**SPECIAL COURT FOR SIERRA LEONE**

(20094 - 20285)

**Case No. SCSL-2004-16-T**

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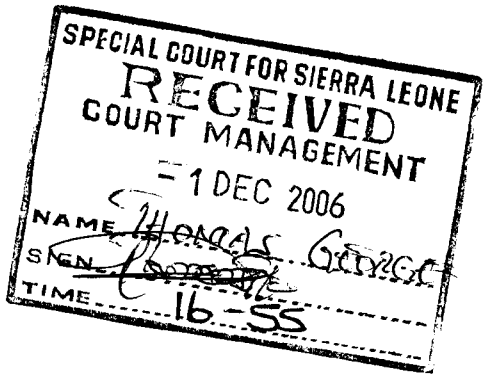
| Before: | Justice Richard Lussick, Presiding<br>Justice Teresa Doherty<br>Justice Julia Sebutinde |
| Registrar: | Lovemore G. Munlo, SC |
| Date filed: | 1 December 2006 |




**THE PROSECUTOR**

**against**

**ALEX TAMBA BRIMA**

**BRIMA BAZZY KAMARA**

**and**

**SANTIGIE BORBOR KANU**

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**CONFIDENTIAL**

# KANU – DEFENCE TRIAL BRIEF

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# I DEFENCE THEORY ON CRIMES AND CRIME BASE EVIDENCE

1. The Defence herewith presents its theory on the elements of crime of several of the crimes alleged in the Indictment against the Third Accused.

## 1.1 Count 1 – Terrorism

2. Para. 41 of the Indictment, insofar relevant, reads that "[m]embers of the AFRC/RUF subordinate to and/or acting in concert with Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, committed the crimes [in the Indictment] as part of a campaign to terrorize the civilian population of the Republic of Sierra Leone, and did terrorize that population."

3. Acts of terrorism are charged as a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.d. of the Statute.

*Definition of Terrorism*

4. The ICTY Trial Chamber in *Prosecutor v. Galic* gave the following definition of the crime of terror: "1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body and health within the civilian population. 2. The offender willfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence. 3. The above offence was committed with the primary purpose of spreading terror among the civilian population."[1] Trial Chamber I of the Special Court ruled that this definition might be of assistance in the interpretation of Article 3(d) of the Statute.[2]

5. Trial Chamber I in the aforementioned decision in *Prosecutor v. Norman et al.* also held, in the interpretation of the concept of terrorism, that "the proscriptive ambit of

[1] *Prosecutor v. Galic*, Case No. IT-98-29-T, Judgement and Opinion, 5 December 2003, para.133.
[2] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motion for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 110.

Protocol II in respect of 'acts of terrorism' does extend beyond acts of threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side-effect."[3]

6. The Trial Chamber in para. 49 of the Rule 98 Decision, adopted the *Norman* Trial Chamber definition of 'acts of terrorism,' namely: "[t]he crime of Acts of Terrorism is comprised of the elements constitutive of Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II as well as the following specific elements:

   i. Acts or threats of violence directed against protected persons or their property.
   ii. The offender willfully made protected persons or their property the object of those acts and threats of violence.
   iii. The acts of violence were committed with the primary purpose of spreading terror among protected persons."[4]

7. This definition includes the element of 'property.' The Trial Chamber assumed that this definition was accepted by the Defence,[5] which is not the case. The Defence in its Rule 98 Motion mentioned both the abovementioned *Galic* case and the *Norman* definitions of terrorism. These definitions are not similar to each other, and are different on one essential part.

*No 'Property' Element*

8. Neither Trial Chamber I, nor Trial Chamber II indicate in their respective Rule 98 Motions the reasons as to why such definition was broadened to include the aspect of 'property.'

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[3] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 111, referring to the ICRC Commentary on the Additional Protocols, at 1375.
[4] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 49.
[5] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 49.

