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SCSL-04-16-T

(19945 - 20093)

SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

Before: Hon. Justice Richard Lussick, Presiding
Hon. Justice Julia Sebutinde
Hon. Justice Teresa Doherty

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR

Against
ALEX TAMBA BRIMA

BRIMA BAZZY KAMARA

SANTIGIE BORBOR KANU

CONFIDENTIAL
KAMARA FINAL TRIAL BFIEF

Office of the Prosecutor:
Mr. Christopher Staker
Mr. Karim Agha
Mr. Charles Hardaway

Defence Counsel for Brima
Mr. Kojo Graham
Ms. Glenna Thompson

Defence Counsel for Kanu:
Mr. Geert-Jan Alexander Knoops
Ms. Carry Knoops
Mr. Agibola E. Manly-Spain

Defence Counsel for Kamara:
Mr. Andrew Daniels
Mr. Mohamed Pa-Momo Fofanah

PART A: INTRODUCTION:

1. Pursuant to an Order of Trial Chamber II (herein called "the Court") entitled "Order for Filing of Final Trial Briefs and Presentation of Closing Arguments"[1], in which the Court, relying respectively on rules 54, 65*bis*, and 86 of the Rules of Procedure and Evidence of the Special Court (herein after called "the Rules"), ordered *inter alia* that "[e]ach Defence team for the three Accused persons may file a final trial brief in respect of their client...", the Defence for Mr. Ibrahim Bazzy Kamara (herein called "the Second Accused") hereby presents its "Final Trial Brief" for and on behalf of the Second Accused.

2. The Second Accused is charged on a fourteen count Indictment[2] with crimes against humanity, violations of article 3 common to the Geneva Conventions and of Additional Protocol II and other serious violations of international humanitarian law, contrary to Articles 2, 3 and 4 of the Statute of the Special Court for Sierra Leone (herein called "the Statute").

3. Count 1 of the Indictment alleges "acts of terrorism", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under Article 3.d of the Statute; Count 2 alleges "collective punishments", another violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under Article 3.b of the Statute. Both counts are categorized under "terrorizing the civilian population and collective punishments". Count 3 alleges "extermination", a crime against humanity punishable under Article 2.b of the Statute; Count 4 alleges "murder", another crime against humanity punishable under Article 2.a of the Statute; and Count 5 alleges "violence to life, health and physical or mental wellbeing of persons, in particular murder", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under

[1] SCSL-04-16-T, pp. 3-4 dated 30 October 2006.
[2] SCSL-04-16-PT dated 18 February 2005.

Article 3.a of the Statute. Counts 3, 4 and 5 are cumulatively categorized under "unlawful killings". Count 6 of the Indictment further alleges "rape", a crime against humanity punishable under Article 2.g of the Statute; Count 7 alleges "sexual slavery and any other form of sexual violence", both being crimes against humanity also punishable under Article 2.g of the Statute; Count 8 alleges "other inhumane act", a crime against humanity punishable under Article 2.i of the Statute; and Count 9 alleges "outrages upon personal dignity", a violation of article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under Article 3.e of the Statute. Counts 6, 7, 8 and 9 are collectively categorized under "sexual violence". Furthermore, Count 10 of the Indictment alleges "violence to life, health and physical or mental wellbeing of persons, in particular mutilation", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under article 3.a of the Statute; and Count 11 alleges "other inhumane acts", a crime against humanity punishable under Article 2.i of the Statute. Both counts are categorized under "physical violence". Count 12 alleges "conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities", an other serious violation of international humanitarian law punishable under Article 4.c of the Statute. Count 13 alleges "enslavement", a crime against humanity punishable under Article 2.c of the Statute. And finally, Count 14 alleges "pillage", a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II thereof punishable under article 3.f of the Statute.

4. Significantly, Counts 3, 4, 6, 7, 8, 11 and 13, which are alleged as crimes against humanity, are particularly referable to "acts and omissions...committed as part of a widespread or systematic attack directed against the civilian population of Sierra Leone"[3]. The said "civilian population" refers only to "persons who took no active part in the hostilities, or who were no longer taking an active part in the hostilities"[4].

[3] Id.. para. 19, p. 4.
[4] Id.. para. 20, p. 5.

In its "Decision on Defence Motions for Judgment of Acquittal Pursuant to Rule 98"[5] (hereinafter called "the Court's Rule 98 Decision"), the Court defined the term: "*widespread*" in the phrase "widespread or systematic attack" to denote "*massive, frequent, large-scale action, carried out collectively with considerable seriousness and directed at multiple victims*"; and the term "*systematic*" as denoting "*organized action following a regular pattern and carried out pursuant to a pre-conceived plan or policy, whether formalized or not*".[6] The Court held further that "[i]t is not necessary that each act which occurs within the attack should itself be widespread or systematic" but that the act or various acts should "form part of an attack upon the civilian population that is either "widespread" or "systematic".[7] Thus, a single act done within the context of a general widespread or systematic attack upon a civilian population may qualify. Similarly, the Court held that "a perpetrator need not commit numerous offences to be held liable for crimes against humanity".[8]

5. Apart from the specific count charges above, the Indictment also contains "general allegations" as well as allegations concerning "individual criminal responsibility" which, *inter alia*, refers to the Second Accused as "a senior member of the AFRC, Junta and AFRC/RUF forces"[9], "a member of the Junta governing body"[10] and as "a commander of AFRC/RUF forces which conducted armed operations throughout the north, eastern and central areas of the Republic of Sierra Leone…"[11]. Additionally, it is claimed that the Second Accused shared "a common plan, purpose or design (joint criminal enterprise)" with members of the RUF, other members of the AFRC and Mr. Charles Ghankay Taylor[12] to commit the crimes alleged in the Indictment[13]. More significantly, the Second Accused, like the other co-Accused, is said to be both

[5] SCSL-04-16-T, dated 31 March 2006, pp. 17890-17991 of the Records of Court.
[6] Id., para. 42(b), quoting *inter alia*, *Prosecutor v. Akayesu,* ICTR-96-4-T, Judgment, Trial Chamber, 2 September 1998, [hereinafter referred to as "*Akayesu* Trial Chamber Judgment"], at para. 580.
[7] Id.
[8] Id. quoting the ICTY case of *Prosecutor v. Tadic,* ICTY-94-1-T, Judgment, Trial Chamber, 7 May 1997, [hereinafter referred to as "*Tadic* Trial Chamber Judgment"], at para. 649.
[9] Id, para. 25, p.5. AFRC represents "Armed Forces Revolutionary Council" and RUF represents "Revolutionary United Front".
[10] Id. para. 26, p.5.
[11] Id. para. 27, p.6.
[12] The Indictment fails to show who this person is or was in terms of designation, status or characterization.
[13] See paras. 31-34, pp. 6-7 of the Indictment.

"individually criminally responsible" for his own acts and omissions as well as responsible for "the criminal acts of his subordinates"[14], if any.

6. The offences alleged in the Indictment are said to have been committed within Sierra Leone "after 30 November 1996"[15]. However, whilst Counts 3 through to 11 contain specific timeframes, mostly periods outlined within the years 1997, 1998 or 1999 as may be appropriate, Counts 12, 13 and 14 are not so confined; the latter are mostly referable to "all times relevant to [the] Indictment". Counts 1 and 2 do not stand on their own. By their wording in the Indictment, both counts are distinctly reliant and legally supplemental to the succeeding Counts 3 to 14. Counts 1 and 2 thus have no timeframe and can, at best, be qualified by the particulars of Counts 3 to 14 in time.

7. Prior to setting out his Defence, and in compliance with the Court order seeking the Second Accused's response to the Prosecution's filing of its Pre-Trial and Supplemental Briefs, the Second Accused filed his Pre-Trial Defence Brief on 21 February 2005[16]. The said Defence Brief laid out the Second Accused's case theory, attempting to set the facts straight and to, *inter alia*, debunk the allegations against him. The Prosecution's effort to confuse the case against the said Accused was noted.

8. Further to the above, at the close of the Prosecution's case in November 2005, the Second Accused, in concert with the other co-Accused, filed both an Individual and Joint Motion for Acquittal[17] pursuant to Rule 98 of the Rules. The Prosecution accordingly filed its Response[18] to the said respective Motions, to which a Reply was, *inter alia*, filed by the Defence for the Second Accused[19].

9. In considering and dismissing the said Motions for Acquittal by the three Accused in their entirety, the Court, *inter alia*, came to the general conclusion that it is satisfied

[14] Id. paras. 35-36, pp. 6-7.
[15] Id. para. 18, p. 4.
[16] SCSL-04-16-PT, pp. 6259-6281.
[17] Dated 12 and 13 December 2005 respectively.
[18] Dated 23 January 2006.
[19] Dated 30 January 2006.

that there is evidence, *if believed*, upon which a reasonable tribunal of fact could hold beyond reasonable doubt that the Second Accused, together with the other co-Accused, were responsible, individually and/or jointly, for the crimes charged in the Indictment[20]. By the same stretch, however, the Court ruled that "the Rule 98 standard for determining the sufficiency [of evidence] is not evidence on which the tribunal should convict, but evidence on which it could convict"[21].

10. Subsequent to the said Decision, the AFRC Defence commenced its case on June 5, 2006 and called more than 50 Common Witnesses, including 3 Expert Witnesses. The Second Accused additionally called 6 Individual Witnesses and closed his case.

11. Part B of this Final Trial Brief shall deal with analyses of key legal issues in the Indictment from a holistic perspective, to wit, the issues of "Individual Criminal Responsibility" under the Statute. It will include, Individual Criminal Responsibility under Article 6.1 of the Statute (planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of any of the crimes outlined in the Statute), Individual Criminal Responsibility by participating in a Joint Criminal Enterprise[22] and Individual Criminal Responsibility under Article 6.3 of the Statute (superior or command and control criminal responsibility). Additionally, this Part of the Address will deal with the ultimate issue of "Greatest Responsibility" as a major requirement of the Indictment, pursuant to Articles 1 and 15.1 of the Statute. It will also address certain fundamental "Defects" in the Indictment, which cannot be waived to the legal detriment of the Second Accused, and will conclude with a review of "Motive" by certain Prosecution Witnesses to distort events, misrepresent facts and prejudice the Court against the Second Accused.

12. Part C shall address Factual as well as Summarized Legal Analysis of the Indictment on a Count by Count basis. The latter (legal elements) shall include defining each

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[20] See the Court's Rule 98 Decision in its entirety, *supra* at note 5.

[21] Id., para. 271.

[22] Incorporated under Article 6.1 of the Statute by reference to existing customary international law at the time. See the Court's Rule 98 Decision, id., paras. 308-311.

crime alleged and confining the requirements or proof thereof to the facts before the Court, both as presented by the Prosecution and as refuted by the Defence. The former (factual elements) shall essentially look at the evidence before the Court in general, including testimonial and documentary evidence, as well as in particular by selecting certain key witnesses of the Prosecution and then marching their tested evidence against those of the witnesses for the Defence. In the latter regard, the Defence for the Second Accused has undertaken to concentrate more on the following witnesses whom it considers to be fundamental to proof of the Prosecution's case: TF1-334, TF1-167, TF1-184, TF1-023, TF1-045, TF1-033 and TF1-153 as well as the Prosecution's Military Expert Witness, Colonel Richard Iron. Relevant transcripts of the testimonies of each of these witnesses shall be juxtaposed with relevant transcripts of Defence witnesses, especially individual Defence witnesses for the Second Accused, so that clarity will be enhanced as to where the truth lies, where attempts are made to cloud or distort information and events and how and why the Defence for the Second Accused considers the case as unfounded against him.

13. Worthy of note is that Part C of this presentation shall commence analysis of the Indictment from Counts 2 to 3 upwards, skipping Counts 1 and 2 for a later scrutiny. This is because the Defence for the Second Accused, as noted in paragraph 6 of this Address, considers Counts 1 and 2 to be general and, as such, "distinctly reliant and legally supplemental to the succeeding Counts 3 to 14" of the Indictment. It is our Defence's considered view that substances of criminality, or the lack of them, should logically emanate from the specific to the general and not vice versa.

14. Finally, Part D of this Final Trial Brief shall conclude with an analysis of the legal requirements of the Burden and Standard of Proof in International Criminal Trials, such as the current trial, as well as the ultimate prayer from the Defence of the Second Accused, to wit, that based on the holistic analyses of the various limbs of the Indictment and the divers conflicting and uncorroborated evidence before the Court, the Second Accused be acquitted and discharged on every Count of the Indictment for want of establishing a case against him beyond reasonable doubt.

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PART B: ANALYSES OF KEY LEGAL ISSUES IN THE INDICMENT:

i. The Issue of Individual Criminal Responsibility under Article 6.1 of the Statute:

15. The issue of Individual Criminal Responsibility under Article 6.1 of the Statute as distinct from other forms of criminal responsibility attributable to an Accused person, in this case the Second Accused, stands out as a crucial element of the Indictment without which the other forms of individual as well as "greatest" criminal responsibilities may not lie. Article 6.1 of the Statute provides as follows:

> *A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in articles 2 to 4 of the present Statute shall be individually responsible for the crime.*

The Indictment is itself confined to the crimes outlined in articles 2 to 4 of the Statute.

16. Article 6.1 of the Statute thus assumes a "direct" or "contributory" participation by the Second Accused in the crimes outlined in the Indictment. The key elements of this aspect of Individual Criminal Responsibility therefore includes planning, instigating, ordering, committing or aiding and abetting in the planning, preparation or execution of any of the alleged crimes. Each of these elements shall be considered separately and attempts will be made at this stage to illustrate why the Second Accused is not guilty of any of the foregoing elements, to be followed later by a detailed analysis of the evidence under Part C of this Final Trial Brief.

a. "Planning" under Article 6.1 of the Statute:

17. In the Court's Rule 98 Decision,[23] it defined Planning as implying that "*one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases. The **actus reus** requires that the accused, alone or together with others, designed the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The **mens rea** requires that the accused acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime*". (Emphasis added). In the ICTY case of *Prosecutor v. Brdjanin*[24], the Court held that responsibility for planning a crime shall only lie if it is demonstrated that the accused was 'substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance'.

18. As would be more amply demonstrated in the Factual Analysis of this Address, the *actus reus* of the offence of Planning alluded to the Second Accused by the Prosecution is mostly to the effect that he allegedly served as second-in-command to the First Accused[25], was present when the First Accused gave orders for certain alleged offences to be committed and did nothing to stop such offences from being committed[26], or that, in some crime bases, he orchestrated attacks himself[27]. Whilst this *actus reus* has been wholly challenged and denied by Common[28] and, in particular, Individual Witnesses for the Second Accused[29], the First Accused himself, during testimony to the Court, consistently and irrevocably maintained that the Second Accused was, at no point in time, his second-in-command in any undertaking

[23] See para. 284, *supra* at note 5.
[24] ICTY IT-99-36-T, Judgment, Trial Chamber, 1 September 2004 [hereinafter called "*Brdjanin* Trial Chamber Judgment"], para. 357.
[25] See Transcripts of Witness TF1-334 (16 May 2005 – 22 June 2005), TF1-167 (15-21 September 2005) & TF1-184 (26-30 September 2005).
[26] Id.
[27] See especially Transcripts of Witness TF1-334 (20 May 2005 & 15 June 2005), TF1-167 (15-16 September 2005) & TF1-184 (27 September 2005).
[28] Reference to the Transcripts of all Common Witnesses called by and for the three Accused jointly.
[29] Reference to Transcripts of Kamara Defence Witnesses: DBK 037, 005, 012, 129, 131 & 126.

whatsoever[30]. In addition to denying the crimes in the Indictment, the First Accused further stated that the Second Accused was never an accomplice to him in any of the crimes alleged[31]. This stance was maintained in the respective cross-examinations of the First Accused by both the Defence for the Second Accused and the Prosecution[32]. These revelations are crucial because the definition of the offence of "planning" by the Court implies that the designing of the criminal conduct should be accomplished at both *the preparatory and execution phases.*

19. Regarding the alleged orchestration or "planning" of attacks by the Second Accused himself in certain crime bases, namely, Port Loko District including the Westside Jungle[33], the Individual Witnesses for the Second Accused respectively placed the "preparation" and "execution" of such attacks in the exclusive hands of Prosecution Witness TF1-167 and his subordinates[34]. Thus, the evidence before the Court, when holistically considered, does not support the involvement of the Second Accused in the two complementary phases of "planning" in order to sustain the crimes alleged.

20. Besides the foregoing, the offence of Planning, as already noted, requires the existence of the ***mens rea*** that *"the accused acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan"*[35]. The evidence adduced by the Prosecution and challenged and denied by the Defence for the Second Accused fail to show any such "direct intent" by the Second Accused, especially absenting his own planning. Consequently, in the absence of evidence that the Second Accused, or together with any other person, designed or contemplated designing the commission of any of the crimes alleged in the Indictment at both the preparatory and execution

[30] See Tamba Brima's Transcripts of 06 June 2006 to 06 July 2006.
[31] Id.
[32] Id., especially Transcripts from 21 June 2006 to 06 July 2006.
[33] See Transcripts of Witness TF1-334 (15 June 2005) & TF1-167 (16 September 2005)
[34] See especially Transcripts of Kamara Defence Witnesses: DBK 037 (03-05 October 2006), DBK 012 (05, 09 & 18 October 2006), DBK 129 (09 & 18 October 2006), DBK 131 (10-11 October 2006), DBK 126 (11-12 October 2006) & DBK 005 (05 & 12 October 2006),.
[35] See *Prosecutor v. Kordic and Cerkez*, ICTY IT-95-14/2A, Judgment, Appeals Chamber, 17 December 2004, [hereinafter called "*Kordic* Appeals Chamber Judgment"] paras. 29-31.

phases[36], the element of "planning" in Article 6.1 of the Statute should be discountenanced and the offence of planning dismissed against the Second Accused.

b. "Instigating" under Article 6.1 of the Statute:

21. Like Planning above, Instigating is defined by the Court in its Rule 98 Decision[37] as meaning *"prompting another to commit an offence. Both acts and omissions may constitute instigating, which covers express as well as implied conduct. A nexus between the instigation and the perpetration must be proved, but it is not necessary to demonstrate that the crime would not have been perpetrated without the involvement of the accused. The* ***actus reus*** *requires that the accused prompted another person to commit the offence and that the instigation was a factor substantially contributing to the conduct of the other person(s) committing the crime. The* ***mens rea*** *requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation"*. (Emphasis added).

22. It is the submission of the Defence for the Second Accused that the tested evidence led by the Prosecution does not per se disclose "Instigation" as defined above. What the evidence of the Prosecution discloses, through various witnesses who testified[38], is an allegation of "ordering", which shall be dealt with separately in a short while. Thus, "prompting" or "bringing about"[39] has been used by the Prosecution in an authoritative sense, assuming a level of command and control over others to whom directions were given, devoid of any ordinary sense attached to the term or offence of "Instigating". To the extent that this is the case, the Defence for the Second Accused holds that the evidence led and the allegations made in the Indictment, within the

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[36] See *Akayesu* Trial Chamber Judgment, *supra* note 6, at para. 480; *Brdjanin* Trial Chamber Judgment, *supra* note 24, at para. 268.
[37] *Supra* at para. 293.
[38] Especially Prosecution Witnesses: TF1-334, 167, 184 & 023.
[39] See ICTY's *Prosecutor v. Blaskic*, Judgment, Trial Chamber, 3 March 2000, [hereinafter "*Blaskic* Trial Chamber Judgment"] at para.280.

context of the AFRC being an "armed unit", do not qualify for the offence of Instigating as provided in Article 6.1 of the Statute. The offence should be dismissed.

c. "Ordering" under Article 6.1 of the Statute:

23. Similarly, the Court, in its Rule 98 Decision,[40] defined Ordering as requiring "*proof that a person in a position of authority uses that authority to instruct another to commit an offence. A formal superior/subordinate relationship between the accused and the perpetrator is not required. It is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can reasonably be implied. There is no requirement that the order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence. It is not necessary for the order to be given by the superior directly to the person(s) who perform(s) the* ***actus reus*** *of the offence. What is important is the commander's mens rea, not that of the subordinate executing the order (...) The* ***actus reus*** *of "ordering" requires that the accused, as a person in a position of authority, instructed another person to commit an offence. The* ***mens rea*** *requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order*". (Emphasis added).

24. From the foregoing definition by the Court, it follows that for the offence of "Ordering" to lie, the accused should firstly, possess the authority, expressly or impliedly, to order the commission of the offence[41]; and secondly, that the accused "acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that

[40] See paras. 295-96.

[41] See *Prosecutor v. Kordic and Cerkez*, ICTY IT-95-14/2-T, Judgment, Trial Chamber 26 February 2001, [hereinafter called "*Kordic* Trial Chamber Judgment"] at para. 388; and *Akayesu* Trial Chamber Judgment, *supra* note 6, at para. 483.

order"[42]. Initially, it is the submission of the Defence that although the Prosecution alleges in the Indictment that the Second Accused was "a senior member of the AFRC, Junta and AFRC/RUF Forces"[43], it did not lead any evidence to show that the Second Accused "ordered" or "instructed" the commission of any crime within the period defined as "the AFRC period", to wit, May 1997 to February 1998.

25. Furthermore, in the case of allegations made by the Prosecution, through the Indictment and its witnesses, that the Second Accused "ordered" or "instructed" the commission of crimes during the period of "the AFRC faction"[44], to wit, from February 1998 to the invasion of Freetown in January 1999, the Defence for the Second Accused submits that the said allegations were not only mostly uncorroborated[45] or conflicting in substance[46], but that they were vigorously challenged and denied by especially the First Accused under oath[47] as well as the tested Individual Witnesses for the Second Accused[48].

26. Similarly, allegations made by the Prosecution, through its witnesses and the Indictment, that the Second Accused "ordered" or "instructed" the commission of crimes during the period after the invasion of Freetown, notably between the months of February and April 1999 at various locations in the Port Loko District, were also not only uncorroborated[49] or conflicting in account[50] but in all cases strongly challenged and denied by the Individual Witnesses for the Second Accused[51].

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[42] See the Court's Rule 98 Decision, para. 296 quoting *Kordic* Appeals Chamber Judgment, *supra* note 35, paras. 29-30.
[43] *Supra*, at note 9.
[44] For use of this phrase, see Exhibit P. 36 (the Prosecution's Military Expert Report, at para. A4 c.
[45] Such as the allegation by Witness TF1-023 about the Second Accused ordering the killing of civilians at Mile 38 (Transcript of 10 March 2005, at p. 36).
[46] See Transcripts of Witness TF1-334 (15 June 2005) & TF1-167 (16 September 2005) about events that occurred after 6 January 1999 en route to Magberi or the Westside Base.
[47] See note 30, *supra*.
[48] See note 34, *supra*.
[49] See notes 45 & 46, *supra*.
[50] See note 46, *supra*.
[51] See note 34, *supra*.

