, p. 12 lines 11-25
[1987] Transcript 19 May 2008, p. 47 lines 2-9

France International to disarm the RUF by force.[1988] A message from Komba Gbundema to Foday Sankoh, dated 14 April 2000, reports who UNAMSIL "arrived aggressively" in Kambia.[1989] DMK 444 was able to give enlightening testimony in this regard, stating that Jetley regarded Kabbah "as a constituted authority" whilst he regarded Sankoh "as more of a rebel". Thus, it is submitted that the aforementioned views held by the force commander created a contemptuous attitude in his personnel to the RUF and their aggressive stance in subsequent dealings with them.

1363. A message from the Second Accused to Foday Sankoh, dated 23 April 2000, records an incident where UNAMSIL personnel "occupied" houses belonging to RUF and, upon being asked, refused to leave, resulting in UNAMSIL personnel "flogging one of the field commander's security leaving him seriously injured to his head". The message further reports how UNAMSIL "used threatening [sic] remarks that if [the RUF] don't disarm they will use force to disarm."[1990] Finally, a message, dated 3 May 2000, to Foday Sankoh from an unidentified source in Makeni reads as follows: "The main thing that sprang the fighting in Makeni down to Magburaka is because of the following reasons. When our men were on patrol around the town, the UNAMSIL attacked them and forcefully disarmed them with a remark that they are to be in the camp".[1991] The unambiguous suggestion therein is that, unprovoked, UNAMSIL opened fire on the RUF.

1364. Thus, through contemporaneous documentary the Chamber has before it not only a clear audit trail demonstrating the aggressive position taken by UNAMSIL, on the orders of field commander Jetley to disarm the RUF by force, but also specifically documented incidents where UNAMSIL elements engaged unprovoked force. This is borne out by the testimonies of Prosecution witnesses TFI 288, TFI 165 as well as DMK 444. Whilst UNAMSIL's Chapter VII mandate is evidenced through a Security Council Resolution 1270, it is submitted that UNAMSIL personnel were engaged as combatants against the RUF. Therefore, they fall outside the scope of the Convention on the Safety of United Nations and Associated Personnel and Protocol I. As such, it is submitted that UNAMSIL were not within the group envisaged by Common Article 3 or Protocol II, that they do not constitute a civilian population and that no conviction can be sustained for any alleged conduct committed against them under international humanitarian law, as authorised by the Statute.

[1988] Exhibit 34, at p. 8104
[1989] Exhibit 33, at p. 8828.
[1990] Exhibit 33, at p. 8839.
[1991] Exhibit 34, at p. 8097.

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d) ALIBI[1992] AND OTHER ASPECTS OF THE DEFENCE CASE

1365. The Kallon Defence notified the parties of its intention to rely on the following alibi defences: that the second accused "was not present at the scene of the alleged incident involving UNAMSIL peacekeepers at Makuth Village between Lunsar and Makeni on 3 May 2000 as alleged and was at Makeni Town the material time of the alleged act".[1993] The Kallon Defence also led evidence that establishes an alibi in respect other material allegations levelled against him. The relevant parts of the evidence are described, *infra*.

1366. From the conclusion of the Lome Peace Accords in July 1999, the second accused devoted his time to the implementation of disarmament.[1994] Concurrently with that he took up the management of several businesses which he owned in Magburaka, Makeni and Masingbi.[1995] At the time of the aforementioned allegations the second accused was based primarily in Magburaka with his family.[1996]

1367. On 26 April 2000, the second accused was in his bar in Makeni where Colonel Kailondo was also in attendance. Having just returned from Freetown, Colonel Kailondo gave the second accused a message from Foday Sankoh, concerned the second accused's continued efforts to implement the disarmament process, "to stay off on all activities of RUF within his own area of control, that is Makeni."[1997] The Kallon Defence recalls the message from Foday Sankoh to the second accused, personally, in which, Foday Sankoh had issued a threatening and unequivocal warning that the second accused should not permit disarmament in Makeni and Magburaka and that "[a]ny mistake towards implementing the above subject matter, you will be responsible. Act as mandated". The credibility of threats made by Foday Sankoh to his officers were, at that time, not in doubt. In this regard, the second accused recalled how Rashid Sandy had been executed by Foday Sankoh, personally.[1998]

1368. Accordingly, the second accused returned immediately that night to Magburaka.[1999] The second accused returned to Makeni on 30 April to borrow a musical set from a friend who owned a pub there. That friend was TFI 041 who was called by the Prosecution and corroborated the alibi described herein. He said that another friend of his needed a musical set

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[1992] The alibi is supported by the second accused's testimony (Transcript 15 April 2008, p. 38-72) and, specifically, by the evidence cited herein.
[1993] The Kallon Notification of Alibi, at pg 4.
[1994] See, eg, Transcript 15 April 2008, p. 37 line 9-29.
[1995] Transcript 15 April 2008, p. 38 line 15-24
[1996] See, eg, Transcript 15 April 2008 p. 58 line 2-4; and TFI 041, Transcript 10 July 2006, p. 67 line 12-15.
[1997] Transcript 15 April 2008. p. 57 line 20-28.
[1998] Transcript 15 April 2008. p. 53 line 2-7.
[1999] Transcript 15 April 2008. p. 58 line 2-4.

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as he was opening his own pub in Magburaka. On the morning of 1 May the second accused set off to return the musical set to Makeni. TFI 041 said that, on that day, himself and Morris Kallon went together to the proposed NCDDR camp and that they went there in a blue/black Mercedes.[2000] The witness stated that in the Mercedes, there was himself, the second accused, his uncle, Corporal Jalloh, and his civilian driver, whose name he could not remember.[2001] He confirmed that there was no gun in the vehicle.[2002] This was in accordance with the prevailing orders, they carried no weapon in the car, as they were in an area where UNAMSIL were deployed.[2003] On the way to Makeni they stopped at the DDR camp "to greet...Mr. Andrew Kanu, and the various RUFP party member that were working at the DDR centre" at sometime between 9am and 11am.[2004] There, he met and spoke with Andrew Kanu as well as the "Mammy Queens" who were employed as cooks at the DDR camp.[2005] [redacted] He said that they spoke together and that the second accused was at the camp for a total of "less than one hour".[2007] At no time did he discuss the disarmament of the RUF or see any RUF combatants disarming.

1369. Following the stop at the DDR camp, the second accused proceeded to Makeni where he dropped TFI 041.[2008] The witness could not, however, remember the date but said it was in May and that it happened before the RUF were supposed to disarm on 6 May, 2000.[2009] On the way they passed a RUF checkpoint which was under the command of Ibrahim Dugba. On arriving in Makeni, the second accused saw a large crowd of people in Independence square, the site of the task force office, where Kailondo, AS Kallon and Ibrahim Dugba were based. There he saw "Colonel Kailondo standing without no shirt shouting that he will not take this". This version of events is corroborated in every material aspect by TFI 041, bar the

[2000] Transcript of 10 July 2006, p. 67 lines 19-22; p.68 line 9; DMK 095, Transcript 1 May 2008, p. 41 line 9-17, testifying that he was driving a "blue/black" coloured car, although he couldn't remember the make.
[2001] TFI 041, Transcript 10 July 2006, p.68 line 6-9; [redacted]
[2002] Transcript 17 July 2006,p.51 line 14-15
[2003] Transcript 15 April 2008. p. 62 line 2-7; TFI 041, Transcript 17 July 2006, pg. 51, line 12-17; [redacted]
[2004] Transcript 15 April 2008, p. 60, line 22-24; and p. 61 line 19-20;
[2005] TFI 041, Transcript 10 July 2006, p. 70 line 3-4
[2006] Transcript 01 May 2008, p. 40 line 25 – p. 41 line 6
[2007] [redacted]
[2008] TFI 041, Transcript. 17 July 2006, p.52 line 3-5; DMK 095, Transcript. 01 May 2008, p. 43 line 5-6.
[2009] Transcript 17 July 2006, p. 52 lines 3-18.

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identification of Colonel Kailondo. Instead, TFI 041 identifies Colonel Gbao in Independence Square.[2010] DMK 032, [redacted] the RUF radio operator [redacted] also testified that he saw Kailondo, shirtless, "grumbling that the United Nations troops, who were based at Makump, they have disarmed some RUF combatants". [2011]

1370. According to the second accused, Kailondo approached him who, anticipating trouble, got back in his car and returned quickly back to Magburaka with his uncle and driver. He subsequently described how Kailondo had a "group of combatants around him" at that time.[2012] He passed the DDR centre but made no stop there. Nor did he see any RUF combatants there. This was corroborated by DMK 095 who testified that he saw the second accused "going back towards Magburaka direction" and that he did not stop at the DDR Camp.[2013]

1371. On his return to Magburaka he was informed by Colonel Pepe that UNAMSIL had attacked the RUF positions in Makeni. In order avoid anticipated problems, he went to Masingbi that day, 1 May, with his family, which was closer to the safety of the "Mende line" in Bo.

1372. On 2 May, the second accused returned to Magburaka. He learnt that, by that time, Kailondo and Komba Gbundema had attacked the Arab College and the UNAMSIL had taken up an offensive position at Pampana Bridge. He took an alternative route to Magburaka in order to avoid the Arab College. He did not return to Makeni on that day.

1373. On 3 May, the second accused went from Magburaka to Teko Barracks in Makeni. On the way to Teko Barracks he stopped at the task force office in Makeni where he met Mr Sesay and Kailondo. There they saw a long convoy coming towards Teko Barracks from Lunsar Highway. The second accused testified that Kailondo said that Foday Sankoh had ordered himself and Komba Gbundema to intercept the convoy, which was to provide reinforcement to UNAMSIL. AS Kallon was also at the task force office at that time.[2014] Thereafter, the second accused and Mr Sesay went together to Teko Barracks. the second accused testified that he stayed in Makeni that day in order to prevent looting of civilian property, including his own pub, by RUF combatants who the second accused anticipated were at that time, beyond the control of their commander, Colonel Kailondo. He said that day

[2010] TFI 041, Transcript. 10 July 2006, p. 70 line 21-29.
[2011] Transcript 5 May 2008, p. 19 lines 19-21
[2012] Transcript 15 April 2008, p. 67 line 12-16
[2013] DMK 095, Transcript 01 May 2008, p. 43 line 14-15
[2014] Transcript 15 April 2008, p. 70 line 27-29

he patrolled areas of Makeni "so that when these RUF combatants see our vehicles moving, they will not go on.[a] rampage of looting".[2015]

1374. In May 2000, the prevalent command structure in the area of Makeni[2016] and Lunsar, where the majority of allegations arose was represented by Kailondo, the RUF ground commander in Makeni, based at Teko Barracks, and Battle Group Commander of the RUF,[2017] Colonel Ibrahim Dugba, the RUF task force commander, AS Kallon, the overall MP commander in Makeni,[2018] Komba Gbundema, brigade commander in Kambia,[2019] and Miloskie Kallon was the brigade commander in Lunsar.[2020]

e) SUBMISSIONS ON THE SUBSTANTIVE ALLEGATIONS

i) Attack on UNAMSIL Personnel at DDR Camp, 1 and 2 May 2000

(1) Evidence of Ganese, Mendy and Ngondi

(a) Major Ganese's Evidence

1375. Major Ganese testified that an RUF commander, who he identified as both "Brigadier Kallon" and "General Kallon", "assaulted" Major Salahuedin at the DDR camp in Makeni, on 1 May 2000.[2021] According to the witness "Brigadier Kallon" was so aggressive that "the peacekeepers there took Major Salahuedin and hid him at the platoon base".[2022] "Brigadier Kallon then allegedly went looking for Major Salahuedin but, unable to find him, ordered that the witness be arrested instead.[2023] He said that, at that time, he was assaulted by a group of

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[2015] Transcript 15April 2008, p. 72 line 12-15
[2016] Transcript 15April 2008, p. 64 line 29 – pg 65, line 2
[2017] Transcript 15April 2008, p. 20 line 26-29, testifying that to his appointment to Battle Group Commander; TFI 165,
Transcript 30 March 2006, p. 74 line 19 – p. 75 line 1, testifying that he had authority to grant permission for the movement of UNAMSIL and Transcript 29 March 2006, p. 7 line 16, testifying that he was a commander in Makeni at that time; Transcript 30 March 2006, p. 113 line 18-20, impliedly accepting counsel for second accused's proposition that he was "ground commander at Makeni"; DIS 214, Transcript 17 January 2008, p. 83 line 5-8.
[2018] TFI 041, Transcript 17 July 2006, p. 38 line 5-8; DIS 214, Transcript 17 January 2008, p. 83 line 9-19, testifying that AS Kallon was present at that time.
[2019] Transcript.15 April 2008, p. 55 line 25-27; DIS 214, Transcript 17 January 2008, p. 83 line 20-21, testifying to his activity in the area at the time.
[2020] TFI 041, Transcript 17 July 2006, p. 27 line 17 – p. 28 line 3, testifying that he was brigade commander in Lunsar in 2000
[2021] Transcript 20 June 2006, p. 24 line 2 – p. 25 line 23
[2022] Transcript. 20 June 2006, p. 25, line 16-19.
[2023] Transcript. 20 June 2006, p. 25 line 26 – pg 26, line 1.

armed combatants,[2024] loaded into the pink Mercedes and taken to Makump, where he was held at gunpoint under a tree.[2025]

1376. He gave evidence that, at that time, a Land Rover with UN markings approached the group of rebels in Makump and that the rebels opened fire on the Land Rover then disarmed and arrested the four occupants. The witness said that these abductees were Major Maroa, OC A Company, "his driver and two other military personnel of the Kenyan battalion."[2026] The witness testified that he was taken to Teko Barracks where he subsequently met up with Major Maroa and three other Kenyan abductees who told him that they had been assaulted by RUF personnel.[2027] According to the witness, on the way from Makump to Teko Barracks, "General Kallon" shouted orders to RUF personnel, manning checkpoints, to "[s]top all UN vehicles".[2028]

1377. Major Ganese also alleged that Commander Knup Gjellesdad and Lieutenant-Colonel Mendy came looking for him at Teko Barracks on 1 May 2000 and were also detained by the RUF.[2029]

1378. He also testified that Major Bosco Odhiambo and three other unidentified peacekeepers, who also came looking for the hostages on 2 May 2000, were abducted and that they were all held together in a small room at Teko Barracks.[2030]

1379. Major Ganese gave evidence that the DDR camp was attacked[2031] and eventually burnt down[2032] by RUF combatants. According to the witness, himself, Commander Gjellesdad, Colonel Mendy and Major Odhiambo were "forced to stand behind...dead and injured [RUF combatants]" so that a photograph could be taken.[2033] Major Ganese does not mention the aforementioned "Brigadier Kallon" in conjunction with these attacks.

1380. He testified that, in the early hours of 3 May 2000, they were taken from Matotoka to Masingbi and then onwards to the next destination which has a sign outside it saying "Camp 11 Small Sefadu". He gave evidence that on the way from Masingbi to the latter destination

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[2024] Transcript. 20 June 2006, p. 26 line 10-14.
[2025] Transcript. 20 June 2006, p. 25 line 26 – pg 28, line 5.
[2026] Transcript. 20 June 2006, p. 29 line 4 – pg 30, line 2.
[2027] Transcript. 20 June 2006, p. 31 line 15 – pg 32, line 2.
[2028] Transcript. 20 June 2006, p. 30 line 12-16.
[2029] Transcript 20 June 2006, p. 32 line 9-12
[2030] Transcript 20 June 2006, p.33 line 2-8
[2031] Transcript 20 June 2006, p.16 line 12-26
[2032] Transcript 20 June 2006, p. 55, line 11-14.
[2033] Transcript 20 June 2006, p. 34 line 21-24; and pg 35, line 8-11.

several of the abductees were injured when the truck that was transporting them crashed into a "crater".[2034]

(b) Colonel Mendy's Evidence

1381. Colonel Mendy gave evidence that between 3pm and 4pm on 1 May 2000 he was in his room in the team site in Looking Town, Makeni. At that time Major Knut informed him that Major Ganese and Major Salahuedin had been involved in a shooting incident at the DDR camp. In light of that he then went with Major Knut to go and look for Ganese and Salahuedin.[2035] He said that, thereafter, he went to the task force office in Makeni with Major Knut and that Major Knut was arrested there by "Brigadier Morris Kallon". The witness said that he refused to leave Major Knut and, as such, accompanied him voluntarily.[2036] The witness continued as follows:

> "At first ['Brigadier Morris Kallon'] said he was going to give us a driver to drive us to Teko Barracks under escort by his men. Afterwards he changed his mind and said, 'Okay, I will hand over the key back -- the keys back to Major Knut. He will drive, but my men will escort you.' They were in uniform and armed. They drove us to Teko Barracks" [2037]

1382. The witness said that, at Teko Barracks, he met Major Ganese who told him that he had been abducted by members of the RUF[2038] and that Major Salahuedin had been assaulted by Mr Kallon personally.[2039] He said that thirteen other Kenyan soldiers were detained in the same room as them in Teko Barracks on 1 May[2040] and that a Major "Marro" had told him that "Brigadier Morris Kallon" had been present at the capture of the other Kenyan soldiers[2041].