9. Trial Chamber I mentions the *Galic* definition, and consequently indicates that it bases its definition on the ICRC Commentaries while concluding that "'acts of terrorism' does extend beyond acts of threats of violence committed against protected persons to 'acts directed against installations which would cause victims terror as a side-effect."[6] However, in its definition, this aspect of 'installations' is without any explanation or substantiation transformed into 'property.'

10. It seems from the wording that Trial Chamber I extensively interprets 'installations' as 'property,' although this is not explained by Trial Chamber I. 'Installation,' as indicated in the Cobuild dictionary, can be defined as a place that has been specially built by the army, navy, or air force to contain people or equipment; a place that contains equipment and machinery which are being used for a particular purpose (for instance, North Sea oil and gas installations). Property, on the other hand, can be defined as all the things that belong to them or something that belongs to them.

11. Therefore, it is the Defence submission that the Trial Chamber I definition cannot be used by Trial Chamber II as there is no legal basis for assuming the element of 'property' in its definition. The Defence thus contends that Trial Chamber II should re-examine this definition in order to insure that the correct scope of this crime is exercised.

*Reasons Why 'Property' Element Should Not Be Included*

12. The Defence contends that the element of 'property' added by Trial Chamber I, and duplicated by Trial Chamber II, to the ICTY definition of terror, is an element which should not be incorporated in this definition for the following reasons.

13. In the **first place**, serious care should be taken in adding elements to the definition of terrorism, and thus widening the scope of the provision. In international politics, several heads of state have attempted to widen the scope of the international war on terror to include organizations including their national opponents and other

[6] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 111.

competitors disagreeing with the government's policies. For instance, mention is made of China's attempt to widen the scope of terrorism.

14. China's Foreign Minister Zhu stated the following: "We think terrorism should be opposed no matter where it manifests itself, where it comes from-and no matter who the perpetrators and their targets are." Or, as Chinese President Jiang Zemin pointed out while meeting with Russian President Putin: "China is determined to counter all forms of terrorism, no matter where and when it takes place and no matter who it is targeting." Beijing's all-embracing approach was reflected in the APEC antiterrorist manifesto. It said APEC (Asia-Pacific Economic Cooperation) leaders condemned "murderous deeds as well as other terrorist acts in all forms and manifestations, committed wherever, whenever and by whomsoever."[7]

15. This is merely an example indicating the caution which should be taken in defining terrorism, and more specifically, in widening the definition thereof. The definition provided to such a crime by an international tribunal will have its effect on the interpretation thereof in international politics; especially of such sensitive international issue.

16. In the **second place**, another reason why the definition should exclude the 'property' element is that terrorism should be directed at sowing terror. The question raised here is whether an attack on someone's property can actually be categorized as terrorizing people.

17. In paras. 262 and 263 of the Rule 98 Decision, the honorable Trial Chamber holds that the evidence on "destruction of civilian property by burning" may be charged more appropriately under, *inter alia*, the count of terrorism.[8] The Defence respectfully holds that the burning of property does not fulfill the strict requirements of the crime of terrorism.

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[7] See, The Jamestown Foundation China, China Brief, Volume 1, Issue 8, October 25, 2001, see: No Peace Without Justice, http://www.npwj.org/?q=node/43 (last visited on 25 November 2006).

[8] [8] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 262-263.

18. For the above reasons, the Defence respectfully submits that the definition of terrorism should exclude the 'property' element.

### 1.2 Count 2 – Collective Punishment

19. Collective punishment is a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.b. of the Statute.

20. This provision of 'collective punishments' should be interpreted "in its widest sense" according to the ICRC commentaries.[9] Yet, several requirements must be met for this charge. The Trial Chamber in its Rule 98 Decision, accepts the following definition:[10]
    (i) The general elements of Article 3 common to the Geneva Conventions and Additional Protocol II;
    (ii) A punishment imposed upon protected persons for acts that they have not committed; and
    (iii) The intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishments.[11]

21. The Trial Chamber again assumes that the Defence accepts this definition; however, the Defence respectfully contends that it did not indicate so in its Rule 98 Motion. Nonetheless, the Trial Chamber states that it adopts said definition.[12]

22. The second element of said definition requires "[a] punishment imposed upon protected persons for acts that they have not committed." The Defence submits that the Prosecution has not led evidence to the fact that the punishment as required by the second element, was for acts that they have not committed.