27. In the light of the above, the Defence for the Second Accused submits that the evidence available to the Court creates sufficient doubt about the allegations made out against the Second Accused in the Indictment vis-à-vis the offence of "ordering", particularly against the backdrop of a later argument in this Final Trial Brief that the Second Accused never held any "position of authority" within the so-called "AFRC faction" or any armed group or unit. The Defence for the Second Accused thus prays that the crime of 'ordering' within Article 6.1 of the Statute be dismissed against him.

d. "Committed" under Article 6.1 of the Statute:

28. In the Court's Rule 98 Decision,[52] it held that *"an individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law".*[53] *There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.* (Emphasis added).

29. Following the Judgment of the Appeals Chamber in *Prosecutor v. Tadic*[54], the said Chamber proceeded in the subsequent Judgment of *Prosecutor v. Krnojelac*[55] to define "*committed*" as "*first and foremost the physical perpetration of a crime by the offender himself*". The *actus reus* is paramount to the existence and proof of the offence of "committed". Thus, absenting physical perpetration of a crime by an accused coupled with the existence of doubt as to whether the said accused commanded a position of authority in a defined armed group(s), any submission that that accused should be held culpable for "committing" a crime ought to be dismissed.

30. In the case of the Second Accused, it is the submission of his Defence that whilst the evidence of "committed" available to the Court consisted in isolated allegations

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[52] See para. 277.
[53] Referring to ICTY's *Prosecutor v. Tadic*, IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999 [hereinafter called "*Tadic* Appeals Chamber Judgment"], at para. 188.
[54] Id.
[55] ICTY Judgment, Appeals Chamber, 15 March 2002 ["*Krnojelac* Appeals Chamber Judgment"], para. 73.

by certain witnesses for the Prosecution, the said allegations were either mostly uncorroborated or clearly conflicting and thus failed *in extensio* to withstand cross-examinations[56]. This situation is further compounded by the fact that the key Prosecution Witnesses who alleged the said direct crimes themselves had motives[57], and their account of events was also vigorously challenged and denied by especially Individual Witnesses for the Second Accused[58]. In this regard, the Defence for the Second Accused submits that the offence of "committed" as provided in Article 6.1 of the Statute has not been proven and should therefore be dismissed.

e. "Aiding and Abetting" under Article 6.1 of the Statute:

31. Again, in its Rule 98 Decision[59], the Court defined the ***actus reus*** of "aiding and abetting" as requiring that "*the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime*". The Court further held that the "***mens rea*** *requires that the accused knew that his acts would assist the commission of the crime by the perpetrator or he was aware of the substantial likelihood that his acts would assist the commission of the crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed*". (Emphasis added). It was held in the case of *Prosecutor v. Kunarac*[60], that presence alone is not sufficient to prove "aiding and abetting", unless it can be shown that such presence gave legitimacy or encouragement to the acts of the principal. Thus, to aid and abet by omission, the failure to act should have

[56] See notes 45 & 46, *supra*.
[57] Individual Witnesses for the Second Accused, namely, Witness DBK 012 and DBK 131 alleged special treatment of TF1-334 & TF1-184 whilst in prison and that this was through officials of the Special Court. TF1-167 admitted being an informant of the Sierra Leone Police prior to his testimony to the Court. For the latter information on TF1-167, see Transcript of 19 September 2005, pp.35-36.
[58] See note 34, *supra*.
[59] See paras. 301-2.
[60] ICTY Judgment, Trial Chamber, 22 February 2001, ["*Kunarac* Trial Chamber Judgment"], at para. 393.

a significant effect on the commission of the crime in issue[61]. The *actus reus* of the offence is therefore a crucial element in substantiating its commission.

32. In analyzing this offence as claimed in the Indictment, the Defence for the Second Accused submits that the thrust of the Prosecution's case centers round purported acts of assistance, encouragement and/or support allegedly given to the First Accused by the Second Accused in the alleged planning and execution of orders to commit crimes[62]. Aiding and abetting is also inferred in allegations by the Prosecution that the Second Accused was firstly, at a certain period in the Kono District, second-in-command to Dennis Mingo alias "Superman", a senior RUF commander[63]; and secondly, that he was at a later stage third-in-command to SAJ Musa, who was the frontrunner of the "AFRC faction", on the march to Freetown sometime in 1998[64].

33. The Defence for the Second Accused replies to the foregoing allegations by re-submitting that the First Accused himself consistently denied in both examination-in-chief and cross-examinations that: i) the Second Accused was his deputy[65], ii) that the Second Accused aided and abetted him or any one in committing the crimes alleged in the Indictment,[66] and iii) that the Second Accused was a commander in an alleged AFRC/RUF coalition that committed crimes in Kono and other parts of Sierra Leone[67]. Besides, whilst many of the Prosecution Witnesses called made no mention of the Second Accused's presence in the Kono District[68], several of those who alleged his presence in the District during the period of the Indictment affirmed that there was no joint criminal enterprise or authority between the "AFRC faction" and the RUF[69].

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[61] See *Akayesu* Trial Chamber Judgment, *supra* note 6, at para 705.
[62] See note 25, *supra*.
[63] Id.
[64] Id.
[65] See note 30, *supra*.
[66] Id.
[67] Id.
[68] Especially non-insider Prosecution Witnesses to whom reference shall be made in Part C of this Brief.
[69] See for example, Transcript of TF1-184 (27 September 2005, pp. 8-9 & 30 September 2005, pp. 61-62), as well as the Transcript of TF1-045 (21 July 2005, p.35).

34. Significantly too, any semblance of truth in the Prosecution's allegations regarding assistance, encouragement or support by the Second Accused to the First Accused, the RUF and/or SAJ Musa was dealt a final blow by the tested evidence of both Common Defence Witnesses and Individual Witnesses for the Second Accused,[70] as well as by the tested evidence of the First Accused[71]. Consequently, the Defence for the Second Accused submits that the offence of "aiding and abetting" as contained in Article 6.1 of the Statute has not been proven and should be dismissed.

Conclusion:

35. In conclusion, the Defence for the Second Accused submits that the requirements of Article 6.1 of the Statute has altogether not been proven *beyond reasonable doubt*[72] against the Second Accused to warrant a conviction by the Court and must be dismissed. In the case of *Prosecutor v. Delalic et al*[73], the Trial Chamber held that "the accused is only required to lead such evidence as would, if believed and uncontradicted, induce a reasonable doubt as to whether his version might not be true, rather than that of the Prosecution. Thus the evidence which he [the accused] brings should be enough to suggest a reasonable possibility". The requirement for the Prosecution to establish proof of its case beyond reasonable doubt shall be more comprehensively dealt with under the final part, Part D, of this Final Trial Brief.

ii. The Issue of Individual Criminal Responsibility by Participating in a Joint Criminal Enterprise:

a. "Joint Criminal Enterprise" Defined by the Court:

[70] Reference to the Transcripts of all Common Defence Witnesses as well as Kamara's Witnesses at note 34
[71]
[72] The standard of proof in international criminal trials requires the Prosecution to prove its case against the accused "beyond a reasonable doubt": ICTY's *Prosecutor v. Delalic et al*, Judgment, Trial Chamber, 16 November, 1998, ["*Delalic* Trial Chamber Judgment"], at para. 601.
[73] Id., at para. 603.

36. Though the Court admitted in its Rule 98 Decision that Article 6.1 of the Statute does not make explicit reference to "joint criminal enterprise"[74], it adopted the International Criminal Tribunal for the Former Yugoslavia (ICTY)'s Appeals Chamber decision in the case of *Prosecutor v. Tadic*[75] that: participation in a joint criminal enterprise existed as a form of liability in customary international law applicable to an Article 6.1 situation. The Court then proceeded to set out the three categories of "joint criminal enterprise" identified in the above decision, to wit, the "*basic*" form, in which "*all co-perpetrators, acting pursuant a common purpose, possess the same criminal intention*"; the "*systemic*" form, being "*a variant of the basic form characterized by the existence of an organized system of ill-treatment, for example, concentration camps in which the prisoners are killed or mistreated pursuant to the joint criminal enterprise*"; and the "*extended*" form, which concerns "*cases involving a common purpose to commit a crime where one of the perpetrators commits an act which, while outside the common purpose, is nevertheless a natural and foreseeable consequence of the effecting of that common purpose*".[76]

b. The Prosecution's Notion/Use of "Joint Criminal Enterprise":

37. On its part, the Prosecution failed to clearly set out, in especially the Indictment, which limb or limbs of the afore-mentioned "joint criminal enterprise" it was relying upon to establish collective criminal responsibility of the three Accused. The Prosecution merely sought to rely on reference to the entire concept of 'joint criminal enterprise' in its Pre-Trial Brief, presented in a slightly varied form, as justification for alleging the offence against the three Accused[77]. That reference included "same criminal intention" the definition of which is similar to the "basic form joint criminal enterprise"; "acting pursuant to a concerted plan", which is also similar to the "systemic form of joint criminal enterprise"; and "foreseeable conduct outside the common design", which is akin to the "extended form of joint criminal enterprise".

[74] See para. 308 of the Decision.
[75] *Tadic* Appeals Chamber Judgment, *supra* note 53, at paras. 188 & 226.
[76] Id., paras. 195-226. See also para. 309 of the Court's Rule 98 Decision, *supra*.
[77] See para. 209 of the Prosecution's Pre-Trial Brief filed pursuant to orders of court dated 13 February 2004 and 1 April, 2004 respectively.

Even where it attempted at mapping out the forms of joint criminal enterprise it knew to exist at customary international law, the Prosecution failed to identify with distinct particularity which of the forms it was relying on to prove its case against the three Accused. This failure is equally worsened by the fact that no such position is taken in the Indictment as well, which is the key document that indicts the three Accused, invites them to take a plea and sets the entire case in motion. The Prosecution's reference to an explanation of joint criminal enterprise in the Indictment is merely to the phrase, "[sharing] of a common plan, purpose or design",[78] simpliciter.

c. The Prosecution's Notion/Use of "Joint Criminal Enterprise" is Defective:

38. In the light of the foregoing, the Defence for the Second Accused, firstly, submits that it is not for the Court to draw any conclusion for the Prosecution as what its inference by the use of the phrase, "joint criminal enterprise", in the Indictment was or were[79]. Rather, it is for the Prosecution to distinctly illustrate in the Indictment its use and meaning of the phrase, particularly when it is used as a crucial limb of criminal responsibility therein. Put simply, it is submitted that the three forms of "joint criminal enterprise" cannot be incorporated by reference into the Indictment.

39. Secondly, the Prosecution's failure to indicate in the Indictment that it was using "joint criminal enterprise" as a limb of "customary international law" is, in the submission of the Defence for the Second Accused, fatal. Admittedly, nothing in Article 6 of the Statute makes reference to 'joint criminal enterprise in any of its forms' as a limb or category of individual criminal responsibility under the Statute. Notwithstanding that, paragraph 35 of the Indictment clearly, and erroneously, suggests that "joint criminal enterprise" is a (key) ingredient of individual criminal responsibility under Article 6.1 of the Statute.

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[78] See para. 33 of the Indictment.
[79] See the Court's Rule 98 Decision, *supra* at paras 321-23.

40. Consequently, it is the submission of the Defence for the Second Accused that the reference to "joint criminal enterprise" in the Indictment in its current form is defective and should not be entertained by the Court as an element of the Indictment. As will soon be discussed under another sub-topic to this Final Brief: "Defects in the Indictment", a defective Indictment cannot be legally sustained[80] or cured by the failure of an Accused person to raise its defect as a preliminary jurisdictional issue.

d. Extended or "Foreseeable" Form of Joint Criminal Enterprise:

41. Apart from the defective use of the phrase, "joint criminal enterprise", by the Prosecution in the Indictment, the Defence for the Second Accused observes that the Prosecution alleges a "joint criminal enterprise" for crimes alleged in the Indictment only between the three Accused (as a whole and as members of the AFRC) and the RUF[81], "including ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO",[82] and not among the three Accused *inter se*. Apparently, using the third limb of "joint criminal enterprise", namely, the "extended" or "foreseeable conduct outside the common design" test of collective criminality, the Prosecution seeks to impose *individual* criminal responsibility for a litany of crimes not directly attributable to any of the three Accused. The Defence for the Second Accused submits that the theory that such crimes were "reasonably foreseeable consequence[s]" of a "shared common plan" between the AFRC and the RUF because they both aimed at gaining control of Sierra Leone and its mineral resources[83] pushes the joint criminal enterprise doctrine beyond its breaking point. Besides, it, in any event, misconstrues the true nature of the relationship between the AFRC and the RUF. Because these legal and factual foundations are faulty, the crimes set forth in the Indictment cannot be attributed to the three Accused on the basis of a joint criminal enterprise.

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[80] See *Prosecutor v. Nsengiyumva*, ICTR Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to Personal Jurisdiction on the Amended Indictment, 12 May, 2000, ["the *Nsengiyumva* Decision"], para.1; also, *Prosecutor v. Kanyabashi*, ICTR Decision on Defence Preliminary Motion for Defects in the Form of the Indictment, 31 May, 2000, ["the *Kanyabashi* Decision"], para. 5.1.

[81] As said in note 9 of this Final Trial Brief, AFRC represents "Armed Forces Revolutionary Council" and RUF represents "Revolutionary United Front".

[82] See paras. 33-34 of the Indictment.

[83] Id.

42. More importantly, the "extended" or "foreseeable" form of joint criminal enterprise liability imparts personal liability to members of the enterprise for crimes that may not only have been committed by them, but for crimes that they also may not have understood as being within the scope of the enterprise. Because this theory imposes co-perpetrator status on individuals far removed from the actual crime, it should be reserved only for those who substantially contributed to the joint criminal enterprise. The evidence before the Court does not show that the three Accused, and in particular the Second Accused, made any such substantial contribution to the alleged joint criminal enterprise. Therefore, the Accused cannot be held responsible for any crimes on the basis of the extended form of joint criminal enterprise liability.

43. In recent years, both the international criminal tribunals and international criminal law scholars have called for a narrower and more cautious application of extended-form joint criminal enterprise liability.[84] The ICTY, for example, has limited the application of third-form liability to cases where the accused "carried out acts that substantially assisted or significantly effected the furtherance of the goals of the enterprise, with the knowledge that his acts or omissions facilitated the crimes committed through the enterprise."[85] Whether the accused made a contribution substantial enough for extended-form liability to attach will depend on the nature of the accused's role vis-à-vis the gravity and scope of the crimes for which he is to be held accountable.[86] Thus, the accused's participation in the enterprise must be evaluated in terms of: (1) the overall size of the enterprise, (2) the nature of the functions performed by him, (3) the position of the accused vis-à-vis the crimes in

[84] *See, e.g.*, 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, 150 (January 2005)[hereinafter Danner & Martinez] ("At the very least, such a requirement will avoid the unsavory possibility of the prosecution proving a low-level defendant's contribution to a [joint criminal enterprise] defined as all the crimes occurring within a country over a multi-year period[.]")

[85] See *Prosecutor v. Kvocka*, IT-98-30/1-T, Judgment, Trial Chamber, 2 November 2001, ["*Kvocka* Trial Chamber Judgment"], at para. 312. In the same paragraph, the Trial Chamber noted that 'aiding and abetting' is the better way to conceive the responsibility of one who "contributes to the commission of the crimes by playing a role that allows the system or enterprise to continue its functioning." Although this form of liability may have probably captured the role of the Accused in the present case, the Prosecutor does not allege that the Accused "aided and abetted a joint criminal enterprise".

[86] Id. *Kvocka* at para. 311.

question, and (4) the "efficiency, zealousness or gratuitous cruelty" displayed by the accused in his role in the enterprise.[87]

44. By thus restricting the application of third-form joint criminal enterprise liability, international criminal courts can ensure that culpability is assigned only to those who deserve it, and in proper measure, by carefully assigning liability on the basis of the accused's individual actions and intent.[88] In the present case, the evidence presented by the Prosecutor, when weighed within the bounds of the allegations in the Indictment, fails to demonstrate that the three Accused, and in particular the Second Accused, contributed to a joint criminal enterprise for the purposes of assigning extended-form liability.

e. Basic or "Same Criminal Intention" Form of Joint Criminal Enterprise:

45. Besides, assuming *arguendo* that the Prosecution was, for any unknown reason using the first limb of the joint criminal enterprise doctrine to indict the three Accused, it has to prove that the perpetrators acted pursuant to a specific common design, plan or purpose and that they shared the same specific criminal intention at the time.[89] In order to convict an accused under this category, the Prosecution must prove that each individual accused voluntarily participated in at least one aspect of the common design and that he intended the criminal act even if he did not perpetrate it himself.[90] It thus seems in the current case that the Prosecution indicted the three Accused by using this category of "joint criminal enterprise" when it asserted in the Indictment that all crimes alleged therein were "actions *within* the joint criminal enterprise."[91] (Emphasis added). However, as already noted, the Prosecution has

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[87] Id.

[88] See Danner & Martinez at pp. 154-55 (discussing the *Krstic* court's apparent discomfort with assigning perpetrator liability to individuals who bear lesser culpability than others who were not before the ICTY); *see also Presecutor v. Krstic*, IT-98-33-A, Judgment, 19 April 2004, para. 137 ["*Krstic* Trial Chamber Judgment"]; and *Prosecutor v. Vasiljevic*, IT-98-32-A, Appeal Judgment, 25 February 2004, para. 102.

[89] See *Tadic* Appeals Chamber Judgment, *supra* note 53, para. 196.

[90] Id., paras. 196 & 220; See also *Prosecutor v. Simic*, IT-95-9-T, ICTY Judgment, Trial Chamber, 17 October 2003, ["*Simic* Trial Chamber Judgment"], at para. 157.

[91] See para. 34 of the Indictment.

chosen to allege a joint criminal enterprise only between the AFRC and the RUF, and not among the three Accused within the AFRC. Moreover, as will be more fully shown under Part C of this Brief, the pieces of evidence made available to the Court by the Prosecution and countered by the Defence, jointly and severally, are legally insufficient to prove a joint criminal enterprise between the RUF and the AFRC[92].

46. The Prosecution seeks to make the Accused liable as co-perpetrators for acts carried out by the RUF at all times of the Indictment; yet, the evidence before the Court indicates that during much of that period, the AFRC and the RUF were at odds and often ill-treated each other[93]. The case law from which the joint criminal enterprise doctrine emerged requires that a prosecutor establish the existence of a criminal "common plan, design, or purpose" in order to assign guilt on the basis of a joint criminal enterprise.[94] It is not enough that a broad allegation is made in the Indictment that the "joint criminal enterprise" complained of was "to gain and exercise control over the territory of Sierra Leone, in particular the diamond mining areas" and/or "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise"[95]. This being a common or mutual objective/enterprise, which is similarly denied, does not constitute a specific crime or criminal intention, whether direct or foreseeable, same or similar, basic or systemic within the context of the Indictment or of Article 6.1 of the Statute.

47. In order to prove the existence of a joint criminal enterprise, the Prosecution must establish the existence of a common plan, design, or purpose *specifically* aimed at committing a criminal act within the tribunal's jurisdiction.[96] The Prosecution must allege and prove that the accused joined with others in a plan aimed at achieving an

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[92] "Proof beyond reasonable doubt" is the golden thread that runs through all elements of criminal liability.
[93] See for example, Transcript of TF1-184 (27 September 2005, pp. 8-9 & 30 September 2005, pp. 61-62), as well as the Transcript of TF1-045 (21 July 2005, p.35), *supra* at note 69.
[94] *Tadic* Appeals Chamber Judgment, para. 227; and *Simic* Trial Chamber Judgment para. 158, *supra*.
[95] See paras. 33-34 of the Indictment.
[96] *Tadic* Appeals Chamber Judgment, para. 227, *supra*.

end that constitutes a crime within the indictment.[97] In the absence of evidence showing a criminal purpose, plan, design or intention between the AFRC and the RUF, the Prosecutor cannot rely on a theory of joint criminal enterprise between the two groups as a basis for individual liability of each of the Accused.

f. Systemic or "Concerted Plan" Form of Joint Criminal Enterprise:

48. The second category of joint criminal enterprise earlier mentioned encompasses "systems of ill-treatment," such as concentration camps.[98] In order to convict an accused under this category, the prosecution must prove: (1) the existence of an organized system of repression; (2) the accused's active participation in the enforcement of such a system; (3) the accused's knowledge of the nature of the system; and (4) the accused's intent to further the system of repression.[99] In the instant case, the Prosecutor does not appear to allege liability on the basis of this category of joint criminal enterprise. The case law reserves this category for highly organized institutions of ill-treatment, and such institutions do not appear explicitly or impliedly in the Indictment, the Prosecution's Pre-Trial Brief, or any of the evidence.

49. While it is true that this form of liability makes an appearance in the brief statement on the joint criminal enterprise doctrine in the Prosecution's Pre-Trial Brief at paragraph 209, none of the Prosecution's evidence avers to the existence of second-form joint criminal enterprise. It is the understanding of the Defence for the Second Accused then that the Prosecution intended to proceed only on the basis of the first and third forms of joint criminal enterprise liability. But if for some reason the second form was intended, the Defence for the Second Accused contends that the evidence does not support any such notion, especially as both Witnesses for the Prosecution

[97] Id.; The ICTY jurisprudence suggests that there must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the [court's] Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization. Membership alone is not enough to come within the scope of these declarations.
[98] *Tadic* Appeals Chamber Judgment, para. 202.
[99] Id., at paras. 202-03.

and Defence alluded to several cases of disunity between the RUF and the AFRC as well as to incidents of ill-treatment by the former against the latter[100].

g. Different Types of "AFRC" within the Alleged Joint Criminal Enterprise:

50. Throughout the Indictment, the Prosecution alleges a "joint criminal enterprise" between the AFRC and the RUF. It refers to the AFRC Forces as "Junta", "soldiers", "SLA" and "ex-SLA"[101] and to the RUF as "rebels" and "People's Army"[102]. The Indictment also conjoins the two Forces and refers to them as ""Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army"[103].

