1306) SCSL-04-15-A (5098-5013) 5098

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: **Hon. Justice Renate Winter, President,**
Hon. Justice Jon Kamanda,
Hon. Justice George Gelaga King
Hon. Justice Emmanuel Ayoola, and
Hon. Justiee Shireen Avis Fisher

Acting Registrar: **Ms. Binta Mansaray**

Date filed: **7 July 2009**

THE PROSECUTOR

V.

ISSA HASSAN SESAY

Casc No. SCSL-04-15-A

PUBLIC

Request that the Pre-Hearing Judge Present Additional Evidenee from *Prosecutor* v. *Taylor* Before the Appeals Chamber

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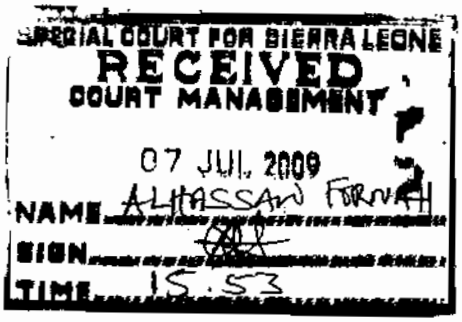

INTRODUCTION

1. The Sesay Defence, pursuant to Rule 115, here requests the Pre-Hearing Judge to present additional evidence from *Prosecutor* v. *Taylor* before the Appeals Chamber. In particular, the Defence requests the presentation of portions of Exhibit D-63 and portions of TF1-060, TF1-263, TF1-367, and Karmoh Kanneh's *Taylor* testimony.[1] This motion sets out in full the reasons and supporting evidence upon which the Sesay Defence relies to establish that the additional evidence from *Taylor* was not available at trial. The Defence submits that this evidence for presentation is relevant, credible, and could have been a decisive factor in the Trial Chamber's Judgment. The Defence submits that the requested additional evidence be considered together with the evidence at trial and the Sesay Defence's submissions on appeal.
2. In accordance with Rule 115, this motion is being served on the Prosecution and filed with the Registrar.

LEGAL STANDARD

3. For evidence to be presented under Rule 115, it must be shown that the evidence was not available at trial or discoverable through the exercise of due diligence by the moving party[2] and that the interests of justice require the presentation of that evidence. In determining whether the interests of justice require the presentation of the requested additional evidence, the Pre-Hearing Judge should consider whether the evidence is: i) relevant to a material issue; ii) credible; and iii) *could* have been a decisive factor in reaching the decision at trial.[3] Applying *in dubio pro reo*, any doubt should be resolved in favour of the Appellant.[4]

Availability

4. The evidence for which the Defence requests presentation first came to light in *Taylor*, becoming available to the Defence after the close of the Defence case in *Prosecutor* v. *Sesay et al.*[5] As the Prosecution did not disclose the witness statements (e.g., under Rule 68) upon which the *Taylor* testimony emanated, this evidence was not available in any form,[6] even

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[1] For purposes of judicial economy, the Defence pinpoints the portions of testimony from the witnesses and exhibit from *Taylor* (below) that is "additional" to the evidence presented at trial. That is, the Defence is not requesting the consideration of evidence that does not serve a legitimate forensic purpose or is cumulative to the evidence presented at trial. The Defence notes that the introduction of the requested additional evidence does not prejudice the Prosecution as it either was presented by a Prosecution witness (i.e., Exhibit D-63) or emanated from a Prosecution witness.

[2] *Prosecutor* v. *Krstić*, IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal," 5 August 2003.

[3] Rule 115.

[4] *Prosecutor* v. *Dusko Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time-Limit and Admission of Additional Evidence, 15 October 1998, Para. 73.

[5] Defence case for Sesay concluded on the 13th March 2008 (Transcript, 13 March 2008, pp. 55) with the caveat that former President Kabbah would testify at a later date.

[6] *Prosecutor* v. *Krstić*, IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal," 5 August 2003.

upon a reasonable exercise of due diligence,[7] prior to the close of Sesay's defence case. Moreover, as TF1-060, TF1-263, and TF1-367 were testifying against Sesay it was impossible or impracticable to seek their cooperation.

Interests of Justice

5. The materiality of the requested evidence and whether it could have affected the verdict at trial will be discussed in connection with the evidence. The evidence is credible inasmuch as it was called by the Prosecution and the Defence does not challenge its reliability or credibility.[8] Further, the Chamber made specific findings in connection with the credibility of TF1-263 and TF1-367: the Chamber found TF1-263 "generally credible"[9] and "largely accepted [TF1-367's] evidence as being trustworthy."[10] Although the Chamber did not make specific findings on TF1-060's credibility, TF1-060 was relied upon heavily at Paras. 1664-1666.

ADDITIONAL EVIDENCE

TONGO FIELDS

6. Sesay was convicted of unlawful killings in the Tongo Fields area (including Cyborg Pit; Counts 3-5)[11] and the enslavement (Counts 1 and 13)[12] of an unknown number of civilians in connection with forced mining at Cyborg Pit. The Trial Chamber also found that over a hundred child soldiers (Count 12) guarded Cyborg Pit[13] and killed miners at Cyborg Pit.[14] These crimes were found to have occurred between August and December 1997.[15]
7. Exhibit D-63 and the *Taylor* testimony of TF1-060 and Karmoh Kanneh, all of which were unavailable at trial,[16] fatally impacts upon the credibility of TF1-035, TF1-041, TF1-045,

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[7] *Prosecutor* v. *Krstić*, IT-98-33-A, "Decision on Applications for Admission of Additional Evidence on Appeal," 5 August 2003. The Defence notes that the whereabouts of Karmoh Kanneh (let alone his presence in Sierra Leone), even through the exercise of due diligence, was unknown to the Defence at the time of trial. *See* supporting Annex A. Moreover, as the Defence was uncertain as to the precise nature of the evidence he could have provided (*Prosecutor* v. *Krstić*, IT-98-33-A, "Decision on Applications for Subpoenas," 1 July 2003, para. 8) the Defence exhausted "all mechanisms of protection and compulsion available" without subpoenaing Kanneh under Rule 54).