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[9] ICRC, Commentary on the Additional Protocols, at 1374.
[10] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.
[11] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 118; *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.
[12] *Prosecutor v. Norman et al.*, Case No. SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 118; *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.

23. Evidence has been led, indicating that civilians were killed or had their limbs amputated, and that because they had voted for President Kabbah, they would be killed or have their limbs amputated.[13] However, there is no single piece of evidence showing that these civilians had not committed the alleged act, i.e. voted for President Kabbah, required by the second element of this Chamber's definition.

24. This necessarily leads to the conclusion that the evidence led during the trial in this regard, does not fulfill the elements of the crime of collective punishments as set forth by the Trial Chamber in the Rule 98 Decision.[14]

### 1.3 Counts 3, 4 and 5 – Extermination and Murder

25. The Trial Chamber enumerated four elements for the crime of extermination, besides the elements of crimes against humanity:
    (i) 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 a population;
    (ii) The killing or destruction constituted part of a mass killing of members of a civilian population;
    (iii) The mass killing or destruction was part of a widespread or systematic attack directed against a civilian population; and
    (iv) 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.[15]

26. International humanitarian law defined murder as a crime against humanity as "the intentional killing of a person as part of a widespread or systematic attack upon a

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[13] TF1-004, Transcript 23 June 2005, p. 5-6; TF1-021, 15 April 2005, p. 28, p. 29, TF1-033, Transcript 11 July 2005, p. 18-19, 12 July 2005, p. 58; TF1-083, 8 April 2005, p. 66-68; TF1-098, Transcript 5 April 2005, p. 42; TF1-153, Transcript 22 September 2005, p. 98, 23 September 2005, p. 50-51; TF1-157, Transcript 25 July 2005, p. 5; TF1-179, Transcript 27 July 2005, p. 41; TF1-184, Transcript 27 September 2005, p. 36-37; TF1-198, Transcript 28 June 2005, p. 15; TF1-206, Transcript 28 June 2005, p. 104; TF1-216, Transcript 27 June 2005, p. 79, 93; TF1-217, Transcript 17 October 2005, p. 26; p. TF1-227, Transcript 8 April 2005, p. 102-103, 11 April 2005, p. 35; TF1-272, Transcript 4 July 2005, p.53; TF1-278, Transcript 6 April 2005, p. 7.
[14] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 62.
[15] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 73.

civilian population."[16] The Trial Chamber in its Rule 98 Decision set out the following elements for the crime of murder as a crime against humanity:

(i) The perpetrator by his acts or omission caused the death of a person or persons;

(ii) The perpetrator had the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death;

(iii) The murder was committed as part of a widespread or systematic attack directed against a civilian population; and

(iv) 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.[17]

27. Trial Chamber II indicated that the international humanitarian legal definition of this crime is "the wilful killing of a person or persons protected under the Geneva Conventions of 1949 and Additional Protocol II during an armed conflict."[18]

28. The following elements are enumerated:

(i) The perpetrator inflicted grievous bodily harm upon the victim in the reasonable knowledge that such bodily harm would likely result in death;

(ii) The perpetrator's acts or omission resulted in the death of the victim;

(iii) 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;

(iv) The violation took place in the context of and was associated with an armed conflict; and

(v) The perpetrator was aware of the factual circumstances that established the protected status of the victim.

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[16] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 74.
[17] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 74.
[18] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 75.

29. The Defence contends that Prosecution evidence does not link the Third Accused with any acts of extermination, as indicted by count 3 of the Indictment, either through the form of individual criminal responsibility or superior responsibility.

30. Extermination and counts 4 and 5 are alleged in Kono District between about 14 February 1998 and 30 June 1998. It is the Defence submission that the Third Accused was not present in this District during most of the time relevant to the Indictment. He did not have any position of operational command, and could not practically exert such influence either, because of his absence most of the time. Although witnesses do at times testify of his presence, this presence was very rare.