1383. According to the witness a "Colonel Jimmy" had forced him and Major Knut and "Marro" to have their photograph taken beside the corpses of dead RUF combatants;[2042] that the captives were made to strip naked and that their hands were bound in such a way as to cause injury;[2043] that they were transported by the RUF in a "Land Rover belonging to the

[2034] Transcript 20 June 2006, p. 40 line 19 – p. 42 line 22
[2035] Transcript 27 June 2006, p. 4 line 24 – p. 5 line 2
[2036] Transcript 27 June 2006, p. 7 line 14-23
[2037] Transcript 27 June 2006, p. 7 line 24-29
[2038] Transcript 27 June 2006, p.11 line 4-11
[2039] Transcript 27 June 2006, p. 10 line 26-29
[2040] Transcript 27 June 2006, p. 11 line 16-21
[2041] Transcript 27 June 2006, p. 12 line 10-12
[2042] Transcript 27 June 2006, p. 13 line 1-5
[2043] Transcript 27 June 2006, p. 14 line 3-29

Kenyan UNAMSIL"[2044]; and that, while in transport under captivity of the RUF, he suffered a broken leg as the result of an accident.[2045]

(c) Brigadier Ngondi's Evidence

1384. TF1 165 testified that, on 1 May 2000, he was in radio communication with Major Maroa from the DDR Camp in Makump.[2046] Major Maroa reported to him that, at that time, "Brigadier Kallon" advanced towards the DDR camp, firing gunshots from the window of his vehicle.[2047] He said that, once there, "Brigadier Kallon" had "slapped" Major Ganase, a MILOB, forced him into his vehicle and that he "drove off".[2048]

1385. He said that on the same day two UNAMSIL officers, one of whom was Colonel Mendy, were dispatched to negotiate the release of Major Ganese but that they were also taken captive. He also testified to that he dispatched Major Odhiambo, Captain Gula and a driver and "an operator" to discuss the release of the UNAMSIL detainees and that they were subsequently taken hostage.[2049] Although the witness mentioned that they were instructed to talk to "General Issa, Brigadier Kallon, Colonel Gbao"[2050] he did not suggest that Mr Kallon was involved with their abduction in any way.

1386. According to the witness, RUF forces attacked UNAMSIL at the DDR Camp in Makeni on 2 May 2000. He said that in that attack two UNAMSIL soldiers were killed by RUF combatants. The victim's names were Private Yusif and "another soldier by the name of Wanyama."[2051]

1387. Of all the allegations that Ngondi made, he alleged the involvement, once again through the hearsay identification of Major Maroa, of the second accused in a single incident. Notably, the witness testified that he met the second accused "on some few occasions", all prior to 20 April 2000[2052] and that, on each occasion, he had interacted with the second accused "very well"[2053] thus displaying behaviour which is at odds with the conduct alleged against him on 1 May 2000.

[2044] Transcript 27 June 2006, p. 17 line 25-27
[2045] Transcript 27 June 2006, p. 24 line 18-24
[2046] Transcript 29 March 2006, p. 27 line 28 p. 28 line 2
[2047] Transcript 29 March 2006, p. 29 line 1-4
[2048] Transcript 29 March 2006, p. 29 line 1-18
[2049] Transcript 29 March 2006, p. 35 line 8 – p. 36, line 9.
[2050] Transcript 29 March 2006, p. 35 line 25-29
[2051] Transcript 29 March 2006, p. 42 line 7 – p. 44 line 5.
[2052] Transcript 30 March 2006, p.115 line 18 – p.116 line 1.
[2053] Transcript. 30 March 2006, p. 115 line 15-17.

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(d) Defence Refutation

(i) Mistaken Identification

1. Abductions of Major Ganese and Major Maroa

1388. Although the Prosecution led three witnesses to testify to this incident, the evidence of all three is inextricably linked, and entirely dependent upon, the hearsay identification made, in the first place, by Major Maroa. A point accepted by Major Ganese; when counsel for Kallon suggested to him that "apart from what Major Maroa may have told him, there is no way he can really say it was Morris Kallon or Brigadier Kallon that arrested him", the witness responded saying "you're right".[2054] In addition, Colonel Mendy's account of the abduction is hearsay, related to him by Major Ganese and Major Maroa.[2055] Given Ganese's acknowledgement that, but for Major Maroa, he would not have been able to identify the second accused, Mendy's evidence is also dependent on Maroa. Finally, in the evidence of Ngondi, he states that events at the DDR camp were relayed to him by Major Maroa, himself, whilst he listened remotely.

1389. Yet the Prosecution did not call Major Maroa. As such the Chamber was not afforded the opportunity to test the identification of the second accused. The Prosecution did not establish the level of familiarity of Major Maroa with the Accused, his level of certainty as to the identification nor whether any circumstances surrounding Maroa's own personal encounter with the alleged assailant rightly cast doubt over the identification. The burden is on the Prosecution to prove its case beyond a reasonable doubt, not on the Accused, whose innocence is presumed.

1390. Nor did the Prosecution seek an in-court identification from the only eye-witness to the allegation, although it is the Prosecution's case that Ganese was physically and personally abducted by the Accused, thus belying the Prosecution's concerns that as to the accuracy of the identification. These fears were demonstrably shared by the witness himself who referred to his assailant as both as "Brigadier Morris Kallon"[2056] and as "General Kallon".[2057]

[2054] Transcript. 30 March 2006, p.87, lines 14-18.
[2055] Transcript. 29 June 2006, p. 28 line 15-18.
[2056] Transcript 20 June 2006, p. 24 line 16
[2057] See Transcript. 20 June 2006, p. 29-31.

1391. The second accused vehemently denied the allegation in his testimony and it lies in contradiction with the cogent alibi evidence described, *supra*. DMK 095, [redacted], testified that he saw Kailondo come to the camp from Makeni,[2058] although he did not witness the abduction of Major Ganese. It is submitted that the following evidence elicited through Major Ganese himself as well as other witness supports an inference that the assailant was, in fact, Kailondo or AS Kallon:

i) The witness testified that he did not know of the positions of Kailondo and AS Kallon as the RUF ground commander and overall MP commander, respectively, responsible for the Makeni operational area.[2059] In his evidence-in-chief, the witness stated that "Brigadier Kallon" was fourth brigade commander of the RUF based in Magburaka.[2060] The witness agreed that Magburaka and Makeni were separate areas of competence.[2061] According to the witness, the pink Mercedes benz, driven by his assailant, came from the direction of Makeni, not Magburaka.[2062]

ii) The witness accepted that given the aforementioned positions held by Kailondo and AS Kallon, in a normal military operation, that they would be responsible for maintaining order at the Makeni barracks, rather than Brigadier Kallon, who was based in Magburaka;[2063] and

iii) Colonel AS Kallon was the overall MP commander for Makeni. Major Ganese agreed that matters of arrest fell within the purview of the military police.[2064]

1392. According to Major Ganese, "Brigadier Kallon" arrived at the DDR camp with RUF combatants, firing guns from a pink Mercedes Benz car.[2065] This is inconsistent with the testimony of TFI 041, according to which the second accused arrived at the DDR camp in blue/black Mercedes Benz, with himself and the second accused's uncle and driver, who were both civilians and there were no guns in the car.[2066] The second accused confirmed this in his testimony before the Court.

1393. It is submitted that Major Ganese's identification is wholly inconsistent with a body of cogent evidence before the court and that a more plausible alternative explanation has been demonstrated. In light of that and given that the basis of his identification was information

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[2058] Transcript 01 May 2008, p. 45 line 14-19
[2059] Transcript 20 June 2006, p. 84 line 26 – p. 85 line 6; see also evidence of TFI 165, which establishes that Kailondo was one of the commanders at Teko Barracks, Transcript. 29 March 2006, p. 7 line 16-17.
[2060] Transcript 20 June 2006, p.85 lines 15-17.
[2061] Transcript. 20 June 2007, p. 85 line 15-19.
[2062] Transcript. 20 June 2006, p. 87, line 6-10.
[2063] Transcript 20 June 2006, p. 88, line 17-25.
[2064] Transcript 20 June 2006, p. 85, line 11-14.
[2065] Transcript 20 June 2006. p.24, lines 2-21
[2066] Transcript 17 July 2006, p.50 line 6-p.51 line 14

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related to him by a third party, Major Maroa who was never called by the Prosecution, rather than personal knowledge, it is further submitted that reasonable doubt has been created as to the accuracy of the identification.

2. Abduction of Major Knut

1394. Colonel Mendy was the only witness to testify to the second accused's involvement in the abduction of Major Knut. Although Colonel Mendy did identify the second accused in Court,[2067] he was asked to give a description of him and gave no answer, suggesting a lack of certainty.[2068] He also conducted his identification of the Second Accused after the Third Accused, which as confirmed by the Court. Therefore, such evidence only demonstrates the witness' ability to distinguish the Second Accused from the First Accused, with whose appearance he suggested he was very familiar, testifying "I cannot count the number of times I saw [Mr Sesay] in Makeni". It is submitted that such evidence has virtually no probative value. Furthermore, under cross-examination Colonel Mendy's identification of the second accused was undermined. It is evident from his testimony that his identification was deduced from intelligence that the Second Accused was the second in command to the First Accused.[2069] Whilst the Second Accused did hold the position of acting Battle Group Commander at the time, nevertheless the evidence establishes that Kailondo was the *de facto* commander in Makeni. Mendy mistakenly testified that the second accused had been based at Makeni up until the time of the abduction of Major Knut, whereas the overwhelming weight of the evidence suggests that the Second Accused was based in Magburaka.[2070] He gave the following evidence:

> "Now, is it your evidence that Morris Kallon was based at Teko Barracks in Makeni?
> A. "I would say he was based in Makeni, My Lord.
> Q. "And to be precise, from what period? February 2000 to the day of this incident, May 1st, 2000, he was based in Makeni?
> A. "I found him there up to the time of my incident."[2071]

1395. Furthermore, it is significant that Major Ganese's testimony bears no account whatsoever of the abduction of Mendy and Knut. This led to the unlikely inference that,

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[2067] Transcript 27 June 2006, p. 43 lines 14-29
[2068] Transcript 27 June 2006, p. 43 lines 8-13
[2069] Transcript of 27 June 2006, p. 127 lines 24-29
[2070] The evidence is described in relation to command responsibility, *infra.*
[2071] Transcript 27 June 2006, p. 120 line 23-28

whilst in detention together, Mendy and Knut were not asked or did not discuss with their co-abductees how they had arrived their.

1396. It is submitted that this is contrary to the alibi evidence described above, which describes the second accused as based in Magburaka at this time.[2072] It is submitted that, as with Major Ganese's evidence, the more plausible explanation is that Colonel Kailondo and Colonel AS Kallon, both based in Makeni, were responsible for the alleged abductions. It is significant that the witness said that he had no information about the RUF set-up in Magburaka,[2073] such that would have enabled him to more readily distinguish between Brigadier Morris Kallon, who was based in Magburaka, and Colonel AS Kallon, who was based in Makeni.

1397. In light of the foregoing, it is submitted that reasonable doubt has been demonstrated as to the identification of the second accused.

(ii) Contradictory Evidence

1398. In his testimony before the Chamber, the second accused vigorously denied any involvement in the aforementioned allegations. He gave the following relevant evidence, inter alia:

> Q. "Did you approach any of the MILOBS or the UNAMSIL personnel with a gun with violence on 1 May 2000?
> A. "No, sir. As I told you, on my way from Makeni to Magburaka, I do not make any stop at the DDR camp. I passed through and I went to Magburaka."[2074]

1399. The second accused's testimony in this regard was corroborated by TFI 041 and DMK 095.[2075] TFI 041 said that Morris Kallon came to invite him to the proposed NCDDR camp and that they went there in a blue/black Mercedes.[2076] The witness stated that in the Mercedes, there was himself, Morris Kallon, his uncle, Corporal Jalloh, and his civilian driver, whose name he could not remember.[2077] The witness confirmed that there was no gun in the vehicle.[2078] At the DDR camp, he said that Morris Kallon complained about the unsanitary state of the camp.[2079] He further confirmed that all of them who had earlier boarded the

[2072] See, eg, Transcript 15 April 2008, p. 58 line 2-4; and TFI 041, Transcript 10 July 2006, p. 67 line 12-15.
[2073] Transcript. 27 June 2006, p. 120 line 20-22.
[2074] Transcript 15 April 2008, p. 86 line 27 – p. 87 line 2.
[2075] The evidence of DMK 095 is described in the "Alibi" section, *supra*.
[2076] Transcript 10 July 2006, p67, lines 19-22; p68, line 9
[2077] Transcript 17 July 2006, p.50, lines 4-13 & 27-29; p.51, lines 6-8
[2078] Transcript 17 July 2006, p.51 lines 9-15.
[2079] Transcript 17 July 2006, p51, lines 20-27.

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Mercedes went into it and returned to Makeni; the witness could not, however, remember the date but said it was in May and that it happened before the RUF were supposed to disarm on 6 May, 2000.[2080]

1400. DMK 095 testified [redacted]. He testified that around 10 combatants came to the camp to disarm on that day[2081] and that Kailondo, who was armed, arrived at the camp with "over 15" armed men.[2082] The witness confirmed that the second accused was not with him.[2083] The witness explained that Kailondo that there was agreement between the "bossman" and the government of Sierra Leone as to whether disarmament should go ahead.[2084] According to the witness, they stopped disarming at that point and ran towards Makeni.[2085] On the road to Makeni he was picked up by a Kenyan soldier in a Land Rover.[2086] He said that he heard shooting which, he was told by the Kenyan the following day, came from the DDR Camp where "Kailondo's group" and UNAMSIL had engaged each other.[2087] He was informed three RUF and one UNAMSIL personnel died as a result.[2088]

1401. Contradictions lie between the evidence of Prosecution witnesses Colonel Mendy and TFI 360. [redacted] Whereas Colonel Mendy alleged that himself and Major Knut were abducted by the second accused from the task force office on the afternoon of 1 May 2000,[2090] according to the evidence of TFI 360 he did not see Colonel Mendy or Major Knut there and positively affirmed that no abductions occurred in Makeni on that day.[2091] Furthermore, TFI 041 testified that, once he was dropped in Makeni, [redacted] nothing further of significance happened that day.[2092] He did not recall the abduction of any UNAMSIL that day at the task force office. The evidence of these Prosecution witnesses is clearly irreconcilable.