[8] Unless otherwise noted. Out of abundance of caution, the Defence here states that "credibility" should not be confused with "veracity." For example, although Exhibit D-63 may have been proffered and admitted for the truth of its contents, this does not necessarily impute that all of those respective contents are true.

[9] Judgment, Para. 587.

[10] Judgment, Para. 552.

[11] *E.g.*, Judgment, Paras. 1106-1108.

[12] *E.g.*, Judgment, Paras. 1119-21 and 1129-30.

[13] Judgment, Para. 1664.

[14] Judgment, Paras. 1665-66.

[15] Judgment, Para. 1094.

[16] Exhibit D-63 was first disclosed to the Defence on 28 April 2009 upon email requests to the Prosecution. As such, the Defence was not privy to this exhibit prior to the close of *Sesay et al.* The disclosure of this document was first requested in an email from the Defence to the Prosecution dated 15 April 2009. The Defence repeated its request in emails dated 23 and 24 April 2009. *See* Annex B of the Defence "Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material." Exhibit D-63 was disclosed to Taylor Defence by the Prosecution *See*, Taylor Transcript/TF1-060, 30 September 2008, pp. 17568.

TF1-060 himself, TF1-366, TF1-367, and TF1-371 and the Chamber's reliance upon these witnesses in arriving at its findings that there were unlawful killings at Cyborg Pit (Paras. 1082-1087 and 1106-1108; Ground 31), enslavement at Cyborg Pit (Paras. 1088-1095 and 1118-1121; Ground 32), acts of terrorism at Cyborg Pit (Paras. 1129-1130; Grounds 31-32), and the Chamber's finding that there was an attack directed against the civilian population of Kenema District (Para. 956; Ground 28). Had Exhibit D-63, the *Taylor* testimony of TF1-060, or the *Taylor* testimony of Karmoh Kanneh been available at trial – either alone or in combination – it could have affected the verdict in connection with these alleged crimes.

Exhibit D-63

8. Exhibit D-63 is a series of six typed "Situation Reports" spanning August through November 1997 concerning the activities of the RUF and AFRC in the Tongo Fields area. The Defence requests the presentation of the typed portions of Exhibit D-63.[17] The six reports are from TF1-060, a member of the Caretaker Committee, to the Paramount Chief of the Lower Bambara Chiefdom[18] while the Paramount Chief was in Kenema Town during the junta period. The reports purport to have been made contemporaneously with the events described in those reports and also purport to be a complete record of the events spanning August through November in the Tongo Fields area while the RUF and AFRC were present.
9. The Defence relies on Exhibit D-63 as additional evidence inasmuch as the *absence*[19] of the

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TF1-060 testified in *Taylor* on 29 and 30 September 2008, after the close of *Sesay et al.*
Karmoh Kanneh testified in Taylor on 8, 9, 12, 13, and 14 May 2008, after the close of the Sesay Defence case in *Sesay et al.*

[17] The Defence notes that there are handwritten notes, made by TF1-060 (*Taylor* Transcript/TF1-060, 30 September 2008, pp. 17569.), on the back of these typed reports. These handwritten notes are non-contemporaneous and were in fact made years after the events described in the typed reports. TF1-060 testified in *Taylor* that he "wrote [these handwritten notes] to refresh [his] memory before [he] testified in the RUF trial" (*Taylor* Transcript/TF1-060, 30 September 2008, pp. 17569-17570). Correspondingly, their reliability is questionable. The Defence disputes the credibility of the handwritten notes.
The Defence notes that the Appeals Chamber indicated that further enquiry was required of Exhibit D-63 (Para. 31 of the "Decision on Requesting the Prosecution to Disclose Rule 68 Material" citing footnote 10 of *Prosecutor* v. *Sesay*, SCSL-04-15-A-1268, "Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material," 7 May 2009) concerning the origin of the Exhibit and when the handwritten notes were made. The Defence submits that the above-cited portion of TF1-060's testimony should be satisfactory in that TF1-060 testifeid that he was the author of the handwritten notes and that he made them in preparation for his testimony in *Sesay*. The Defence notes that, in its Motion Requesting Disclosure of Rule 68 Material (footnote 10), the Defence incorrectly stated that TF1-060 was not examined on when these handwritten notes were made.
Although the Defence, in the main, disputes the veracity of the handwritten portions of Exhibit D-63, the Defence notes that the statement that "Sam Bockarie (Mosquito) *wanted the approval of our paramount chief* for their stay in the chiefdom … in order to have the civilian populace in the chiefdom, males in particular, to be used as labourers for their diamond mining" (Exhibit D-63, pp. 1010409; emphasis added) supports the Defence case that civilians were not forced to mine in an organized system of labour. Further, this comports with TF1-035's testimony that Bockarie "*begged*" (Transcript/TF1-035, 5 July 2005, pp. 90; emphasis added) the civilians to mine for the RUF (Referred to in the Grounds of Appeal at Para. 168). This statement significantly detracts from the Chamber's finding of enslavement.

[18] The Lower Bambara Chiefdom includes the Tongo Fields area.