51. However, the evidence before the Court suggests not only that the AFRC was different from the "soldiers", "SLAs" or "ex-SLAs" as well as from the "RUF" or "rebels"/"People's Army"[104], but that the AFRC operated as a separate, governing *de facto* entity distinct from the "soldiers", "SLAs" or "ex-SLAs" commanded by SAJ Musa[105]. This lack of understanding by the Prosecution and its Witnesses as to what name to call the soldiers under SAJ Musa's command led the Prosecution's Military Expert Witness to call Musa's group "the AFRC faction"[106]. Many lay Witnesses of both the Prosecution and the Defence, however, chose to call Musa's group as "SLAs" or "ex-SLAs" coming to Freetown to reinstate the Armed Forces of Sierra Leone (hereinafter called "AFSL")[107], which had been "disbanded"[108] by the

[100] See notes 69 and 34 respectively, *supra*.
[101] See para. 12 of the Indictment.
[102] Id., para. 9.
[103] Id., para. 13.
[104] See Exhibit P.36 of Col. Iron as well as Transcript of 14 October 2005, p. 3 in which the witness admitted that the AFRC was a political junta, the *de facto* government of Sierra Leone then and had an army. According to Exhibit P.36, at para. A4, this AFRC was different from "the AFRC faction".
[105] Id.
[106] Including Col. Iron, the Prosecution's Military Expert above, see Exhibit P.36, at para. A4.
[107] Especially the non-insider Prosecution Witnesses to whom reference will be made in Part C of this Brief. Besides, the Sierra Leone Army (SLA) has had different nomenclatures over the passage of time and professional mutation. As will be noticed in this Final Trial Brief, the SLA has been variously called the

President of Sierra Leone at the time. Although the President acted unconstitutionally in unilaterally disbanding the AFSL established by an Act of Parliament[109], many Sierra Leoneans, including lay witnesses before the Court, believed that the AFSL had been truly "disbanded" and hence, often referred to the soldiers as "ex-SLAs". Evidently, the illegal manner that the President employed to disband the AFSL and raise the Civil Defence Force(s) (CDF) in its stead, without Parliamentary debate and approval,[110] appears to have been one of the reasons for sustained but unsuccessful combat efforts by SAJ Musa and those loyal to him to "reinstate" the Army.

52. The Defence for the Second Accused submits that the AFRC, also known as "Junta", only existed within the jurisdiction of Sierra Leone from the 27 May 1997 to mid-February 1998. The AFRC, as the *de facto* political-cum-military regime in Sierra Leone, ceased to exist immediately it was overthrown by ECOMOG[111] Forces in mid-February 1998. Whilst evidence exists of an understanding between the AFRC and the RUF during the former's reign, that understanding and the activities resulting from it remained largely political[112]. The political-cum-military nomenclature of the AFRC did not change even when the RUF was attached to it. Equally, the RUF did not change or lose its political and military objectives, structures and philosophies even after attaching to the AFRC[113]. In fact, evidence avails before the Court that the relationship between the AFRC and RUF became sour and was at a point of acrimony and detachment at least a few months to ECOMOG's invasion[114].

Sierra Leone Armed Forces (SLAF), Armed Forces of Sierra Leone (AFSL), and now the Republic of Sierra Leone Armed Forces (RSLAF).

[108] See the testimony of Prosecution Military Expert Witness, Col. Irons, in Transcript of 14 October 2005, p. 5, lines 24-27.

[109] Contrary to sections 165 & 166 of the Constitution of Sierra Leone, 1991 (Act No. 6 of 1991).

[110] Section 166 of the Constitution prohibits the raising of any armed force except by an Act of Parliament.

[111] Economic Community (of West African States) Monitoring Group, a military unit of ECOWAS.

[112] See testimony of TF1-045, for example, in Transcript of 19 July 2005, pp. 68-75. The joint meetings attended by the RUF and the AFRC were political in nature, mostly to discuss international pressure to relinquish power, dialogue etc. So were their activities. Positions held by the RUF were also political.

[113] Id. see Transcript of 045 (x-exam). The witness also admitted that the RUF tried to overthrow the AFRC

[114] See note 69 *supra*. Gibril Massaquoi of the RUF was also arrested for planning a coup, see Transcripts of 19 September 2005, p. 54 (TF1-167) and 21 July 2005, p.32.

53. The Prosecution has alleged that the Second Accused was "a senior member of the AFRC, Junta and AFRC/RUF forces". The AFRC and the Junta may have been one and the same, but not so with the RUF. Senior members of the RUF may have served in the AFRC's Junta regime, but that did not imply or express that the Junta or the AFRC was one and the same with the RUF or vice versa; or that the two institutions operated as a merged or fused unit after mid-February 1998[115]. The *de jure* regime of President Kabbah assumed some level of factual control over certain parts of Sierra Leone from mid-February 1998 onwards, when the AFRC legally ceased to exist[116]. The Prosecution's Military Expert, Colonel Irons, in his Military Expert Report, defines the alleged "**RUF/AFRC**" coalition as "the bulk of junta forces *following* the February 1998 Invention *(sic)*; but excludes the AFRC faction commanded by SAJ Musa and Gullit that emerged from mid-1998 to early 1999".[117] (Emphasis added) This definition assumes that the alleged merger between the AFRC and the RUF took place *after* the February 1998 invasion of Freetown. Similarly, the Military Expert describes the "**AFRC**" as "the organization consisting primarily of ex-SLA soldiers, *excluding RUF elements*; during or after the ECOMOG intervention of February 1998"[118]. (Emphasis added). During cross-examination, however, the Military Expert admitted that the regime in power immediately before and during the ECOMOG intervention was that of the "AFRC" *de facto* government[119]. Legal documentary evidence before the Court also verifies that reference was only made to an "AFRC" regime[120], not an AFRC/RUF coalition.

54. Besides, other than being a member of the serving AFRC government, no direct or foreseeable evidence of any form bordering on individual criminal responsibility was established against the Second Accused for the crimes alleged during the AFRC or Junta period, namely, 27 May 1997 to mid-February 1998. To this extent therefore,

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[115] Id.
[116] Soldiers were fleeing Freetown, others were arrested and detained by ECOMOG, see note 25, *supra*.
[117] See Exhibit P.36, para. A4 b.
[118] Id., para. A4 a.
[119] See note 104, *supra*.
[120] See Exhibits P4 (AFRC Proclamation) as well as other AFRC Decrees (Exhibits P5.1-3).

allegations of a joint criminal enterprise between the Second Accused and the RUF or any person or armed force should fail and must be dismissed.

55. This leaves us with the question of whether the Second Accused was a member of the so-called "AFRC/RUF" coalition or "AFRC faction". Again, according to the Prosecution's Military Expert above, the "RUF/AFRC" coalition "excludes the AFRC faction commanded by SAJ Musa and Gullit that emerged from mid-1998 to early 1999".[121] (Emphasis added). The Expert further describes the "**AFRC faction**" as "the force *predominantly consisting of AFRC fighters* that planned and executed the 6 January 1999 invasion of Freetown, and was led by SAJ Musa or Gullit".[122] (Emphasis added). Thus, merging the exclusionary clause in the definition of "RUF/AFRC" above with the definition of "AFRC faction", would leave us with the following definition of "AFRC faction": "the force predominantly consisting of AFRC fighters that emerged from mid-1998 to early 1999 that planned and executed the 6 January 1999 invasion of Freetown, and was led or commanded by SAJ Musa and/or Gullit." This merged definition put together by the Defence for the Second Accused infers that, if the Prosecution's Military Expert were to be believed, any assumed or alleged merger between the AFRC and the RUF involving the Second Accused may have occurred only *after or following* the February 1998 intervention and lasted till *mid 1998*.

56. That said, any allegation or evidence suggesting that the Second Accused was a member of an "AFRC faction" or a coalition of any "AFRC/RUF" forces, save being a member of the AFRC's *de facto* regime which ceased to exist in mid-February 1998, is challenged, denied and refuted by the testimonies of the First Accused, Common Witnesses for the Defence and the Second Defendant's Individual Witnesses[123]. A detailed examination of their respective testimonies shall be done in Part C of this Final Trial Brief.

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[121] See note 117, para. A4 b, *supra*.
[122] Id., para. A4 c.
[123] See notes 28, 30 and 34, *supra*.

Conclusion:

57. The confused and misleading indication that the "AFRC" establishment continued to exist post-mid-February 1998 seriously undercut allegations in the Indictment about the existence of a joint criminal enterprise between the Second Accused and his co-Accused, on the one hand, and between them and the RUF, on the other hand. Besides, even though it is contended by the Defence for the Second Accused that the Prosecution did not allege any form of "joint criminal enterprise" between or among the three co-Accused, the said Defence equally submits that, relying on the tested evidence of the First Accused together with the evidence of the Common and Individual Witnesses for the Second Accused[124], no form of "joint criminal enterprise" to commit the crimes alleged existed between or among the Second Accused and any of the other two Accused. Furthermore, the Defence for the Second Accused relies on the conclusion reached by the Joint Defence Military Expert, Major-General Willem A. J. Prins, in his Military Expert Report that "[b]etween the RUF and the AFRC a joint force or joint structure in military operational sense was never established"[125]. As a result, the Prosecutor's case theory of joint criminal enterprise liability that seeks to assign the three Accused with responsibility for crimes committed by members of the RUF faction, must fail. The same will hold for any 'joint criminal enterprise' alleged by the Accused *inter se*.

iii. The Issue of Individual Criminal Responsibility under Article 6.3 of the Statute:

58. The Prosecution further alleges in the Indictment that: "*in addition, or alternatively, pursuant to Article 6.3 of the Statute, ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, while holding positions of superior responsibility and exercising effective control over their subordinates, are each individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in*

[124] Id.
[125] See Exhibit 36, "Military Expert Report on the Armed Forces Revolutionary Council Faction", July 2006, para. 180.

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"[126]. In the case of the Second Accused, the Prosecution, as already noted, alleges that he was "a senior member of the AFRC, Junta and AFRC/RUF forces", "a member of the Junta governing body" and was, *inter alia*, "a commander of AFRC/RUF forces which conducted armed operations through out the north, eastern and central areas of the Republic of Sierra Leone…"[127]

59. Article 6.3 of the Statute specifically provides that: *"[t]he fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".* Similarly, Article 6.4 of the Statute, though not quoted in the Indictment, provides that *"[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires".*

60. As the Court itself acknowledges in its Rule 98 Decision[128] referred to earlier, "a three-pronged test for liability" should be established under Article 6.3, to wit, firstly, "the existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime"; secondly, that "the accused knew or had reason to know that the crime was about to be or had been committed"; and thirdly, that "the accused failed to take the necessary and reasonable measure to prevent the crime or punish the perpetrator thereof". Each of these elements shall accordingly be analyzed vis-à-vis the case.

[126] See para. 36 of the Indictment.
[127] See notes 9, 10 and 11, *supra*.
[128] See para. 328 of the Decision.

a. Existence of a Superior-Subordinate Relationship:

61. The existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime (his/her subordinate) is predicated upon the power of the said commander to "effectively" command and control the acts of his or her subordinate[129], assuming that the commander exercised any form of authority at all. Relying particularly on Article 28 of the Statute of the International Criminal Court (ICC), any thing short of establishing and proving "effective command and control" by a superior over the conduct of his/her subordinate(s) ousts individual responsibility for the crimes perpetrated by such subordinate(s). "Effective control" is 'a material ability to prevent or punish criminal conduct, however that control is exercised'[130]. In the case of *de facto* commanders, they must exercise such effective power and control over their subordinates that are substantially similar to the power and control exercised by *de jure* commanders, for individual criminal responsibility to lie[131]. Also, the superior should be able to exercise "substantial influence" over his or her subordinates in order to satisfy the requirement of effective control; failing which, liability cannot be grounded in superior command responsibility.[132]

62. In the *Prosecutor v. Kordic and Cerkez,*[133] the Trial Chamber, in its Judgment, set out the elements for a determination of "superior authority". It stated that the starting point is "the official position" held by the accused, noting however that the existence of a position of authority, whether *de jure* or *de facto*, will be based on an assessment of "the reality of the authority of the accused"[134]. The Court noted that "military positions will usually be strictly defined and the existence of a clear chain of command, based on strict hierarchy, easier to demonstrate. Generally, a chain of command will comprise different hierarchical levels starting with the definition of

[129] See *Prosecutor v. Delalic et al*, IT-96-21, ICTY's "Celebici case", Judgment, Appeals Chamber, 20 February 2001, para 256 ["*Delalic* Appeals Chamber Judgment"]; see also Article 28 of the Statute of the International Criminal Court (ICC).
[130] *Delalic* Appeals Chamber Judgment, para. 197, endorsing the Trial Chamber's findings on the issue.
[131] Id.
[132] Id., para. 266
[133] *Kordic* Trial Chamber Judgment, paras. 418-24 [the "Lasva Valley"case], *supra* at note 41.
[134] Id., para. 418.

policies at the highest level and going down the chain of command for implementation in the battlefield. At the top of the chain, political leaders may define the policy objectives. These objectives will then be translated into specific military plans by the strategic command in conjunction with senior government officials. At the next level the plan would be passed on to senior military officials in charge of operational zones. The last level in the chain of command would be that of the tactical commanders which exercise direct command over the troops."[135] Quoting further from the "ICRC Commentary" on Additional Protocol I of the Geneva Conventions, the Court noted that "there is no part of the army which is not subordinated to a military commander at whatever level. [Consequently], responsibility applies from the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task"[136]. Significantly too, for criminal responsibility to lie, the Court held that it must be shown that the powers and duties exercised by the superior are "real"[137].

63. Judging from the foregoing, and even before assessing the question on whether the Second Accused possessed requisite *mens rea* to achieve superior responsibility, the Defence for the Second Accused submits that the totality of the evidence adduced by the Prosecution against the Second Accused and correspondingly countered by the Witnesses for the Defence, individual and common, demonstrates that the Second Accused did not hold any position involving the exercise of superior authority in the Sierra Leone Army (earlier and hereinafter referred to as "SLA") or AFSL or any armed force in Sierra Leone[138].

[135] Id., para. 419.
[136] Id. para. 420.
[137] Id. para. 422.
[138] During the AFRC period, the Army had a recognizable structure headed by Maj. Johnny Paul Koroma as commander-in-chief, together with other senior military officials acting in various senior command positions, including Col. S.O. Williams as Army Chief of Staff and Brigadier S.F.Y. Koroma as Chief of Defence Staff (see Transcripts of TF1-334, 167 and 184). The second accused was only Sergeant then. After the AFRC period, and as already noted, evidence that the second accused was second-in-command to the first accused and third-in-command to SAJ Musa was denied by both the first accused and individual witnesses for the second accused. Defence evidence shows that the second accused only emerged in the so-

64. The Defence Military Expert, in reviewing the evidence adduced by the Prosecution to the Court including the Military Expert Report by the Prosecution's Military Expert, **firstly**, concluded that "the history of the SLA shows a total breakdown of military organization". He went on to say that "during the AFRC regime all forms of discipline and regimentation of the RSLAF [Republic of Sierra Leone Armed Forces] were brought down to zero and ultimately finished the image of the RSLAF. This was also the starting point of the AFRC faction when ousted from power in February 1998"[139]. This view was also corroborated by TRC 001[140], a Common Defence Witness of high military education and standing in the RSLAF. The fact that the Prosecution's Military Expert failed to properly review the military structure and operations of the Army before and during the AFRC regime, confining himself in lieu to the AFRC faction[141], undercuts the efficacy of his Report and its ultimate conclusions. Thus, regarding the SLA under the AFRC regime, the Defence for the Second Accused submits that the Second Accused, as a Sergeant, performed no military function and wielded no military authority over any one; his role was at best 'political' within the AFRC Government, and nothing more. He was therefore in no position of superior authority to command military or combat operations in any part of Sierra Leone or to order or supervise the commission of the crimes. As the Defence's Military Expert further concluded, "the AFRC", which the Second Accused served as Principal Liaison Officer III, "only had the semblance of a military structure and hierarchy. Specifically, the criteria of the *span of command* and the *span of control* were not fulfilled"[142].

called 'AFRC faction' at Col. Eddie Town, where he was detained and rendered inactive till the death of SAJ Musa at Benguema in December 1998, see note 34 *supra*. Thereafter, nothing was heard of him again.

139 Exhibit P.36, para. 172, *supra*. As already noted in note 107 of this Final Brief, the Sierra Leone Army (SLA) has had different nomenclatures over the passage of time and professional mutation. The SLA has been variously called the Sierra Leone Armed Forces (SLAF), Armed Forces of Sierra Leone (AFSL), and now the Republic of Sierra Leone Armed Forces (RSLAF).

140 See Transcript of 16 October 2006, p. 115 & p.116 (lines 13-22).

141 Exhibit P.36 in its entirety, especially para. E6; see also Court Transcripts of 13-14 October 2005.

142 Id., Exhibit P.36, para. 176.

65. **Secondly**, contrary to views expressed and conclusions reached by the Prosecution's Military Expert aforesaid, the Defence Military Expert concluded in his Report that "the AFRC faction did not exhibit the majority of the characteristics of a traditional military organization which therefore supports the view that the AFRC faction was an irregular military force"[143]. The Defence Military Expert also concluded that various groups within the AFRC faction were "not recognizable"[144]. The evidence led by the Prosecution, as well as the Defence maintained by the Second Accused and the other co-Accused, through Common and Individual Witnesses, altogether create a wry picture at odds with the purported existence of an "AFRC faction" with "a strong command capability", "functional characteristics of a military organization", and "high levels of coherence between strategic, operational and tactical levels" as portrayed by the Prosecution's Military Expert[145].

66. Other than merely portraying the "AFRC-post-February 1998" and the "RUF" as one and the same, which evidence was challenged and denied by both witnesses for the Prosecution and the Defence[146], the Prosecution fails to provide any clear evidence as what the command and control structure of the SLAs as a combat unit was in Kono District[147], for example. Similarly, evidence of mutiny by junior soldiers at Colonel Eddie Town leading to the arrest and long detention of the three Accused[148], among others, weakens any responsible chain of command and the existence of superior authority by the Accused over their subordinates. Furthermore, even the Prosecution's Military Expert concluded in his Report that "the AFRC faction had a strong command capability which failed on 6th January"[149]. This conclusion admits the absence of an effective command and control, if any, over the fighters that attacked Freetown on 6th January, 1999. And perhaps, more crucial to these material information is the fact that in addition to the posture of passivity portrayed by many of the Prosecution Witnesses about the Second Accused vis-à-vis

143 Id., para. 177.
144 Id., para. 175.
145 Id., Exhibit P.36 in its entirety, especially para. E6 thereof. Contrast with notes 30 & 34, *supra*.
146 See notes 25, 28, 30 & 34, *supra*
147 See note 25, *supra*.
148 See Transcripts of 21 June 2005, pp. 65-66, 15 September 2005, pp. 75-79, and notes 30 and 34, *supra*.
149 See Exhibit P. 36, para. E6.1.d, *supra*.

crimes committed and orders given for crimes to be committed[150], a potent alibi placing the Second Accused elsewhere at the time of many of the alleged crimes or, in some cases, failing to locate him at alleged crime scenes, persist. This alibi was, in many instances, corroborated by the First Accused under oath as well as by Individual Witnesses for the Second Accused[151].

67. The foregoing averments leads the Defence for the Second Accused to the ultimate conclusion that even if the Court were to decide that the Second Accused held a "position of superior or military authority" within the so-called "AFRC" or "AFRC faction", the Second Accused did not exercise any effective command and control over the alleged criminal subordinates assigned or affixed to him by the Prosecution.

b. Knowledge that the Crime has been Committed or was about to be Committed:

68. Apart from the requirement for superior-subordinate relationship noted above, a second limb of Article 6.3 is the *mens rea* requirement, namely, proof by the Prosecution that the Second Accused, among others, "knew or had reason to know that the crime was about to be or had been committed". Though "actual knowledge" may be proved through direct or circumstantial evidence, it must not be presumed[152]. Some of the indicia of superior knowledge may include: the number, type and scope of illegal acts; the number and nature of the troops involved; the geographical location of the acts; the widespread nature of the acts; and the *modus operandi* of similar illegal acts and location of the superior at the appropriate times[153].

69. Regarding indirect or circumstantial knowledge by the accused, superior criminal responsibility is not one of "strict liability"; each case has to be individually examined to ascertain the requisite *mens rea*, taking account of the superior's

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[150] More than half of the Prosecution Witnesses did not know or mention the Second Accused by name, whilst key Prosecution witnesses like TF1-334, 184 and 167 mostly account for his presence without more.
[151] See the testimonies of Kamara Individual Witnesses, at note 34, *supra*.
[152] See *Blaskic* Trial Chamber Judgment, para 307, *supra* note 39.
[153] See *Archbold International Criminal Court: Practice, Procedure & Evidence*, 2003, edited by Dixon, Khan and May, para 10.35, p. 295.

situation at the appropriate time[154]. Customary international law observes that superiors are not under a duty to know; they are only liable when they had "information which should have enabled them to conclude in the circumstances at the time, that [the perpetrator] was committing or was going to commit such a breach and if they did not take feasible measures within their power to prevent or repress the breach"[155]. On the basis of the analysis of the Prosecution's evidence above as well as the detailed count-by-count assessment of both Prosecution and Defence witness evidence to be undertaken in Part C of this Address, it is the submission of the Defence for the Second Accused that the Second Accused lacked the requisite *mens rea* for crimes alleged in the Indictment pursuant to Article 6.3 of the Statute.

c. The Accused's Failure to Prevent the Crime or Punish the Perpetrator:

70. This third limb of Article 6.3 of the Statute seeks to posit "culpable omission" as a crucial element of superior-subordinate individual criminal responsibility. In view of the analysis of this form of individual criminal responsibility, it is the submission of the Defence for the Second Accused that this third limb of Article 6.3 can only lie if the first two limbs are established. In order words, the accused has to be a commander over identified subordinates, he has to have effective command and control over them and their conduct, and more significantly, he has to possess the requisite *mens rea* of knowing or having reason to know that the subordinates have committed or are about to commit the crime outlined in the Indictment. Since it has been denied by the Defence for the Second Accused that the Prosecution failed to establish the first two limbs of Article 6.3 of the Statute against the Second Accused, the question of whether the Second Accused took necessary steps to prevent the crimes and/or punish the (would-be) perpetrators is of no moment. The alibi suggested in defence of the Second Accused by Common Defence Witnesses and, in particular, by Individual Witnesses for the Second Accused as well as those for the First and Third Accused reinforces the lack of need to defend this limb of Article 6.3 of the Statute.