1402. In addition, the Defence called a range of witnesses who were in Makeni on 1 May 2000 who gave detailed eye-witness accounts as to the events which unfolded on that day, and

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[2080] Transcript 17 July 2006, p52, lines 3-18.
[2081] Transcript 01 May 2008, p. 43 line 19-22
[2082] Transcript 01 May 2008, p. 45 line 14-27
[2083] Transcript 01 May 2008, p. 46 line 17-19
[2084] Transcript 01 May 2008, p. 46 line 26 – p. 47, line 3.
[2085] Transcript 01 May 2008, p. 47 line 6-14
[2086] Transcript 01 May 2008, p. 47 line 14-19
[2087] Transcript 01 May 2008, p. 47 line 18 – p. 48, line 19.
[2088] Transcript 01 May 2008 , p. 48 line 22-23
[2089] Transcript 22 July 2005, p. 2 line 13-14; and p. 4 line 1
[2090] Transcript 27 June 2006, p. 6 line 15-21; and p. 7 line 14-23
[2091] Transcript 26 July 2005, p. 65 line 14-26;and p. 66, line 3-5
[2092] Transcript 10 July 2006, p. 70 line 15-19

who categorically testified that no abductions of UNAMSIL personnel took place there on that day. DMK 032, [redacted] the RUF radio operator [redacted] gave evidence that the approaching road was clearly visible through a window in the office.[2094] He testified that the Second Accused did not visit [redacted] from 1 to 10 May 2000.[2095]

1403. The Kallon Defence also called DMK 145 [redacted].[2096] He testified that he was told about the following incident by Colonel Mendy and Major Knut, who had received the information from Major Ganese at some time "between 2 p.m. and 3 p.m.":[2097] according to them, RUF combatants were demanding their weapons back at the DDR camp on 1 May 2000.[2098] He gave evidence that, upon hearing this news, Mendy and Knut drove *directly* from Makeni to the DDR camp in Makump[2099] and that he didn't see them again after that. This is in clear contradiction Mendy's evidence who said that he travelled from the Makeni team site to Makump, via the task force office. The witness further testified that when Major Ganese spoke to Colonel Mendy over the phone he did not, to his knowledge, mention that he had been abducted nor did he mention the name the second accused.[2100] The witness also stated that he did not hear the name of the Second Accused mentioned in conjunction with the incidents at Makump on 1 May 2000.[2101]

1404. DMK 047, an RUF insider witness, was in Makeni at the material time. He denied that the Second Accused was involved in any of the aforementioned abductions.[2102] He said that the Second Accused was not in Makeni at the time.[2103]

1405. Furthermore, material Prosecution witnesses to the same events did not corroborate each other. Major Ganese and Colonel Mendy both testified to the assault of Major Salahuedin and the abduction of Major Ganese, *inter alia*. In this regard, Colonel Mendy gave hearsay evidence of accounts related to him by Major Ganese and Major Maroa. Therefore, to that extent, the evidence of the Colonel Mendy cannot be said to have provided a new and corroboratory account to the evidence of Major Ganese but merely to have repeated his

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[2093] Transcript 5 May 2008, p. 16 lines 8-11
[2094] Transcript 5 May 2008, p. 17 lines 6-14
[2095] Transcript 5 May 2008, p. 18 lines 4-6
[2096] Transcript 8 May 2008, p. 58 lines 13-19; and Transcript 9 May 2008,
[2097] Transcript 8 May 2008, p. 74 lines 16-26
[2098] Transcript 8 May 2008, p. 74 lines 16-24
[2099] Transcript 8 May 2008, p. 74 line 28 – p. 75 line 1
[2100] Transcript 8 May 2008, p. 75 lines 9-16
[2101] Transcript 8 May 2008, p. 75 lines 1-16
[2102] Transcript 25 April 2008, p. 62 lines 19-22
[2103] Transcript 25 April 2008, p. 62 lines 16-18

purported recollection of the relevant events. Notwithstanding that, with regard to material elements of their evidence, Ganese and Mendy were not consistent with each other.

1406. Mendy said that he was one of 17 abductees detained in the same room in Teko Barracks on 1 May:

> "In all we were three MILOBS, 14 Kenyans, making 17 in number."[2104]

Whereas Ganese's evidence is:

> "[o]n 1st May, we were a total of seven, Your Honour."[2105]

1407. Like in Buedu the defence headquarters of the RUF was in Makeni and most of the senior officers who reported to the leader had offices in Makeni. Therein we had the officer in charge of the NCCDR Colonel Jimmy ,then the overall MP commander and MP adviser, then, the overall headquarter brigade commander Kailondo, then, [redacted] (DMK 161) [redacted] who testified that he reported to the leader and Kailondo, then, the overall security commander and chairman of the joint security board among others. All these senior officers were present in Makeni during the alleged abduction of UNAMSIL personnel. DMK-116 was [redacted] testified that even in Magburaka where the Second Accused resided he (second accused) had no disciplinary authority over his unit. The evidence adduced established that after the signing of the Lome Peace Accord the Accused became a businessman. Reason why on the 1st of May 2000 the very day the hostilities broke out in Makeni he was on a business trip to return the musical equipments he borrowed from TF1-041. In these circumstances he had no knowledge of the events as the evolved on that day.

1408. According to Colonel Mendy, Major Ganese had told him that "he was also secured by Colonel Gbao". In his live testimony, however, Major Ganese said that Gbao stood by like a statue whilst the second accused's men dragged him into the pink Mercedes that they had brought to the camp.[2106]

1409. Additionally, Mendy testified that himself, Major Knut and "Marro" were forced to have their photograph taken in front of dead RUF combatants.[2107] Ganese gave similar evidence but said that it was himself, Commander Gjellesdad (Major Knut), Colonel Mendy and Major Odhiambo who were forced to stand behind the corpses.[2108]

[2104] Transcript 27 June 2006, p. 11 line 20-21
[2105] Transcript 20 June 2006, p. 32 line 20
[2106] Transcript 20 June 2006, p.26, lines 16-27.
[2107] Transcript 27 June 2006, p. 12 line 22 – p. 13 line 2
[2108] Transcript 20 June 2006, p.34 line 21-p.35 line 11

(iii)Alternative Explanation for the Abduction of Major Maroa, inter alia

1410. DMK 032 testified that, on 1 May 2000, Kailondo came into his office and expressed disapproval at the UNAMSIL disarmament of RUF combatants and, thereafter, from his clear vantage point in the task force office, he saw Kailondo arrest a UNAMSIL Land Rover.[2109]

1411. DAG 111 testified that he witnessed Ishmael Kamara report to Kailondo at the house of the Third Accused that RUF combatants had disarmed at the DDR camp in Makump[2110] and that Kailondo grew angry at the news.[2111] DAG 111 testified that he drove the Third Accused and Ishmael Kamara, *inter alia*, from Makeni to Makump DDR camp on the day of the controversial disarmament of the RUF combatants.[2112] The Third Accused sent the witness back to in the direction of Makeni with Ishmael Kamara in order to inform Kailondo that RUF combatants had been disarmed but that he would "handle the matter"[2113] He testified and that, on arriving at Teko Barracks, Ishmael Kamara told Kailondo the news.[2114] The witness testified that, thereafter, he drove back to Makump, via the Makeni parking ground where he put fuel in his car.[2115] On the way back, he a vehicle that he recognised as Kailondo's Land Rover stopped on the road next to a UN Land Rover and that "CO Kailondo's boys were trying to disarm some of the Kenyan soldiers".[2116] The witness corroborates the account given by Major Ganese of Major Maroa's abduction in almost every material aspect, except he testifies that Kailondo's men were responsible, not the Second Accused. Both witnesses testified to the abduction of Kenyan UNAMSIL personnel, who were in a Land Rover, on the same day and both in roughly the same area, on the road between the Makump DDR camp and Makeni.[2117]

(2) TFI 360's Evidence

1412. TFI 360, an RUF radio operator, testified that [redacted] he received information from Mr Gbao that "Morrison Kallon" came to Makump from

[2109] Transcript 5 May 2008, p. 19 line 19 – p. 20 line 6
[2110] Transcript 17 June 2008, p. 66 lines 3-22
[2111] Transcript 17 June 2008, p. 67 lines 3-5
[2112] Transcript 17 June 2008, p. 67 lines 3 – p. 68 line 12
[2113] Transcript 17 June 2008, p. 75 lines 10-15; and p. 76 lines 15-20
[2114] Transcript 17 June 2008, p. 77 line 29 – p. 78 line 4
[2115] Transcript 17 June 2008, p. 88 lines 9-17
[2116] Transcript 17 June 2008, p. 88 line 27 – p .89 line 24
[2117] Transcript 20 June 2006, p. 29 line 4-9

Magburaka and warned that "if the people were not careful, within 72 hours he would launch an attack on the UN".[2118] He said that Mr Gbao and "Mr Kallon" went together to the camp at Makump.[2119] The witness alleged that "civilians came running" and that they were shouting " [y]our bosses have attacked the people, now they're firing at the place".[2120]

(a) Contradictions Within the Evidence of TFI 360

1413. The witness contradicted himself in relation to the whereabouts of Mr Sesay on the day of the aforementioned attacks, testifying, initially, that "Mr Kallon" came to the "radio room" and sent a message to Mr Sesay in Kono,[2121] that, despite Foday Sankoh's orders that he should go to Makeni, Mr Sesay did not in fact go[2122] and then testifying Mr Sesay was in the Makeni, in the office with the witness himself.[2123]

1414. Displaying clear difficulties with maintaining consistency in his testimony, after alleging a series of attacks, the witness contradicted himself about which attacks resulted in detention of UNAMSIL personnel. To questioning by counsel for Sesay, the witness responded:

> "Q. So we have detentions in Makeni followed by detentions in Magburaka, followed by detentions in Makoth; is that right?
> A. Yes."[2124]

1415. Whereas, under cross-examination by counsel for the second accused, he affirmed that he did not know of any abductions in Makump, Makeni or Magburaka and that the only abductions took place at Makoth [sic].[2125] Notably, the witness appeared adamant under cross-examination that [n]o detention occurred in Makump.[2126] It is submitted that, given his position in the task force office in Makeni, where he was monitoring radios, as well as the detailed testimony that he was consequently able to give in relation to other events, that this is information that he would have known about, if it had happened.

1416. The witness credibility was effectively impeached through prior inconsistent statement as to the following material aspects of his evidence:

[2118] Transcript 22 July2005, p. 3 line 24 – p. 5 line 12
[2119] Transcript 22 July 2005, p. 5 line 28-29
[2120] Transcript 22 July 2005, p.6 line 3-5
[2121] Transcript 22 July 2005, p. 6 line 2-16
[2122] Transcript 22 July 2005, p. 6 line 26- p. 7, line 1.
[2123] Transcript 22 July 2005, p. 8 line 12-15
[2124] Transcript 25 July 2005, p. 60 line 27-29
[2125] Transcript 26 July 2005, p. 65 line 14-26; p. 66 line 3-5. The Defence submits that the name "Makump" appearing in the transcripts is a misrepresentation of the evidence and that the transcripts should read "Makoth".
[2126] Transcript 25 July 2005, p. 62 line 23

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i. his own whereabouts at the time he received information that the attacks at Makeni; [redacted]

ii. Mr Sesay's source of information about the abductions; giving a statement to the Prosecution that Foday Sankoh called Sesay in Kono and told him about the incident;[2129] rendering evidence-in-chief that "Mr Kallon" informed Mr Sesay who, in turn relayed the information to Foday Sankoh,[2130] and, finally, responding to cross-examination that the second accused passed the information to Sankoh, who then passed it onto Sesay.[2131] Notably, counsel for the second accused highlighted that this is the first time the second accused's involvement is mentioned by the Witness.[2132]

iii. The witness' own source of information for the attacks against UNAMSIL at Makeni; giving a statement to the Prosecution that he heard "Kallon in Makeni reporting to Foday Sankoh in Freetown"[2133] then, under cross-examination, stating that he heard about the attacks for the first time when Mr Gbao and the second accused came into his office in Makeni.[2134]

iv. The particulars of the witness' own role during the attack on Makeni; giving a statement to the Prosecution that he "arrived in Makeni as one of those sent as radio operator with the fighting men"[2135] then, under cross-examination, the witness denied his statement and asserted that he met the troops as he arrived in Makeni.[2136]

1417. For these reasons and others, already demonstrated, it is submitted that the evidence of TFI 360 is not credible and should be disregarded.[2137]

(b) DMK 032's Evidence

1418. DMK 032, [redacted] He

[2127] Statement of 25 June 2004, pg 10021 (Transcript.25 July 2005, p. 79 lines 7 - 11)
[2128] Transcript 25 July 200, p. 72 lines 2 -11
[2129] Statement of 25 June 2004, pg 10021 (Transcript 25 July 2005, p. 80 lines 23 - 24)
[2130] Transcript. 22 July 2005, p. 6 line 15-29.
[2131] Transcript 25 July 2005, p. 81 lines 6 - 9
[2132] Transcript 25 July 2005, p. 81 lines 10 - 13
[2133] Statement of 25 June 2004, p. 10021 (Transcript 26 July 2005, p. 102 lines 17 - 20)
[2134] Transcript 26 July2005, p. 102 lines 24 - 27
[2135] Statement of 25 June 2004, p. 10021 (Transcript. 25 July 2005, p. 82 lines 21 - 23)
[2136] Transcript 25 July 2005, p. 83 lines 21 - 27
[2137] See "Core Prosecution Witnesses Who Testified Against the Accused.
[2138] Transcript 5 May 2008, p. 16 lines 8-11 [*exhibit 362*]

testified that he did not see TFI 360 at the task force office from 1 to 3 May 2000[2139] and that he had, in fact, already disarmed [redacted] in Port Loko at that point.[2140]

(3) TFI 361's Evidence

[redacted] TFI 361 gave evidence that he was in Kambia at the time of the disturbances at the DDR Camp in Makump on 1 May 2000.[2141] He stated that he subsequently came to Makeni and was told that the Second and Third Accused "attacked" UNAMSIL on the orders of the First Accused.[2142] However, the witness appeared reluctant to stand by this evidence as a testament of the truth and he conceded that the information was not in his statement to the Prosecution, explaining "...I was not on the scene, so I cannot say much about it. So even in my statement, I did not put it in my statement".[2143] [redacted]

1420. However, this was not borne out by Hindolo Koroma. First, he did not give any evidence of the involvement of the Second Accused in events on 1 May 2000 after he had dropped the witness off in Makeni, let-alone that he was responsible for attacks on UNAMSIL positions.[2144] Second, he testified that the First Accused was in Kono at the time of the "alleged attacks on the UNAMSIL peacekeepers in May 2000" and that, although he subsequently returned to Makeni, the witness "didn't hear that when he was in Makeni he was annoyed". The evidence suggests that Mr Sesay did not issue orders to the Second or Third Accused to attack UNAMSIL positions, as indicated by TFI 361.

ii) <u>Attack at Magburaka on 2 May</u>

1421. Major Ganese testified that, at around midnight on 2 May 2000, they were taken from Matotoka to Masingbi and then onwards to the next destination which had a sign outside it indicating "Camp 11 Small Sefadu". He said that in "some bushes in Matotoka area" another

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[2139] Transcript 5 May 2008, p. 18 lines 17-20; see also Exhibit 364.
[2140] Transcript 5 May 2008, p. 18 lines 25-29
[2141] Transcript 19 July 2005, p. 81 line 24; questioning the witness on the events described in radio message dated 3 May 2000 (Exhibit 34, at pg 8097) which, the Defence says refer to the disturbances at Makump on 1 May 2000.
[2142] Transcript 19 July 2005, p. 82 line 15-22; questioning the witness on the events described in radio message dated 3 May 200 (Exhibit 34, at pg 8097) which, the Defence says refer to the disturbances at Makump on 1 May 2000.
[2143] Transcript 19 July 2005, p. 82 line 22-23
[2144] Transcript 10 July 2006, p. 70 line 3, and 15-16

nine peacekeepers were brought out from the bush who were "similarly devoid of their uniforms" with "their hands tied to the front." He identified one of the peacekeepers as Major Rono, OC of B Company KENBATT 5, but the eight alleged abductees were not identified.[2145] Thereafter they travelled together to Masingbe and then "Small Sefadu", where they were detained. There were 20 detainees in total.

1422. He gave evidence that on the way from Masingbi to the latter destination several of the abductees were injured when the truck that was transporting them crashed into a "crater".[2146]

1423. The evidence of TFI 165 establishes that Mr Sesay was the superior commander present at the alleged abduction of Major Rono and that it took place in Magburaka on 2 May 2000.[2147] Neither witness alleged the presence or involvement of the second accused

iii) Attack on the UN Convoy

(1) Introduction

1424. The Chamber heard evidence that Kenyan and Zambian UNAMSIL personnel were abducted on 3 May 2000, on the road between Lunsar and Makeni, and about the subsequent detention in Yengema, [redacted] of Zambian Lieutenant Colonel Eddie Kasoma and General Mulinge, UNAMSIL "sector three commander", *inter alia*. Prosecution witness Kasoma alleged the involvement of the second accused as the commanding officer at the time of his abduction and that he visited them in captivity, each time in the company of 30 to 40 heavily-armed securities, some of whom were aged between 10 and 12 years old, and that the reason that he knew this was that, every time they came, himself [redacted] were briefed about their visit by [redacted].

1425. However, the Chamber also heard evidence refuting the involvement of the second accused from Prosecution witness TFI 362 and DMK 147. The Prosecution did not elicit corroboratory evidence from its witness, TFI 362, [redacted] Furthermore, DMK 147, who was called by the Defence, and who corroborated Kasoma with respect to almost every other detail of the abduction and detention within his knowledge, categorically denied that the second accused visited

[2145] Transcript 20 June 2006, p. 39 line 22 – p. 40 line 16
[2146] Transcript 20 June 2006, p. 40 line 19 – p. 42 line 11
[2147] Transcript 29 March 2006 (Amended), p. 36 line 19 – p. 37 line 7

Yemgema. He also denied that they were subject to beating and torture, as alleged by Kasoma.