[19] "Where, for instance, a report is presented as a full account of an event by a person who has a responsibility

following crimes in the exhibit tends to prove that they did not occur:

> no civilian was intentionally killed in connection with mining at Cyborg Pit;[20]
> no civilian was subjected to foreed mining (as part of a system or otherwise);
> no ehild soldiers guarded Cyborg Pit or killed miners there.[21]

10. The Defence recalls that the Chamber found that the enslavement in the Tongo Fields area was of a sheer seale.[22] As such, should any organized system of foreed labour havc existed, it certainly would have been reported; this is espeeially in the context of reporting other mining incidents[23] and unlawful killings.[24] The Defence notes that the mining site at Cyborg Pit is specifically referred to in the typed reports.[25] No force or any organized system of labour is mentioned in conneetion with Cyborg Pit or any other mining site. The reports lend weight to the Defence submission that the Chamber's verdict, finding unlawful killings, enslavement, or ehild soldiers at Cyborg, is unsafe.

11. Exhibit D-63 also impugns the Chamber's finding that there was an attack in Kenema District.[26] Thc Chamber found, based on TF1-060's testimony, that the rebels "staged attacks on Panguma and Bumpe in Kenema District."[27] Resultantly, the Chamber found, basecl on TF1-060's evidence alone[28] that these crimes were "not isolated ineidents but rather a central feature of a concerted campaign against civilians"[29] demonstrating the *modus operandi* of the

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so to do, an omission may be interpreted as indicating that what was omitted did not take place, so as to effect the credibility of the Proseeution evidence in regard to that incident."[19] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1286, "Decision on Sesay Defence Motion Requesting the Appeals Chamber to Order the Prosecution to Disclose Rule 68 Material," 16 June 2009, Para. 29.

[20] The only killings in connection with mining referred to in Exhibit D-63 are in the non-contemporaneous hand-written notes made by TF1-060 to refresh his recollection prior to testifying; thus the veracity of the accounts is unreliable. They are: three people killed by being fired upon at Wuima (00101403); child combatants killed three people while they were mining by the Roman Catholic Church at Pandebu (00101403) (note, this contradicts the typed report at 00101402 where no child soldiers are present and no one is killed); and child combatants killed two miners at Sandeyeima village (00101405) (not referred to in the typed reports). This is in stark contrast to the Trial Chamber's findings at Paras. 1082-1087 and 2050 that 63 people were killed at or around Cyborg Pit.

[21] Again, referenees to child soldiers are made only in the non-contemporaneous hand-written notes made by TF1-060 to refresh his recollection prior to testifying; thus the veracity of the accounts is unreliable. Exhibit D-63 purports that child soldiers killed miners digging by the Roman Catholic Church at Pandebu (00101403); child combatants killed two miners at Sandeyeima village (00101405); and "child combatant did most of the killings at Tongo" (00101407). The Defence notes that, on p. 00101404, Exhibit D-63 states "NB. ... 5. Child combatants always playing damages and killings."

[22] Judgment, Para. 1997.

[23] *E.g.*, mining at the Tongo Aeroplane field (i.e., Cyborg Pit) and at the Jehova's Witnesses and Roman Catholic churches (pp. 101402).

[24] *E.g.*, the killing of John Dakowa (pp. 1010406), Pa Vandi Sei (pp. 101413), and 15 civilians at Bumpeh village (pp. 1010413).

[25] *E.g.*, Cyborg Pit is here referred to as "Side-Buck" (pp. 101402). Notwithstanding, it is clear from Exhibit D-63 (i.e., at the Tongo Aeroplane field) and TF1-060's testimony that this is Cyborg Pit.

[26] *E.g.*, Judgment, Para. 956

[27] Judgment, Para. 956.

[28] Transcript/TF1-060, 29 April 2005, pp. 66-67 and 92-94. Cited at footnote 1865.

[29] Judgment, Para. 956.

combatants in raping and killing eivilians, razing houses, and looting property.[30] Exhibit D-63, however, makes clear that the combatants were intent on engaging the Kamajors in combat, not civilians.[31]

TF1-060

12. The Defence requests the presentation of pp. 17538-17540[32] of TF1-060's testimony from *Taylor*. This testimony directly contradicts the evidence of TF1-035 and TF1-045[33] and the Chamber's findings that, *inter alia*, civilian miners were unlawfully killed at Cyborg Pit by being fired upon.[34]
13. In *Taylor*, TF1-060[35] testified that the only people that died at Cyborg Pit were miners that were present at the pit when sands collapsed on them.[36] As diseussed in TF1-060's evidenee in *Taylor*, trailings[37] from previous diamond mining companies were dumped at Cyborg Pit[38] causing the walls of the pit reached 20 feet high.[39] These trailings contained small diamonds not recovered by thc mechanical washing sites of the previous mining companies.[40] On morc than one occasion, the walls of the pit collapsed on the miners – both civilians and combatants – killing them.[41]
14. Thc Defence respectfully submits that this is not "a description of death caused by the dangerous conditions of the pit *as distinguished from* death caused by acts of persons."[42]