31. The Prosecution led evidence that in Koidu Buma, RUF Rambo killed fifteen people.[19] Witness TF1-216 indicates that three people were killed in Paema in "Operation No Living Thing."[20] Witness TF1-033 claims that 40 people were killed in Sama Bendugu.[21] This same witness testifies of hundreds of civilians being killed by Savage under Gullit's command in Tombodu.[22] However, this witness tones down this number, by stating the following:

> Q. The figures you have given, Mr Witness, did you count them?
> A. Well, I saw a large number of -- [Overlapping speakers].
> Q. Please, just answer my question.
> A. No."[23]

32. Witness TF1-113 mentions one incident in Kailahun, where some 67 persons from Ngeima, Bandajuma and Boworbu were collected, and killed.[24]

33. Prosecution and Defence evidence suggest that an attack took place on Karina around May 1998. The Defence evidence presented states that seven people were killed.[25] Two OTP witnesses supports this Defence evidence.[26] Another OTP witness, TF1-033, speaks of "500 civilians were killed." In addition to that, "about 300 were also

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[19] TF1-334, Transcript 20 May 2005, p. 23.
[20] TF1-216, Transcript 27 June 2005, p. 80-81.
[21] TF1-033, Transcript 11 July 2005, p. 17.
[22] TF1-033, Transcript 11 July 2005, p. 11.
[23] TF1-033, Transcript 11 July 2005, p. 79.
[24] TF1-133, Transcript 18 July 2005, p.84-85, 87-90.
[25] DBK-089, Transcript 14 July 2006, p. 7-8; DBK-094, Transcript 11 July 2006, p. 38-39;
[26] TF1-058, Transcript 14 July 2005, p. 78-80. At a later stage this witness mentions six corpses, see TF1-058, Transcript 14 July 2005, p. 104. Witness TF1-055 testifies that he and the other villagers buried five people, including those people killed at the mosque; see TF1-055, Transcript 12 July 2005, p. 138.

amputated in both towns [Karina and Bonoya]. Many rapes, over 200 -- over hundreds of women were raped in that town."[27] The Defence submits that this latter evidence is, compared to the other evidence available, not reliable, and should not be taken into account. Especially given the size of the town of Karina (and Bonoya), the estimates given by Witness TF1-033 seems to be inconsistent with the other available evidence. This same witness testifies of 200 people being killed in Rosos,[28] whilst indicating: "This is an approximation. It could be more than or less than."[29] The Defence contends that also this part of Witness TF1-033's evidence is unreliable, and should have any weight in the assessment of this alleged crime.

34. In Bonoya, Prosecution witness TF1-158 states that he did not see any corpses.[30] However, another Prosecution witness testifies that three people were killed in Bonoya. Again, another witness states that six people were killed in Bonoya.[31] Evidence has been led by the Prosecution that one person was killed in Mandaha.[32] Another Prosecution witness states that two persons were killed.[33] In Colonel Eddie Town, one Prosecution witness testifies of an incident where three people were killed.[34] One Prosecution witness mentions Mabaka, that two people were killed.[35] In Fadugu, according to Prosecution evidence, some civilians were killed.[36] In Gbendembu, two policemen were killed,[37] and in Kamalo, Prosecution evidence indicates that fifteen people were set aside and killed by O-Five.[38]

35. Witness TF1-083 mentions 70 corpses in a mosque in Western Area in January 1999.[39] No clear indication is given as to the person or group responsible for such killings. In Kissy Town, according to witness TF1-021, some 71 persons were shot down. The witness lays no foundation for such statement, he did not count the