[154] *Delalic* Appeals Chamber Judgment, para. 239, *supra* note 129.
[155] See Article 86(2) of the 1997 Geneva Protocol I Additional to the Geneva Conventions of 1949.

Conclusion:

71. In conclusion, the Defence for the Second Accused submits that Article 6.3 of the Statute has altogether not be established or sufficiently proven beyond reasonable doubt against the Second Accused to warrant a conviction by the Court thereunder and should thus be dismissed.

iv. The Issue of Greatest Responsibility as a Key Element of the Indictment:

a. The Definition/Requirement for Greatest Responsibility:

72. The issue of "greatest responsibility" is perhaps the most fundamental element of the Indictment, though not so expressed therein. The jurisdictional competence of the Court in trying the three Accused is founded upon the foundation of "greatest responsibility" provided for in Article 1.1 of the Statute and expanded in Article 15.1 of the same. According to Article 1.1, "*[t]he Special Court [including the Trial Chamber] shall (...) have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone*". (Emphasis added). Article 15.1 of the Statute goes further to define the role and function of the Prosecutor as follows: "*[t]he Prosecutor shall be responsible for the investigation and prosecution of persons who bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996. The Prosecutor shall act independently as a separate organ of the Special Court. He or she shall not seek of receive instructions from any Government or from any other source*". (Emphasis added).

b. Personal Jurisdiction versus Use of Prosecutorial Discretion or Strategy:

73. As noted in the emphasis above, there is a wider prosecutorial independent discretion to investigate and prosecute persons who are considered to "bear the greatest responsibility for serious violations of international humanitarian law and crimes under Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996". According to Article 1.1 above, the said persons "[include] leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone". Notwithstanding this inclusion, the Defence for the Second Accused submits that the wordings of both Articles 1.1 and 15.1 create a more limited personal jurisdiction which superseded the broader formulation of "persons most responsible" suggested later by the United Nation's Secretary General to the Security Council, which the latter rejected[156]. This calls for careful scrutiny in the narrow selection of persons who meet the criteria of bearing "the greatest" criminal responsibility for events in the Indictment. Thus, whilst the Prosecution has a wider independent discretion to investigate and prosecute this category of persons, the Court has the ultimate decision of determining, based on available evidence at the end of the trial, whether the Prosecution in fact satisfied that threshold requirement of selecting the three Accused, among many senior military officers in the AFRC government and "faction", as bearing that utmost liability.

74. The Defence for the Second Accused therefore finds it odd and in fact takes the greatest exception to the introductory wording of Article 1.1 of the Statute, which unequivocally suggests that "the Special Court [including the Trial Chamber] shall", like the Prosecution, "have the power *to prosecute* persons who bear the greatest responsibility" for the crimes outlined in the Statute. (Emphasis added). It is the Defence's true desire and hope that, in construing and determining those who "the greatest responsibility" as outlined, the Court shall approach the issue purely from a judicial perspective devoid of any "prosecutorial" discretion. The first Trial Chamber

[156] The letter of 22 December 2000 from the President of the Security Council to the Secretary General rejected the latter's recommendation for a replacement of the phrase "persons who bear the greatest responsibility" with "persons most responsible", S/2000/1234, para. 1.

of the Special Court was more fully able to capture and articulate the distinction between the Special Court's "personal jurisdiction" and the Prosecutor's "prosecutorial strategy or discretion" in the case of *Prosecutor v. Fofana,*[157] when it unanimously held that the greatest responsibility requirement is a component of "personal jurisdiction".[158] Thus, while that requirement does of course "guide the prosecutorial strategy, it does not exclusively articulate prosecutorial discretion."[159]

75. Given that there was no preliminary hearing before the Court in which the Prosecution's articulation of discretion and strategy in the selection of its victims could have been tested, the Defence for the Second Accused did not have the opportunity of challenging that discretion or strategy. However, the Defence for the Second Accused is consoled by the fact that the Court (the present Trial Chamber) is more fully resolved to determine and ascertain the fundamental issue of "greatest responsibility" in its final judgment, having had the chance of listening to the totality of the evidence adduced by both the Prosecution and the Defence. The Defence for the Second Accused considers the Prosecution's exercise of discretion and strategy regarding the issue of "greatest responsibility" at this stage as a *prima facie* issue, requiring a reasonable trier of fact to determine its selective application, prudent use and evidential efficacy[160].

c. The Standard/Evidential Requirement to establish Greatest Responsibility:

i. <u>The Standard Requirement:</u>

76. In constructing the standard of greatest responsibility as understood by the United Nations Security Council and the Secretary General, the Court noted that the use of the word "including" in the phrase "persons who bear the greatest responsibility (...) <u>including</u> those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" inferred

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[157] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004.
[158] Id., paras. 26-27.
[159] Id., para. 27.
[160] See para. 39 of the Court's Rule 98 Decision, supra.

that "the category of "persons who bear the greatest responsibility" is by no means limited to "those leaders..." and that there may be other persons who fall into that category"[161]. At the minimum, the Special Court initially set the standard of inclusion into the category of "persons who bear the greatest responsibility" at *political* or *military leaders* "who, in committing [the crimes set out in the Indictment], have threatened the establishment of and implementation of the peace process in Sierra Leone". This yardstick is reinforced by Article 6.2 of the Statute, which provides that "*[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment*".

77. Not having fully exhausted the category of *political* or *military leaders* through perhaps a judicial screening process to determine "greatest criminal responsibility", the Defence for the Second Accused submits that any attempt by the Court at broadening the said category to include other persons like the Second Accused, who was merely a "Sergeant" and "Principal Liaison Officer 3" in the AFRC military and political establishments respectively, gives the impression of lending support to prosecutorial strategy by chance. The Defence for the Second Accused further avers that the inclusivity of *political* or *military leaders* into the category of those who bear greatest criminal responsibility is only at the minimum; choice of persons within that bracket should not go below the said minimum, as is currently the case with the Second Accused and co-Accused, who were low-ranking individuals in the AFRC.

ii. <u>The Evidential Requirement:</u>

78. The Defence for the Second Accused submits that the evidence advanced by the Prosecution, and exhaustively countered by the Defence, cannot uphold or sustain *beyond reasonable doubt* any inference that the Second Accused is among those who bear the greatest responsibility for the heinous crimes alleged in the Indictment. A reasonable trier of fact will find that the Prosecution itself introduces evidence of prominent individuals, military and political, who, within the confines of a judicial

[161] Id., para 35.

enquiry, bear greatest responsibility for the said crimes.[162] The AFRC had a military structure that was recognized by even the Military Expert Witness for the Prosecution[163] and confirmed by the Military Expert Witness for the Defence[164]. Command and control hierarchy was similar to that which obtained in regular armies, at least within the AFRC government as distinct from "the faction".

Conclusions of the Prosecution's Military Expert Witness:

79. The Prosecution's Military Expert Witness, as earlier noted, describes the AFRC faction as having "a clearly recognizable military hierarchy and structure (...) similar to the conventional armies upon which it was modeled"; that it "demonstrated high levels of coherence between strategic, operational and tactical levels, although at times the strategic goals (...) were not clear"; and that it had "a strong command capability which failed on 6th January" 1999.[165] To reach these conclusions, the Prosecution's Military Expert Witness relied extensively on one-sided interviews and statements by potential Prosecution Witnesses; did little or no research on the AFSL prior to the AFRC military coup, including the basis of the Army's establishment; mostly failed to interview senior officers of the RSLAF, including those who participated in the AFRC government and faction; and derived conclusive answers to military questions on the AFSL or SLA[166] by reference to foreign doctrines and methodologies bereft of contents in the national situation. The Defence for the Second Accused submits that this approach could at best be described as monofocal, lacking in professional direction and largely unhelpful in assisting the Court ascertain those who, *inter alia*, bear greatest responsibility for the crimes in the Indictment.

Conclusions of the Defence's Military Expert Witness:

80. On the other hand, the Military Expert Witness for the Defence, with the benefit of hindsight and learning from the mistakes of his predecessor, started from the very

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[162] See testimonies and Transcripts of TF1-045, 033, 334, 167 and 184, at note 25 *supra*.
[163] See note 104, *supra*.
[164] See Exhibit D. 36, Part E paras. 172-78.
[165] Exhibit P.36, at para. E6.1.
[166] Again, the Sierra Leone Army (SLA) has had different nomenclatures over the passage of time. It has been variously called the Sierra Leone Armed Forces (SLAF), Armed Forces of Sierra Leone (AFSL), and now the Republic of Sierra Leone Armed Forces (RSLAF); see note 107 *supra*.

premise of conducting a historical research into the entire Republic of Sierra Armed Forces, tracing its weaknesses and strength through interviews with senior Sierra Leone Military Officers, both serving and retired. The Expert also had the benefit of reading and assessing his predecessor's Military Expert Report as well as Court transcripts displaying testimonies of Prosecution Witnesses to the Court. He read the Report of the Truth and Reconciliation Commission for Sierra Leone and other related texts, drawing some of his conclusions from views expressed in them.[167] Though these views, opinions and conclusions from them were untested evidence before the Court, unlike transcripts of evidence before it, they go a long way in giving an insight into the causes of the conflict in Sierra Leone, its patterns and trends, the role of its key players, and, *inter alia*, how blame for the conflict can be apportioned.

81. The Defence for the Second Accused is therefore more inclined to believe and rely upon the conclusions reached in the Defence's Military Expert Report as follows: that "the history of the SLA shows a total breakdown of military organization...", in other words that "during the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image of the RSLAF. This was also the starting point of the AFRC faction when ousted from power in February 1998"; that "junior ranks in the SLA were totally neglected by the politicians and (senior) officers"; that "the AFRC faction can be qualified as an irregular military force"; that "the precondition, set in the Iron report, that recognizable groups need to exist to establish a military organization, is not fulfilled during the conflict in which the AFRC faction participated", in other words "the various groups were not recognizable"; that "the AFRC only had the semblance of a military structure and hierarchy (...) the criteria of the *span of command* and the *span of control* were not fulfilled"; that "the AFRC faction did not exhibit the majority of the characteristics of a traditional military organization and therefore supports the view that the AFRC faction was an irregular military force"; and, among others, that "within the AFRC faction there was at most a coherent linkage between the operational level and the tactical level. The strategic-military level and the grand

[167] See Exhibit D.36 as well as the testimony of Gen. Prinz as Defence Military Expert.

strategy level did not exist"[168]. Consequently, it is the submission of the Defence for the Second Accused that the foregoing approach is broad-based, inclusive, has a professional basis and direction, and helpful in assisting the Court determine those who, *inter alia*, bear greatest responsibility for the crimes in the Indictment.

Those who Bear Greatest Responsibility in the AFRC Government and Army:

82. The evidence before the Court illustrates that the AFSL under the AFRC had a commander-in-chief in the person of Major Johnny Paul Koroma, who was indicted but is currently at large. He was a member of the Supreme Council of the AFRC: the highest decision-making body of the AFRC, distinct from the AFRC plenary to which the Second Accused belonged.[169] The AFRC had a Deputy Defence Minister in the person of Colonel Avivavo Kamara who assisted the commander-in-chief and the Supreme Council in initiating defence and security policies of the AFRC for action by AFRC military and battle-field commanders. He was a Supreme Council member of the AFRC but was not indicted.[170] Colonel S.O. Williams was the Army Chief of Staff then, responsible for the running of the AFSL under the AFRC government. Evidence before the Court shows that he is still a serving member of the RSLAF. [171] He was not indicted. Brigadier Mani was also Director of Military Operations in the AFRC government, a position that speaks to its functions. He also commanded and controlled SLAs who served with him in the "Northern Jungle" during the period of the AFRC faction. He continued to serve the RSLAF until his retirement only recently in 2006.[172] Brigadier Mani was also not indicted.

Those who Bear Greatest Responsibility in the AFRC/RUF Coalition:

83. Within the RUF, Mr. Gibril Massaquoi is, among others, described as a senior commander of the RUF movement, who was aide and personal confidante to Mr.

[168] Exhibit D.36, Part E paras. 172-78, *supra*.
[169] See notes 25, 30 and 34 *supra*.
[170] Id.
[171] Id.
[172] Id.

Foday Sankoh for many years prior to the latter's demise.[173] He was one of the RUF senior officers that served on the AFRC decision-making body, contributing towards the political and military policies of the government.[174] He, together with other RUF members, is alleged to have later attempted to overthrow the AFRC government, for which he was imprisoned at the Pa Demba Road Prisons.[175] He personally assisted the fighters that invaded Freetown on 6 January, 1999 (who freed him from jail) in at least overseeing and reporting their military operations during the invasion.[176] In lieu of being charged for bearing "greatest responsibility" for the crimes alleged in the Indictment, at least from a joint enterprise perspective, Mr. Massaquoi served as one of the Prosecution's key witnesses, testifying in open court for all and sundry to see.

84. Similarly, Mr. Mike Lamin is described as a senior commander and officer of the RUF movement.[177] He was also one of the RUF senior officers that served on the AFRC decision-making body, contributing towards the political and military policies of the government.[178] He later served as Minister of Trade, representing the RUF in a post-war Coalition Government headed by President Kabbah. Mr. Lamin is said to have withdrawn to Kailahun after the AFRC government's removal to continue his work as an RUF senior commander and officer. He served the RUF throughout the period of the AFRC faction.[179] Mr. Lamin was not indicted and is instead "suspected" as being on the Prosecution's list of key witnesses against the three Accused. Also, Colonel Akim is said to have been a former SLA who became a senior RUF commander, fighting in Kono District, Kailahun District, Tongo in the Kenema District and other parts of Sierra Leone during the period of the AFRC government and faction.[180] He is today a free man walking the streets of Sierra Leone.

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[173] See Transcripts of Gibril Massaquoi himself in his testimony to the Court as well as that of TF1-045. In the case of TF1-045, see Transcripts of 19-22 July 2005.
[174] Id., see in particular, see TRC 01's Transcript of 16 October 2006, pp. 102-103.
[175] See TF1-045's Transcript of 21 July 2005, p. 32 and TF1-167's Transcript of 19 September 2005, p.54.
[176] This was in Mr. Massaquoi's own testimony to the Court.
[177] TF1-045's Transcripts of 19-22 July 2005.
[178] Id., see note 174 *supra*.
[179] See Tamba Brima's testimony to the Court, note 30 *supra*.
[180] See notes 25, 30, 34 and 177 above, *supra*.

Those who Bear Greatest Responsibility in "the AFRC Faction":

85. During the purported period of "the AFRC faction", a certain SLA who became an RUF commander and subsequently lord unto himself, by the name of Savage, was said to have committed a number of serious atrocities in especially the Kono District, including Tombodu and its environs, and the Koinadugu District, including Kabala, Fadugu and its environs.[181] He was said to have been assisted by a certain Staff Alhaji, an SLA who became RUF.[182] Mr. Savage is said to be at the Pa Demba Road Prison for various offences against the laws of Sierra Leone. Although the Second Accused and his co-Accused were in the same prison at one point in time, they were removed from there and arraigned before the Special Court to face charges of serious international crimes outlined in the Indictment. Mr. Savage is, however, still at the Pa Demba Road Prison without being indicted for the serious international crimes contained in the Indictment. His former deputy, Staff Alhaji, is said to be still serving in the Republic of Sierra Leone Armed Forces (RSLAF) without being indicted too.

86. Another SLA, Major F.A.T Sesay who allegedly became a Colonel in "the AFRC faction", is said to have served both the AFRC government as a senior military officer and the AFRC faction as, *inter alia*, Administrative Officer, second-in-command to S.A.J Musa and overall commander of the SLA troops that invaded Freetown.[183] He is said to have made an announcement over radio about SLA's invasion of Freetown. Major F.A.T Sesay has never been indicted for any crime since events of 1999.

Those who Bear Greatest Responsibility in the Elected *De Jure* Government:

87. Evidence of mistreatment and marginalization of especially rank and file members of the AFSL by governments immediately preceding the AFRC[184] as well as the ill-advised unconstitutional attempt by the President of Sierra Leone to disband the

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[181] See Transcripts of TF1-334 and 167, in particular Transcript of TF1-334 on 21 June 2005, pp 65-66. See also note 25 *supra*.
[182] Id.
[183] See notes 25, 30 and 34 *supra*.
[184] See Exhibit D.36 Part E, paras. 172-180 and TRC 01's Transcript of 16 October 2006. The governments immediately preceding the AFRC include the SLPP Government of President Ahmad Tejan Kabbah, the President of Sierra Leone then and now.

AFSL[185] served as weapons of anger, disownment and frustration that evidently fuelled the instability and chaos in Sierra Leone post-1997. The Defence for the Second Accused submits that these cumulative actions of neglect of the Army and unlawful disbandment were foreseeable causative factors of the crimes that were allegedly committed by SLAs or ex-SLAs during the period of the "AFRC faction". Thus, the Defence submits that the President of Sierra Leone, being Commander-in-Chief of the AFSL at the time of his purported disbandment and consequent chaos that followed, cannot be removed from the legal category of those "who bear the greatest responsibility" for the crimes alleged in the current Indictment before the Court. But like the previous categories of persons mentioned above, the President of Sierra Leone was also not indicted by the Prosecution, notwithstanding the provisions of Article 6.2 of the Statute that: "*[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment*".

Overall Conclusion on the Issue of Greatest Responsibility:

88. The overall conclusion and submission of the Defence for the Second Accused on this limb of the Closing Argument is that the Second Accused does not, legally and factually, qualify as one of those "who bear the greatest responsibility" for all of the crimes alleged by the Prosecution in the Indictment before the Court.

v. Defects in the Form of the Indictment:

a. Defects in the Form of the Indictment as a Jurisdictional Issue:

89. The issue of fundamental defects in the Indictment preferred by the Prosecution against the three Accused is one that runs through the entire judicial process against them. In the case of the Second Accused, the Defence submits that it first raised one major issue of defect in the Indictment in its Defence Pre-Trial Brief filed with Court

[185] For more on the constitutionality of the disbandment of the AFSL, see Para. 51 of this Final Trial Brief.

Management on 21 February, 2005.[186] Though the Defence for the Second Accused then clearly and unambiguously signaled to the Prosecution its concerns and objection to the form of the Indictment against its client, thereby giving the Prosecution ample time to amend the Indictment to fit the charges against the Second Accused[187], the Prosecution chose not to avail itself of the opportunity. Similarly, at the close of the Prosecution's case in November 2005, the Defence for the Second Accused again raised the same issue in its Motion for Acquittal[188], to which the Prosecution replied that any allegation of a defect in the form of the Indictment ought to have been raised as a preliminary issue under Rule 72 of the Court's Rules before commencement of the trial. The Court noted the objection of the Second Accused but held that it was "beyond the scope of [a Rule 98 Decision]"[189].

90. However, in the "Separate Concurring Opinion of Hon. Justice Julia Sebutinde" to the Court's Rule 98 Decision[190], the Learned Trial Judge raised two issues of defects in the form of the Indictment against the three Accused, feeling "compelled [to so do] in the interest of justice"[191]. These issues concerned firstly, Count 7 in the Indictment which the Learned Trial Judge held as "[offending] the rule against duplicity"; and secondly, Count 8 of the Indictment, which she rules to be "redundant". Before going into these two fundamental issues of defect in the Indictment as part of the submissions of the Defence for the Second Accused under this rubric, the Defence avers that, notwithstanding the provisions of Rule 72 above, jurisdictional issues concerning the right of the accused to clearly and unambiguously understand the true nature of allegations of criminality preferred against him by the Prosecution, in order to be able to respond to them in a comprehensible manner, cannot be ousted by confinement to a preliminary objection. The Prosecution, *at all times and stages of the trial,* bears a legal obligation not to confuse the accused by preferring an Indictment or amending the same in a manner that makes it complex or difficult for

[186] See para. 23 of Kamara Defence Pre-Trial Brief on defects in the use of Article 6(1) & (3) of the Statute.
[187] The Prosecution commenced hearing against the accused in March 2005 and closed its case on 21 November 2005, calling 59 witnesses.
[188] See Defence Motion for Judgment of Acquittal Pursuant to Rule 98, filed 12 December 2005, at para. 12
[189] See the Court's Rule 98 Decision, para. 59, *supra.*
[190] Id., pp. 17987 to 17991 of the Court Records, dated 31 March, 2006.
[191] Id., para. 2 of the Separate Concurring Opinion.

the accused to understand the nature of the charges against him. This obligation is in harmony with the spirit and letter of giving due protection to the rights of accused persons under the Statute[192].

91. In *Prosecutor v. Nsengiyumva*, the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) stated as follows: "It is a general principle of criminal law that all facts of a given offence attributed to an accused person are to be set out in the indictment against him or her. Thus, for an indictment to be *sustainable*, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence"[193]. (Emphasis added). The Defence reiterates that a defective Indictment cannot be "sustained" through a trial, except where no one raises the defect. It is not surprising therefore that the Learned Trial Judge felt compelled to raise certain defects in the form of the current Indictment against the three Accused during the trial, to wit, after the close of the Prosecution's case and before hearing the Defence.

b. Defect in the Use of Articles 6.1 and 6.3 of the Statute in the Indictment:

92. In the light of the foregoing, the Defence for the Second Accused re-state that the Prosecution has failed in the Indictment to distinguish between *specific acts of the Second Accused,* for which he is alleged to bear greatest "individual criminal responsibility under Article 6.1 of the Statute", and *acts of the Second Accused's purported subordinates,* which have been transferred or attributed to him by the Prosecution, pursuant to Article 6.3 of the Statute. In the ICTR case of *Prosecution v. Joseph Kanyabashi*,[194] the Trial Chamber held that "the wording of charges" to the effect that "the accused incurs individual criminal responsibility based on the same facts, both under Article 6(1) of the Statute and that of Article 6(3) as hierarchical superior (...) makes it impossible for the Accused to understand the nature and the cause of the specific charges brought against him, since the same facts cannot

[192] See Article 17(4)(a) of the said Statute.
[193] See the *Nsengiyumva* Decision, para. 1, *supra* at note 80.
[194] See the *Kanyabashi* Decision, paras. 5.8 to 5.11., at note 80, *supra*. See also Kamara Defence Pre-Trial Brief, SCSL-2004-16-PT, filed 21 Feb. 2005, para. 23 aforesaid.

simultaneously give rise to the two types of responsibility provided for under the Statute", to wit, responsibility for the Accused's direct acts (under Article 6.1) and/or responsibility for his omissions(under Article 6.3). As a result, the Court ruled that "*the Prosecutor must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6(1) of the Statute from those for which he incurs criminal responsibility under Article 6(3)*"[195].