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[30] Judgment, Para. 956.
[31] Pp. 101413. 800 eombatants went to Dodo Chiefdom "with the hope of finally squashiug the Kamajors."
[32] In particular, *Taylor* Transcript/TF1-060, 29 September 2008, pp. 17538, line 23, to pp. 17540, line 23.
[33] Judgment, Paras. 1082-1087.
[34] Judgment, Para. 2050.
[35] TF1-060 also testified in *Sesay et al.* on 29 April 2005.
[36] *Taylor* Transcript/TF1-060, 29 September 2008, pp. 17538-40. "Q. When the workers were working for the AFRC, was it ever dangerous? A. Yes, sir. It was dangerous as time went on. This is the trailings, I mean sand, at Cyborg. Sand. So when they eame they did not open the pit widely. So while at times they were digging, then the sand have to collapse and then kill people."
[37] When potentially diamond-rieh gravel is separated into its constituent parts by washing plants, one of the constituent parts that is removed is exeess sand. In diamond miniug nomenclature, the excess sand is called "trailings." *Taylor* Transeript/TF1-060, 29 September 2008, pp. 17539.
[38] *Taylor* Transeript/TF1-060, 29 September 2008, pp. 17539.
[39] *Taylor* Transeript/TF1-060, 29 September 2008, pp. 17539.
[40] Although TF1-060 doesu't explicitly testify to this faet, this infereuee is logical as the miners would not be mining at Cyborg Pit if there were no diamonds present in the waste trailings. That these trailings contained diamonds was confirmed by the Defenee witnesses. *See, e.g.*, Sesay Defence Closiug Brief at Paras. 637-638.
[41] *Taylor* Transcript/TF1-060. 29 September 2008, pp. 17538-40. The Defenee notes that this eomports *exactly* with the Defenee ease. As stated in the Sesay Defenee Closing Brief (at Paras. 634-638), diamond-laden waste-sand from the NDMC (National Diamond Mining Company) days was plaeed at the loeation later referred to as Cyborg Pit. These sands collapsed on the miners, killing them. No one died from being fired upon; only by sands collapsing.
Further, this evidence eonfirms, in part, TF1-035's evideuee (at Transeript/TF1-035, 5 July 2005, pp. 87) that during the first purported shooting ineident "some [miners] were ... *covered by the sand.* Some were killed by the bullet." As submitted in the Sesay Defenee Closing Brief at Para. 636, weapons were likely fired, as a warning of danger, shortly after sands collapsed at Cyborg Pit.
[42] *Prosecutor* v. *Sesay*, SCSL-04-15-A-1286, "Decision on Sesay Defence Motion Requesting the Appeals Chamber to Order the Prosceution to Disclose Rule 68 Material," 16 June 2009, Para. 35; emphasis in original.

Although, TF1-060 testified that on multiple occasions people were killed while mining at Cyborg, eaeh of these instances was from sand collapsing on the miners.[43] There is no suggestion in TF1-060's evidence that miners were killed at Cyborg by being fired upon.[44] TF1-060 testified that the *only* deaths at Cyborg Pit were from sands collapsing on the miners, killing them.

15. TF1-060's evidence eonfirms that no one died at Cyborg Pit as a result of intentional killing in connection with forced mining; is silent concerning an organized system of forced labour at Cyborg Pit; and does not refer to a weapon being fired at Cyborg Pit. TF1-060 also does not refer to child soldiers being present at Cyborg Pit. This supports the Defence contention that the Chamber's verdict, finding unlawful killings, enslavement, or ehild soldiers at Cyborg, is unsafe.

Karmoh Kanneh

16. The Defence further requests the presentation of Karmoh Kanneh's evidence from *Taylor* as it relates to Tongo Fields.[45]

17. During the junta, Kanneh was appointed the mission commander to capture Tongo. Upon Tongo's capture, Kanneh was in Tongo for a month.[46] Although Kanneh was present for TF1-035 and TF1-045's purported shooting incidents,[47] enslavement at Cyborg Pit, and the purported presence of children guarding Cyborg Pit (or otherwisc being present in the Tongo Fields area), Kanneh did not testify to the occurrence of these crimes.

18. In direct contrast, the Prosecution led Kanneh in his direct evidence on a new theory that miners mined for the RUF and AFRC government for two days of the week.[48] For the next four days, civilians – should they havc desired to do so – were free to mine.[49] The last day of the week was a resting day (no one mined).[50] There was no force. This comports *exactly* with

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[43] *Taylor* Transcript/TF1-060, 29 September 2008, 17538: "So while at times they were digging, then the sand have to eollapse and then kill people."

[44] The Defence notes that TF1-060 also testified in about killings in eonnection with mining at Sandeyeima and Wuima (*Taylor* Transcript/TF1-060, 29 September 2008, pp. 17538). That TF1-060 testified about these killings (both occurring on one oeeasion each), but not killings at Cyborg Pit, provides a strong indication that miners at Cyborg Pit were not killed by being fired upon.

[45] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9367-9368, 9373 (lines 6-27), and 9376 (lines 13-26).

[46] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9368.

[47] As found by the Chamber at Paras. 1082-1087 and discussed in the Sesay Grounds of Appeal at Paras. 158-159, these unlawful killings purportedly occurred within the first month of the RUF and AFRC's entry into the Tongo Fields area.

[48] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9373: "A. The work that they were doing we arranged it in such a way every week they would [mine for diamonds for] two days for the government, that is the RUF and the AFRC."

[49] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9376: "Q. You said that the mining for the government would be for two days. What would happen for the remainder of the days? A. Well for the rest of the days it was free for all, soldiers and civilians. Whoever could mine for the other four days, you were free to do so."

[50] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9376. "There would be no work. [The seventh day] is a day that is reserved. Nobody goes to work."

the Defence case that days were set aside each week for miners to transport and wash gravel from the RUF and AFRC security piles and that this did not, in the freedoms available, amount to enslavement.[51] At the very least it substantially undermines the Chamber's findings of a brutal chain ganging system.

19. Further, Kanneh testified that armed guards were in the Tongo Fields area to "secure" the civilian miners for their protection (and not to force them to mine):

> They protect them and at the same time keep guard over them, because it was an enemy zone. It had been captured, the enemies were there and so you guard and also protect the person.[52]

This lends further support to the Defence contention that the Chamber's verdict, that there were unlawful killings, enslavement, or child soldiers at Cyborg, is unsafe.