[27] TF1-033, Transcript 11 July 2005, p. 19.
[28] TF1-033, Transcript 11 July 2005, p. 28-29.
[29] TF1-033, Transcript 11 July 2005, p. 20.
[30] TF1-158, Transcript 14 July 2005, p. 105.
[31] TF1-157, Transcript 22 July 2005, p. 57-58.
[32] TF1-157, Transcript 22 July 2005, p. 81.
[33] TF1-334, Transcript 23 May 2005, p.78-79.
[34] TF1-167, Transcript 15 September 2005, p. 72-74.
[35] TF1-157, Transcript 22 July 2005, p. 79.
[36] TF1-199, Transcript 6 October 2005, p.78.
[37] TF1-334, Transcript 23 May 2005, p.86.
[38] TF1-334, TF1-Transcript 25 May 2005, p.4.
[39] Transcript 8 April 2005, p. 70.

bodies.[40] The amounts he mentions seem quite random, especially given the fact that the amounts he mentioned are quite large and unspecified. In order to recognize an amount of 71 bodies, one needs to actually count them before coming to such conclusion. The evidence presented does not indicate that this witness actually counted the bodies, and thus this part of witness TF1-021's evidence is deemed unreliable by the Defence and should have no weight in the determination of the Third Accused's alleged guilt on this count. The civilians in this mosque harboured ECOMOG soldiers, and thus the Defence contends that these people were not protected persons as defined by the Geneva Conventions nor were they to be considered as civilians, given their active interference in the conflict.

36. The Defence contends that civilians who voluntarily decide to remain inside the mosque, where one of the warring parties are hidden, do not enjoy full protection of international humanitarian law.

37. The Summary Report of the Third Expert Meeting on the Notion of Direct Participation in Hostilities indicates that the suggestion "that **voluntary** shields are similarly not directly participating in hostilities because 'their actions do not pose a direct risk to opposing forces' and they are not 'directly engaged in hostilities'" constitutes an "excessively narrow" interpretation of international humanitarian law.[41] It continues:

> Most importantly, the standard is participation in hostilities, not engagement therein. In this particular case, the human shields are deliberately attempting to preserve a valid military objective for use by the enemy.
> (...)
> Indeed, to suggest otherwise would actually run counter to the underlying purposes of humanitarian law in that it would encourage voluntary shields by minimizing the risk they assumed by their actions. This would heighten, in turn, the risk to the civilian population generally by disrupting humanitarian law's delicate balance between military necessity and protection of civilians.[42]

38. Evidence has been brought forward by Prosecution witnesses relating to killings in Freetown and Western Area during beginning of 1999, but no amounts of actual

[40] TF1-021, Transcript 15 April 2005, p. 30.
[41] Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23-25 October 2005, Summary Report (URL address: www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf), p. 521.
[42] Third Expert Meeting on the Notion of Direct Participation in Hostilities, Geneva, 23-25 October 2005, Summary Report (URL address: www.icrc.org/Web/eng/siteeng0.nsf/htmlall/participation-hostilities-ihl-311205/$File/Direct_participation_in_hostilities_2005_eng.pdf), p. 521-522.

deaths are reported, no responsible persons or groups mentioned,[43] and in several cases it is unclear whether such acts even fall within the Indictment period, which only runs from 6th January 1999.[44]

39. Concerning Bo District, Witness TF1-004 mentions that in Tikonko five civilians were shot.[45] This same witness mentions a burial of "up to 200 or more."[46] This witness at the same time indicates the following: "At that time, when the soldiers are in Tikonko, it wasn't an SLA time. We were calling them rebels, RUF. Those are names we heard."[47] The Defence respectfully submits that these incidents in Bo District in the period indicated were committed by RUF rebels. This happened during the AFRC government period; however, the AFRC did not have any control over these incidents in Bo District, nor has the Prosecution led any evidence to that effect. In Kenema District, several allegations were made about killings, including in Tongo Field where the AFRC and RUF allegedly killed a lot of people.[48] Another witness holds that three people were killed in Tongo.[49] And again another witness testifies of Mosquito ordering boys to be killed.[50] The above evidence supports the following conclusions.