93. The Defence for the Second Accused avers that the same insufficient, frequently uncorroborated and conflicting facts have been used by the Prosecution to, firstly, express individual criminal responsibility by the Second Accused under Article 6(1) of the Statute for 'his alleged direct acts' *(...by his act)* and, secondly, to infer individual criminal responsibility by the Second Accused under Article 6(3) of the Statute for his alleged 'indirect acts', to wit, the acts of his purported subordinates *(...by his omission)*. This is especially worrisome considering that the Prosecution has, throughout its Response to the respective Defence Motions for Acquittal Pursuant to Rule 98[196], relied on arguments posited in weak foundations of "joint criminal enterprise" or "superior command responsibility" wherever submissions of no case on individual criminal responsibility were made by the Defence. The Defence for the Second Accused therefore implores the Court to dismiss any pleading in the Indictment that joins or seeks to join "individual criminal responsibility" and "superior command responsibility" together based on the same evidence or facts.

c. Count Seven as a Defective Pleading in the Form of the Indictment:

94. As already highlighted above, the Learned Trial Judge, the Hon. Justice Sebutinde, raised Count 7 as one of two legal defects in the form of the Indictment against the three Accused. In her submission, Count 7 offends the rule against duplicity; the Defence for the Second Accused agrees with her submissions and prays that Count 7 of the Indictment be dismissed for its defectiveness in form and substance.

[195] Id., para. 5.23 of the *Kanyabashi* Decision.
[196] Filed on 23 January 2006 aforesaid.

95. In considering Count 7 in its current form as "duplex and defective in as far as it does not enable the accused persons to know precisely which of the crimes (sexual slavery or sexual violence) they should be defending themselves against"[197], the Learned Trial Judge stated in her Separate Concurring Opinion as follows:

> "On the face of it, Count 7 appears to charge the accused with the single crime against humanity entitled "*Sexual Slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute*". I am not aware that such a crime in fact, exists under International Humanitarian law. In reality, Count 7 in its current form encapsulates two separate and distinct crimes, namely the crime against humanity of sexual slavery and the crime against humanity of sexual violence. <u>In essence, what the Prosecution has done is to charge the accused persons with the two distinct crimes against humanity in one count thereby offending the rule against multiplicity, duplicity, uncertainty or vagueness</u>"[198]. (Emphasis added).

96. In *Prosecutor v. Karemera,*[199] the Trial Chamber in, *inter alia*, considering issues of defects in the form of the Indictment against the accused, equally held as follows: "The Chamber notes 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"[200]. Thus, the Defence for the Second Accused 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 can, therefore, not be *sustained* as part of the Indictment for any purposes of the trial. As much as the Prosecution would

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[197] See para. 8 of the Separate Concurring Opinion, *supra*.

[198] Id., para. 6.

[199] 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.

[200] Id. para 16.

have found it duplex and objectionable to charge the three Accused with "sexual slavery" and "rape" or "other inhumane act" together, so must they now find it objectionable to charge "sexual slavery" and "sexual violence" together[201]. Again, by failing to fully utilize the caveat in the Learned Trial Judge's direction in her Separate Concurring Opinion that the defect in Count 7 "could be cured by an amendment pursuant to Rule 50 of the Rules"[202], the Prosecution can be said to have known the problem, was informed and alerted about its danger, but chose to ignore it at its peril.

d. Count Eight as another Defective Pleading in the Form of the Indictment:

97. Furthermore, the Defence for the Second Accused agrees with the Learned Trial Judge's conclusion in her Separate Concurring Opinion that Count 8 of the Indictment is "redundant"[203]. Without restating the opinion and conclusions of the Hon. Trial Judge here, since her Separate Concurring Opinion forms part of the Court records, the Defence for the Second Accused concurs with and adopts her submission that: "Count 11 is sufficient to cover any alleged incidents of "other inhumane acts" envisaged under the Indictment (...) [A]ll sex-related or gender crimes envisaged in the Indictment are adequately covered by Counts 6, 7 and/or 9 of the Indictment and should not be charged under the general regime of "other inhumane acts"[204].

98. The Defence for the Second Accused also adopts the reasoning behind the Hon. Trial Judge's decision and relies as well on the arguments and conclusions reached by Trial Chamber I of the Special Court in the case of *Prosecutor v. Sam Hinga Norman et al* that: "it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution and forced pregnancy) under Article 2.i since "other inhumane acts", even if residual, must logically be restrictively interpreted as

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201 See also the Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence in the SCSL case of *Prosecutor v. Sam Hinga Norman*, Trial Chamber, 24 May, 2005, para. 19.
202 See para. 9 of the Separate Concurring Opinion, *supra*.
203 Id. para. 10.
204 Id.

covering only those acts of a non-sexual nature amounting to an affront to humanity"[205].

99. For the reasons above stated, and the fact that the Prosecution failed to avail itself the opportunity of amending the Indictment to more properly assist the Second Accused understand the true nature and causes of the charges against him, the Defence for the Second Accused submits that Count 8 of the Indictment cannot be *sustained* and prays, therefore, that it be dismissed or struck out for being "redundant" and offending against the rule against multiplicity and uncertainty.

e. The Offences under Article 5.b of the Statute Contrary to the "Malicious Damage Act, 1861" are not Pleaded in Count 14 of the Indictment:

100. For the purposes of this rubric, the Defence for the Second Accused restates the objection of the three Accused in their Joint Legal Part of the Defence Motion for Judgment of Acquittal Under Rule 98 filed on 13 December 2005. The Defence submits that the elements of the offence of "pillage" do not envisage and are not meant to include "burning". As already reviewed in the Court's Rule 98 Decision[206], the offence of "pillage" firstly, anticipates and includes the 'appropriation of private or public property'; secondly, it connotes the *mens rea* of 'deprivation of the owner' of the use of his property as well as 'appropriation by the taker' of the same; and finally, the offence assumes lack of 'consent by the owner' of the 'appropriation by the taker'. "Burning", or when legally used as an offence, "arson" or "malicious damage", does not form an element of "pillage", which is more akin to "looting". The same or similar facts may lead to the two offences of 'pillage' and 'malicious damage/arson', but not the legal ingredients of their composition.

101. In light of the foregoing, the Defence for the Second Accused submits that the Statute envisaged and provided for situations in which the Prosecution may wish to

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[205] Para. 19 (iii).
[206] See paras 240-43 of the Rule 98 Decision.

use prosecutorial discretion and strategy in charging and prosecuting persons bearing greatest responsibility for allegedly "burning" property, public or private. Article 5.b of the Statute provides for "wanton destruction of property under the Malicious Damage Act, 1861", a "crime under Sierra Leonean law", and enumerates the same to include: i) Setting fire to dwelling houses, any person being therein, contrary to section 2 of the Act; ii) Setting fire to public buildings, contrary to sections 5 and 6 of the Act; and iii) Setting fire to other buildings, contrary to section 6. As to why the Prosecution, in its wisdom, chose to avoid trying crimes under Sierra Leonean law, is not for the Defence for the Second Accused to comment since that forms part of prosecutorial discretion and strategy. That said, the Defence for the Second Accused vigorously objects to any attempt by the Prosecution to infer provisions of the Statute where such provisions are so clearly expressed.

102. In the above regard, whilst the Defence for the Second Accused agrees with the Court in its Rule 98 Decision that offences listed in Article 3 of the Statute, including "pillage", are "not an exhaustive list of the possible violations"[207] therein, the Defence submits that any attempt to look elsewhere for supplements to the list can only be justified in the absence of an express provision in the Statute to that effect. Where a statute is fully, clearly and unambiguously expressed, it will defeat an essential rule of statutory interpretation to read differently into the statute that which is so clearly and fully expressed. Relying on the *expressio unius est exclusio alterius* rule of construction, the Trial Chamber in the ICTY case of *Prosecutor v. Kupreskic et al*, held that "the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights"[208]. The *expressio unius* rule of construction harmonizes with the maxim of statutory interpretation: *lex specialis derogat generali*, which infers that 'if an action is regulated by both a general provision and a specific one, the latter prevails as most appropriate being more specifically directed towards that action. 'Pillage' is specific, 'Burning' inappropriate.

[207] Id., para 264.

[208] Judgment, Trial Chamber, 14 January 2000, ["*Kupreskic* Trial Chamber Judgment"], at para. 623.

103. For the reasons above stated, and the fact that the Prosecution failed to avail itself the opportunity of amending Count 14 of the Indictment and probably add another Count to include the offence(s) enumerated under Article 5.b of the Statute in order to legally define and confine acts of "burning" thereunder, the Defence for the Second Accused submits that Count 14 of the Indictment is defective and cannot be *sustained* in the current form in which it is. The Defence for the Second Accused prays, therefore, that every pleading and evidence touching and concerning "burning" as part of the offence of "pillage" be discountenanced and dismissed for wrongful inclusion into that offence.

vi. The Elements of Alibi and Motive as Evidence in the Second Accused's Case:

104. The Defence for the Second Accused avers that although the Second Accused has not pleaded Alibi as part of his case, there is overwhelming evidence before the Court in favour of the Second Accused indicating his absence or inaction in most of the alleged crime scenes. Since the Accused has a right to silence[209] and the Prosecution bears the burden of proving its case beyond reasonable doubt against the Accused[210], the Second Accused chose to be silent and allow the evidence to unfold in its natural form. This way, the Court became seized of evidence of "motive" by certain Prosecution witnesses to distort their respective accounts of events against the Accused in return for some benefits or reward from the Prosecution[211]; the Court, at first hand, also witnessed contradictory or uncorroborated accounts of certain events by Prosecution witnesses against the Second Accused[212]; the Court heard and saw how many witnesses for the Prosecution and Defence (common and individual) made no mention, or had no recollection, of the Second Accused in their respective testimonies to the Court about what they saw, heard and experienced during the conflict[213]; and the Court was at least able to learn from many witnesses for the Prosecution and Defence (common and individual) about the absence or inaction of

[209] By virtue of Article 17(4)g) of the Statute.
[210] See *Delalic* Trial Chamber Judgment, para. 601, *supra* at note 72.
[211] See Transcripts of Kamara's DAB 012 (05-09 October 2006) and DAB 131 (10-11 October 2006).
[212] See notes 45 and 46, for example *supra*.
[213] See notes, 25, 28, 30 and 34, *supra*.

the Second Accused in the respective crime scenes alleged in the Indictment[214]. Each of these strands of evidence shall be fully captured in the Count-by-Count analysis of the Indictment under Part C of this Final Trial Brief.

105. Notwithstanding that the Defence for the Second Accused failed to plead Alibi as part of its defence pursuant to the Rules of Court[215], it is submitted that failure to so do is not fatal as the Rules themselves admit to that[216]. The Defence for the Second Accused submits that evidence subsist before the Court that the Second Accused spent much of his time at his village in the Port Loko District during the period of the "AFRC faction", namely, after the mid-February 1998 invasion of Freetown by ECOMOG troops[217]. Evidence also subsist to the effect that he played no active part in combat during the period of the "AFRC faction"[218]. Similarly, Defence evidence subsist that the Second Accused was not present at the so-called "Westside base" throughout the period of the crimes alleged in the Indictment[219]; the evidence suggest to the contrary that a key Prosecution witness, Junior Johnson alias Junior Lion (TF1-167), was in fact the overall commander of the Westside base during the period of the alleged crimes[220]. The same or similar evidence suggest that the said Junior Johnson was assisted in his operations and crimes at the Westside base and its environs by, *inter alia*, witness TF1-334, another key Prosecution witness[221]; some of the Defence witnesses who testified to this effect made bold to say that they were themselves involved in committing violent crimes in the Westside base vicinity pursuant to the orders and oversight of Junior Johnson[222].

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214 Id.
215 See Rule 67(A)(ii)(a) of the Rules of Procedure and Evidence.
216 Id., Rule 67(B). See also the ICTR case of *Prosecutor v. Ntagerura*, Decision on Prosecutor's Motion for Ntagerura's Defence to fulfill its obligations in respect of the reciprocal disclosure of evidence pursuant to Rules 67(A)(ii) and 67(C) of the Rules of Procedure and Evidence, 10 July, 2000.
217 See Transcripts of Kamara's DAB 012 (05-09 & 18 October 2006); DAB 126 (11-12 October 2006) as well as the testimonies of Kamara's individual witnesses: note 34, *supra*.
218 Id.
219 Id., see especially Transcripts of Kamara's DAB 012 (05-09 October 2006); DAB 037 (03-05 October 2006); DAB 129 (09 & 18 October 2006) and DAB 131 (10-11 October 2006); as well as the Transcript of Kanu's Witness: DBK 117 (16 October 2006).
220 Id., see Transcripts of Kamara's DAB 012 (05-09 October 2006); DAB 037 (03-05 October 2006); DAB 129 (09 & 18 October 2006) and DAB 131 (10-11 October 2006).
221 Id.
222 Id.

106. Of crucial note in this regard, is the fact that evidence equally subsist before the Court that Junior Johnson and witnesses TF1-334 and TF1-184 had similar motives for testifying against the Second Accused in particular and his co-Accused in general. In the case of the Second Accused, individual witnesses testifying on his behalf, namely witnesses: DAB-012 and DAB-131 related accounts of unusually special treatment of witnesses TF1-334 and TF1-184, among others, at the Pa Demba Road Maximum Prison by the Prison Authorities and members of the Sierra Leone Police and Special Court whilst serving in the prison[223]. These special treatments were alleged to be unconnected with their undertaking to testify to the Court against the three Accused in return for their freedom. Whilst both TF1-334 and TF1-184 gave what the Defence considers as implicating and sometimes dubious answers to questions on motive for their testimonies to the Court[224], Junior Johnson admitted to being an undercover agent for the Sierra Leone Police shortly after the setting up of the Special Court[225]. The Defence for the Second Accused submits that Prosecution Witnesses: TF1-334 and TF1-184's desire for freedom and its attendant amenities, coupled with Junior Johnson's particular passion for drugs and money were significant factors that fuelled their respective motives to, *inter alia*, testify against the Second Accused.

107. In conclusion, under this rubric, the Defence for the Second Accused submits that there is evidence of Alibi to show that the Second Accused was not present at many of the scenes of crime, and that in the singular instance where he was admitted to be present by Individual Defence Witnesses, namely at Colonel Eddie Town, he was made inactive by virtue of his arrest and being in prolonged custody.[226] The Defence for the Second Accused also notes that the First Accused, with whom the Second Accused is alleged to have been nearly throughout the times material to the Indictment (according to key Prosecution Witnesses), pleaded Alibi in his defence

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[223] See Transcripts of Kamara's DAB 012 (05-09 October 2006) and DAB 131 (10-11 October 2006).
[224] TF1-184, for example, admitted to have been taken out of Prison by the Sierra Leone Police and interviewed by officials/investigators of the Special Court whilst in Prison. He also admitted to being a Yard Provost in prison, a position that Kamara's witnesses allege is the result of a reward by Special Court officials for resolving to testify against Kamara and co-accused:(Transcript of 29 September 2005, pp. 8-9).
[225] See Transcript of 19 September 2005, pp. 35-36.
[226] See Kamara's individual witnesses testimonies to the Court, at note 34, *supra*.

and called witnesses to that effect. The First Accused particularly denied being with the Second Accused at the crime scenes and times alleged in the Indictment.[227]

PART C: SUMMARIZED LEGAL AND FACTUAL ANALYSES OF THE INDICTMENT:

108. As noted in paragraph 13 of this Final Trial Brief, the factual analyses of the Indictment, supported by a definition of each of the offences in the Indictment, shall begin with an analysis of Count 3 upwards to Count 14 and then conclude with Counts 1 and 2 respectively. This is because the Defence for the Second Accused considers Counts 1 and 2 of the Indictment to be 'distinctly reliant and legally supplemental to the succeeding Counts 3 to 14'. The analyses under this main rubric shall thus be from the specific to the general.

COUNT 3:

a. The Crime of Extermination (An Unlawful Killing): A Crime Against Humanity:

The Legal Definition of the Crime of 'Extermination':

109. Count 3 alleges "extermination", a form of "unlawful killing" and a crime against humanity punishable under Article 2.b of the Statute. The Court, in its Rule 98 Decision, noted that in order to prove the crime of "extermination" as alleged, the Prosecution should lead evidence to substantiate the elements of the offence as follows: firstly, that *the perpetrator intentionally caused the death or destruction of one or more persons by any means*, including the infliction of conditions of life calculated to bring about the destruction of a numerically significant part of the population; secondly, that the killing or destruction constituted part of a *mass killing of members of a civilian population*; thirdly, that *the mass killing or destruction was part of a widespread or systematic attack directed against a civilian population*; and fourthly, that *the perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian*

[227] See at note 30, *supra*.

population.[228] (Emphasis added). In summary, ***extermination*** under international humanitarian law involves "the intentional mass killing or destruction of part of a population as part of a widespread or systematic attack upon a civilian population".[229]

110. In particular, the Accused must be aware that his act(s) or omissions are part of "a mass killing event", which has "close proximity in time and place".[230] The requisite *mens rea* in this regard is knowledge that an act or omission is directed against certain groups of individuals and causes mass destruction, or forms part of an event that causes mass destruction, or that the act or omission alleged is done with "recklessness or gross negligence" which causes mass destruction to a certain group of individuals under Article 2 (b) of the Statute.[231]

COUNT 4:

b. <u>The Crime of Murder (An Unlawful Killing): A Crime Against Humanity:</u>

<u>The Legal Definition of the Crime of 'Murder':</u>

111. Count 4 alleges "murder", another crime against humanity punishable under Article 2.a of the Statute. Similarly, the Court, in its Rule 98 Decision, noted that in order to prove the crime of "murder" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows: <u>firstly</u>, that *the perpetrator by his acts or omissions caused the death of a person or persons*; <u>secondly</u>, that the perpetrator *had the intention to kill or to cause serious bodily harm* in the reasonable knowledge that it would likely result in death; <u>thirdly</u>, that the murder was committed as *part of a widespread or systematic attack directed against a civilian population*; and <u>fourthly</u>, that *the perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.*[232] (Emphasis added).

[228] See para. 73 of the Rule 98 Decision.
[229] Id., in which the Court quoted the Trial Chamber's Judgment in *Akeyesu*, *supra* at paras. 590-92.
[230] See *Prosecutor v. Kayishema & Anor*, ICTR-95-1-T, Trial Chamber Judgment, 21 May 1999, para 147.
[231] Id., para. 146.
[232] See also para. 74 of the Rule 98 Decision as well as the Trial Chamber Judgment in *Akeyesu*, at paras. 589-90, *supra*.

COUNT 5:

c. <u>Violence to Life, Health and Physical or Mental Well-being of Persons, in Particular Murder (An Unlawful Killing): A Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II:</u>

<u>The Legal Definition of the Crime of 'Violence to Life, etc. ("Murder")':</u>

112. Count 5 alleges "violence to life, health and physical or mental well-being of persons, in particular murder", a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and punishable under Article 3.a of the Statute. Similarly, the Court, in its Rule 98 Decision, noted that in order to prove "violence to life, health and physical or mental well-being of persons, in particular murder" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows: <u>firstly</u>, that *the perpetrator inflicted grievous bodily harm upon the victim in the reasonable knowledge that such bodily harm would likely result in death*; <u>secondly</u>, that *the perpetrator's acts or omission resulted in the death of the victim*; <u>thirdly</u>, that the victim was a person *protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation;* <u>fourthly</u>, that the violation took place *in the context of and was associated with an armed conflict;* and <u>finally</u>, that *the perpetrator was aware of the factual circumstances that established the protected status of the victim.*[233] (Emphasis added). This crime, not being a crime against humanity within the definition of the Indictment, proof of a widespread or systematic attack directed against a civilian population is irrelevant.

113. In summary, the Court held that "murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II" is the "willful killing of a person or persons protected under the Geneva Conventions of 1949 and of Additional Protocol II during an armed conflict"[234]. This category of persons include persons

[233] See para. 77 of the Court's Rule 98 Decision.
[234] Id., para. 75.

taking no active part in hostilities, including the wounded or sick and prisoners of war or persons who have fallen into enemy hands as well as those in hostile territory. The Court further held that the internal armed conflict in Sierra Leone, by virtue of which the Indictment was preferred, forms part of armed conflicts covered by the Geneva Conventions and Additional Protocol II[235].

Factual Analysis to Disprove Counts 3, 4 and 5 above of the Indictment:

114. 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 42 to 50 of the Indictment, pursuant to Article 6.1 and Article 6.3 of the Statute of the Court. The said allegations touch and concern eight set of occurrences at various locations in the Republic of Sierra Leone, to wit, the Districts of Bo, Kenema, Kono, Kailahun, Koinadugu, Bombali, Freetown and the Western Area, and Port Loko. The crimes are said to have been perpetrated between the period of 25 May 1997 and April 1999 in which 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.

Crime-Based Factual Analysis of Evidence on Counts 3 to 5 of the Indictment:

Bo District

115. The Prosecution in the indictment alleged that victims were routinely shot, hacked to death and burnt to death. Unlawful killings included the following;

> Paragraph 43 of the Indictment alleges that "between about 1 June 1997 and 30 June 1997, AFRC/RUF attacked Tikonko, Telu, Sembehun, Gerihun and Mamboma, unlawfully killing an unknown number of civilians".

Witnesses For The Prosecution

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[235] Id., para. 76.

116. In order to prove unlawful killings alleged in Bo District under Counts 3, 4 and 5, the Prosecution called TF1-004, TFI-053 and TFI-054 as relevant and pertinent to the Counts. The Prosecution did not lead any evidence to show that the Second Accused was present in Bo throughout the period relevant to the Indictment neither was evidence led to show that the Second Accused unlawfully killed civilians in Bo relevant to the period of the Indictment. The Prosecution failed to show that the Second accused took part in, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of unlawfully killing of civilians in Bo. The Prosecution witnesses failed to prove that the attack on Bo was against a civilian population.

117. Prosecution Witness TFI-054 was in Gerihun Town in the period June to July 1997 and at that time theAFRC was in control of Gerihun town.[236] TFI-054 knew the AFRC's top leaders were; Boysie Palmer who was the Brigade Commander for Bo, ABK who was the Secretary to the Secretariat and AF Kamara who was the Secretary of State for the southern region under the AFRC regime stationed in Bo. [237] Prosecution Witness TFI-053 also confirmed in his testimony that he saw Boisey Palmer, AF Kamara[238] who were in the general area of Demby's house. [239] The Prosecution through its witnesses TF1-004, TFI-053 and TFI-054 failed to show the existence of a superior-subordinate relationship between the Second Accused and AF Kamara , Boysie, Palmer AF Kamara and ABK. The Prosecution failed to show that the Second Accused excised effective control[240] over AF Kamara, Boysie Palmer, ABK and the soldiers in Bo during the period referred to in the Indictment.