20. The Defence further notes that, as TF1-060 and Kanneh were led on this evidence during their direct-examination in *Taylor*, the Prosecution's allegations of crimes that occurred at Cyborg Pit and, correspondingly, its case of criminal liability for crimes that were alleged to have occurred at Cyborg Pit (including the absence of unlawful killings, the absence of child soldiers, and the absence of an organized system of forced labour at Cyborg Pit), changed since being led in the RUF trial.[53] It is not within the reasonable exercise of prosecutorial discretion to lead such inconsistent cases and then seek to uphold a conviction on the most incriminating (and repudiated) version. This highlights the obvious: that the case against Sesay was unreliable and the conviction that flowed unsafe.

KONO DISTRICT MINING

21. Sesay was convicted of planning enslavement in Tombodu and throughout Kono District between December 1998 and January 2000 (Count 13).[54] TF1-077 and TF1-367's evidence in *Taylor* significantly detracts from and is fatal to the Chamber's findings that Sesay planned such enslavement.[55] To prevent a miscarriage of justice, the requested additional evidence should be presented before the Appeals Chamber and the Trial Chamber's verdict that Sesay planned enslavement should be overturned (Ground 35).

TF1-367

22. Based largely on TF1-367's evidence, the Chamber convicted Sesay of planning enslavement

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[51] *See*, Sesay Defence Closing Brief, Paras. 605-608.
[52] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9368.
[53] *E.g.*, no miners were intentionally killed at Cyborg Pit; there was no organized system of forced mining at Cyborg Pit; and miners washed gravel for the RUF and AFRC government for only two days of the week instead of seven.
[54] *E.g.*, Judgment, Para. 2116.
[55] Inasmuch as, *inter alia*, Sesay didn't receive diamonds prior to 2000; that Sesay did not order the movement of miners from Makeni or Magburaka prior to 2000; and that TF1-077 wasn't forced to mine in Tombodu prior to 2000.

in Tombodu and throughout Kono District.[56] The Defence requests the presentation of portions of TF1-367's evidence from Taylor.[57] The presentation and acceptance of this testimony will contradict the Chamber's findings at, *inter alia*, Paras 1246-1259 (Ground 35).

23. In Taylor, *TF1-367 was led by the Prosecution* to establish the following:

i) armed guards were present at the mining sites *to prevent* the harassment of the miners[58] (contradicting the findings at e.g., Paras. 1247, 1251, 1255);
ii) when mining, the miners themselves intentionally dressed shabbily beeause they required such clothes when working at the mines[59] (contradicting the finding at Paras. 1251-1253, 1258);
iii) diamonds were given to Bockarie through the time Bockarie was present in Buedu. Only after Sesay transferred back to Koidu (and Bockarie had left Sierra Leone) were diamonds then given to Sesay.[60] As the Chamber found that Sesay transferred back to Koidu in February 2000,[61] on TF1-367's evidence, the first time that Sesay received a diamond was after the end of the Indietment period (contradicting the finding at Para. 1245). Also, that TF1-367 testified that Sesay was transferred back to Koidu impugns his testimony in *Sesay et al.* in which he states that Sesay never left Kono District throughout 1999;[62]
iv) TF1-367 was removed from his position on the Mining Unit because *he wasn't* forcing civilians to mine.[63] In other words, between December 1998 and January 2000 civilians weren't being forced to mine (eontradieting the findings at Paras. 1246-1259); and
v) TF1-367 was the mining commander for at least three months after Foday Sankoh was arrested in Freetown in May 2000.[64]

24. The Defence recalls that the Chamber found the collection of diamonds was, in part, a significant contribution to planning enslavement.[65] As TF1-367's testimony in *Taylor* demonstrates, (item iii) above), the first time Sesay received a diamond was after the end of the Indictment period (this was confirmed by TF1-071 in *Sesay*[66]). TF1-367's *Taylor* testimony thus significantly detracts from the Chamber's finding[67] that Sesay planned any enslavement in Kono District.

25. The Defence notes that the Prosecution did not respond to the Defence's factual and legal arguments concerning Sesay's non-involvement in the diamond mining operations through

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[56] *E.g.*, Judgment, Paras. 1246-1259.
[57] In particular, *Taylor* Transcript/TF1-367, 21 August 2008. pp. 14201, lines 15-23; pp. 14202, lines 1-9; pp. 14226, liue 17 to pp. 14227, line 3; pp. 14237, lines 4-28; and pp. 14241, lines 10-23; 28 August 2008, pp. 14916, line 16 to pp. 14919, line 17; and 1 September 2008, pp. 15044, line 18 to pp. 15045, line 4; and pp. 15052, liues 24-29. TF1-367's evidenee in *Taylor* was not available at trial as TF1-367 testified in *Taylor* after the close of Sesay's defence case.
[58] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14201, lines 15-23.
[59] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14202, lines 1-9.
[60] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14226, line 17 to pp. 14227, line 3.
[61] Judgment, Para. 2126.
[62] Transeript/TF1-367, 23 June 2006, pp. 80.
[63] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14237, lines 4-28.
[64] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14241, lines 10-23.
[65] Judgment, Para. 2113.
[66] Transcript/TF1-071, 25 January 2005, pp. 79. The first occasion on which Sesay received diamonds was in 2000.
[67] *See, e.g.*, Judgment Para. 2116.

2000, that Sesay did not receive diamonds prior to 2000, and that Bockarie was in control of the diamond mining operations (including Kennedy reporting directly to Bockarie).[68] Indeed, that Bockarie was in control of the operations and received the diamonds (without any interdiction from Sesay) is consistent with the Chamber's finding that the Mining Unit was a special unit[69] "which did not form part of the operational chain of command."[70] As there was no military reason why diamonds would have been reported to (or through) Sesay instead of directly to Bockarie, the Chamber's finding that Sesay came to Kono to collect diamonds[71] (and the Chamber's reliance thereon to convict Sesay for planning enslavement[72]) is cast further into doubt. The doubt is especially compounded in view of TF1-367's *Taylor* testimony that Sesay didn't receive any diamonds until 2000.