(1) The Evidence

(a) Events of 1 and 2 May 2000

1426. TFI 288, Eddie Kasoma, was a Lieutenant-Colonel in the Zambian army in January 2000.[2148] He was deployed in Sierra Leone in towards mid-April 2000.[2149] DMK 147[redacted] was called by the First and Second Accused. From the time of their arrival in Sierra Leone, they had been based at Lungi. On 1 May 2000 they received a message from force commander Jetley that they were required to move to Makeni in order to stabilise "the situation that had arisen in Makeni",[2150] referring to problems between the RUF and the Kenyan contingent deployed in Makeni.[2151]

1427. On 2 May 2000 the mission departed Lungi for Makeni. It comprised of a Zambian battalion, led by Lieutenant-Colonel Kasoma and the "sector headquarters from the Kenyan contingent" of "about 30" men, led by the sector headquarter commander, Brigadier-General Mulinge.[2152] They spent the night of 2 May 2000 in Lunsar.[2153]

(b) Events of 3 May 2000

1428. On 3 May they embarked upon the road from Lunsar to Makeni where they met a roadblock.[2154] After some negotiations, and following a request from personnel manning the roadblock, Lieutenant-Colonel Kasoma passed through the roadblock, upon which he was "surrounded" by RUF combatants.[2155] According to Kasoma, the ambush took place in a village called Moria.[2156] He said that there were "well over 100" RUF combatants there, of a mixture of ages and that most of them were armed.[2157] He said that, thereafter, he was

[2148] Transcript 22 March 2006, p. 4 line 13-16
[2149] Transcript 22 March 2006, p. 8 line 15-17
[2150] Transcript 22 March 2006, p. 9 line 21-25; and DMK 147, Transcript 06 March 2008, p. 9 line 9-23
[2151] TFI 288, Transcript. 22 March 2006, p.10 line 4-9.
[2152] DMK 147, Transcript 06 March 2008, p. 13 line 14-19; TFI 288, Transcript 22 March 2006, p. 10 line 29 – pg 11 line 8.
[2153] DMK 147, Transcript 06 March 2008, p. 15 line 19-24; TFI 288, Transcript 22 March 2006, p. 12 line 7-9.
[2154] TFI 288, Transcript 22 March 2006, p. 13 line 29 – p. 14, line 4; DMK 147, Transcript 06 March 2008, p. 18 line 24-25; and p. 21 line 15-17.
[2155] Transcript 22 March 2006, p. 17 line 9-14
[2156] Transcript 22 March 2006, p. 17 line 21
[2157] Transcript 22 March 2006, p. 18 line 3-6

separated from his men and taken to a small shelter where he met a man who he "later identified...[as] the commander for that area".[2158] As to the identification of the "commander", the witness testified: "Later on I came to learn that he was Morris Kallon."[2159] He said that he was he was forced, at gunpoint, to sign a note to the units under his command, luring them forward into an ambush.[2160]

1429. Under cross-examination, the witness declined to give a description of the commander who he identified as Morris Kallon, stating that it the incident had happened a long time ago,[2161] although he testified that one of the commanders present walked with a limp.[2162]

1430. DMK 147 testified that, at the roadblock, the Zambian battalion was at the front of the convoy, whilst he was at the rear, and that they couldn't communicate because of a lack of radios.[2163] He confirmed that Kasoma went forward, beyond the roadblock and that, sometime thereafter, a note, signed by Kasoma was delivered by a combatant, containing instructions.[2164] DMK 147 refused to accept the instructions, suspecting that Kasoma was, at this point, being held against his will.[2165] The witness testified that shortly thereafter an RUF officer arrived "alleging that he had come from Makeni" and that he had been sent by Mr Sesay "to make contact with the convoy" out of concerns for the safety of troops.[2166] The witness confirmed that the officer didn't identify himself and affirmed that he did not hear the name Morris Kallon mentioned at that time.[2167]

1431. The witness testified that they decided to proceed and after passing through a further roadblock, the entire convoy was surrounded by RUF combatants and they were ordered to disarm.[2168] DMK 147 described the person in charge of RUF combatants as "a short person who was actually limping as he walked" but said that he didn't "get to know his name".[2169] It is the Defence case that the commander responsible for the abductions of both Kasoma and DMK 147 was Komba Gbundema.[2170] This is the unequivocal statement in the evidence of Prosecution witness TFI 360.[2171] DMK 147 confirmed that throughout his encounters at the

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[2158] Transcript 22 March 2006, p. 19 line 7-10
[2159] Transcript 22 March 2006, p. 19 line 12
[2160] Transcript 22 March 2006, p.19 line 14-p.21
[2161] Transcript 23 March 2006, p. 131 line 7-13
[2162] Transcript 23 March 2006, p. 133 line 2
[2163] Transcript 06 March 2008, p. 21, line 20 – p. 22, line 12.
[2164] Transcript 06 March 2008, p. 23, line 2 – p. 24, line 6.
[2165] Transcript 06 March 2008, p. 24, line 10-14
[2166] Transcript 06 March 2008 p. 24, line 14-21
[2167] Transcript 06 March 2008, p. 55, line 21-24.
[2168] Transcript 06 March 2008, p. 27, line 8-16.
[2169] Transcript 06 March 2008, p. 28, line 13-15.
[2170] Transcript 15 April 2008, p. 73, line 7-9; DIS 214, T. 17/01/08, p. 83, line 26-29
[2171] Transcript 22 July 2005, p. 9, line 6-20

roadblocks, culminating in his abduction, he did not hear mention of the name Morris Kallon.[2172]

(c) Transfer to Yengema

1432. Thereupon, both Kasoma and DMK 147 were taken to Makeni and onto Yengema, Kono District. Neither witness testified that they saw each other until they reached Yengema. Kasoma testified that he was taken to Makeni in a red van, with the man who he identified as Morris Kallon, where he discovered the soldiers who had "remained in the convoy behind".[2173] They had been disarmed and stripped of their uniforms.[2174] He said that, in Makeni, Morris Kallon introduced him to Issa Sesay[2175] and that he was taken to Yengema that night, arriving "at about 0600" the following morning, with "roughly about a hundred" other abducted Zambian soldiers.[2176] DMK 147 described how he was also taken to Makeni, where there was a brief stopover, and then on to Yengema, where they arrived on 4 May 2000, at "around roughly 8 o'clock, 9 o'clock".[2177]

(d) Detention at Yengema

1433. At Yengema, Lieutenant-Colonel Kasoma and DMK 147 were held together in [redacted] house throughout their 23 day period of captivity. DMK 147 testified that Kasoma's deputy and one of his own officers, called Captain Wanjagi Wanjagi were also held with them.[2178] The other detainees were held in a disused school block.[2179]

1434. As to the conditions of their detention, the evidence of DMK 147 and Lieutenant-Colonel Kasoma diverged. Mr Kasoma stated that he [redacted] were held in poor conditions.[2180] He also said that they were subject to threats and torture, including threats of execution, and when he was questioned as to who was subjected to threats, [redacted] DMK 147 denied that there was any "beating or

[2172] Transcript 06 March 2008, p. 57, line 16-18; p. 63, line 1-5
[2173] Transcript 22 March 2006, pg 22, line 12-20.
[2174] Transcript 22 March 2006, pg 23, line 17-19.
[2175] Transcript 22 March 2006, pg 23, line 28 – pg 24, line 11.
[2176] Transcript 22 March 2006, pg 24, line 27 – pg 25, line 18.
[2177] Transcript 06 March 2008, pg 28, line 19 – pg 29, line 5.
[2178] Transcript 06 March 2008, pg 33, line 2-4
[2179] Transcript 22 March 2006, pg 26, line 14-17. Transcript 06 March 2008, pg 38, line 24 – pg 39, line 1
[2180] Transcript 22 March 2006, pg 40, line 13-16; pg 41, line 21-23
[2181] Transcript 22 March 2006, pg 42, line 1-18.

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assaulting" of the detainees.[2182] Further on in his examination-in-chief he stated categorically that in Yengema "there was no mistreatment"[2183] and that no soldier was assaulted during the period of detention at Yengema.[2184] He testified that [redacted] looked after the captives as "best she could have done", including arranging medical care and bathing and that the same treatment was given to everybody.[2185] When questioned about Kasoma's own attitude towards the condition of their detention, DMK 147 stated "I believe we shared a common view".[2186]

(e) Misidentification of the second accused.

1435. Kasoma said that, during their period of captivity, RUF personnel, including Issa Sesay, the second accused, and Lansana, "who was brigade commander for that area", used to visit [redacted] house; he said that he saw Lansana almost on a "daily basis" and that he saw the second accused and Mr Sesay about four times.[2187] He said that every time they came, they were accompanied by 30 to 40 heavily armed RUF soldiers some of whom were children between the ages of 10 and 12.[2188] When questioned on his identification of the second accused and Mr Sesay, the witness stated:

[redacted]

1436. Despite Kasoma's explicit evidence that [redacted] when he testified before the Chamber DMK 147 categorically denied all knowledge of the second accused's visits:

> "...was there anybody in [Mr. Sesay's] company who presented himself as a senior officer of the RUF?
> A. No, My Lords.
>
> [...]

[2182] Transcript 06 March 2008, pg 35, line 13-19.
[2183] Transcript 06 March 2008, pg 38, line 16-17.
[2184] Transcript 06 March 2008, pg 64, line 23-24.
[2185] Transcript 06 March 2008, pg 37, line 4-7.
[2186] Transcript 06 March 2008, pg 44, line 12-16.
[2187] Transcript 22 March 2006, pg 27, line 15-24.
[2188] Transcript 22 March 2006, pg 27, line 28 – pg 28, line 21.
[redacted]

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Q. And you also said that he did not speak to the other three of your colleagues?
A. Correct.
Q. But is it possible that he would have spoken to your colleagues without your knowledge?
A. No.
Q. Other than Issa Sesay, did you see any other officer come to Yengema during your stay there in the company of 30 to 40 security guards?
A. No.
Q. You never saw any such officer come there with security guards, 30 to 40, some of who were children aged between ten and 12?
A. No.
Q. Did [redacted] ever introduce you to a person named Morris Kallon, who was a senior RUF officer?
A. I can't recall that.
Q. Did Kasoma at any time during your entire stay at Yengema tell you that a person named Morris Kallon has come to Yengema where you were staying?
A. No."[2190]

1437. He further testified that at no point did Kasoma identify the person who had been involved in his abduction on 3 May.[2191] He testified that the only RUF commanders that he encountered during this period were [redacted], Lansana Conteh[2192] and Mr Sesay, who he saw twice.[2193]

1438. Prosecution witness TFI 362 corroborated the evidence of DMK 147 that Mr Sesay came to Yengema twice.[2194] No evidence was elicited from her that the second accused accompanied him on either occasion.

1439. It is submitted that there is no possibility of reconciling the evidence of Kasoma and DMK 147. According to Kasoma, the second accused accompanied Mr Sesay on the occasions when he came to Yengema. DMK 147 recorded the visits of Mr Sesay in his evidence, but categorically denied that the second accused was in his company. [redacted]

1440. Furthermore, Kasoma's purported implication of the second accused in his abduction on 3 May stems from the same mode of identification. Responding to counsel for the second accused's proposition that the commander present during his abduction was, in fact, Komba

[2190] Transcript 06 March 2008, pg 66, line 20 – pg 67, line 21.
[2191] Transcript 06 March 2008, pg 68, line 13-16.
[2192] Transcript 06 March 2008, pg 39, line 2-9.
[2193] Transcript 06 March 2008, pg 42, line 5.
[2194] Transcript 22 April 2005, pg 31, line 19-22.

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Gbundema, he verified this, testifying as follows: "I didn't know [Mr. Kallon], but in the process of captivity it became clear and I came to know him."[2195] Therefore, the allegation of the second accused's involvement in the witness' abduction is nullified.

1441. In his testimony the second accused stated that, on 3 May 2000 he saw a "long convoy...coming from Lunsar Highway directly heading toward Teko Barracks".[2196] He testified that, having made inquiries with Kailondo and AS Kallon at the task force office in Makeni, he was informed by them that Komba Gbundema had been instructed by Foday Sankoh to "intercept the reinforcement of UNAMSIL that were coming to Makeni".[2197] the second accused's testimony in this regard was corroborated by DIS 214 who gave evidence that he knew Komba Gbundema "very well" and affirmed on cross-examination that "Komba Gbundema came with troops from Kamakwie and took the Zambians at Makoth as hostages".[2198] The second accused vehemently denied the allegation that he was involved in the abduction and detention of UNAMSIL personnel, as alleged by Kasoma.[2199]

1442. It is the defence case that the commander present at the abduction of Kasoma was, in fact, Komba Gbundema, as testified to by TFI 360.[2200] It is submitted that the evidence of Kasoma is consistent with this finding for the following reasons: (i) both DMK 147 and Kasoma identified a man walking with a limp as present at the scene of their abduction. Kasoma. Komba Gbundema walked with a limp;[2201] (ii) Kasoma testified that he was transported to Makeni in a red van with the RUF commander. Komba Gbundema drove a red van,[2202] whereas the second accused drove a blue/black Mercedes Benz; (iii) Komba Gbundema was the ground commander at Makeni at the time and, as such, the attack occurred within his area of competence. Kasoma affirmed that he did not know who was the ground commander of the RUF in Makeni at that time[2203] and, as such, was unable to refute the proposition that the commander present at his abduction was Komba Gbundema; and (iv) the reasons articulated above which cast doubt over the identification of the second accused.

(f) Prior Inconsistent Statement

[2195] Transcript 23 March 2006, pg 144, line 25-26.
[2196] Transcript 15 April 2008, pg 69, line 15 – pg 70, line 9.
[2197] Transcript 15 April 2008, pg 70, line 10-12.
[2198] Transcript 17 January 2008, pg 83, line 22-27.
[2199] Transcript 15 April 2008, pg 88, line 19-25.
[2200] Transcript 22 July 2005, pg 9, line 6-20.
[2201] Transcript 15 April 2008, pg 73, line 7-9; DIS 214, T. 17 January 2008, pg 83, line 26-29.
[2202] Transcript 15 April 2008, pg 73, line 12-14.
[2203] Transcript 23 March 2006, pg 136, line 9-11.

1443. Under cross-examination, it was revealed that, notwithstanding his provision of several prior statements to the Prosecution, Kasoma mentioned the second accused for the first time a month before he testified, during the provision of "additional information".[2204] He confirmed that he made no mention of Morris Kallon in his first telephone statement to the Prosecution in July 2003.[2205] He also confirmed he had not mentioned Morris Kallon in his second statement made in Zambia on 25 January 2006.[2206] The witness confirmed that it was only in the last month when giving additional information to the Prosecution that he had made mention of the second accused. When questioned on the previous omissions of the second accused's name, the witness stated that the earlier statements had been in summary form and it was only later that he gave a detailed statement.[2207] However, when pressed on the issue, he conceded that his report to his superiors, wherein no mention of the second accused was made, was not a summary and that it was, in fact, a full report.[2208]

(g) Regressive Testimony

1444. Kasoma testified that Denis Lansana was brigade commander of Kono and that he visited him daily during his period of captivity in Yengema[2209] and that he knew Denis Lansana as a "very friendly" who had met on his initial trip to Koidu in January 2000. He explained the identification as follows: "I'm telling you that when I came to Koidu in January I met him in person, and that is the same person I came to meet during my period of captivity. So I knew him so well." [redacted]

1445. It was put to the witness that he was mistaken and that the commander was, in fact, Lansana Conteh.[2211] He accepted that this may be true[2212] but failed to reasonably explain why he had initially named Denis Lansana. It is submitted that this testimony exposes a willingness to adopt possible propositions put to him by the Prosecution, in order to render to it his own sense of assistance notwithstanding his precise recollection of the facts.

[2204] Transcript 23 March 2006, pg 142, lines 25-27.
[2205] Transcript 23 March 2006, pg 141, line 23 - pg 142, line 1-19.
[2206] Transcript 23 March 2006, pg 142, lines 21-24.
[2207] Transcript 23 March 2006, pg 142, line 28-29; pg143, line 24-29
[2208] Transcript 23 March 2006, pg 144, lines 10-16
[2209] Transcript 22 March 2006, pg 27, line 15-24; and T. 23 March 2006, pg 94, line 21-23.
[2210] Transcript 21 January 2008, pg 52, line 26 – pg 53, line 16.
[2211] Transcript 23 March 2006, pg 95, line 22 – pg 96, line 2.
[2212] Transcript 23 March 2006, pg 96, line 11-12.

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(h) Embellished Testimony

1446. [redacted] Kasoma alleges [redacted] that women were sexually abused,[2213] that the second accused came to Yengema with 30 to 40 heavily armed securities, some of whom were between 10 and 12 years old, an allegation which he made for the first time a month prior to his testimony. According to DMK 147 this did not happen.