Witnesses for the Second Accused's Defence

118. Defence Witness DAB-059 testified that the First Accused, had no command control over the SLAs in Bo during the period 1 June 1997 to 30 June 1997. Witness

[236] Witness TFI-054, TT 19 April 2005 page 77
[237] Witness TFI-054, TT 19 April 2005 page 78 and 107 Cross-examination
[238] Witness TFI-053 TT 18 April 2005 page 107, Witness TFI-053, TT 19 April 2005, pages 18-19 Cross-examination
[239]Witness TFI-053, TT 19 April 2005, pages 20, 21 Cross-examination
[240] See *Celibici* Appeals Judgment, para. 256; see also *Prosecutor v. Halilovic*, ICTY judgment 16 November 2005, IT-01-48-T, paras. 57-63.

testified that Brigadier Boysie Palmer was the Brigade Commander in Bo during the period 1 June 1997 and 30 June 1997 and that the First Accused and the Second Accused had no command control over Brigadier Boysie Palmer while he was the Brigade Commander in Bo.[241]

119. DBK 137 gave evidence that he was an educated industrialist and that he was born in the Tinkoko Chiefdom[242]. He testified that he was present in Bo in June 1997 around the period that the AFRC took over from the Tejan Kabbah Government [243]. To Defence Counsel's question: " At that time were Kamajors present in Bo?" DBK 137 answered "Very few were there but they were in one area, a town called ...Gerihun"[244]. DBK 137 gave evidence of the killings of two civilians, a Dr Tommy and Mr Jah killed by the Kamajors when they left for Gerihun[245]. The Second Defendant relies on the evidence of DBK 137 who testified that Paramount Chief Demby was killed in Gehirun by the Kamajors in 1997.[246]As regards the Tinkoko crime base DBK 137 gave evidence that during the period June, July, and August 1997 he met with civilians and Sierra Leon Soldiers in his village Sembehun 17 in the Tinkoko Chiefdom[247]. He testified that following the departure of the Soldiers the Kamajors entered his village burning over 10 houses and killing two persons in his presence.[248] With respect to the Tinkonko crime base DBK 137 testified that Guinean Soldiers attacked Tinkonko Town. DBK 137 testified that he never saw or heard of the Second Accused as being one of the soldiers who attacked Gehirun and Tinkoko.[249] DBK 137 testified that Colonel Boisey Palmer was the Brigade Commander in Bo after the AFRC came to power and that after the AFRC came into power Sierrra Leone soldiers continued to be in Bo.[250]Under cross- examination DBK 137 maintained that the "overall boss" for Bo was the Brigade Commander Colonel

[241]DAB O59 Transcript of 27 September,2006 page 85
[242] See Transcript 2 October 2006 page 119.
[243] See Transcript 2 October 2006 page 122.
[244] See Transcript 2 October 2006 page 124.
[245] See Transcript 2 October 2006 page 126.
[246] See Transcript 2 October 2006 page 127.
[247] See Transcript 2 October 2006 page 132.
[248] See Transcript 2 October 2006 page 133.
[249] See Transcript 2 October 2006 page 133 – 135.
[250] See Transcript 2 October 2006 page 137.

Boisey Palmer[251] and also stood by his testimony about who carried out the killing of Paramount Chief Demby.

Findings of the Second Accused's Defence

120. To allege that The Second Accused bears the greatest responsibility for the unlawful killings in Bo, the Prosecution have to prove that the Second Accused intended to and committed directly or indirectly either by his acts and or omission the killings of civilians in Bo.

121. The Prosecution failed to prove beyond a reasonable doubt that the Second Accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of these unlawful killings. During these unlawful killings the Second Accused was not personally present. The Prosecution has not established that the Second Accused gave an order or orders for soldiers to commit the offences alleged. Furthermore, it is not possible on this evidence and in the circumstances to infer that the Second Accused knew or had reason to know that these killings were being committed.

122. In this case the Prosecutor has failed to establish beyond a reasonable doubt that the AFRC and the RUF were joined in a common plan or purpose which amounts to or involves the commission of a crime under the statues of the Court. In the Indictment, the Prosecutor defines the joint criminal enterprise between the AFRC and the RUF as 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[.]"[252]

123. The Prosecutor states that the aim of the alleged joint criminal enterprise was to gain political power and control over the territory of Sierra Leone, which does not in

[251] See Transcript 3 October 2006 page 8.

[252] Indictment at ¶ 33.

itself constitute the crime alleged in the Indictment nor, indeed, a crime enumerated in the Statute. From the outset of the case, then, the Prosecutor has failed to even allege the existence of a shared criminal purpose between the AFRC and the RUF.

124. On the contrary Prosecution Witness TFI-054 testified that a group of Kamajors and delegation of four men come from Freetown. Some of the men in the delegation had names like Mike Lamin, Mr Gbao. The meeting was to negotiate a peace deal between Kamajors and AFRC in Gerihun.[253] Witness TFI-053 confirms in his testimony that when AFRC took power, a meeting was organised between the Kamajors and the soldiers to bring about peace. It was during one such meeting attended by TFI-053 , that the soldiers offered a peace deal to Kamajors. [254]

Kenema District

Paragraph 44 of the Indictment alleges that "between about 25th May 1997 and about 19 February 1998, in locations including Kenema town, members of AFRC/RUF unlawfully killed an unknown number of civilians"

Witnesses For The Prosecution

125. Prosecution Witness TFI-062 testified that at the time of the coup on May 25th 1997, CDF Kamajors were in control of the Tongo area.[255] In August 1997 soldiers in combat uniforms and some in civilian clothes, went to Tongo[256] and Sam Bockarie alias "Mosquito" was in command of the soldiers. [257] TFI-062 alleged that at all times the rebels were in Tongo, Bockarie was in command and control. When he was not there, he appointed a replacement. [258] Victor was another commander in Tongo, Mavenun area. AFRC/RUF, under Mosquito's command, gave the civilians in Tongo the authority to mine for diamonds in Cyborg pit.[259] Witness TFI-122 testified that

[253] Witness TFI-054 TT 19 April 2005 page 87, Transcript 20 April 2005 page 30 Cross-examination
[254] Witness TFI-053, TT 19 April 2005, pages 14 and 32 Cross-examination
[255] Witness TFI-062 TT, 27 June 2005 page 6
[256] Witness TFI-062 TT 27 June 2005 page 8
[257] Witness TFI-062 TT, 27 June 2005 page 9 and 42
[258] Witness TFI-062 TT, 27 June 2005 page 46 Cross-examination
[259] Witness TFI-062 TT, 27 June 2005 pages 13-14

throughout the 9 month period, Sam Bockarie, alias Mosquito, was in Kenema. He had total command and control of the fighters the Kenema.[260]

126. Prosecution Witness TFI-045 testified that Eddie Kaneh, was the Resident Minister of the east for the AFRC in Kenema, who reported directly to Johnny Paul Koroma.[261] General Mosquito was in charge in Kenema.[262] In 1997 Mosquito (Sam Bockarie), was in charge of the RUF at that time as an overall commander, as Foday Sankoh was out of the country.[263]

127. TFI-062 stated that Johnny Paul Koroma was the Chairman of the new government, and Mosquito the Vice-Chairman.[264]

128. Witness TFI-167 testified that Mosquito was in control of the eastern province at the material time, including Kenema, Kono, Kailahun, Tongo Field, including the mining areas. Mosquito killed BS Massaquoi in Kenema. In his prior statement page 10482 – TFI-167 states Mosquito became an outlaw as time went by. He was doing things without any order. [265]

Witnesses For The Second Accused's Defence

129. DAB-147 stated that after the coup he reported to headquarters in Kenema and was assigned to the Secretariat at the 18th Battalion. His commander was Major Massaquoi. Other Officers the 18th Battalion was Captain Rogers.[266] He was Intelligence Officer under the command of Lieutenant Ben Kenneh. Captain Demoh Musa was the OC secretariat in Kenema.[267]

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[260] Witness TFI-122 TT, 24 June 2005, pages 127 Cross-examination
[261] Witness TFI-045 TT 19 July 2005 page 32
[262] Witness TFI-045 TT 19 July 2005 page 79
[263] Transcript 19 July 2005 page 12-13 closed session
[264] Transcript, 27 June 2005 page 43 Cross-examination
[265] Transcript of 19 September 2005, page 55-56
[266] Transcript of 03 October 2006 page 18-19
[267] Transcript of 03 October 2006 page 21

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130. Witness DAB-147 testified that Sam Bockarie was the RUF leader in Kenema.[268] Sam Bockarie was doing public executions in the town.[269] Sam Bockarie went to apprehend the BS Massaquoi, Mr Kpaka and Dr Momoh who were alleged Kamajor sympathisers.[270] The Officer in Charge at the Secretariat in Tongo was one Sergeant-Major Junior. [271] Witness testified that Manawa and Mopleh were the RUF persons in charge of the Cyborg Pit. They reported to Sam Bockarie.[272]

131. Witness DAB-147 testified that during the period 25th May 1997 and February 1998, he did not hear of Ibrahim Kamara, the Second Accused working together with Sam Bockarie [273]. Between May 1997 and February 1998, DAB-147 did not meet with any Sierra Leone Army soldier known as Ibrahim Kamara also referred to as Bazzy. [274]

132. Witness DAB O59 testified that the First and Second Accused had no command control over the Resident Minister in Kenema. [275]

133. Witness DAB-033 testified that the SLA had an office in Tongo but they were subjected to the RUF administration.[276] He left Tongo, because of the RUF pressure and that their High Command Captain Yamao Kati, who was commanding the SLAs was shot to death. Because the SLA did not have command he was afraid and left Tongo. [277] The SLA was disarmed. [278] Witness DAB-033 stated that he did not hear or see Ibrahim Bazzy Kamara commanding or ordering or forcing anyone to mine for the AFRC. [279]

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[268] Transcript of 03 October 2006 page 23
[269] Transcript of 03 October 2006 page 27-28
[270] Transcript of 03 October 2006 page 30-31
[271] Transcript of 03 October 2006 page 36
[272] Transcript of 03 October 2006 page 37
[273] Transcript of 03 October 2006 page 52
[274] Transcript of 03 October 2006 page 50-51
[275] **DAB O59 Transcript of 27 September,2006** page 86
[276] Transcript of 25 September 2006, page 43
[277] Transcript of 25 September 2006, page 44
[278] Transcript of 25 September 2006, page 44
[279] Transcript of 25 September 2006, page 44

Findings Of The Second Accused's Defence

134. The Prosecution failed to adduce any evidence to show that the Second Accused was present in Kenema throughout the period relevant to the Indictment. Neither was evidence led to show that the Second Accused unlawfully killing civilians in Kenema during the period relevant to the indictment. The Prosecution failed to show that the Second accused planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of unlawfully killing of civilians in Kenema.

135. The Prosecution failed to show that Second Accused who was PLOIII had command and control over Sam Bockarie, Eddie Kaneh and or the soldiers in Kenema. The Prosecution failed to establish the existence of a superior-subordinate relationship or the effective control for that matter over any persons. The Prosecution failed show that the Second Accused knew or had reason to know that unlawful killings were carried out.

Kono District

> Paragraph 45 of the Indictment alleges that "about mid February 1998, AFRC/RUF fleeing Freetown arrived in Kono District"; and that "between about 14 February 1998 and 30 June 1998, members of AFRC/RUF unlawfully killed several hundred civilians in various locations in Kono District, including Koidu, Tombodu, Foindu, Willifeh, Mortema, and Biaya".

Witnesses For The Prosecution

136. Witness TFI-334 testified that Johnny Paul Koroma ordered him, his Operational Commander, and Superman to capture Koidu Buma and Koidu Geiya. [280] This Witness does not mention the Second Accused as being present when these orders were given neither does this Witness mention that the Second Accused participated in the attacks on civilians.

[280] Transcript 18 May 2005 page 15, Exhibit P13

137. Witness TFI-334 stated that at Masingbi Road, Bazzy arrived[281] and automatically became the SLA commander because he was the most senior commander and he was one of the senior RUF members that were in Kono during that time.[282] TFI-334 stated that Superman was superior to Bazzy in Kono.[283]

138. Witness TFI-167 testified Superman was overall commander and Bazzy was second in command to him.[284] Witness TFI-167 testified that Superman reported to Mosquito at Kailahun. Bazzy was also in charge of G4, keeping arms and ammo. [285] This Contrary to Witness TFI-334 who testified that Superman was in charge of the arms.

139. Witness TFI-167 testified that they passed through Tombodu, met battalion commander Savage. Savage had killed a lot of civilians, more than 150, and thrown them into the pit. They were killed using machetes. From the pit going to court barri, he saw about five dead bodies. [286] Witness TFI-167 testified that Savage had enough weapons to defend himself and his men and that was the reason why nobody dared to tell Savage what to do. Savage would not listen to anyone except Johnny Paul Koroma. In his earlier statement TFI-167 stated that Gullit and Five-Five had to stop Savage.[287]

140. Witness TFI-167 testified that Mosquito was in control of the eastern province at that time, including Kenema, Kono, Kailahun, Tongo Field, including the mining areas. In his prior statement page 10482 – TFI-167 states Mosquito became an outlaw as time went by. He was doing things without any order. [288]

[281] Transcript 18 May 2005 page 19
[282] Transcript 18 May 2005 page 21 and 30
[283] Transcript 18 May 2005 page 24
[284] Transcript 15 September 2005 page 38
[285] Transcript 15 September 2005 page 39
[286] Transcript 15 September 2005 page 45
[287] Transcript 19 September 2005 page 47-49
[288] Transcript of 19 September 2005, page 55-56

141. Witness TFI-167 testified that RUF were arresting some SLAs, . The fight was about command and control between the RUF and SLA. It was at Kabala that SAJ refused to join the RUF. In the absence of Johnny Paul Koroma in Kono, they were under the RUF and took instructions from Superman, who took instructions from Mosquito. At that time, the SLAs were very angry in Kono. [289]

142. Witness TFI-033 testified that he heard Gullit ordering Savage to burn Tombodu town, where hundreds of civilians were killed by the AFRC. Many civilians were locked up in houses set on fire by Savage and his fighters. TFI-033 was present. AFRC commanders present in Tombodu at that time: Hassan Papa Bangura, Five-Five Ibrahim Bazzy Kamara; Ibrahim Sesay "Biyoh"; Abdul Sesay. [290] During cross-examination TFI-033 testified that hundreds of civilians were killed and hundreds amputated but he did not count the victims. He had never been in Tombodu before he was captured. He did not know the population of Tombodu before he went there. TFI-033 doesn't remember what other places in Kono he passed through until he arrived to Tombodu.[291]

143. Witness TFI-033 testified that he could not remember the things that happen when he was taken hostage until he felt safe in Gullit's hands and regained "his normal senses" This was when Gullit gave him the task to follow news for him.[292] Witness TFI-033 testified that the attack on Tombodu was in March 1998 but he does not remember how long it was after his capture that the attack took place or how long the attack lasted. TFI-033 claims ECOMOG attacked AFRC and RUF in Kono to drive them out and not vice versa. TFI-033 stated that when he arrived Tombodu, the AFRC was already in occupation. TFI-033 never heard about an AFRC attack on Tombodu. But claims that the AFRC "were burning the town, killing civilians."[293] Witness TFI-033 testified that the ECOMOG defeated AFRC and RUF at Tombodu and Gullit ordered them to go to his home town, Yaya. In Tombodu there were only

289 Transcript of 19 September 2005, page 60
290 Transcript Monday, 11 July 2005 page 11-12
291 Transcript Monday, 11 July 2005 page 79 Cross-examination
292 Transcript Monday, 11 July 2005 page 80 Cross-examination
293 Transcript Monday, 11 July 2005 page 81-82 Cross-examination

AFRC fighters. TFI-033 testified that he cannot tell if there were any RUF in Tombodu. [294]

144. TFI-033 testimony is inconsistent, full of exaggerations and contradicts with other Prosecution witnesses. The evidence in on the facts have no credibility Defence submits that the evidence cannot reasonable support the allegation that the Second Accused is criminally responsible for unlawful killing or other crimes in Kono.

Witnesses For The Second Accused's Defence

145. Defence witness DBK-129 testified that they escorted Johnny Paul Koroma to Kono where they left him there. There were RUF fighters in Kono and Superman was the overall commander with Peleto as his second in command. During that time the RUF that had the overall commander over Kono. The SLAs were under the RUF, because they had the command of the town.[295] He did not see or hear about the killing of civilians, during that period.[296] He left Kono because the RUF had command of the town [297]Witness DBK-129 testified that he did not see Ibrahim Bazzy Kamara, the Second Accused, in Kono, during that time. [298]

146. Witness DBK-113 testified that he went to Kono at Hill Station in Koidu Town. The RUF were staying at Hill Station and there were some soldiers. In Kono he met Leather Boot, Colonel King, Junior Lion, Savage, and some RUF commanders; Superman, Mike Lamin, Morris Kallon. DBK-113 stayed in Kono up to when ECOMOG were advancing from the Sewafe Bridge, to take over Kono.[299] Witness DBK-113 testified that the relationship between the SLA soldiers and the RUF in

[294] Transcript Monday, 11 July 2005 page 84 **Cross-examination**
[295] Transcript, 09 October 2006 page 69- 71
[296] Transcript, 09 October 2006 page 71
[297] Transcript, 09 October 2006 page 73
[298] Transcript, 09 October 2006 page 71
[299] Transcript, 13 October 2006 page 12-13

Kono were not good, the RUFs said all the soldiers should be under their command. No soldier should be under the AFRC as it was an RUF movement.[300]

147. Witness DBK-113 testified that he did not or hear about Ibrahim Bazzy Kamara being present at Koidu Town. [301] The Overall commander in Kono in charge of the RUF fighting forces in Koidu Town, at the time was Superman. [302] This Savage was Superman's task force officer. [303]

148. DAB 098 gave testimony that he was in Tombodu Town during the period relevant to the Indictement.[304]. He mentions Tikelo and Savage as "big men" in Tombudu town[305] and Superman as a superior to Savage in Tombodu. DAB 098 mentions that he stayed with Tikelo and the rebels for 6 months.[306]As regards the burning of persons in Tombobu this witness testifies that several persons were burnt alive in Tombodu Town under the instructions of Savage[307]. DAB 098 did not know of the Second Accused being the leader of rebels in Tombodu[308]neither did he ever hear of the name Bazzy Kamara or Ibrahim Bazzy Kamara.[309]

149. Witness DAB-018 testified that at the muster parade in Kabala Johnny Paul Koroma said the soldiers were to receive orders from the RUF. In Kono it was the RUF who gave orders. [310] Witness DAB-018 testified that because Johnny Paul had said that everybody should take orders from the RUF and if he were to refuse taking order from the RUF, he would have been shot and killed. DAB-018 stated that he used to see military police of the RUF capture some soldiers and few seconds later they were lying dead on the street. If one spoke about SLA you got into problem.

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300 Transcript, 13 October 2006 page 14
301 Transcript, 13 October 2006 page 48
302 Transcript, 13 October 2006 page 66
303 Transcript, 13 October 2006 page 16
304 Transcript, 04 September 2005 page 10
305 Transcript, 04 September 2005 page 20-23
306 Transcript, 04 September 2005 page 28
307 Transcript, 04 September 2005 page 33
308 Transcript, 04 September 2005 page 38
309 Transcript, 04 September 2005 page 47-48(cross examination)
310 Transcript, 07 septembre 2006 page 7-9

There was an order that there was no SLA, that everybody should subdue himself under the RUF.[311]

150. DAB-018 knew Akim as SLA, and in the bush, Akim associated himself with the RUF, until he became an RUF. Colonel Akim. had a battalion for himself, and some of the SLAs that were senior to him, started working under him. There was contact between him and Morris Kallon. Colonel Maada a soldier also associated with RUF.[312] Witness DAB-018 testified that he was in Kono for about two to three months until the time when "the chopper" came. DAB-018 testified that General Issa said that at any time the jets came, if any person was to burn between 10 to 15 houses, he was going to give him a promotion. While in Kono DAB-018 received orders from Akim.[313] The overall boss was Mosquito.[314] The Alpha Jets bombed In Koidu Town.[315] Witness DAB-018 testified that he did not hear or see Ibrahim Bazzy Kamara in Kono.[316]

Findings Of The Second Accused's Defence

151. Command and control are inseparable. To hold a person liable on the basis of superior responsibility there needs to be proof of both command and control. Command needs to be exercised through control.[317] Having control means having effective authority over subordinates.[318] Being called commander in itself is not sufficient to infer subordination; there must be exercise of superior authority over the institution and its personal.[319]

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[311] Transcript, 07 septembre 2006 page 11, 13-14
[312] Transcript, 07 septembre 2006 page 12
[313] Transcript, 07 septembre 2006 page 14-15
[314] Transcript, 07 septembre 2006 page 16
[315] Transcript, 07 septembre 2006 page 19
[316] Transcript, 07 septembre 2006 page 44
[317] The Criminal Responsiblilty of Individuals for Violations of International Humanitarian Law by E. van Sliedregt. 2003 page 152
[318] *See* para. 378, *Celebici* Trial Judgement, endorsed by the *Celebici* Appeal Judgement, paras. 256 abd 265-266
[319] *Celebici* Judgement, para. 763.

> "Effective control has been accepted, as a standard for the purposes of determining superior responsibility. The showing of effective control is required in cases involving both *de jure* and *de facto* superiors." [320]

152. Prosecution failed to adduce sufficient evidence to prove that the Second Accused was a commander that had effective control over the AFRC Troops in Kono in the period relevant to the Indictement. The Prosecution witnesses TF1-334,TF1-184 and TF1-167 gave extensive evidence in support of the Defence, that the RUF header by Mosquito, Superman and Morris Kallon had total command and control over Kono in the period relevant to the Indictment.