26. Further, on cross-examination, TF1-367 testified that:

i) after the RUF had captured Koidu from the ECOMOG, ordinary people (i.e., civilians) were mining for themselves[73] (contradicting the finding at Paras. 1246-1259);
ii) he pro-actively intervened in the beating of civilians engaged in mining[74] (contradicting the finding at Paras. 1246-1259);
iii) he never ordered anyone to beat a civilian for refusing to work[75] (contradicting the finding at Paras. 1246-1259);
iv) the miners mining for the RUF prior to the arrival of miners from Makeni and Magburaka "were loyal" and "nobody used to beat them"[76] (contradicting the finding at Paras. 1246-1259). This confirms TF1-367's testimony in *Sesay et al.* that, *inter alia*, these miners were *trusted*[77] and that miners were free to leave the mining sites on the weekends[78] (confirming this finding at Para. 1248);
v) the only miners that were beaten were new miners that came from Makeni and Magburaka because "they did things the way they wanted to do them"[79] (contradicting the finding at Paras. 1246-1259, particularly Para. 1249);
vi) instead of beating the miners, TF1-367 told his subordinates to jail them for an hour or two[80] (contradicting the finding at Paras. 1246-1259);

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[68] Sesay Defence Appeal, Paras. 271-275. The Prosecution referred to these arguments (at Prosecution Response, Para. 7.112) but did not rebut them deferring merely to its arguments concerning the weight and credibility to be given to witness testimony.
[69] Judgment, Para. 678; this paragraph falls under the heading "Overview of the RUF Special Units."
[70] Judgment, Para. 674. The Defence notes the Chamber's finding at Para. 681 that the "Leader, BFC, BGC and BFI could exercise command and control over the special units." This finding appears to be limited to the special security units (e.g., G5, MP, IDU, and IO units).
[71] Judgment, Para. 1245: Diamonds were delivered to Sesay, "in his capacity as Battlefield Commander."
[72] Judgment, Para. 2113.
[73] *Taylor* Transcript/TF1-367, 1 September 2008, pp. 15044, line 18, to pp. 15045, line 4.
[74] *E.g.*, *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14916, line 29, to 14917, line 29.
[75] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14916, lines 16-25.
[76] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14918, lines 14-20.
[77] Transcript/TF1-367, 23 June 2006, pp. 79. "[T]hose [miners] who were in the bush with us for long, those whom we trusted."
[78] Transcript/TF1-367, 23 June 2006, pp. 50.
[79] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14918, line 14, to pp. 14919, line 17.
[80] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14918, lines 1-5: "Q. So can I take it then that you found the beating of miners totally objectionable? A. Yes, I told them to jail them than to beat them up, because if you were to be jailed for an hour or two when you come out you will advise yourself, but to beat somebody was not good."

vii) when these additional miners arrived from Makeni and Magburaka, "they did not go by the control"[81] (contradicting the finding at Paras. 1246-1259). Notwithstanding, TF1-367 tried to prevent them from being beaten[82] (contradicting the finding at Paras. 1246-1259, particularly Para. 1249);

viii) beeause TF1-367 tried to prevent the harassment of the miners from Makeni and Magburaka, TF1-367 was removed from his position;[83]

ix) as TF1-367 testified that he was the mining commander for at least three months after Foday Sankoh was arrested in Freetown in May 2000,[84] this places the arrival of the miners from Makeni and Magburaka well into 2000 and beyond the end of the Indictment period (contradicting the finding at Paras. 1246-1259, particularly Para. 1249). This also contradicts the finding that 200 to 300 civilians were forced to mine at Kaisambo during the Indictment period (Para. 1247) as TF1-367 testified that the miners that mined there were from Makeni and Magburaka;[85]

x) when Pelleto took over mining operations, the civilian miners complained that they were being harassed and could no longer engage in private mining.[86] Although it is unclear how this is within TF1-367's knowledge, and taking TF1-367's account to be true, the implication is nonetheless clear that there was private mining prior to Pelleto's arrival and during the Indictment period (contradicting the finding at Paras. 1246-1259).

27. Based solely on TF1-367's testimony from *Taylor*, Sesay's conviction for planning enslavement should be overturned. The Chamber found that Sesay planned enslavement because "throughout 1999 and 2000, [he] visited Kono District and collected diamonds"[87] and he "arranged for transportation of the captured civilians to the mines."[88] As discussed above, TF1-367 indicated in *Taylor* that, during the Indictment period, Sesay didn't collect any diamonds and also did not arrange for the transportation of miners to Kono District. Should Sesay's conviction for planning enslavement be upheld, a miscarriage of justice would result.

TF1-077

28. The Defence requests the entry of pp. 18257-58 from TF1-077's testimony in ***Taylor***.[89] This portion of TF1-077's testimony makes it abundantly clear that TF1-077 was first captured in

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The Defenee notes that it is unelear who would have been jailed as TF1-367 indicated that there were no problems with the miners with the RUF prior to the arrival of the miners from Makeni and Magbnraka and that the miners from Makeni and Magbnraka were beaten for not abiding by "the control."

[81] *Taylor* Transcript/TF1-367, 28 Augnst 2008, pp. 14919, lines 12-17.

[82] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14918, lines 21-26.

[83] *Taylor* Transcript/TF1-367, 28 August 2008, pp. 14918, lines 21-26.