(i) Events Up to and Including Release

1447. Testifying to their release, Lieutenant-Colonel Kasoma and DMK 147 were transported in a two separate vehicles, to Koidu.[2214] Although neither could remember the exact date, both testified that they were released after 23 days of captivity. From Koidu, they were taken to another destination where they met with 50 to 60 other Zambian soldiers who were not with them at Yengema.[2215] Kasoma gave evidence that he saw the second accused there with Mr Sesay.[2216] DMK 147 testified that he was told by Kasoma that he had seen Mr Sesay in Koidu but he made no mention of the second accused.[2217]

(j) Major Ganese's Evidence

1448. Major Ganese testified that, on 20 May 2000 he was taken from "Small Sefadu" to Koidu, along with Knup, Odhiambo and Corporal Stephen Moragie.[2218] He said that there he met up with 52 other Zambians whose condition he described as "very pathetic." He said that he was told by one of them that they had been held for 18 days.[2219] The witness did not mention the second accused in conjunction with this allegation. Neither does the evidence

[2213] Transcript 23 March 2006, pg 89, lines 25-29; pg 90, lines 1-5, pg 91, lines 27-29; pg 92, lines 1-11.
[2214] TFI 288, Transcript 22 March 2006, pg 46, line 5-13; DMK 147, Transcript 06 March 2008, pg 47, line 9-15.
[2215] Transcript 22 March 2006, pg 47, line 5-9.
[2216] Transcript 22 March 2006, pg 46, line 21-22.
[2217] Transcript 06 March 2008, pg 47, line 21-23.
[2218] Transcript 20 June 2006, pg 48, line 1-5.
[2219] Transcript 20 June 2006, pg 48, line 6 – pg 49, line 25.

establish the parties responsible for the abduction or detention of the Zambians. Major Ganese saw Zambian abductess on 20 May 200 in Koidu. Lieutenant-Colonel Kasoma and [redacted] saw Zambian abductees outside Koidu on 26 May 2000. The evidence does not establish that the witnesses testified about the same group of abductees. In the alternative, if the Chamber accepts that they were the same group of abductees, Ganese does not allege the second accused's involvement.

(k) TFI 071's Evidence

1449. TFI 071 gave evidence that, whilst he was in Koidu Town, he "saw some troops who have captured peacekeepers from Makeni, Lunsar axis and Magburaka from Kono District", in June 2000.[2220] He said that, according to "reliable information", they had been abducted by the RUF and that "Morris Kallon, Augustine Gbao and Kailondo were the main, principal commanders involved."[2221] According to the witness, some of the abductees had been held at Yengema and the "[m]ost senior commanders" were held at Tombodu.[2222] He said that the abductions occurred in May 2000.

1450. The witness' account is unverifiable hearsay. According to the witness, his testimony emanated form "reliable information", as he himself was in Kono at this time.[2223] No more evidence was supplied as to its provenance. He said that the abducted peacekeepers were "over 300" in number and that they were captured from Magburaka and Lunsar.[2224] He said that they were of a mixed nationality, being both Kenyan and Zambian.[2225] He said that, from their respective detention in Tombodu and Yengema, they were taken to Kailahun upon the order of Sam Bockarie.[2226]

1451. By itself, the evidence amounts to an uncorroborated allegation from an unidentified source. The particulars of the allegation are vague with respect to the date, the number and identities of abductees and the role of Accused in the abductions.

1452. Furthermore, it cannot be said to corroborate the evidence of Kasoma, [redacted] as the evidence diverges on nearly every material element of the allegation. TFI 071 testified that the abductions took place at Lunsar and Magburaka whereas Mulinge

[2220] Transcript 24 January 2005, pg 2, line 17 – pg 3, line 3.
[2221] Transcript 24 January 2005, pg 4, line 7 – pg 5, line 11.
[2222] Transcript 24 January 2005, pg 13 line 17-19
[2223] Transcript 24 January 2005, pg 2 line 15-16
[2224] Transcript 24 January 2005, pg 13, line 7-15.
[2225] Transcript 26 January 2005 (unredacted), pg 32, line 12-25.
[2226] Transcript 24 January 2005, pg 13, line 22-24.

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and Kasoma testified to abductions on the Lunsar-Makeni road. TFI 071 said that there were over 300 personnel abducted, whereas Kasoma testified that there were just 115,[2227] a substantial discrepancy in the evidence. TFI 071 testified that the senior officers were held at Tombodu, whereas Kasoma [redacted] testified that they were held at Yengema. TFI 071 testified that the abductees were sent to Kailahun on the order of Sam Bockarie, whereas Kasoma [redacted] testified that Mr Sesay gave the order. Finally, TFI 071 testified that the abductions occurred in June 2000, whereas Kasoma [redacted] testified that they were abducted on 3 May 2000.

1453. In light of the foregoing, it is submitted that the evidence of TFI 071 is not corroborated and is of inadequate probative value to support a conviction.

(l) TFI 360's Evidence

1454. According to TFI 360, Mr Sesay sent a message to Foday Sankoh reporting the attacks at Makeni, Makump and Magburaka involving RUF and UNAMSIL, which he had received from "Kallon".[2228] Subsequently, Mr Sesay sent an order for Komba Gbundema from Kamakwie to reinforce RUF positions and also to Tongo.[2229]

1455. The witness alleged "Morrison Kallon" spoke to a crowd of armed men in the street in the centre of Makeni that a UN convoy was approaching and that he was sending Komba Gbundema there "with his troop" to arrest them.[2230] According to the witness, Mr Sesay and Mr Gbao were also present at that time. The witness said intelligence had been received from to this effect from "Gume" in Lunsar.[2231]

1456. According to the witness Komba Gbundema halted the convoy 100 yards from Makoth and "almost all the UN personnel were arrested".[2232] He did not allege the participation of the second accused and affirmed, under cross-examination, that Komba Gbundema was the commander present at the scene of the abduction.[2233] He said that the

[2227] Transcript 22 March 2006, pg 25, line 17 – pg 26, line 6.
[2228] Transcript 22 July 2005, pg 6, line 20-24.
[2229] Transcript 22 July 2005, pg 7, line 1-20.
[2230] Transcript 22 July 2005, pg 9, line 12-27.
[2231] Transcript 22 July 2005, pg 7, line 18-20; pg 8, line 3-10
[2232] Transcript 22 July 2005, pg 9, line 6-20.
[2233] Transcript 26 July 2005, pg 66, line 3-8.

detainees were taken to Makeni[2234] and then on to Magburaka where they spent the night.[2235] He said that the following morning he met them in Makali.[2236]

1457. TFI 360 gave contradictory evidence in regards to material aspects of his testimony including the number of trucks that the witness saw in Makali carrying abducted UNAMSIL personnel; using the singular term 'vehicle' to denote one truck of captured UNAMSIL personnel on two occasions during his testimony,[2237] but on another occasion stating that there were three trucks containing UNAMSIL personnel followed by other trucks containing their belongings.[2238]

1458. For these reasons and others, already demonstrated, it is submitted that the evidence of TFI 360 is not credible and should be disregarded.[2239]

(m) Evidence of DMK 161 and DMK 039

1459. DMK 161, [redacted] a senior member of RUF. He testified that Komba Gbundema had received a message from Foday Sankoh "that 500 UN troops were coming to Makeni and Sankoh told him that on no account should he allow those people to enter Makeni. He should arrest them."[2240] DMK 161 then gave a detailed and coherent testimony about how he and Komba Gbundema encountered the UN convoy at Makoth.[2241] According to the witness, the encounter was peaceful[2242] and resulted in General Hassan being escorted to Makeni.[2243] The accounts given by the First and Second Accused accord with this version of events.[2244]

1460. DMK 039, [redacted] a former RUF combat medic, testified that, on 2 May 2000, she overheard Komba Gbundema talking about a message sent from Foday Sankoh that he should "arrest the man".[2245] [redacted] She also testified that on 3 May 2000 she met her brother who told her that he had the

[2234] Transcript 22 July 2005, pg 9, line 20-21.
[2235] Transcript 22 July 2005, pg 11, line 1-2.
[2236] Transcript 22 July 2005, pg 11 line 6-9.
[2237] Transcript 22 July 2005, pg 9, line 20-21; Transcript 26 July 2005, pg 105, line 21
[2238] Transcript 25 July 2005, pg 75, lines 11 - 13
[2239] See "Core Prosecution Witnesses Who Testified against the Accused" and discussion of the witness in "Attacks at DDR Camp", *supra.*
[2240] Transcript 22 April 2008, p. 28 line 27 – p. 29 line 2
[2241] Transcript 22 April 2008, p. 29 line 20 – p. 34 line 25
[2242] Transcript 22 April 2008, p. 30 line 28
[2243] Transcript 22 April 2008, p. 31 line 27 – p. 32 line 1
[2244] Sesay, Transcript of 25 May 2007, p. 65 lines 24-26; and Transcript of 15 April 2008, p. 69 line 9 – p. 70 line 26
[2245] Transcript 25 April 2008, p. 30 line 4-15

Second Accused and that he was "angry" about what "Komba Gbundema and the others had done".[2246]

1461. He testified that he did not see the Second Accused until night on 2 May 2000.[2247] At that time, the First and Second Accused convened a meeting at Teko Barracks demanding an explanation for the abductions. The Second Accused ordered "Komba Gbundema to present everything and to put them in order, in order for them not to be misused, he said, because we have to release these people."[2248]

(2) Conclusion

1462. It is submitted that the aforementioned evidence cannot sustain a conviction on any theory of liability. The evidence implicating the personal involvement of the second accused, for Kasoma, TFI 360 and TFI 071, all suffer from preclusive flaws based, particularly, in a lack of credibility. Furthermore, no superior responsibility can be imputed to the second accused for the crimes alleged. Kasoma, [redacted] all testified to Mr Sesay's presence at Yengema. As to the abductions on 3 May, Mulinge testified that Mr Sesay had sent a RUF officer to escort the convoy to Makeni and Kasoma testified that he met Mr Sesay in Makeni. Therefore, Mr Sesay, as the interim leader of the RUF, was the senior commander on the ground. Therefore, the second accused cannot be said to have exercised effective control in the sense of the material ability to prevent or punish RUF units in the area at that time. Nor have the Prosecution established that the second accused had any actual or imputed knowledge of the incidents. Therefore, no conviction on a theory of command responsibility can result.

ii) <u>Allegations Made By TFI 366</u>

1463. TFI 366 gave evidence that he participatedted, with others, in a number of violent attacks against UNAMSIL personnel. The time frame provided by the witness was vague. He said that he met the second accused, Mr Sesay Mr Gbao, Alpha Momoh and himself met Magburaka junction[2249] and that the attacks were coordinated there. According to the witness,

[2246] Transcript 25 April 2008, p. 30 line 26 – p. 31 line 2
[2247] Transcript 22 April 2008, p. 34 lines 1-3
[2248] Transcript 22 April 2008, p. 34 lines 16-21.
[2249] Transcript 10 November 2005, pg 36, line 9-27.

the second accused was in command of a group that attacked at Lunsar Highway,[2250] that Mr Gbao attacked UN positions at Makump and that Mr Sesay attacked Magburaka,[2251] in a series of staggered attacks on the same day. According to the witness, the second accused attacked first,[2252] followed by Mr Sesay, who fought alongside the witness "for the whole day" in Magburaka.[2253] He alleged that the second accused captured "many" UN personnel and took them to Teko Barracks.[2254] He alleged that, on the same day, he saw "two UN helicopters shooting" in [Magburaka] town".[2255] According to the witness, later on that day, he attacked a UN convoy of 80 vehicles on the road from Magburaka to Kono.[2256] He said that he passed the second accused on the Lunsar Highway who was transferring captured UNAMSIL personnel to Masingbi.[2257] Thereafter he said that a meeting was convened between Mr Sesay, the second accused, Mr Gbao, Superman and Gibril Massaquoi in which it was decided to break Foday Sankoh out of prison in Freetown.[2258] He also alleged that UNAMSIL troops that were captured and detained at Makeni, were later taken to Small Sefadu and then on to Charles Taylor in Liberia.[2259] The Prosecution failed to elicit a timeframe for the allegation.

1464. Through the wildly incriminatory and patently false evidence of TFI 366 the Prosecution sought to establish widespread attacks and a situation of armed conflict where, at most, isolated incidents of violence erupted between elements of the RUF and UNAMSIL pursuant to a misunderstanding as to the mandate of UNAMSIL and the rights and obligations of the RUF and the government of Sierra Leone, under the Lome Peace Accord. The witness pieced together bits of allegations made by other witnesses, that the Prosecution knew would testify, in a manner haphazard and incoherent when considered alongside the remainder of the Prosecution case. Thereafter, the witness developed and embellished his testimony at will in order to incriminate the three accused persons. All under license from the Prosecution who called him to testify in order to establish the prerequisite situation of widespread armed conflict in order to proceed with its prosecution of crimes against humanity and war crimes at

[2250] Transcript 10 November 2005, pg 36, line 13 – pg 37, line 18.
[2251] Transcript 10 November 2005, pg 37, line 12-15.
[2252] Transcript 10 November 2005, pg 37, line 28-29.
[2253] Transcript 10 November 2005, pg 39, line 19-24; pg 42, line 6-8
[2254] Transcript 10 November 2005., pg 43, line 29 – pg 44, line 15
[2255] Transcript 10 November 2005, pg 42, line 10-12.
[2256] Transcript 10 November 2005, pg 42, line 16-28.
[2257] Transcript 10 November 2005, pg 43, line 29 –pg 44, line 2.
[2258] Transcript 10 November 2005, pg 45, line 1-10.
[2259] Transcript 10 November 2005, pg 45, line 16-23.

a time, after the conclusion of the relevant accords guaranteeing ceasefire, disarmament and amnesty, of peace.

1465. TFI 366 contradicts the Prosecution case in the following respects:

i. TFI 366 alleged that the attacks on Makump and the attacks on the convoy of vehicles occurred on the same day. Prosecution witnesses testified to attacks on Makump on 1 and 2 May 2000. Other Prosecution witnesses testified to attacks on a convoy of Zambian and Kenyan personnel on 3 May 2000.

ii. TFI 288 testified that Mr Sesay was at Makeni on 3 May 2000 when the convoy as attacked. TFI 366 testified that Mr Sesay was fighting at Magburaka all day.

iii. Major Ganese testified that he was taken to Small Sefadu and that he was released from there, whereas TFI 366 testified that those who were detained at Small Sefadu were taken to Liberia and Charles Taylor.

iv. TFI 366 alleged that Superman and Gibril Massaquoi at a meeting in Makeni on the day of the attacks.[2260] More credible testimony establishes that both men were in Freetown at this time.[2261]

1466. For these and the reasons already set out,[2262] it is submitted that the evidence of TFI 366 be disregarded in its entirety.

iii) Allegations Made by TFI 117

(1) Prosecution Allegation

1467. TFI 117 testified that he took part in attacks on Kenyan UNAMSIL personnel at Mabanta, Mankneh and Makump camps, near Makeni on an unspecified date.[2263] According to the witness, the DDR camp at Makump was the first to be attacked.[2264] He testified that, although other commanders, unnamed by the witness, were present, Mr Gbao and Mr Sesay were responsible for the attack.[2265] The witness himself did not participate in the attack. It is inferred from the evidence that he knew that it was Mr Sesay and Mr Gbao who were

[2260] Transcript 10 November 2005, p.45 line 4-5
[2261] DMK 161, Transcript 22 April 2008, p. 29 line 27-29
[2262] See "Core Prosecution Witnesses Who Testified Against the Accused".
[2263] Transcript 30 June 2006, pg 26, line 1-8.
[2264] Transcript 30 June 2006, pg 27, line 6-9.
[2265] Transcript 30 June 2006, pg 28, line 29 – pg 29, line 6.

responsible because they were informed of this at the task force office where the witness went, after he had met the second accused and Mr Gbao at St Francis Junction.[2266]

1468. The witness testified that, at that point, he "teamed up" with others and started attacking Mbanta and Mankneh.[2267] When asked who was "in charge of the operations at Mabanta and Mankneh", the witness replied "we were scattered. There was no order at that time. Except later, when we came to the task force office."[2268] He said that they returned to the task force office after the attacks and that Gibril Massaquoi, Mr Sesay, the second accused, Mr Gbao, Digba and General Bropleh were present.[2269]

1469. According to the witness Kenyan UNAMSIL personnel had been abducted and the witness and others had wanted to kill them but "master" ordered them not to and, instead, that they should be sent to Kailahun.[2270] Subsequently, they were taken to Kailahun but the witness himself was not involved in the moving.[2271]

(2) Defence Refutation

1470. The witness misidentified the second accused in court.[2272] This was subsequent to an objection raised by the counsel for Gbao and joined by counsel for the second accused, to the procedure adopted by the Prosecution in relation to in-court identifications, and to which the Prosecution responded that "[i]t could very well be that the witness is mistaken as to the identity of one or all of them and, once he misses out, there's nothing the Defence can say that prejudices their case."[2273] Therefore, it is submitted that the evidence be disregarded as it tends to incriminate the second accused, that the anticipated Prosecution the aforementioned course of action and, as such, that it suffers no prejudice therefrom.