153. Witness TFI-184 stated that SAJ Musa told him that he would never go to Kono and Kailahun, because the RUF was in total control. [321]

154. Witness TFI-334 testified that Superman was in complete control of the radio communication set[322] and that the SLAs, Bazzy, the operation commander and TFI-334 should hadno authority to make any radio communications.[323] Superman was in charge of distributing the ammunition. [324] TFI-334 testified that Morris Kallon was an advisor.[325] Witness TFI-334 stated that Mosquito ordered the attack on Koidu Geiya[326] and Sewafe. [327]

155. Witness TFI-334 testified that Morris Kallon told the SLAs in Kono he recognized no other fraction but the RUF.[328]

156. The Prosecution failed to show that the Second accused to part in, planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of unlawfully killing of civilians in Kono

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[320] *Celebici* Appeal Judgement, para. 196. The Appeals Chamber referred to Article 28 of the ICC Statute which reaffirmed the standard of effective control.
[321] Transcript 27 September 2005 page 6-7
[322] Transcript 18 May 2005 page 24
[323] Transcript 19 May 2005 page 3-4
[324] Transcript 20 May 2005 page 48-50
[325] Transcript 19 May 2005 page 7
[326] Transcript 20 May 2005 page 23-24
[327] Transcript 18 May 2005 page 33-34
[328] Transcript 19 May 2005 page 10

157. Although the second Accused was mentioned as being allegedly present in Kono District during the period above stated, the evidence led by the Prosecution falls short of indicating that he was directly or otherwise involved in the commission of the crimes stated hereunder. In particular, whilst TF1-019, TF1-072, TF1-074, TF1-076, TF1-198, TF1-206, TF1-216 and TF1-217 do not mention the second Accused in their testimonies at all, the witnesses who mentioned him, including TF1-033, TF1-167 and TF1-334, either failed to show that he directly or indirectly participated in committing the crimes specified above, or failed to corroborate themselves on the particular unlawful actions attributed to the second Accused under the Count charges herein, in order to prove the necessary elements of the offence. Similarly, the second Accused submits that evidence capable of supporting a conviction was not led in Kono District to show that persons under his command, authority or direction, if any, took part in the incidents as alleged by the Prosecution.

Kailahun District:

> Paragraph 46 of the Indictment alleges that "between about 14 February 1998 and 30 June, 1998 in locations including Kailahun town, members of AFRC/RUF unlawfully killed an unknown number of civilians".

Witnesses For The Prosecution

158. Prosecution Witness TFI-113 testified that Sam Bockarie , Mohammed Terawali, Issa Sesay, and Augustine Gbao as a G5 commander all acted in the stead of Foday Sankoh [329] Witness TFI-113 testified that the overall commander of RUF in Buedu was ex-Brigadier Sam Bockarie also known as Mosquito. Brigadier Issa Sesay was the next persons in command.[330]

159. Witness TFI-113 testified that in Baoma, she saw eight corpses and saw Mosquito shoot two people. Mosquito orded Joe Fatoma, to kill the rest of the people. TFI-113 saw soldiers bring prisoners out one by oneout of which 57 were killed in front of her

[329] Transcript 18 July 2005 page 73 and 76 close session
[330] Transcript 18 July 2005 page 59-60

by a combination of MPs, SLA and RUFs. [331] In her previous statement TFI-113 said that all four killers were RUF and that she did not see any AFRC soldiers around. [332]

160. Witness TFI-045 testified that after the AFRC left Freetown and met Mosquito in his base in Buedu, they took direct command from him. This lasted from September 1997 until the disarmament of Johnny Paul Koroma in February/ March 1998. After the disarmament of Johnny Paul there was a final split. 'The AFRC soldiers were only loyal to AFRC commanders; RUF commanders were only loyal to RUF commanders at that time.[333]

Witnesses For The Second Accused's Defence

161. Defence Witness DAB-142 is a trader and Defence Witness DAB-140 is a farmer in Buedu. Defence Witness DAB-142 and DAB-140 both testified that Mosquito arrested some of the SLAs in Kalihun notably John Koroma and Tamba Brima[334] and took them to Buedu.[335] During this period, apart from the commanders mentioned, DAB-142 did not hear, or have anyone mention the name of Ibrahim Bazzy Kamara as being one of the commanders of the Rebels in Kalihun. [336]

Findings Of The Second Accused's Defence

162. The Prosecution did not lead any evidence to show that the second Accused was in Kailahun throughout the period relevant to the Indictment. Besides, all the witnesses above made clear indications that the entire Kailahun District was an RUF stronghold and was, at all times relevant to the Indictment, under the command and control of various RUF Commanders, including Sam Bockarie, alias Mosquito, Issa Sesay, Morris Kallon and Manawai, to name a few. As already noted, TF1-045, an

[331] Transcript 18 July 2005 page 89 and 90
[332] Transcript 18 July 2005 page 114-116
[333] Transcript 21 July 2005 page 35 Cross-examination
[334] DAB-142 Transcript 19 September 2006 page 18-19
[335] DAB-140 Transcript 19 September 2006 page 72
[336] Transcript 19 September 2006 page 10; DAB-140 Transcript 19 September 2006 page77

RUF ex-combatant, especially testified that Bockarie was in overall command of the Eastern Province, including Kailahun District, assisted by Issa Sesay and other named commanders. Furthermore, the second Accused submits that no evidence was led in Kenema District to show that persons under his command, authority or direction, if any, took part in the incidents alleged hereunder.

163. The arrest of Johnny Paul Koroma by Sam Bockarie in Kalihun is a clear indication that the SLAs and the RUF were not at any time relevant to the indictment working together for a common purpose.

Koinadugu District:

> Paragraph 47 of the Indictment alleges that "between about 14 February 1998 and 30 September 1998, in several locations including Heremakono, Kabala, Kumalu (or Kamalu), Kurubonla, Katombo, Koinadugu, Fadugu and Kamadugu, members of the AFRC/RUF unlawfully killed an unknown number of civilians".

Witnesses For The Prosecution

164. Prosecution Witness TFI-334 and TFI-167 testified that Ibrahim Bazzy Kamara was present in Kabala.[337] TFI-334 stated that they spent about three days in Kabala.[338] Prosecution Witness TFI-199 testified that they attacked Kabala upon the orders of Colonel Savage and people were killed. [339] From TFI-199 testimony Kabala was attacked after the attack on Karina. This testimony is contrary to that of other Prosecution witnesses who allege that The Second Accused was in the Bambali District in June 1998.

165. Prosecution Witness TFI-334 and TFI-167 alleged that Bazzy was present in Kabala but they were not aware that an attack was carried out in Kabala. Witness TFI-334 stated that he arrived in Kono in early March 1998 when the Second

[337] Transcript 17 May 2005 page 81 Transcript 15 September 2005 page 30-31
[338] Transcript 17 May 2005 page 81
[339] Transcript 6 October May 2005 page 86-88

Accused allegely was in Kono[340] That the attack on Kabala was at the end of March. No evidence was led to show that Bazzy Kamara knew or had reason to know that there was an attack on Kabala.

166. Prosecution Witness TFI-033 testified that in April 1998 Yiffin was attacked and 60 civilians died[341] While in cross-examination TFI-033 stated that 40 civilians were killed. [342]In his prior statement TFI-033 stated that Yiffin was attacked around July 1996. [343] TFI-033 prior statement also stated that in June 1998 they entered Koinadugu Dstrict and they attacked the towns of Sama Bendugu and Yiffin, and burnt people in houses. That Bendugu, about 40 people were killed and a total of more than 150 people were killed in 2 towns. Witness TFI-033 denies ever having said these in his prior statement. Witness TFI-033 testified that he could not remember the things that happen when he was taken hostage until he felt safe in Gullit's hands and regained "his normal senses", when Gullit gave him the task to follow the news for him,[344]

167. Witness TFI-184 testified that Tamba Brima, Bazzy or Kanu were not part of the attack on Mongo to get ammunition, or the attack on Kabala because the Nigerian ECOMOG was there. [345]

168. Witness TFI-184 testified that Gullit, Bazzy, Coach Gibono, Junior Lion, Junior Sheriff, FAT Sesay came to Kurubonla. [346] Witness TFI-184 testified that SAJ Musa told Gullit to look for a base camp, and that they should only have the military as a target, and avoid targeting civilians. Gullit, Bazzy, Five-Five, Bomb Blast, Bio, Junior Lion, Coach Gibono, Fat Sesay, Junior Sheriff left Kurubonla. [347]

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[340] Transcript 18 May 2005 page 17; Transcript 20 May 2005 page 3
[341] Transcript Monday, 11 July 2005 page 15-16
[342] Transcript Monday, 11 July 2005 page 96 Cross-examination:
[343] Transcript Monday, 11 July 2005 page 151-152 Cross-examination:
[344] Transcript Monday, 11 July 2005 page 80 Cross-examination
[345] Transcript 29 September 2005 page 93-94 Cross-examination (close session)
[346] Transcript 27 September 2005 page 19
[347] Transcript 27 September 2005 page 20-21

169. Witness TFI-153 testified in examination in chief that in Yifin he saw soldiers arrive. To his understanding the soldiers told him that they had come with one commander who was Bazzy.[348] He never saw Bazzy trying to stop the assaults on women in Yiffin. [349] In cross examination he stated that it was the when he went to the chief, the chief told that there is a honourable in town.[350] When TFI-153 went to Rosos it was the time he met Bazzy and realized he was the Bazzy. [351] When asked why he changed his statement, TFI-153 stated that it was because his statement was taken in English. Witness TFI-153 can read and write English fluently and is a teacher[352] Witness TFI-153 stated that he was loyal to SAJ Musa and held him in high regard[353] He blamed the First Accused for SAJ Musa's death and the way SAJ was buried.

170. Contrary to the testimony of TFI-153 is Witness TFI-033 who testified that 60 people were killed in Yiffin. Witness TFI-153 who testified that he was in Yiffin when the soldiers arrived and that he spent a lot of time with the chief of the village and was there when women used to come to and complain to the chief. [354] TFI-153 never stated that any one was killed in Yiffin. Witness TFI-033 does not mention the Second Accused as being present in Yiffin.

171. Defence submits that the testimony of TFI-033 and TFI-153 in several respects at odds, biased and inconsistent with their previous their written statement and thus carry little or no weight.

Witnesses For The Second Accused's Defence

[348] Transcript, 23 September 2005 page 82 Cross-examination
[349] Transcript, 22 September 2005 page 36
[350] Transcript, 23 September 2005 page 82 Cross-examination
[351] Transcript, 23 September 2005 page 82 Cross-examination
[352] Transcript, 23 September 2005 page 84 Cross-examination
[353] Transcript, 23 September 2005 page 56 Cross-examination
[354] Transcript, 22 September 2005 page 33

172. Several Defence witnesses testified that Superman and SAJ Musa were the leaders in Koinadugu.[355] The ECOMOG attacked Kabala and Mongo Bendugu killing civilians.[356]

173. Defence Witness DBK-012 testified he went to Kabala around March 1998. Witnesses DBK-012 and DBK-037 testified that the over all commander in Kabala was SAJ Musa.[357]

174. FAT Sesay was the second in command to the SAJ Musa in Kabala.[358] Witness DBK-129 testified that he saw the Second Accused at Masiaka, with his family.He testified that the Second Accused told him that he was going to Port Loko, with his family. DBK-126 did not see the Second Accused in Kabala.[359] Witness DBK-012 testified that in Kabala, he got information from a Soldier that the Second Accused, Ibrahim Kamara, had an accident.[360]

175. DBK-037 testified that he never saw Ibrahim Bazzy Kamara at Mongor and Kurubonla.[361] Witness DBK-012 testified that he did not see second accused present at the time he met SAJ Musa at Kurubonla.[362] Witness DBK-012 testified that at Mongo Bendugu, the ECOMOG Alpha Jet, bomb, Killed innocent civilians, and soldiers.[363]

176. Defence Witness DAB-081 testified that the fighters SLA and RUF fighters who occupied Koinadugu in July 1998 were led by, SAJ Musa and Superman.[364] Witness

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[355] DAB-091, Transcript, 24 July 2006 page 10, 12; DAB-088, Transcript, 24 July 2006 page 29 and 36, 40 Cross-examination; DAB-080,Transcript, 20 July 2006 page 67 and 75; DAB-081, Transcript, 20 July 2006 page 82

[356] DBK-012, Transcript 05 October 2006 page 92, 94-95 ; DBK-037 Transcript 03 October2006 page 87 and 94

[357] DBK-012, Transcript 05 October 2006 page 89; DBK-037, Transcript 03 October2006 page 87

[358] Transcript 05 October 2006 page 92

[359] Transcript, 09 October 2006 page 67-68

[360] Transcript 05 October 2006 page 90

[361] Transcript 03 October2006 page 93 and 95

[362] Transcript 05 October 2006 page 103

[363] Transcript 05 October 2006 page 94-95

[364] Transcript, 20 July 2006 page 82

stated that the RUF accepted no leadership or any command from the SLA. Musa warned that no civilian shall not be harassed or killing but the RUF rebels were carrying out killings, beating and rape.[365] There was animosity between the two groups SAJ Musa shot an RUF man who killed a civilian and the two factions. The RUF rebels hated SAJ Musa for killing their member. This forced SAJ Musa and the SLA to finally leave Koinadugu.[366] Witness DAB 077 testified that the ECOMOG forces attacked Fadugu killing people.[367] The ECOMOG were in Fadugu from March to September 1998[368] and during this period they killed civilians. [369]

177. Witnesses DBK-012 testified that he knows Prosecution Witness TFI-334, that TFI-334 was with him throughout the movement to Freetown and back. TFI-334 was DBK-012 second in command on operations.[370] DBK-012 testified that during the cease fire TFI-334 was involved in a shot out at Juba Hill and was sent to Prison. [371] DBK-012 met TFI-334 at Pademba Road Prison in the year 2002. [372] While in Prison TFI-334 received preferential treatment in exchange for his testimony against Tamba Brima, Bazzy Kamara, and Borbor Santigie Kanu.[373] TFI-334 was released from in 2004 because he was not charged and because of the Special Court programme.[374]

178. Defence Witness DBK-113 testified that while he was at Pademba Road prisons, in 2000 he met Prosecution Witness TFI-334, TFI-184, Defence Witness DBK-012, DBK-131, Ayo Cole and Ranger. DBK-113 testified that while in prison people came from the Special Court and said that all of them were to be called, who were put in safe custody. they were 16. the people from the Special Court. Witness DBK-113 testified that he was taken to an office which was and they told him that;

[365] Transcript, 20 July 2006 page 95
[366] Transcript, 20 July 2006 page 98 and 100-101
[367] Transcript, 19 July 2006 page 56, 60
[368] Transcript, 19 July 2006 page 63
[369] Transcript, 19 July 2006 page 69,73-74 and 100 Cross-examination
[370] DBK-012, Transcript 09 October 2006 page 21
[371] DBK-012, Transcript 09 October 2006 page 22 and 31
[372] DBK-012, Transcript 09 October 2006 page 22
[373] DBK-012, Transcript 09 October 2006 page 24-27
[374] DBK-012, Transcript 09 October 2006 page 24 and 32

""You are young men and it's good for you to come out and prosecute these people, and we will do something for you." What you want to learn, we'll do so, and we'll make you to travel to go overseas. And if you had a brother and a sister, then we'd put you together so that you could go overseas--- They told us that we were to testify against Bazzy, Santigie Kanu and Tamba Brima." [375]

179. DBK-113 testified that he was not in agreement with the persons from the Special Court. TFI-184, Alie Turay, Ayo Cole, who was called Six Finger, Ranger, and TFI-334 agreed with the persons from the Special Court and TFI-184 and TFI-334 boasted about it. Because they accepted to testify, those who agreed to give testimony, they enjoyed lots of privileges while in prison.[376]

180. DBK-131 testified that Alabama,Ranger, Bobson Yapo Sesay, tried to convice him to come and prosecute the First, Second and Third Accused. He testified that if he gave evidence against the three Accused persons he would be freed from prison, a car will be bought for him he will be flown to Canada. DBK-131 testified that Alabama and Bobson Yapo Sesay enjoyed privileges in prison because they agreed to testify and boasted about it. [377]

181. Prosecution Witness TFI-167 in cross-examination that the more information he provides to OTP, the more the Office of the Prosecution helped him. [378]

182. Defence submits that the testimonies of Prosecution Witness TFI-334, TFI-Alabama and TFI-167 are biased, unsafe and should not be relied upon to convict the Second Accused on any count in the indictment

Findings Of The Seconds Accused's Defence

[375] Witness DBK-113, TT 13 October 2006 page 58-59
[376] Witness DBK-113, TT 13 October 2006 page 60-65
[377] Witness DBK-131, TT 10 October 2006 page 109-114; TT 11 October 2006 page 10-15
[378] Witness TFI-167 TT **19 September 2005 page 31**

183. The Defence submits that Bazzy Kamara was not present in Kabala at the time of the attack on Kabala. The Prosecution has failed to show that Bazzy excised any command and control over those who committed these killing. Prosecution witnesses also confirmed that SAJ Musa was the commander in Kabala.

184. Although the second Accused was mentioned as being allegedly present in Koinadugu District, in particular Kabala Town, during the period above stated, the evidence led by the Prosecution falls short of indicating that he was directly or otherwise involved in the commission of the crimes stated hereunder. In particular, whilst TF1-094, TF1-133, TF1-147, TF1-209 and TF1-310 do not mention the second Accused in their testimonies at all, the witnesses who mentioned him, including TF1-033, TF1-153, TF1- 167, TF1-184 and TF1-334, made no reference to him participating in, or directing any other person, to commit the offences alleged hereunder in any part of Koinadugu District.[379] Similarly, the second Accused submits that evidence capable of supporting a conviction was not led in Koinadugu District to show that persons under his command, authority or direction, if any, took part in the incidents as alleged by the Prosecution.

185. Further attack in the Koinaduge district was not against a civilian population.

Bombali District:

> Paragraph 48 of the Indictment alleges that "between about 1 May 1998 and 30 November 1998 in several locations in Bombali District, including Bonyoyo(or Bornoya), Karina, Mafabu, Mateboi, and Gbendembu (or Gbendubu of Pendembu), members of the AFRC/RUF unlawfully killed an unknown number of civilians"

Witnesses for the Prosecution

186. Prosecution Witness TFI-334 testified that Bazzy was the deputy brigade commander to Gullit. Ibrahim Bazzy Kamara was with the advance team on the move

[379] Reference by TF1-153 to the second Accused being, for example, in Yiffin with his subordinates is easily rendered doubtful under cross-examination when the witness denied seeing him there: see Court Transcript of of 23 Sept. 2005, pp. 82 to 83.

to Karina. [380] Witness TFI-334 testified that in Karina, he, Bazzy and the CSO met five young girls in a flat house. TFI-334, Bazzy and the Bazzy's CSO set a house ablaze while the main door was closed by Bazzy. They stood there until the house burnt to ashes.[381] Witness TFI-334 when asked in cross-examination stated that there were six young girls. [382] Witness TFI-167 stated that as they were entering Karina, there was a house with a Benz vehicle parked outside. He was there with Bazzy and Eddie Williams aka Maf. When Eddie Williams went into the house, wrapped people in carpets of the house and set the house on fire. He drew fuel from the Mercedes Benz. [383] Prosecution Witness TFI-334 and TFI-167 both gave different versins story of the same incident they alleged to have participated in.

187. Prosecution Witness TFI-055 who was in Karina at the time of the attack, does not mention that anybody was burnt in a house in Karina. TFI-055 testified that he and the other villagers buried 5 people; including those killed by the mosque, in the same grave[384] and that some people told TFI-055 that Jabbie was the one that came in and fought in Karina.[385]

188. Witness TFI-033 testified that Bonoya and Karina suffered the worst atrocities ever meted out on civilians. About 500 civilians were **kill**ed, 300 amputated, over 200 women raped. [386] Witness TFI-033 testified that he knew the Second Accused[387] and he testified on the troop's movement in the Bombali district and the commanders but failed to mention the Second Accused as being present in the Bombali district. TFI-033 from his testimony should be in a position to know if Second Accused was present and second in command to Gullit during the attacks in Bombali as alleged by Witness TFI-334 and TFI-167. Further there is a huge disparity between 5 people and 500 peopls being killed in Karina.

[380] Transcript 23 May 2005 page 59-61
[381] Transcript 23 May 2005 page 66-67
[382] Transcript 21 June 2005 page 54 and 56 Cross-examination
[383] Transcript 15 September 2005 page 54-55
[384] Transcript, 12 July 2005 page 138
[385] Transcript, 12 July 2005 page 142
[386] Transcript Monday, 11 July 2005 page 19, Transcript, 12 July 2005 page 80-81 Cross-examination
[387] Transcript , 11 July 2005 page 6

189. Witness TFI-167 testified that at Rosos, Gullit sent teams to Mateboi, to get all civilians join them at Camp Rosos. The civilians did not come and a second team was dispatched, and Arthur returned with the head of the chief, Gullit, Bazzy, and other commanders were present. [388] Witness TFI-167 testified that Gullit was the most senior commander at Major Eddie Town and Bazzy was his second in command. [389]

190. Witness TFI-334 testified that at Colonel Eddie Town, O-Five ordered the arrest of Gullit, Five-Five, Bazzy, Abdul Sesay, Coachy Borno, Operation Commander A. [390] O-Five arrested them because there was disunity among them. TFI-334 testified that the issue was solved and they were released. [391] Witness TFI-334 only made mention of the arrest in cross-examination. On the arrest at Eddie Town Witness TFI-167 testified that after O-Five arrived, all senior high commanders were arrested: Gullit, Bazzy, Five-Five, Hassan Papah Bangura, Woyoh, Abdul Sesay, and Bio because they were not planning the operation properly. [392] TFI-167 arrested Ibrahim Bazzy together with Baski.[393] When SAJ arrived, he said that they should be under house arrest. They were under arrest till they got Newton where they were reinstated.[394] TFI_334 and TFI-167 give different versions of the arrest.

191. Witness TFI-184 testified that after the death of SAJ Musa Alex Brima became in commander in chief of the AFRC forces and the Second Accused was his deputy and Five-Five became brigadier and army chief of staff. [395]

192. Defence submits that Prosecution Witness TFI-334, TFI-184, TFI-167, and TFI-033 all gave conflicting and uncorroborated testimonies.