40. One of the elements of extermination is that 'mass killings' took place. The Statute provides no definition of mass killings, and neither does the Rule 98 Decision. By way of reference, the Defence makes reference to some incidents of which the ICTY Prosecution indicated that it was 'mass killing'; mentioned are incidents where 160 Bosnian Muslims were killed, another incident where 47 Bosnian Muslim men were killed.[51] The ICTY Trial Chamber spoke of a 'mass killing' in an incident where "thousands of able-bodied Muslim men" had been killed.[52]

41. The Defence submits that the evidence presented above, is first of all not conclusive and above all indistinguishable to be able to determine whether 'mass killings' took

[43] For instance: TF1-098, Transcript 5 April 2005, p.36.
[44] For instance: TF1-157, Transcript 25 July 2005, p. 17-18.
[45] TF1-004, Transcript 23 June 2005, p. 13.
[46] TF1-004, Transcript 23 June 2005, p. 82.
[47] TF1-004, Transcript 23 June 2005, p. 99.
[48] TF1-122, Transcript 24 June 2005, p. 72.
[49] TF1-062, Transcript 27 June 2005, p. 12.
[50] TF1-122, Transcript 24 June 2005, p. 22.
[51] *Prosecutor v. Karadzic*, Amended Indictment, 31 May 2000, Case No. IT-95-5/18, para. 22.
[52] *Prosecutor v. Tolimir, Miletic, and Gvero*, Decision on Interlocutory Appeal against Trial Chamber's Decisions Granting Provisional Release, 19 October 2005, Case No.: IT-04-80-AR65.1, para. 23.

place. The witnesses are generally very unclear about numbers, as is evidenced by witness TF1-033, who makes mention of 500 civilians being killed in Karina.[53] Moreover, for some of the presented evidence, no link is established with the Indictment period, most amounts seem quite randomly guessed by illiterate witnesses, and most of the evidence is rather linked to the RUF, or to Savage, who did not form part of any structure.

42. It can thus be concluded that these killings were quite random, and did not take place in a widespread and systematic attack. Accordingly, no conviction can be entered. In any case, no link can be made to the Third Accused either personally or as his alleged role as a commander, and thus, the Defence holds that the Third Accused cannot be found guilty of the crime of extermination.

### 1.4 Count 6 – Rape

43. The Defence herewith refers to the following definition of rape, a crime against humanity, punishable under Article 2.g. of the Statute:

(i) The perpetrator invaded the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.

(ii) The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.

(iii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.

(iv) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[54]

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[53] TF1-033, Transcript 11 July 2005, p. 19.

[54] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 294 (ICC Elements of Crimes).

### 1.5 Count 7 – Sexual slavery and Count 8 – Other Inhumane Act (Forced Marriage)

44. The Prosecution has charged the Third Accused with the crime of "forced marriages", claiming that an "an unknown number of women and girls were abducted and (....) forced into 'marriages' (...). The 'wives' were forced to perform a number of conjugal duties under coercion by their 'husbands'."[55] According to the Prosecution, forced marriages can be categorized as an "other inhumane act", a crime against humanity punishable under article 2.i of the Statute.[56] It expressed the view, as given by a Prosecution investigator, that "the crimes of sexual violence are not simply sexual slavery but are most appropriately characterized as forced marriage".[57]

45. It can thus be derived that the Prosecution has already indicated in the pre-trial stage of the proceedings that it holds the view that the crimes of sexual violence that allegedly occurred in Sierra Leone can be better characterized as forced marriage, an "Other Inhumane Act", and not, or to a lesser extend, as a sexual slavery. The Defence will therefore mainly focus its discussion on (the concept of) forced marriage as the most appropriate characterization of the evidence the Prosecution has led on the crimes of sexual violence, according to this same Prosecution.

46. The honourable Trial Chamber has decided that the crime against humanity of "other inhumane acts" constitutes of the following elements:
    (a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;
    (b) The act was of a gravity similar to any other act referred to in Article 2 a. to h. of the Statute;
    (c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;

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[55] Indictment, paragraphs 51-57, wherein the Prosecution charges the Third Accused with this crime of "forced marriage" in the following Districts: Kono District, Koinadugu District, Bombali District, Kailahun District and Freetown and the Western Area.
[56] *Prosecutor v. Brima et al.*, Request for Leave to Amend the Indictment, SCSL-2004-16-PT-11, 9 February 2004, par. 4.
[57] *Prosecutor v. Brima et al.*, Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-2004-16-PT-70, 6 May 2004, par.10.