1471. The Defence also notes the contradictions that the evidence of TFI 117 exposes in the Prosecution case. Although the timeframe for the allegations made by the witness are based on the most circumstantial of evidence, the witness alleges that Gibril Massaquoi and General Bropleh were present at the task force office in Makeni at the time of the allegations.[2274] It is submitted that Gibril Massaquoi and General Bropleh were in Freetown at that time.[2275] In

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[2266] Transcript 30 June 2006, pg 31, line 1-13.
[2267] Transcript 30 June 2006, pg 31, line 13-15.
[2268] Transcript 30 June 2006, pg 32, line 15-19.
[2269] Transcript 30 June 2006, pg 32, line 20-28.
[2270] Transcript 30 June 2006, pg 33, line 14-18.
[2271] Transcript 30 June 2006, pg 33, line 16-28.
[2272] Transcript 30 June 2006, pg 82, line 4-8.
[2273] Transcript 30 June 2006, pg 46, line 9-11.
[2274] Transcript 30 June 2006, pg 32, line 24-28
[2275] Transcript 22 April 2008, p. 29 line 27-29

this and many other regards, it has been demonstrated that TFI 117 is not credible and that his evidence should be disregarded.

b) EXCLUSION OF DAG 111'S INCRIMINATORY EVIDENCE

1472. Defence witness DAG-111 in his testimony sought to incriminate the Second Accused in the 1 May 2000 Makump DDR camp incident.[2276]

1473. Should the court decide not to grant our application to exclude the question and answer, then the Defence of the Second Accused would submit that both the question and answer do not in any way support or clarify the Prosecution's theory of the case. Both the question and answer do not explain why the third accused notified by Kailondo about the disarmament. Nor why the third Accused told Kailondo that he will take charge of the situation and proceeded to see Brigadier Ngondi and then went to the DDR camp to demand the return of the men and the weapons. The Prosecutor did not pursue the issue further to establish why neither the third accused or Kailondo deemed it necessary to inform the Second Accused about the disarmament of these combatants once they were informed about it. The question and answer do not establish why the RUF subordinate officers in Makeni on getting the information about the disarmament sought out the third accused who in turn sought out Kailondo and not the 2nd Accused as such.. A plausible understanding of the question and answer is that neither the operation nor the perpetrators of the acts that followed were under the effective control of the Second Accused.

1474. The Kallon Defence reiterates this submission in respect of any other adverse testimony elicited either by a co-accused or the prosecution in similar manner.

c) ARTICLE 6(3) RESPONSIBILITY

1475. The Second Accused became Brigadier and the acting battle group commander in April 2000[2277] therefore at the time of the confrontations between the RUF and UNAMSIL he held that rank and position. However, it is the Defence case, clearly supported by the evidence, that the confrontational position taken by RUF elements surrounding the events of May 2000 was generated from the command structure in place in Makeni. This was represented by Colonel Kailondo, Komba Gbundema and AS Kallon, *inter alia*. Furthermore, the evidence establishes that, at the material time, this group of manipulable junior

[2276] Transcript 19 June 2008, p.29 lines 18-29

[2277] Transcript of 14 April 2008, p. 58 lines 19-21; and Transcript of 15 April 2008, p. 20 line 12

commanders reported directly to Foday Sankoh, who had engineered a reporting system which bypassed the Second Accused and other nominal members of the RUF leadership who were committed to disarmament. Notwithstanding indicators that UNAMSIL intended to disarm the RUF by force, the Second Accused remained committed to implementing the Lome Peace Accord, belying Foday Sankoh's dogmatic stance against disarmament. The Second Accused was geographically and structurally remote from the incidents alleged in support of Counts 15-18. Moreover, he lacked the capacity to intervene. Therefore, it is clear that notwithstanding his designated position and rank, he exercised no effective control over any of the perpetrators.

i) Foday Sankoh's Opposition to Disarmament and Directive to the Second Accused

1476. On 16 April 2000 Foday Sankoh sent a message to the Second Accused ordering him, in uncompromising and threatening terms. The message reads as follows:

> "You should not allow anyone to fool you on any disarmament programme. There should be no disarmament in that area for now until further instruction. Any mistake towards implementing above subject matter, you will be responsible. Act as mandated."

1477. His stance is well documented. Furthermore, it is evident that it was borne out if disapproval for the aggressive approach adopted by UNAMSIL to the disarmament of the RUF, and the intent expressed in this regard by its force commander, General Jetley. Exhibit 34 is a radio message sent from Sankoh to Issa Sesay, dated 3 April 2000, recording the abhorrent perception formed by the RUF leader to Jetley's stated intention to disarm the RUF immediately with force, broadcast on Radio France International.[2278]

1478. The Second Accused explained in his testimony the immediate threat that he apprehended form this directive. He illustrated the credibility of the threat with examples of how disobedience to Foday Sankoh had resulted in execution.[2279] Furthermore, the credibility of Foday Sankoh's threats was widely acknowledged in the RUF. TFI 362 gave evidence that failure to obey an order by Foday Sankoh would cause a member of the RUF to fear for their life and that she had never disobeyed such an order herself.[2280] DMK 161 testified that

[2278] Exhibit 34, at p. 8104.
[2279] Transcript 15 April 2008, p. 53 lines 2-20
[2280] Transcript 26 April 2005, pg 104, line 4-21.

"...since [he] was a personal security to Foday Sankoh....[he] knew that that within the RUF nobody would reject Foday Sankoh's orders.[2281]

1479. The evidence of the First Accused suggests that Foday Sankoh was irrational and unpredictable, stating his position on a matter and subsequently changing it without basis.[2282] This is corroborated by the evidence of DMK 161[redacted], as follows: "Since the time Pa Sankoh left Nigeria when he was arrested, he was not steadfast with his words. He would say something to one person, and when he talked to the other person, he will tell him some different thing."[2283]

ii) Makeni Ground Commanders Exercised Effective Control

1480. In May 2000, the prevalent command structure in the area of Makeni and Lunsar, where the majority of allegations arose was represented by Kailondo, the RUF ground commander in Makeni, based at Teko Barracks, and Battle Group Commander of the RUF,[2284] Colonel Ibrahim Dugba, the RUF task force commander, AS Kallon, the overall MP commander in Makeni,[2285] Komba Gbundema, brigade commander in Kambia,[2286] and Miloskie Kallon was the brigade commander in Lunsar.[2287] DMK 032, [redacted] He testified that was under the immediate command of Kailondo.[2288] DAG 111 gave an account of events in Makeni on the day that RUF combatants were disarmed at Makump. His evidence suggests that Kailondo was a senior commander in Makeni at the time and that his men were responsible for the abduction

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[2281] Transcript 22 April 2008, p. 29 line 12-15
[2282] Transcript 25 May 2007, p. 16 lines 16-18
[2283] Transcript of 22 April 2008, p. 30 lines 10-12
[2284] Kallon, Transcript 15 April 2008, pg 20, line 26-29, testifying that to his appointment to Battle Group Commander; TFI 165, Transcript 30 March 2006, pg 74, line 19 – pg 75, line 1, testifying that he had authority to grant permission for the movement of UNAMSIL and Transcript 29 March 2006, pg 7, line 16, testifying that he was a commander in Makeni at that time; Transcript 30 March 2006, pg 113, line 18-20, impliedly accepting counsel for the second accused's proposition that he was "ground commander at Makeni"; DIS 214, Transcript 17/01/08, pg 83, line 5-8.
[2285] TFI 041, Transcript. 17 July 2006, pg 38, line 5-8; DIS 214, Transcript 17 January 2008, pg 83, line 9-19, testifying that AS Kallon was present at that time.
[2286] Kallon, Transcript. 15/04/08, pg 55, line 25-27; DIS 214, T. 17 January 2008, pg 83, line 20-21, testifying to his activity in the area at the time.
[2287] TFI 041, Transcript 17/07/06, pg 27, line 17 – pg 28, line 3, testifying that he was brigade commander in Lunsar in 2000
[2288] Transcript of 5 May 2008, p. 17 lines 17-18

of Kenyan UNAMSIL personnel.[2289] The evidence of several witnesses establishes that the Second Accused was based in Magburaka at the time.[2290]

iii) Makeni Ground Commanders Reported Directly to Foday Sankoh

1481. DMK 161, [redacted] a senior member of RUF. He testified that Komba Gbundema had received a message directly from Foday Sankoh ordering him to arrest the UN convoy on 2 May 2000.[2291] The witness also testified that orders to abduct UNAMSIL personnel were issued by Gibril Massaquoi from Freetown.[2292]

1482. DMK 161 also testified that to a meeting convened by the First and Second Accused at Teko Barracks on the night of 2 May 2000, in which they demanded an explanation for the abductions.[2293] Attempting to rectify the situation, which they perceived as prejudicial to the peace process, the Second Accused ordered "Komba Gbundema to present everything and to put them in order, in order for them not to be misused, he said, because we have to release these people."[2294] The witness gave the clearest indication that orders from Foday Sankoh were bypassing the First and Second Accused at this time and going directly to Komba Gbundema and Kailondo, *inter alia*. He testified that "Issa was trying to ask why Pa Sankoh gave that type of order that he, who was taking care of everything there, did not receive that order."[2295] It is submitted that this illustrates the clear lack of control that the Second Accused had over events at the material time, as well as his efforts to prevent criminality.

iv) Second Accused Took Measure to Prevent and Punish

1483. General Opande testified two to examples of the Second Accused intervening to assist the disarmament process. On one occasion, the First Accused sent him to Tongo to restore the disarmament process which had been disrupted by Peleto and Augustine Amara.[2296]

[2289] Evidence described, *supra*.
[2290] DMK 032, Transcript of 5 May 2008, p. 17 line 26 – p. 18 line 2; DMK 146, Transcript of 8 May 2008, p. 103 lines 7-10; DMK 161, Transcript of 21 April 2008, p. 115 lines 14-17
[2291] Transcript 22 April 2008, p. 28 line 27 – p. 29 line 2
[2292] Transcript 22 April 2008, p. 29 line 27-29
[2293] Transcript 22 April 2008, p. 34 lines 1-3
[2294] Transcript 22 April 2008, p. 34 lines 16-21.
[2295] Transcript 22 April 2008, p. 34 lines 13-16
[2296] Transcript 11 March 2008, p. 37 line 22 – p. 38 line 1

1484. He testified that the Second Accused carried Mr Sesay's instructions "very well" in this regard and suggested that Mr Sesay turned to the Second Accused as the reliable man who enforced the smooth and undisrupted progress of disarmament:

> "...every now and then there was some trouble somewhere or difficulty somewhere and are reported to Issa Sesay. Issa will tell me I'll send Morris Kallon, who was then acting as the field commander, and he would go and sort it out and he did."[2297]

1485. In light of the foregoing it is submitted that the Second Accused did not exercise effective control over the combatants that were involved in the confrontations between the RUF and UNAMSIL and that, accordingly, no conviction can be sustained under Article 6(3).

d) JCE

1486. Notwithstanding the wholesale objections to the Prosecution's notion of JCE, it is clear that, by May 2000, the theory pleaded in the Indictment was over. According to the Indictment, the AFRC and the RUF shared a common purpose which was to "gain and exercise political control over the territory of Sierra Leone", amounting to or involving the commission of crimes under the Statute. The end of this of purpose was crystallised in the Lome Peace Accords, when, pursuant to negotiations between the parties, a formal and immediate ceasefire was declared and the RUF were granted entrance into Sierra Leonean national government.[2298] Thereby the RUF had achieved its political aim. The Prosecution led no evidence that criminal activity continued thereafter. Notwithstanding the reservations harboured by Foday Sankoh and other elements of the RUF as to methods employed by UNAMSIL, disarmament and the implementation of the Lome Peace Accords were advanced by May 2000. The Defence relies on the evidence of Prosecution witnesses TFI 165, TFI 041 and TFI 165 whose evidence strongly suggests that Sierra Leone had undergone a transition from war to peace.[2299]

1487. Furthermore, there is no evidence that any alleged alliance between the RUF and the AFRC survived the Lome Peace Accord. It is the Prosecution case that factions of combatants, such as the West Side Boys, arose as a result of "their perceived marginalization at the Lome peace talks."[2300] A cursory glance at the terms of Lome reveals that the Pre-Trial Brief can only be referring to AFRC fighters. General Opande confirmed that there was no relationship between the RUF and the Westside Boys, stating that "[t]here was no love lost

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[2297] Transcript 11 March 2008, p. 38 line 4-9
[2298] The Lome Peace Accord, at Art. I and III-V.
[2299] The evidence is described in the section "No Armed Conflict Existed at the Time of the Alleged Violation", *supra*.
[2300] The Pre-Trial Brief, at Para 52.

between the two".[2301] General Garba spoke of the RUF and SLA in very distinct terms, stating that, whereas the RUF were cooperative and had a credible chain of command, the SLA were leaderless.[2302] Although the evidence led in support of Counts 15 to 18 does not allege the involvement of AFRC or SLA personnel, it is clear that the Prosecution theory of JCE is over.

1488. In the alternative, the Prosecution has not established that the Second Accused in specifically intended the criminal activity of May 2000 nor that it was a natural and foreseeable consequence, such that would satisfy the *mens rea* of the 'basic' and 'extended' forms of JCE. Nor can it be inferred from the facts because at the time of the alleged formation of the JCE, on 25 May 1997, UNAMSIL hadn't been deployed in Sierra Leone. UNAMSIL's founding document, Security Council Resolution S/RES/1270 (1999), was only passed more than two years later.

1489. In light of the foregoing, it is submitted that no conviction on a theory of JCE can be sustained in respect of Counts 15-18.

e) MENS REA

1490. Former UNAMSIL force commander General Opande was questioned as to whether he heard from MILOB's operative in the disarmament process in January 2000, shortly before the incidents alleged in support of Counts 15-18 of the activities of the Second Accused. He responded:

> "I did not only hear, his name crop up as one of the key players in Makeni and Magburaka through the Millops but also through Colonel Gondi who was then the most senior UNAMSIL commander during that time in Makeni and Magburaka."

1491. Furthermore, General Opande gave evidence that he met him "several times" over the three year period that he was in Sierra Leone and that he regarded the Second Accused as someone who aligned himself with Issa Sesay" as someone who was committed to peace.[2303] By way of concrete example of the determination of the Second Accused to pursue peace and reconciliation, General Opande recounted a situation to which he was an eye witness where CDF entered Kono from Guinea wearing "rag-tags". According to the witness, the Second Accused

> "went around in fact very late in the evening he was running around going to find dresses or trousers and shirts, buying them off the streets to give to the CDF combatants".[2304]

[2301] Transcript of 10 March 2008, p. 137 line 23 – p. 138 line 2
[2302] Transcript of 19 May 2008, p. 46 line 19-29
[2303] Transcript of 11 March 2008, p. 34 line 18 – p. 35 line 11
[2304] Transcript of 11 March 2008, p. 38 line 12-21

1492. Referring to the "tripartite meetings" involving the RUF and UNAMSIL, Colonel Oladipo, the former ECOMOG commander testified that the First Accused and Second Accused showed a "willingness that we are ready for peace".[2305] He distinguished them from the "hardliners" who aligned themselves with Foday Sankoh and committed crime, amongst whom were Mike Lamin and Kailondo.[2306] He testified to an occasion in Makeni square where, with the Second Accused, *inter alia*, he discussed peace and UNAMSIL's continuing role, over drinks.[2307]

1493. In addition, the evidence of DMK 161 strongly suggests that the First and Second Accused were committed to peace and that their stance on this was divergent from that of Kailondo and Komba Gbunedema. Testifying about events on 2 May 2000, the witness stated that, after having met Kailondo to discuss the orders issued by Foday Sankoh to arrest a UN convoy "...I went to my house. This -- I did this in order for me to get an opportunity so that Morris Kallon and Issa would meet us in Makeni, so that wouldn't have been violent to those people because some of us wanted peace."[2308]

PART V: CONCLUSION AND PRAYER

1494. With reference to the decision of the Trial Chamber as to the law applicable to Counts 1to 18 of the Indictment and in light of the foregoing, except where argued to the contrary in this Brief, the Defence invites the Chamber to ACQUIT on COUNTS 1 to 18, for the following reasons, including, but not limited to: (i) the theory of JCE laid down in the Indictment has not been established; and (ii) the Indictment is defectively pleaded.