[84] *Taylor* Transcript/TF1-367, 21 August 2008, pp. 14241, lines 10-23.

[85] Transcript/TF1-367, 22 Jnne 2006, pp. 52.

[86] *Taylor* Transcript/TF1-367, 1 September 2008, pp. 15052, lines 24-29. After Pelleto took over "the civilians, everybody started crying. Those who used to work privately started crying. The civilians who were doing the mining were being harassed and they grumbled a lot."

[87] Judgment, Para. 2113.

[88] Judgment, Para. 2113. As concerns Officer Med reported to Sesay (Judgment, Para. 2112), Officer Med was mining in Tombodu in 2000 after the end of the Indietment period (Sesay Defence Appeal, Para. 258). Concerning the Diamond Production Logs (Judgment, Para. 2114), as advanced on appeal, the logs are not dispositive of forced mining (Sesay Defence Appeal, Para. 269). This was confirmed by TF1-367 in *Taylor* inasumuch as he testified to the laek of force through 1999 (when the Logs were being made).

[89] *Taylor* Transcript/TF1-077, 14 October 2008, pp. 18257-58. As TF1-077 testified in Taylor in October 2008,

December 1999, *the December following the Lomé Accord*.[90] Accordingly, this disturbs the Chamber's findings at Paras. 1250-1258 that TF1-077 was first arrested in December 1998[91] subsequently leading to him being forced to mine during the Indictment period (i.e., prior to January 2000). In the very least it raises reasonable doubt as to when TF1-077 was captured (either December 1998 or Deeember 1999); as such, the benefit should be given to the Appellant. In conjunction with the evidence of TF1-077, TF1-012, TF1-071, and TF1-304 from *Sesay*[92] that mining started in Tombodu in 2000, it is clear that – if ever – TF1-077 mined in Tombodu in 2000 after the end of the Indictment period. In addition, in conjunction with TF1-367's requested additional evidence from *Taylor*, this evidenee casts doubt on the conclusion that there was an organized system of forced mining in Kono District (including Tombodu) in 1999, thus casting further doubt on the conclusion that TF1-077 was forced to mine in 1999.[93] Correspondingly, TF1-077's evidence from *Taylor* disturbs the Chamber's finding that there was enslavement in connection with mining at Tombodu and that Sesay planned such enslavement (Paras. 1251-1258; Ground 35) and is further evidence of the miscarriage of justice.

MILITARY TRAINING & CHILD SOLDIERS

29. Sesay was convicted of planning the use of persons under the age of 15 to participate actively in hostilities (Count 12)[94] and enslaving "an unknown number of civilians were forcibly trained for military purposes from 30 November 1996 to 1998 in Kailahun District" (Count 13).[95] TF1-263 and Kanneh's evidence in *Taylor* significantly detracts from the Chamber's findings. To prevent a miscarriage of justice, the requested additional evidence should be presented to the Appeals Chamber and the Trial Chamber's verdict that Sesay planned child soldiers and planned enslavement should be overturned (Grounds 35 and 43). The requested additional evidenee is particularly relevant to the Chamber's findings at, *inter alia*, Paras. 1635-1645 and 1650-1653.

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this evidence was not available to the Defence during *Sesay et al*.

[90] Q. And where were you when you heard about the Lomé Peace Aceord?
A. We were at the border when we heard that peaee had been signed. It was at that time we became happy. We became happy that the war was over and we started coming in bits.
Q. And when you heard about the Lomé Peace Aceord, *was it before or after you were captured*?
A. *They had not captured me*.

[91] Judgment, Para. 1251. Although, TF1-077 testified that he was amongst a group of 50 civilians abducted from Koidu, that he was captured after the Lomé Accord makes it impossible that this capture was during the Deeember 1998 Koidu attack. A reasonable inference available, then and now, was that TF1-077 was lying about this capture.

[92] *See*, Sesay Defenee Appeal, Paras. 256-258.

[93] To be sure, the Defence is in no way suggesting that there was an organized system of forced mining in 2000.

[94] *E.g*, Judgment, Para. 2230.

[95] Judgment, Para. 2156.

TF1-263

30. The Defence requests the presentation of pp. 17936[96] of TF1-263's testimony from *Taylor*.[97] TF1-263's testimony affects the Chamber's findings at Paras. 1640-1642 inasmuch as TF1-263 made clear that no trainee was killed during the training, and further affects the Chamber's findings in reliance upon TF1-141 as TF1-263's evidence directly contradicts TF1-141's evidence.

31. In *Sesay et al.*, TF1-263 was silent as to whether civilians were killed during training and whether they were fired upon. In *Taylor* however, *the Prosecution led* TF1-263 on the fact that no trainee was killed and that only one trainee died from natural causes.[98] This directly contravenes the Chamber's findings at Paras. 1640-1642, in reliance upon TF1-141, that i) trainees were beaten with canes;[99] ii) trainees were forced to traverse a "monkey bridge" and those that were unsuccessful fell on barbed wire and were sometimes shot;[100] iii) that trainees that were unable to endure the training regime were shot and killed;[101] and iv) that many recruits perished from beatings, shootings, or other injuries while training.[102] This supports the Defence contention, advanced at trial, that TF1-141 was not trained at Bunumbu.

32. At best, assuming that TF1-263 was actually trained at Bunumbu, the only injuries sustained by trainees were bruises to their legs[103] when crawling as part of the training exercises.[104] A reasonable Chamber could not have convicted Sesay for unlawful killings in connection with training at military bases.

Karmoh Kanneh

33. In addition to the above testimony concerning Tongo, the Defence requests the presentation of pp. 9390-9391[105] of Karmoh Kanneh's testimony from *Taylor*. This portion of Kanneh's testimony affects the Chamber's verdict in connection with child soldiers "graduating" and being deployed throughout the country (Paras. 1644-1645) and affects TF1-141's credibility.