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[388] Transcript 15 September 2005 page 61and 63
[389] Transcript 15 September 2005 page 69
[390] Transcript 16 June 2005 page 42 Cross-examination
[391] Transcript 21 June 2005 page 66 Cross-examination
[392] Transcript 15 September 2005 page 75
[393] Transcript 15 September 2005 page 75-76
[394] Transcript 15 September 2005 page 79
[395] Transcript 27 September 2005 page 79

Witnesses For The Second Accused's Defence

193. Defence Witness DBK-094 testified that he was in Karina on May 8, 1998, when it was attacked at around 6.00 a.m.[396] DBK-094 stated that the next day, he saw only seven bodies in front of one of the two-story buildings in Karina. DBK-094 and others buried those dead bodies in two mass graves. They buried three men in one grave and four in another grave. [397] Witness DBK-094 confirms that he saw seven dead bodies the day following the attack. DBK-094 did not see any other dead bodies after that.[398] Witness DBK-094 testified that the Imam in Karina was not present in Karina on that particular day.[399] Witness DBK-094 testified that the names he heard that attacked Karina on May 8, 1998, were Jabbie and Adama Cut Hand.[400] He heard from some of his friends in Kono that Junior Lion, the Killer, Boby, were some of the gunmens that entered into Karina.[401]

194. Witness DBK-094 testified that he heard the name Ibrahim Bazzy Kamara over the radio when witnesses were talking about him at the Special Court. DBK-094 testified apart from the radio, he never heard the name of the Second Accused anywhere. [402]

195. Defence Witness DBK-113 testified that the he was with the troop when they got to Karina and the leaders were FAT, Colonel Eddie and Junior Lion. Colonel Eddie led the troops to Karina, and the operation commander was Junior Lion. The soldiers were moving with their families. [403] Junior Lion said that Karina was Tejan Kabba's village, so it should be burnt down. [404] DBK-113 testified that during this period at Karina, he did not see or hear about Ibrahim Bazzy Kamara as being at Karina and he

[396] Transcript 11 July 2006, page 27
[397] 11 July 2006, page 38-39
[398] 11 July 2006, page 65
[399] 11 July 2006, page 43
[400] 11 July 2006, page 73
[401] 11 July 2006, page 74
[402] 11 July 2006, page 101-102
[403] Transcript 13 October2006 page 100
[404] Transcript 13 October2006 page 21

did not see or hear that Ibrahim Bazzy Kamara gave orders to burn houses or to burn civilian houses at Karina.[405]

196. DBK-113 stated that when they got to Mandaha the town was empty.[406] Defence Witness DBK-113 testified that he knew the second accused, Ibrahim Bazzy Kamara at Colonel Eddie village, when they were arrested. Colonel FAT was the overall command who gave the order for other lower commanders, like Junior Lion, Tito to arrest the Second Accused[407] Defence Witness DBK-113 testified that FAT was the commander at Rosos and Colonel Eddie was his deputy.[408] Defence Witness DBK-113 testified that after SAJ Musa's death and burial at Koba Wata, he did not see the Second Accused again.[409]

197. Defence Witnesses DBK-037, DBK-131and DBK-012 testified that in Kurubonla, SAJ Musa dispatch a team, led by FAT, the second man was Eddie; the third man was King; the fourth man, alias Junior Lion to locate a base within the northern area. Ibrahim Bazzy Kamara around Kurubonla.[410]Witness DBK-037 testified that he was part of the advance team and the first base that they located, was at Rosos in the Sanda Chiefdom.[411] DBK-037 stated that no other team went to Rosos. They were the only one that were there for a month. Witness DBK-037 testified that Ibrahim Bazzy Kamara was not present at Rosos.[412] DBK-037 testified that lieutenant FAT was the overall commander at Rosos.[413]

Ibrahim Bazzy Kamara's Arrest

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405 Transcript 13 October2006 page 48-49
406 Transcript 13 October2006 page 48-49
407 Transcript 13 October2006 page 47
408 Transcript 13 October2006 page 27
409 Transcript 13 October2006 page 50 and 105
410 Witness DBK-037, TT 03 October2006 page 94-95; Witness DBK-037 TT 10 October 2006 page 43; Witness DKB-012, TT 05 October 2006 page 105-106
411 Transcript 03 October 2006 page 95
412 Transcript 03 October 2006 page 96
413 Transcript 03 October 2006 page 97

198. Witness DBK-037 testified that the Nigerian-led ECOMOG force invaded Rosos and they found another base called Camp Eddie. [414] At Eddie Town, they had information from one civilian that one former AFRC man, called Ibrahim Kamara, was in his village. FAT, who was the commander asked the MP commander, who was Junior Lion, to make a team and appoint one commander to go and arrest the Second accused.[415] DBK-037 was among those who went to arrest Bazzy Kamara at Port Loko. They brought the him and handed him over to the MP commander, who was Junior Lion.[416] The Second accused was taken to a cell where he was locked up. It was "a booth house." [417]

199. Witness DBK-037 testified that SAJ Musa had given an order to FAT, who was the commander that all former AFRC's should be caught.[418]

200. Defence Witnesses DBK-131 and DBK-012 testified that at Eddie Town the Second Accused was under arrest in a box because they had wanted to go surrender. SAJ Musa said the will be with the movement but and under close arrest[419]

201. Witness DBK-012 testified that when SAJ Musa arrived at Colonel Eddie Town SAJ Musa became the overall commander, FAT was the second in command and Captain Eddie the third in command.[420]

202. Several Defence witnesses testified that the ECOMOG bombed Mandaha. [421]

203. Defence witness DAB-033 testified that Ibrahim Bazzy Kamara did not hold any position under SAJ Musa as the third in command at Eddie Town.[422]

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[414] Transcript 03 October 2006 page 96-97
[415] Transcript 03 October 2006 page 97
[416] Transcript 03 October 2006 page 98
[417] Transcript 03 October 2006 page 99
[418] Transcript 03 October 2006 page 98
[419] Witness DBK-131, TT 10 October2006 page 58-59; Witness DKB-012, TT 05 October 2006 page 109
[420] Transcript, 06 October 2006 page 5
[421] Witness DBK-113 TT 13 October2006 page 21, 49 ; Witness DBK-094, TT11 July 2006, page 61
[422] **Transcript 25 September 2006 page 63**

Findings Of The Second Accused's Defence

204. Although the second Accused was mentioned as being allegedly present in various parts of Bombali District, including Rosos, Makeni and Karina during the period above stated, the evidence led by the Prosecution falls short of indicating that he was directly or otherwise involved in the commission of the crimes stated hereunder. In particular, whilst TF1-055, TF1-157, TF1-158, TF1-179, TF1-180, TF1-199 and TF1-267 did not mention the second Accused in their testimonies at all, the witnesses who mentioned him, including TF1-033, TF1-153, TF1-167, TF1-184 and TF1-334, either failed to show that he directly or indirectly participated in committing the crimes specified above, or failed to corroborate themselves on the particular unlawful actions attributed to the second Accused under the Count charges herein, in order to prove the necessary elements of the offence. In particular, the testimonies of unlawful killings respectively alleged in Karina by TF1-334 and TF1-167 in 1998 were both contradictory and failed to corroborate one another. TF1-334 does not, for example, recall the presence of TF1-167 at the scene, though the latter emphasized his presence but without equally acknowledging the presence of the former.[423] The second Accused also submits that evidence capable of supporting a conviction was not led in Bombali District to show that persons under his command, authority or direction, if any, took part in the incidents alleged by the Prosecution under these Counts.

Freetown and the Western Area:

> Paragraph 49 of the Indictment alleges 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 cityand the Western Area, including Kissy, Wellington, and Calaba Town".

Witnesses For The Prosecution

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[423] See Court Transcripts of 23 May 2005 at pp. 65-66, 21 June 2005 at pp. 56-60, and of 15 Sept. 2005 at pp. 54-56 respectively.

205. Witness TFI-334 testified that Gullit was the overall command of the State House and Bazzy was deputy chief in command. [424] Witness TFI-334 testified that killings took place, at the State House and corpses all were around. [425] Bazzy was present at PWD when Gullit gave orders that civilians gathering at night and burning tyres and singing should be shot [426] Witness TFI-334 testified that at Wellington area they went, shot at civilians and set houses on fire. Bazzy was present[427]

206. Prosecution Witness TFI-334 testified that at Guard Street, Captain Blood, a civilian, one of Bazzy's bodyguards, captured seven young men and executed them. [428]

207. Witness TFI-334 testified that at Savage Square, Gullit, came to the front line troops and said he had received information that the people of Fourah Bay had killed one soldier.Gullit said, in fact, he himself will lead the troops to go to Fourah Bay and to burn down Fourah Bay and to kill people in Fourah Bay. TFI-334 stated that Gullit, Bazzy, Five-Five, operation commander, deputy operation commander, Supervisor A and himself self and other soldiers moved to Fourah Bay. [429]

208. Prosecution Witness TFI-167 also testified about the attack at Fourah Bay. TFI-167 testified that he went to State House and whilst he was there, there was a report that came to Gullit that they had killed a soldier at the Fourah Bay Road area. Alex Tamba Brima sent a troop to Fourah Bay Road to burn down and there should be a lot of killing. The commander that lead the troops to Fourah Bay Road was called Saidu Kambolia and TFI-167 Went with the troops. After the attack TFI-167 went back to State House and met Alex Tamba Brima and other commanders. [430]

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[424] Transcript 14 June 2005 page 21
[425] Transcript 14 June 2005 page 26
[426] Transcript 14 June 2005 page 62
[427] Transcript 14 June 2005 page 98
[428] Transcript 14 June 2005 page 72
[429] Transcript 14 June 2005 page 66
[430] Transcript 16 September 2005 page 43

209. Prosecution witnesses TFI-334, TFI-184 and TFI-167 contradict each other as to where the orders was given to attack Fourah bay, who commanded the attack and who participated in the attack. Prosecution Witnesses TFI-334 and TFI-167 are biased

Witnesses For The Second Accused's Defence

210. Defence Witness DBK-037 and DAB-033 testified that FAT was the overall commander for the movement to the city .[431] It was not AFRC that came to Freetown, it was the Sierra Leone Army that came to Freetown to reinstate the army. FAT was the commander at State House during the Freetown invasion.[432]

211. Defence Witness DBK-037 testified that TFI-334 and Terminator, Pikin and Ashim led the Hastings operation.[433] That the operation from Wellington up to State House was led by O-Five, who was the operational commander.[434]

212. Defence Witness DBK-037 testified that Junior Lion was dispatched to take up the operation to open Pademba Road, together with Pikin. They removed more than 3,000 soldiers and to the State House.[435] Junior Lion reported to FAT. the overall troop commander[436]

213. Defence Witness DBK-012 testified FAT Sesay was the commander at State House, Supported by O-Five operation commander and other commanders, like Bobson Alimamy Yapo Sesay and Alabama, they were all around at State House.[437]

214. FAT Sesay ordered the attack on Pademba Road Prisons and it was carried out by Junior Lion, O-Five, Tito and DBK-012.[438] Over 4,000 SLA soldiers were released. Those soldiers that were released went out of control and stated burning and killing

[431] Witness DBK-037 TT 04 October2006 page 9; Witness DAB-033 TT 25 September 2006 page 67
[432] Transcript 06 October2006 page 15 Cross-examination
[433] Transcript 04 October2006 page 6 ; Transcript 06 October2006 page 12 Cross-examination
[434] Transcript 04 October2006 page 13
[435] Transcript 04 October2006 page 15
[436] Transcript 06 October2006 page 13 Cross-examination
[437] Transcript, 06 October 2006 page 36
[438] Transcript, 06 October 2006 page 31

because the said that during the intervention their families were killed. They did not have any commander.[439]

215. Defence Witness DBK-131 testified that Ibrahim Bazzy Kamara did not became Alex Tamba Brima's second in command during the advance on Freetown. [440] DBK-131 stated that he did not see Ibrahim Bazzy Kamara in Freetown. [441] Defence Witness DBK-131 testified that the last time he saw the three accused was at Waterloo. [442] DBK-113 testified that at State House he saw FAT who was the overall commander, Colonel Eddie Junior Johnson Foday Bah, Colonel Sesay.[443]

216. Defence Witness DBK-131 testified that in Freetown all he heard was the armed robbers that were prison, and some surrendered soldiers were disgruntled and were doing bad things in town. That they were not under any command and control.[444]

217. Defence Witness DBK-113 testified that after SAJ Musa's death and burial at Koba Wata, he never saw the Second Accused. Ibrahim Bazzy Kamara was not second in command to anyone at State House and that DBK-113 did not see him

218. DAB-033 testified that the Second Accused, did not come to Freetown Freetown on 6 January 1999. [445] In Freetown he went to Ferry Junction, to Colonel O-Five's headquarters, because he had been covering from Cabala Town to Eastern Police.[446]

Findings Of The Second Accused's Defence

219. The Defence submits that the Second Accused was not in Freetown at any point relevant to the indictment . Ibrahima Bazzy Kamara did not directly and or indirectly

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[439] Witness DBK-012,TT, 06 October 2006 page 33-35 Witness DBK-131,TT 11 October 2006 page 19-22; Transcript, 26 October 2006 page 52 Cross-examination
[440] Transcript, 26 October 2006 page 48 Cross-examination
[441] Transcript, 26 October 2006 page 52 Cross-examination
[442] Transcript, 26 October 2006 page 89 Cross-examination
[443] Transcript, 13 October 2006 page 51
[444] Transcript, 11 October 2006 page 19-20; Transcript, 26 October 2006 page 52 Cross-examination
[445] Transcript, 25 September 2006 page 107
[446] Transcript, 25 September 2006 page 107

by his act or omissions carry out any unlawful killings in Freetown between on 6 January 1999.

Port Loko District:

Paragraph 50 of the Indictment alleges that "about the month of February of 1999, members of the AFRC/RUF fled Freetown to various locations in the Port Loko District. Between about February 1999 and April 1999, members of AFRC/RUF unlawfully killed an unknown number of civilians in various locations in Port Loko, including Manaarma, Tendakum and Nonkoba".

Witnesses For The Prosecution

220. Prosecution Witnesses TFI-023 testified that Brigadier Bazzy was the commander at Mile 38 and Mammah. [447] At Mammah, Bazzy order soldiers to make the terrain more fearful to slow the ECOMOG, this meant to kill people and putting them on the main highway. [448] Witness TFI-167 testified that Bazzy ordered for five people to be killed[449] Witness TFI-334 later at Mammah, Kankanda had killed 15people and Bazzy congratulated him.[450]

221. Prosecution Witness TFI-334 testified that a captain[451] was told to make Gberi Bana, a civilian free area. Civilians should be executed. Later TFI-334, Bazzy saw the bodies said well done. TFI-334 saw 15 bodies.[452] Prosecution Witness TFI-334 testified that Bazzy ordered attack on Port Loko. They attacked village closes to Port Loko, and the captain of Exhibit 20 executed one woman. [453]

222. Witness TFI-167 testified that whilst he was resting in the village where the fat woman was killed he sent some fighters to the next village to be there as blocking

[447] Witness TFI-023, TT 10 March 2005 page 33
[448]TFI-023 ,Transcript 10 March 2005 page 36-37
[449] Transcript 16 September 2005 page 64-66
[450] Transcript 15 June 2005 page 20-21
[451], Exhibit 20 who is Defence Witness DBK-012
[452] Transcript 15 June 2005 page 28-29, Exhibit 20
[453] Transcript 15 June 2005 page 34 and 36, Exhibit 20

force and when they went, the civilians that they met in the village were all killed.[454] Witness TFI-167 testified that Sheriff complaint to him that Cyborg had amputated those people and killed them and when they got back to west Side TFI-167 complaint to Bazzy he neglected to report.[455] Witness TFI-334 testified that Bazzy said other operations would take place at Makolo. Bazzy said troops should move there and destroy the village and execute any civilian and take all arms and ammunition. Lieutenant Colonel KBC was the overall commander. [456]

223. Witness TFI-253 testified that in April 1999 there were fighters called Gbethis and also another group of soldiers in Manarrma.[457] In Manarrma TFI-253 was caught and taken to the big man Colonol Sesay and Johnson. He heard Johnson and Sesay talking on the phone; Sesay said in the set that 'they had captured Manarrma, Makambisa and that they took along and that they were on operation no living thing.[458]

Witnesses For The Second Accused's Defence

224. Defence Witness DBK-012 who was one of the commanders testified that throughout the movement of the troops from Freetown to the West Side, in 1999, Ibrahim Bazzy Kamara, the Second Accused, was not with the troops. [459] Ibrahim Bazzy Kamara, the second accused did not gave any orders to anyone from anywhere in Sierra Leone throughout the movement from Freetown to the West Side and in West side. [460] Witness DBK-037 also another commander testified that the second accused was not a commander on the retreat from Freetown to West Side.[461]

225. Witness DBK-129 also a commander testified that he never saw Ibrahim Bazzy Kamara at Four Mile and when he went to Mamamah, he did not see Ibrahim Bazzy

[454] Transcript 16 September 2005 page 75-76
[455] Transcript 16 September 2005 page 78-79
[456] Transcript 15 June 2005 page 38
[457] Transcript 15 April 2005 pages 53-54
[458] Transcript 15 April 2005 pages 81-83
[459] Transcript, 18 October 2006 page 86
[460] Transcript, 18 October 2006 page 87
[461] Transcript, 04 October 2006 page 55 Cross-examination

Kamara with the troops.[462] Bazzy Kamara was not with the troops on the retreat from Benguema to Mile 38 and he did not see Bazzy Kamara at Mile 38.[463]

226. Defence Witnesses DBK-037, DBK-129, DBK-012 and DBK-113 all testified that FAT was the overall commander of the AFRC troops and that Junior Lion was his second in commander.[464].

227. Defence Witness DBK-129 testified that at Mamamah Junior Lion was the commander. He order that they dig some holes to block the advancing ECOMOG forces.[465] Defence Witness DBK-129 testified that at Mamamah, Junior Lion gave an order to one of his security called Kankada to make the area fearful. So since the ECOMOG were advancing, they should meet the heads of human beings and their bodies littering, so they would be afraid. Some people were killed and laid their bodies and heads at the checkpoint. Kankada killed more than four civilians. DBK-129 was present when Junior Lion gave this order to Kankada, to kill these people.[466] Prosecution Witness TFI-167 testified that he had up to 52 securities.[467]

228. Witness DBK-129 testified that when he arrived at Magbeni Ibrahim Bazzy Kamara was not with the other troops. Junior Lion was the commander.[468] He did not see or hear about any killing of civilians at Magbeni.[469] The advance team led by Bobby Yapo Sesay and DBK-012 left Magbeni, to found a base.

229. Defence Witnesses DBK-012, DBK-037 and DBK-129 testified that the name West Side was given by Junior Lion.[470] Witness DBK-129 testified that he did not

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[462] Transcript, 09 October 2006 page 89
[463] Transcript, 13 October 2006 page 52
[464] Witness DBK-037 TT, 04 October 2006 page 18; Witness DBK-129, TT, 09 October 2006 page 84; Witness DBK-012,TT, 06 October 2006 page 46-47; Witness DBK-113 TT13 October 2006 page 52
[465] Transcript, 09 October 2006 page 85-86
[466] Transcript, 09 October 2006 page 87-88
[467] Transcript 16 September 2005 page 66
[468] Transcript, 09 October 2006 page 92
[469] Transcript, 09 October 2006 page 94
[470] Witness DBK-012, TT, 06 October 2006 page 44; Witness DBK-037, TT 04 October 2006 page 51 Cross-examination; Witness DBK-129 TT, 09 October 2006 page 94-95

see or hear about Ibrahim Bazzy Kamara being at the West Side.[471] Witness DBK-012 testified that he did not see second accused at the West Side and he never got to hear that the second accused was present at the West Side.[472] Witness DBK-037 testified that the Second Accused was not the overall commander at West Side.[473]

230. Defence Witnesses DBK-012 and DBK-129 testified that at West Side Junior Lion organized an operation towards Port Loko because he had got information that the ECOMOG troops were at Port Loko. Junior Lion was one of the commanders, DBK-012 and Bobby Sherrif, alias, Cambodia were on the operation.[474] Witness DBK-129 testified that Junior Lion planned another operation for Mansumana before the cease fire. DBK-129 did not go for that operation but DBK-012 went on that operation.[475]

231. Defence Witness DBK-012 testified that at Manarrma. Junior Johnson gave instructed that they should go on the offensive. They met a woman with a bag of money, who was distributing arms and ammunition to the Gbethis and Kamajors at Manarrma. Junior Lion captured the woman and ordered DBK-012 to execute the woman and DBK-012 shot her.[476]

232. Defence Witness DBK-012 testified that Junior Lion ordered one of his security called Adaqua, to capture the other woman who was pregnant. Junior Lion said Adaqua should kill the woman. Adaqua, took a stick and beat the woman on her stomach until the woman died. Junior Lion said they were successful and that they should advance to Port Loko at the Schlenker secondary school were they captured two Malians and brought them to the base which was the West Side.[477]

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[471] Transcript, 09 October 2006 page 94-95
[472] Transcript, 06 October 2006 page 49
[473] Transcript, 05 October 2006 page 17 Cross-examination
[474] Witnesses DBK-012 TT, 06 October 2006 page 44; Witness DBK-129 TT, 09 October 2006 page 96
[475] Transcript, 09 October 2006 page 101
[476] Transcript, 06 October 2006 page 46-47
[477] Transcript, 06 October 2006 page 48

233. Defence Witness DBK-129 testified that he did not see or hear about Ibrahim Bazzy Kamara being at the West Side. [478] Witness DBK-012 testified that Junior Lion, said they should block Rogberi. [479] Junior Lion came from Port Loko, he planned another operation and DBK-129 was in charge of that operation to Makoloh. [480] That was the headquarters of the ECOMOG and they attacked Makoloh and removed the ECOMOG at Makoloh.[481] Witness DBK-129 testified that he did not see or hear about any incident of rape at Makoloh. because it was at night. [482]

Findings Of The Second Accused's Defence

234. The Defence submits that Bazzy Kamara was at no time relevant to the indictment present in Prot Loko including Four Mile, Mile 38, Mammah, West Side Port Loko town, Manarrama and Makoloh

Concluding Submission on Counts 3, 4 and 5 of the Indictment:

235. By virtue of the foregoing evidence available to the Court and the totality of the arguments proffered in this Closing Brief, the Defence for the Second Accused submits that the Second Accused is not individually criminally responsible (whether by his act or omission or through the conduct of other individual(s) or through a joint enterprise), and *a fortiori* does not bear the greatest responsibility, for the respective crimes of "extermination", "murder" and/or any "violence to life, health and physical or mental well-being of persons, in particular murder", within the afore-stated Districts of Sierra Leone as alleged in the Indictment.

COUNT 6:

d. The Crime of Rape (A Form of Sexual Violence): A Crime Against Humanity:

[478] Transcript, 09 October 2006 page 94-95
[479] Transcript, 06 October 2006 page 44
[480] Transcript, 09 October 2006 page 98
[481] Transcript, 09 October 2006 page 99
[482] Transcript, 09 October 2006 page 100