1495. In addition, or in the alternative, to ACQUIT on COUNTS 15 TO 18 for the following reasons, including, but limited to: (i) the Prosecution failed to establish that the Second Accused directed an intentional attack towards, unlawfully killed, or took hostage any UNAMSIL personnel relying, in particular on the cogent alibi defence and the failure of material witnesses to identify the Second Accused; (ii) no "armed conflict" existed at the time of the alleged violations; (iii) the targeted personnel were not considered civilians for the purposes of international humanitarian law; (iv) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and

[2305] Transcript of 12 May 2008, p. 29 lines 1-7
[2306] Transcript of 12 May 2008, p. 29 lines 9-25
[2307] Transcript of 12 May 2008, p. 33 line 16 – p. 34 line 8
[2308] Transcript of 22 April 2008, p. 32 lines 17-20

foreseeable consequence of the JCE alleged in the Indictment; and (iv) the Second Accused did not exercise effective control over perpetrators of the alleged offences."

1496. In addition, or in the alternative, to ACQUIT on COUNT 14 for the following reasons, including, but limited to: (i) no credible evidence was led that the Second Accused participated in looting; (ii) allegations of burning do not satisfy the offence of pillage; (iii) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iv) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1497. In addition, or in the alternative, to ACQUIT on COUNT 13 for the following reasons, including, but limited to: (i) the Prosecution failed to establish the Second Accused's involvement in forced mining, referring in particular to his alibi in respect of Kenema District (ii) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iii) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1498. In addition, or in the alternative, to ACQUIT on COUNT 12 for the following reasons, including, but limited to: (i) material Prosecution witnesses incorrectly identified the persons with the Second Accused as participants in hostilities; (ii) the Prosecution has failed to establish that the Second Accused enlisted persons below the age of 15; (iii) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iv) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1499. In addition, or in the alternative, to ACQUIT on COUNTS 10 TO 11 for the following reasons, including, but limited to: (i) the Second Accused was not involved in the alleged mutilations; (ii) material witnesses for the Prosecution testified to events in locations not pleaded, referring in particular to Nimikoro and Bumpeh; (iii) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iv) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1500. In addition, or in the alternative, to ACQUIT on COUNTS 6 TO 9 for the following reasons, including, but limited to: (i) the Second Accused was not involved in rape or sexual violence of any sort; (ii) the Second Accused did not intend the commission of the specific

offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iii) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1501. In addition, or in the alternative, to ACQUIT on COUNTS 3 TO 5 for the following reasons, including, but limited to: (i) the Second Accused was not involved in the unlawful killing of any civilians and he was not present at the location of many of the allegations, relying particularly on the alibi for Bo and Kenema; (ii) the Second Accused did not intend the commission of the specific offences alleged, nor could they have been a natural and foreseeable consequence of the JCE alleged in the Indictment; and (iii) the Second Accused did not exercise effective control over perpetrators of the alleged offences.

1502. In addition, or in the alternative, to ACQUIT on COUNTS 1 TO 2 for the following reasons, including, but limited to: (i) Count 1, "acts of terrorism", is not a cognisable crime; (ii) the offences are defectively pleaded for overbreadth; and (iii).the factual allegations pleaded in support of Counts 3 to 14 have not been established.

DONE IN FREETOWN this 10 day of September 2008

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Chief Charles Taku

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Kennedy Ogetto

ANNEX A: ADDITIONAL CHARGES IN THE AMENDED CONSOLIDATED INDICTMENT IN RESPECT OF WHICH ACCUSED WAS DENIED RIGHT TO ENTER A PLEA

Initial Indictment		**Amended Consolidated Indictment** (new allegations are underlined)	
Para	Allegation	Para	Allegation
9	"After the 25 May 1997 coup d'etat, a governing body, the Supreme Council, was created within the Junta. The governing body included leaders of both the AFRC and RUF."	12	"After the 25 May 1997 coup d'etat, a governing body, the Supreme Council, was created within the Junta. <u>The Supreme Council was the sole executive and legislative authority within Sierra Leone during the Junta.</u> The governing body included leaders of both the AFRC and RUF."
12, 27, 29, 32	Charges Mr Kallon alone: Eg, (para 12) "The **ACCUSED** and all members of the organised armed factions engaged in fighting within Sierra Leone were required to abide by International Humanitarian Law…"	15, 39, 41, 44	Charges Mr Sesay, Mr Kallon and Mr Gbao jointly: Eg (para 15), "**<u>ISSA HASSAN SESAY</u>, MORRIS KALLON, <u>AUGUSTINE GBAO</u>** and all members of the organised armed factions engaged in fighting within Sierra Leone were required to abide by International Humanitarian Law…"
19	Eg, "During the Junta Regime, the **ACCUSED** was a member of the Junta governing body."	22 26	Charges both Mr Sesay and Mr Kallon in respect of the same allegations, eg "<u>During the Junta Regime, **ISSA HASSAN SESAY** was a member of the Junta governing body</u>." "During the Junta Regime, **MORRIS KALLON** was a member of the Junta governing body."
22	"In the positions referred to in paragraphs 17 through 21, **MORRIS KALLON**, individually or in concert with FODAY	34	"In their respective positions, **<u>ISSA HASSAN SESAY</u>, MORRIS KALLON <u>and AUGUSTINE GBAO</u>**, individually or in concert with JOHNNY PAUL KOROMA

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	SAYBANA SANKOH, ISSA HASSAN SESAY, SAM BOCKARIE, JOHNNY PAUL KOROMA, ALEX TAMBA BRIMA aka TAMBA ALEX BRIMA, aka GULLIT and other superiors in the RUF, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces."		aka JPK, FODAY SAYBANA SANKOH , SAM BOCKARIE aka MOSQUITO aka MASQUITA, ALEX TAMBA BRIMA aka TAMBA ALEX BRIMA, aka GULLIT, BRIMA BAZZY KAMARA aka ALHAJI IBRAHIM KAMARA, SANTIGIE BORBOR KANU aka 55 aka FIVE-FIVE aka SANTIGIE KHANU aka S.B.KHANU aka S.B.KANU aka SANTIGIE BOBSON KANU aka BORBOR SANTIGIE KANU and/or other superiors in the RUF, Junta and AFRC/RUF forces, exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces."
24	"The RUF, including the **ACCUSED**, and the AFRC shared 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…"	36	"The RUF, including **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO**, and the AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, shared 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…"
29	"…members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF), subordinate to and/or acting in concert with MORRIS KALLON, conducted armed attacks throughout the territory of the Republic of Sierra Leone, including, but not limited, to Bo, Kono, Kenema, Bombali and Kailahun Districts and Freetown."	41	"…members of the RUF, AFRC, Junta and/or AFRC/RUF forces (AFRC/RUF), subordinate to and/or acting in concert with ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, conducted armed attacks throughout the territory of the Republic of Sierra Leone, including Bo, Kono, Kenema, Koinadugu, Bombali and Kailahun and Port Loko Districts and the city of Freetown and the Western Area."
33-38	Allegations of "unlawful killings" in Bo, Kenema, Kono,Bombali Districts and Freetown *only*.	43-53	Additional allegations of "unlawful killings" in Kailahun, Koinadugu, the Western area and Port Loko.
37	"Unlawful Killings" in Bombali: "Between about 1 May 1998 and 31 July 1998…"	51	"Unlawful Killings" in Bombali: "Between about 1 May 1998 and 30 November 1998 …"

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45-46	Allegations of "physical violence" in Kono and Freetown *only*.	62-67	Additional allegations of "physical violence" in Kenema, Koinadugu, Bombali, the Freetown and the Western area ("various areas of Freetown", amended from "the northern and eastern areas of the city", Wellington and Calaba) and Port Loko.
49-53	Allegations of "abductions and forced labour" in Kenema, Kono, Bombali, Kailahun Districts and Freetown *only*.	70-76	Additional allegations of "abductions and forced labour" in Koinadugu, Freetown and the Western Area (Kissy) and Port Loko
50	"Abductions and forced labour" in Kono District: "Between 14 February 1998 to 30 June 1998…"	71	"Abductions and forced labour" in Kono District: "Between 14 February 1998 to January 2000.
51	"Abductions and forced labour" in Bombali District: "Between 1 May 1998 to 31 July 1998"	73	"Abductions and forced labour" in Bombali District: "Between 1 May 1998 to 31 November 1998".
53	"Abductions and forced labour" in Freetown: "Between 6 January 1999 to 31 January 1999"	75	"Abductions and forced labour" in Freetown and the Western Area: "Between 6 January 1999 to 28 February 1999"
55 56 57 58	"Looting and burning" in Bo, Kono, Bombali and Freetown *only*.	78-82	Additional allegations of "looting and burning" in Koinadugu, Bombali (Mateboi) and Freetown and the Western area (Wellington and Calaba Town replacing "eastern area of Freetown").
57	"Looting and burning" in Bombali District: "Between 1 March 1998 to 30 June 1998".	81	"Looting and burning" in Bombali District: "Between 1 March 1998 to 31 November 1998".
58	"Looting and burning" in Freetown: "Between 6 January 1999 to 31 January 1999".	82	"Looting and burning" in Freetown: "Between 6 January 1999 to 28 February 1999."

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ANNEX B
INDEX OF AUTHORITIES AND DEFINED TERMS

(A) INDEX OF AUTHORITIES

(1) International Covenants, Security Council Resolutions, Statutes, Rules and Practice Directions

Rome Statute of the International Criminal Court, ("Statute of the ICC").

Statute of the International Criminal Tribunal for the Former of Yugoslavia.

Statute of the International Criminal Tribunal for Rwanda.

Statute of the Special Court for Sierra Leone.

Rules and Procedure of the Special Court for Sierra Leone.

International Covenant on Civil and Political Rights.

S/RES/1315 (2000).

(2) Judgments

(a) Special Court for Sierra Leone

Prosecutor v. Brima et al, SCSL-04-16-T, Judgment, 20 June 07, ("AFRC Judgment")

Prosecutor v Brima et al, SCSL-04-16-A, Appeals Chamber Judgment, 22 February 2008 ("AFRC Appeals Judgment")

Prosecutor-v-Moinina Fofana & Allieu Kondewa, SCSL-04-16-T, Trial Chamber Judgment, 2 August 2007, paras. 142-144 & paras. 690-691. [Moinina Fofana & Allieu Kondewa Judgment]

(b) International Criminal Tribunal for Rwanda

Prosecutor v Nahimana, ICTR-99-52-T, Judgment, 3 Dec. 03 ("*Media* Trial Judgement") http://69.94.11.53/ENGLISH/cases//judgement/index.htm

Prosecutor v. Ntagerura et al., ICTR-99-46-T, Judgment and Sentence, 25 Feb. 04, ("*Cyangugu* Trial Judgment") http://69.94.11.53/ENGLISH/cases/Ntagerura/judgement/index.htm

Prosecutor v. Gacumbitsi, ICTR-2001-64-T, Judgment, 17 June 04, ("*Gacumbitsi* Trial Judgment") http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/index.htm

Niyitegeka v. Prosecutor, ICTR-96-14-A, Judgment, 9 July 04, ("*Niyitegeka* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Niyitegeka/judgement/index.htm

Prosecutor v. Ntakirutimana, ICTR-96-10-A & ICTR-96-17-A, Judgment, 13 Dec. 04, ("*Ntakirutimana* Appeal Judgment")
http://69.94.11.53/ENGLISH/cases/Ntakirutimana/judgement/Arret/index.htm

Kamuhanda v. Prosecutor, ICTR-99-54-A, Judgment, 19 Sept. 05, ("*Kamuhanda* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Kamuhanda/judgement/220104.htm

Prosecutor v. Ntagerura et al., ICTR-99-46-A, Judgment, 7 July 06, ("*Cyangugu* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Ntagerura/judgement/index.htm

Gacumbitsi v. Prosecutor, ICTR-2001-64-A, Judgment, 7 July 06, ("*Gacumbitsi* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Gacumbitsi/judgement/index.htm

Muhimana v. Prosecutor, ICTR-95-1B-A, Judgment, 21 May 07, ("*Muhimana* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Muhimana/judgement/index.htm

Prosecutor v. Simba, ICTR-01-76-A, Judgment, 27 Nov. 07, ("*Simba* Appeal Judgment")
http://69.94.11.53/ENGLISH/cases/simba/judgement/index.htm

Prosecutor v. Nahimana et al., ICTR-99-52-A, Judgment, 28 Nov. 07, ("*Media* Appeal Judgment") http://69.94.11.53/ENGLISH/cases/Nahimana/judgement/index.htm

Prosecutor v. Kayishema, Judgment, 21 May 99, ("*Kayishema* Trial Judgment")
http://69.94.11.53/ENGLISH/cases/Ruzindana/judgement/index.htm

Prosecutor v. Laurent Semanza, Case No. ICTR-97-20-A, Judgement 20 May 2005 ("*Semanza* Appeal Jugdment")
http://69.94.11.53/ENGLISH/cases/Semanza/judgement/index.htm

Prosecutor v. Alfred Musema, Case No. ICTR-96-13-T, Judgement, 27 January 2000 ("*Musema* Trial Judgment")
http://69.94.11.53/ENGLISH/cases/Musems/judgement/index.htm

(c) International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Delalic et al., IT-96-21-T, Judgment, 16 Nov. 98, ("*Celebici* Trial Judgment") *http://www.un.org/icty/celebici/trialc2/judgement/index.htm*

Prosecutor v. Kupreskic et al., IT-95-16-T, Judgment, 14 Jan. 00, ("*Kupreskic* Trial Judgment") *http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm*

Prosecutor v. Delalic et al., IT-96-21-A, Judgment, 21 Feb. 01, ("*Celebici* Appeal Judgment") http://www.un.org/icty/celebici/appeal/judgement2/index.htm

Prosecutor v. Kupreskic et al., IT-95-16-A, Judgment, 23 Oct. 01, ("*Kupreskic* Appeal Judgment") *http://www.un.org/icty/kupreskic/appeal/judgement/index.htm*

Prosecutor v. Vasiljevic, IT-98-32-T, Judgment, 29 Nov. 02, ("*Vasiljevic* Trial Judgment") *http://www.un.org/icty/vasiljevic/trialc/judgement/index.htm*

Prosecutor v. Krnojelac, IT-97-25-A, Judgment, 17 Sept. 03, ("*Krnojelac* Appeal Judgment") *http://www.un.org/icty/krnojelac/appeal/judgement/index.htm*

Prosecutor v. Galic, IT-98-29-T, Judgement, 5 Dec. 03, ("*Galic* Trial Judgment") *http://www.un.org/icty/galic/trialc/judgement/index.htm*

Prosecutor v. Blaskic, IT-95-14-A, Judgment, 29 July 04, ("*Blaskic* Appeal Judgment") *http://www.un.org/icty/blaskic/appeal/judgement/index.htm*

Prosecutor v. Kordic, IT-95-14/2-A, Judgment, 17 Dec. 04, ("*Kordic* Appeal Judgment") *http://www.un.org/icty/kordic/appeal/judgement/index.htm*

Prosecutor v. Kvocka et al., IT-98-30/1-A, Judgment, 28 Feb. 05, ("*Kvocka* Appeal Judgment") *http://www.un.org/icty/kkvovka/appeal/judgement/index.htm*

Prosecutor v. Naletilic, IT-98-34-A, Judgment, 3 May 06, ("*Naletilic* Appeal Judgment") *http://www.un.org/icty/naletilic/appeal/judgement/index.htm*

Prosecutor v. Simic, IT-95-9-A, Judgment, 28 Nov. 06, ("*Simic* Appeal Judgment"). *http://www.un.org/icty/simic/appeal/judgement/index.htm*

Prosecutor v. Galic, IT-98-29-A, Judgment, 30 Nov. 06, ("*Galic* Appeal Judgment") *http://www.un.org/icty/galic/appeal/judgement/index.htm*

Prosecutor v. Milorad Krnojelac, Case No. IT-97-25-T, Judgement, 15 March 2002 ("*Krnojelac* Trial Judgement") *http://www.un.org/icty/krnojelac/trialc2/judgement/index.htm*

Prosecutor v. Brdjanin, ICTY, IT-99-36-A, Judgment, 3 April 07, (Appeal Judgement) *http://www.un.org/icty/brdjanin/appeal/judgement/index.htm*

Prosecutor v. Naser Orić, Case No. IT-03-68-T, Judgement, 30 June 2006 ("*Orić* Trial Judgment") *http://www.un.org/icty/oric/trialc/judgement/ori-jud-060630e.pdf*

Prosecutor v. Vidoje Blagojević & Dragan Jokić, Case No. IT-02-60-T, Judgment, 17 January 2005 ("*Blagojević* Trial Judgment") *http://www.un.org/icty/Bbagojevic/trialc/judgement/index.htm*

Prosecutor v. Mitar Vasiljević, Case No. IT-98-32-T, Judgment, 29 November 2002 ("*Vasiljević* Trial Judgement") *http://www.un.org/icty/krnojelac/trialc2/judgement/index.htm*

Prosecutor v. Radoslav Brđanin, Case No. IT-99-36-T, Judgement, 1 September 2004 ("*Brđanin* Trial Judgment") http://www.un.org/icty/brdanin/trialc/judgement/index.htm

Prosecutor v. Fatmir Limaj, Haradin Bala & Isak Musliu, Case No. IT-03-66-T, Judgment, 30 November 2005 ("*Limaj* Trial Judgment") http://www.un.org/icty/limaj/trialc/judgement/index.htm

(3) Interlocutory Decisions

(a) Special Court for Sierra Leone

Prosecutor v. Fofana et al., SCSL-2004-14-AR73, Decision on Amendment of Consolidated Indictment, 16 May 05.