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[96] *Taylor* Transcript/TF1-263, 6 October 2008, pp. 17936.
[97] As TF1-263 testified in October 2008, after the close of Sesay's Defence case, TF1-263's *Taylor* testimony was unavailable at trial.
[98] *Taylor* Transcript/TF1-263, 6 October 2008, pp. 17936:
"Q. Mr Witness, did everyone survive the training? A. One person died. One man died. Q. What happened to the man that died, do you know? A. He fell ill."
[99] Judgment, Para. 1640.
[100] Judgment, Para. 1640.
[101] Judgment, Para. 1641.
[102] Judgment, Para. 1642.
[103] The Defence notes that TF1-263 uses the Krio word "feet" to mean his legs.
[104] *Taylor* Transcript/TF1-263, 6 October 2008, pp. 17936.
[105] *Taylor* Transcript/Kanneh, 8 May 2008, pp. 9390-9391. The Defence relies upon the absence in Mr. Kanneh's testimony of any child soldier being present in the 1st Battalion. There is a wholesale absence in Mr. Kanneh's testimony of child soldiers. At, *e.g.*, pp. 9584-9585 of *Taylor* Transcript/Kanneh, 9 May 2008, Mr. Kanneh refers to being promoted to Battalion commander in 1998 and being made to base at Baiima with his own group of (adult) fighters.

34. At Para. 1645, the Chamber found that after "graduation," TF1-141 – a purported child soldier – was sent to Baima where an RUF Commander named War Eagle headed the 1st Battalion. War Eagle, aka Eagle, is Karmoh Kanneh.[106] Kanneh did not refer to any child being in his battalion, that any child ever joined his battalion, nor that any child took an "active part at the battlefields."[107]

35. Further, Kanneh – being led by the Prosecution – made it clear that there were only men on the operations to attack Segbwema and Daru.[108] This directly contradicts the Chamber's findings at Paras. 1644-1645 and 1650-1653. Had this evidence been available at trial, the Chamber could not have arrived at its verdicts based on TF1-141's evidence.[109]

RELIEF REQUESTED

36. The Defence requests the Pre-Hearing Judge to present the above additional evidence from *Taylor* before the Appeals Chamber. The additional evidence would have been a decisive factor in the Trial Chamber's Judgment, as indicated above. Should the additional evidence be presented before the Appeals Chamber, the Defence requests the Appeals Chamber to reverse the relevant findings and convictions and/or order any other appropriate remedy.

Dated 7 July 2009

Wayne Jordash
Sareta Ashraph
Jared Kneitel

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[106] *Taylor* Transcript/Kanneh, 9 May 2008, pp. 9312. *See also*, pp. 9458 and 9585.
[107] Judgment, Para. 1645.
[108] *Taylor* Transcript/Kanneh, 9 May 2008, pp. 9438-9439:
Q. What did you do after you saw this material?
A. Well, they gave me my own responsibility and they asked me to go and start putting men together. I went and met - I should go and meet the brigade commanders so we should *start to put the men together.*
Q. What were you putting the men together for?
A. It was to carry on my own mission that was given to me, that was to capture Segbwema and Daru and, if possible, to go even beyond.
Q. And did you put the men together?
A. Yes, yes.
[109] *E.g.*, Judgment, Paras. 1636, 1644-1645, and 1651-1653. *See also*, Sesay Defence Appeal at, *e.g.*, Paras. 331-332 and Annex C.

Annex A – Kneitel Statement

5.013

SPECIAL COURT FOR SIERRA LEONE

STATEMENT - Issa Sesay

Family Name: KNEITEL First Name: JARED
Date: 29 June 2009
Location: New York, New York, USA

I am a practicing attorney in good standing called to the bar of the State of New York.

In November 2005 I volunteered for the Sesay Defence. From April 2006 through Mareh 2007 I was employed by the Sesay Defence as a Legal Assistant. I continue to remain employed by the Sesay Defence.

The Sesay Defence charged a variety of Legal Assistants and a Local Investigator to conduct field investigations throughout Sierra Leone to collect documentary evidence and to identify, locate, and interview witnesses that would rebut the Prosecution's allegations against Mr. Sesay as wcll as support a positive defenee case.

I was charged in the above capacity. Between November 2005 and February 2007, I personally spent approximately five months (in aggregate) in the Provinces of Sierra Leone.

The Sesay Defence conceived that Mr. Kanneh (aka Eagle, aka War Eagle), *inter alia* as a battalion commander near the front lines where Mr. Sesay was stationed, might have been able to provide useful information to the Sesay Defence concerning Mr. Sesay's conduct and his care for the welfare of civilians.

Our investigation staff, on repcated occasions, attempted to locate Mr. Kanneh where we expeeted he was residing. Our investigation staff, concurrently and on an ongoing basis, inquired the whereabouts of Mr. Kanneh from persons that we reasonably believed might have known such information or information that could have led to us determining his whereabouts. This included making inquiries of former RUF insiders as well as civilians that were in locations where Mr. Kanneh was based during the war.

Despite diligent efforts in locaring Mr. Kanneh prior to the 5 March 2007 deadline for submitting the Sesay Defence witness list to the Trial Chamber and the parties, we were unable to do so. Until learning that Mr. Kanneh testified as a witness for the Prosecution in *Taylor*, we could not verify that Mr. Kanneh was still alive. As such, we were unable to engage with Mr. Kanneh to determine whethcr he would cooperate with the Sesay Defence.

Signed /s/
Jared Kneitel

Dated 29 June 2009