Prosecutor v. Norman et al., SCSL-04-14-PT, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 05.

Prosecutor v. Sesay et al., SCSL-04-15-T, Partially Dissenting Opinion of Hon. Justice Benjamin Mutanga Itoe on the Chamber Majority Decision of the 9th of December, 2004 on the Motion on Issues of Urgent Concern to the Accused Morris Kallon, 18 March 05.

Prosecutor v. Brima et al., SCSL-03-06-PT-46, Decision and Order on Defence Preliminary Motion On Defects In the Form Of the Indictment, 1 April 04 ("*Brima* Decision on Defence Preliminary Motion").

Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu, SCSL-2003-07-PT, Decision and Order on Prosecution Motions for Joinder 27 Jan. 04.

Prosecutor v. Kondewa., SCSL-03-12-PT-50, Decision And Order On Defence Preliminary Motion For Defects In the Form Of the Indictment, 17 Nov. 03, ("*Kondewa* Decision on Defence Preliminary Motion").

Prosecutor v. Sesay, SCSL-03-05-PT-80, Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 Oct. 03, ("*Sesay* Decision on Defence Preliminary Motion").

Prosecutor v. Sesay et al., SCSL-04-15-T-1105, Notice Re Count 7 of the Indictment, 29 April 08,

Prosecutor v. Sesay et al., SCSL-04-15-T-944, Decision on Gbao Request for Leave to Raise Objections to the Form of the Indictment, 17 Jan. 08

Prosecutor v. Norman et al., SCSL-04-14-T-617, Decision on Motions of Issuance of Subpoena to President Kabbah, 13 June 06

Prosecutor v, Sesay et al., SCSL-04-15-PT-174, Decision on Prosecution Motion for Judicial Notice and Admission of Evidence, 24 June 04

Prosecutor v. Sesay, Brima, Kallon, Gbao, Kamara & Kanu, SCSL-2003-07-PT, Decision and Order on Prosecution Motions for Joinder, 27 Jan. 04

Prosecutor v, Sesay et al. SCSL-04-14-T-731, Decision on The Permissibility of Eliciting Evidence Involving the Second Accused through Cross-Examination of Witnesses Called by the Third Accused; 10 Nov 2006

(b) International Criminal Tribunal for Rwanda

Prosecutor v. Bagosora et al., ICTR-98-41-AR73, Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence, 18 Sept. 06, ("*Ntabakuze* Decision"). http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/180906.htm

Prosecutor v Bagosora et al., ICTR-98-41-T, Decision on Nsengiyumva Motion for Exclusion of Evidence Outside the Scope of the Indictment, 15 Sept. 06. http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/150906.htm

Prosecutor v. Nahimana, et al., ICTR-99-52-A, Decision On The Prosecutor's Motion To Pursue The Oral Request For The Appeals Chamber To Disregard Certain Arguments Made By Counsel For Appellant Barayagwiza At The Appeals Hearing On 17 January 2007, 5 March 07. http://69.94.11.53/ENGLISH/cases/Nahimana/decisions/050307.htm

Prosecutor v. Rwamakuba, ICTR-98-44C-T, Decision on Appropriate Remedy, 31 Jan. 07. http://69.94.11.53/ENGLISH/cases/Rwamakuba/decisions/310107.htm

Prosecutor v. Bagosora et al., ICTR-98-41-T, Decision on Ntabakuze Motion for Exclusion of Evidence, 29 June 06. http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/290606.htm

Prosecutor v Karemera et al, ICTR-98-44-PT, Decision on Defects in the Form of the Indictment, 5 Aug. 05. http://69.94.11.53/ENGLISH/cases/Karemera/decisions/050805.htm

Prosecutor v. Zigiranyirazo, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04. http://69.94.11.53/ENGLISH/cases/Zigiranyirazo/decisions/150704.htm

Prosecutor v Simba, ICTR-2001-76-I, Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment, 6 May 04. http://69.94.11.53/ENGLISH/cases/Simba/decisions/060504.htm

Prosecutor v Gatete, No. ICTR-00-61-I, Decision on Defence Preliminary Motion, 29 March 04. http://69.94.11.53/ENGLISH/cases/Gatete/decisions/290304.htm

Prosecutor v Karemera et al, No. ICTR-98-44-T, Decision on Defence Oral Motions for Exclusion of Witness XBM's Testimony, for Sanctions Against the Prosecution, and for Exclusion of Evidence Outside the Scope of the Indictment (20 October 2006) http://69.94.11.53/ENGLISH/cases/Karemera/decisions/201006.htm

Prosecutor v Simba, ICTR-2001-76-I, Decision on Preliminary Defence Motion Regarding Defects in the form of the Indictment, 6 May 2004 http://69.94.11.53/ENGLISH/cases/Simba/decisions/060504htm

Prosecutor v Bagosora et al, ICTR-98-41-T Decision on Nsengiyumva Motion to admit documents as exhibits (26 February 2007) See also Bagogora Defence Request for admission of documents (21 March 2007 http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/210307.htm

Prosecutor v Bizimungu et al, No. ICTR-99-50-T, Decision on Bicamumpaka's Request for Certification to Appeal a Decision on 6 October 2004 on Bicamumpaka's Motion Opposing the Admissibility of Testimony of Witnesses GFA, GKB and GAP (17 November 2004) http://69.94.11.53/ENGLISH/cases/Bizimungu/decisions/171104.htm

Prosecutor v. Tharcisse Muvunyi, Case No. ICTR-00-55A-AR73, Decision on Prosecution Interlocutory Appeal Against Trial Chamber II Decision of 23 February 2005 http://69.94.11.53/ENGLISH/cases/Muvunyi/decisions/230205.htm

(c) International Criminal Tribunal for the Former Yugoslavia

Proescution v Aleksovski, IT- 95-14/1-AR73, Decision on Prosecutor's Appeal on Admission of Evidence, 16 Feb 1999 *http://www.un.org/icty/aleksovski/appeal/decision-e/90216EV36313.htm*

Prosecutor v. Delalic, Decision on Motion by the Accused Delic based on Defects in the Form of the Indictment, 15 Nov. 96. *http://www.un.org/icty/celebici/trialc2/decision-e/61115FI2.htm*

Prosecutor v. Stanisic, IT-04-79-PT, Decision on Defence Preliminary Motion on the Form of the Indictment, 19 July 05. *http://www.un.org/icty/simatovic/pretrialbrief/prb040719.pdf*

Prosecutor v. Hadzihasanovic et al., IT-01-47-PT, Decision on Form of Indictment, 7 Dec. 01. *http://www.un.org/icty/hadzihas/pre-trial/031010.pdf*

Prosecutor v. Kronjelac, Decision on Preliminary Motion on Form of Amended Indictment, 11 Feb. 00. *http://www.un.org/icty/krnojelac/trialc2/decision-e/00211AI212639.htm*

Prosecutor v. Blaskic, Decision on the Defence Motion to Dismiss the Indictment based Upon Defects in the Form therefore, 4 April 97.
http://www.un.org/icty/blaskic/trialc1/decisions-e/70404DC113291.htm

(4) Motions, Responses and Replies

(a) Special Court for Sierra Leone

Prosecutor v. Sesay et al., SCSL 04-15-T, Prosecution Response to Objections to the Form of the Indictment, 31 Aug. 07.

Prosecutor v. Sesay et al., SCSL 04-15-T, Prosecution Response to Gbao-Request for Leave to Raise Objections to the Form of the Indictment, 31 Aug. 07.

Prosecutor v. Sesay et al.,SCSL-04-15-T Prosecution Notice Concerning Joint Criminal Enterprise and Raising Defects in the Indictment, 3 Aug. 07.

Prosecutor v. Sesay et al., SCSL-04-15-T-727, Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07, Annex H, ("Agreed Statement of Facts").

Prosecutor v. Sesay et al., Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment, 13 Oct. 03.

Prosecutor v. Sesay et al., SCSL-04-15-T-488, Prosecution Application for Leave to Amend the Indictment, 20 Feb. 06.

Prosecutor v. Sesay et al.,SCSL-04-15-T-537, Decision on Prosecution Request for Leave to Call Additional Witness TFI-371 and for Order for Protective Measures, 6 April 06

Prosecutor v. Sesay et al., SCSL-04-15-T-617, Decision on Prosecution Application for Leave to Amend the Indictment, 31 July 06

Prosecutor v. Sesay et al., SCSL-04-15-T-970, Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 7 Feb. 08

Prosecutor v. Sesay et al., SCSL-04-15-T-727, Kallon Defence Filing in Compliance with Scheduling Order Concerning the Preparation and Commencement of the Defence Case, 5 March 07

Prosecutor v. Sesay et al., SCSL-04-15-T-970, Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing and Imposing Sanctions, 7 Feb. 08

Prosecutor v. Sesay et al., SCSL-04-15-T-990, Prosecution Response to Kallon Motion on Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting

Filing and Imposing Sanctions, 15 Feb. 08

Prosecutor v. Sesay et al.,SCSL-04-15-T-1057, Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 14 March 08.

Prosecutor v. Sesay et al.,SCSL-04-15-T-1066, Prosecution Response With Confidential Annex A to Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A, 31 March 08

Prosecutor v. Sesay et al., SCSL-15-04-T-1186, Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment, 26 June 08

(b) International Criminal Tribunal for Rwanda

(c) International Criminal Tribunal for the Former Yugoslavia

(5) Pre-Trial Documents

(a) Special Court for Sierra Leone

Prosecutor v. Sesay et al., SCSL-04-15-T-619, Corrected Amended Consolidated Indictment.

Prosecutor v. Brima et al, SCSL-04-16-PT, Decision and Order on Defence Preliminary Motion on Defects in the Form of the Indictment, 1 April 04

Prosecutor v. Brima et al., SCSL-03-06-I, Further Amended Consolidated Indictment, 18 Feb. 05.

Prosecutor v. Sesay et al., SCSL-04-15-PT-037, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73 *bis*) of 13 February 2004, 27 Feb. 04.

Prosecutor v. Sesay et al., SCSL-04-15-PT-82, Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March as Amended by Order to Extend the Time for Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004, 21 April 04.

(b) International Criminal Tribunal for Rwanda

Prosecutor v. Zigiranyirazo, ICTR-2001-73-I, Decision on the Defence Preliminary Motion Objecting to the Form of the Amended Indictment, 15 July 04
http://69.94.11.53/ENGLISH/cases/Zigiranyirazo/decisions/150704.htm

Prosecutor v. Nchamihigo, ICTR-2001-63-R50, Decision on Defence Motion on Defects

in the Form of the Indictment, 27 Sept. 06
http://69.94.11.53/ENGLISH/cases/Nchamihigo/decisions/270906.htm

(c) International Criminal Tribunal for the Former Yugoslavia

Prosecutor v. Tadic, IT-94-1-T, Decision on the Defence Motion on the Form of the Indictment, 14 Nov. 95
http://www.un.org/icty/tadic/trialc2/decision-e/951114.pdf

(6) Articles and Academic Texts

Trahan J., "Terrorism Conventions: Existing Gaps and Different Approaches," 8 New Eng. J of Int'l & Comp. L. 215, 2002.

The Manual of the Law of Armed Conflicts, UK Ministry of Defence, (Oxford University Press, 2004).

Bassett Moore J., "A Digest on International Law, Vol. 7",

Archibald International Criminal Courts, Practice and Procedure, 2002

Jenia Iontcheva Turner, *Defense Perspectives on Law and Politics in International Criminal Tribunals*, 48 Va. J. Int'l L. 529

Marston Danner A & Martinez J, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75, 108-109 (2005)

(7) Domestic Judgments

Ex parte Bain, 121 US 1, (U.S. 1887)

Crain v. U.S., 162 U.S. 625 (U.S. 1896)

Shelp v. U.S., 81 F. 694, (9th Cir. 1897)

Rulovitch v. U.S., 286 F. 315, 320, (3d Cir. 1923), cert denied, 43 Sup.Ct. 434

Dennis v. State, 230 Ind. 210, (Ind. 1952); *see also State ex rel. Kaufman v. Gould* , 229 Ind. 288 (Ind. 1951).

Stirone v. US, 361 US 212, 217 (U.S. 1960)

Rv Burke [1966] ISCR 474

US v. Grote, 632 F.2d 387, 389 (5th Cir.1980), *cert. denied*, 454 U.S. 819, 102 S.Ct. 98, 70 L.Ed.2d 88 (1981).

US v. Chandler, 858 F.2d 254, 257 (5th Cir. 1988)

US v. Robles-Vertiz, 155 F.3d 725, 728 (5th Cir. 1988)

US v. Arlen, 947 F.2d 139, 144 (5th Cir. 1991)

Dominican VR [1992] 186 ALR 203

US v. Fisher, 3 F.3d 456, 463 (1st Cir. 1993)

Arumugam S/O Muthu Samy v PP [1998] 3 MLJ 73

Jafaar bin Ali v PP [1998] 4 MLJ 406

US v. Diaz, 190 F.3d 1247, 1252 (11th Cir. 1999)

(DPP) v Manamara, 22 March 1999 (CCA) 111/95

State v. Johnson, 198 Ariz. 245, (Ariz. App. Div. 2, 2000)

US v. Daniels, 252 F.3d 411, 413 (5th Cir. 2001)

US v. Dixon, 273 F.3d 636, 639 (5th Cir. 2001)

B) LIST OF DEFINED TERMS

Special Court	Special Court for Sierra Leone
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
UN	United Nations
IMT	International Military Tribunal
Statute	Statute of the Special Court for Sierra Leone
Rules	Rules of Procedure and Evidence of the Special Court for Sierra Leone
Resolution 1315	SC/RES1315 (2000)
CDF Case	*P v. Norman et al.*, SCSL-04-14
RUF Case	*P v. Sesay et al.*, SCSL-04-15
AFRC Case	*P v. Brima et al.*, SCSL-04-16
RUF	Revolutionary United Front
CDF	Civil Defence Forces
AFRC	Armed Forces Revolutionary Council
USMT	United States Military Tribunal

Prorotol II
CA3
AP I
Abella case
CDF Trial Judgment
Prosecutor v Tadic, IT-94-1, Decision on Defence Motion on Hearsay, August 5 1996, para 18
Musema trial judgment
Prosecution *v Akeyesu*,ICTR-96-4-A, Judgment, 1 June, at para 284 *et seq.*

Prosecution v Kunarac, IT-96-23&23/1-A, Judgment, 12 June 02, at para 324.
Prosecutor v. Limaj et al, Case No. IT-03-66-T, Judgment (30 November 2005) at para. 12.

P*rosecutor v Semanza*, Trial Chamber Judgment, 15 May 2003, para 402.

Tadic Appeal Judgment
Tadic Trial Judgement
Prosecutor v Krajisnik, No. IT-00-39-T, *Judgement and Sentence* (27 September 2006) at para. 884; citing *P v. Stakic,* IT-97-24-A, Judgment, 22 March 06, at para 69.
Prosecutor v. Mirsolav Kvocka, ICTY, IT-98-30/1, Trial Judgment, 2 November 2001, paras 309 and 311.
The Prosecutor v. Vasiljevic, ICTY, IT-98-32-T, Trial Judgment, 29 November 2002, paras 68-69.
The Prosecutor v Furundzija, ICTY, No. IT-95-17/1-A, Appeals Chamber, Judgment, 21 July 2000, para. 115
[1] *The Prosecutor v Krstic*, No. IT-98-33-T, Judgement (2 August 2001) at para. 610, listing the Drina Corps as members of the JCE
[1] *The Prosecutor v Blagojevic & Jokic*, No. IT-02-60-T, Judgement, 17 January 2005, para. 709
[1]

The Prosecutor v. Simic, No. IT-95-9-T, Trial Judgement. 17 October 2003, paras 984-985.