(d) The act was committed as part of a widespread or systematic attack directed against a civilian population; and

(e) 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.[58]

47. The Defence holds that the last element of an other inhumane act as a crime against humanity should entail the actual knowledge of the perpetrator and not the lesser requirement, as stated by the honourable Trial Chamber in their Rule 98 Decision, that the perpetrator had reason to know. This was also acknowledged in the ICC Elements of Crimes, mentioning as an element of an other inhumane act that "the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population"[59] The Defence asserts that the honourable Trial Chamber in many of its definitions of the crimes charged in the Indictment in its Rule 98 Decision[60] does not deviate from the definitions given by the ICC Elements of Crimes, and sees no reasons why this should be the case when it concerns other inhumane acts as a crime against humanity.

48. The Prosecution submitted, at the Status Conference of 8 March 2004, that "forced marriage entails a conduct over time whereby a man forces a woman into relationship with all the trapping of marriage, and in which, in the Prosecution's submission, there are obligations in relation to the division of chores and sexual relations as in a marriage,"[61] The Defence is however of the view that, if this conduct cannot be categorized as sexual slavery, this conduct will not constitute a crime against humanity. The exercising of force on a woman to enter into a relationship similar to marriage, is not of "a gravity similar to any other act referred to in Article 2 a. to h. of the Statute" (see element b of the definition of an other inhumane act), especially in view of the more nuanced and complicated relation between the "husband" and "wife"

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[58] *Prosecution v. Brima et al.,* Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, par. 174.
[59] International Criminal Court, *Elements of Crimes*, U.N. Doc. PCNICC/2000/1/Add.2 (2000), Article 7 (1) (k). John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587 p. 298.
[60] *Prosecution v. Brima et al.,* Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006.
[61] *Prosecutor v. Brima et al.,* Decision on Prosecution Request for Leave to Amend the Indictment, SCSL-2004-16-PT-70, 6 May 2004, par.16.

as discussed in the expert report of Dr. Thorsen.[62] In the following paragraphs the Defence will elaborate on the complexities of the concept of forced marriages, and explain why this concept cannot be categorized as a crime against humanity. In addition, the Defence will at the same time with the major flaws of the report of Prosecution expert witness on forced marriages, who does not provide any nuance with regard to the position of women during the war, and has filled her report with sweeping statements without any proper foundation.

*Expert Reports on Forced Marriages*

49. The Defence expert on Forced Marriages, Dr. Thorsen, has a wide experience in the field of gender relations and women's position in rural societies in West Africa,[63] including a excellent theoretical expertise on these subjects. The report drafted by Dr. Thorsen forms a strong, theoretical analysis of the concept of forced marriage, and is also based on her practical experience as a field worker in Western Africa.

50. This is in sharp contract with the expertise of Prosecution expert witness on forced marriages Mrs. Bangura, who has a background as an insurer, and is a women's rights activist.[64] As this Prosecution expert lacks any real expertise on the field of conjugal relationship, Mrs. Bangura gives her own activist view on women as victims and persons who are in need for help[65], and even tries to influence the policy of the international community concerning women's problem in Sierra Leone.[66] The Defence holds the view that the fact that this Prosecution expert is furthering a political goal, seriously influence her status as an independent and impartial expert, and undermines the objectivity of her expert report.[67]

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[62] Expert Report Dr. Thorsen, Exhibit D38.
[63] See the biography of Dr. Thorsen, included in Exhibit D38, and also Transcript 24 October 2005, p.116-120.
[64] Expert Report Mrs. Bangura, Exhibit P32, p.3-4.
[65] See for example p.6-7 of her report (Exhibit P32), wherein she without any foundation states that "the most devastating effect on women of the war was the phenomenon called 'bush wife', 'rebel's wife or 'jungle wife'. In addition, on p.10 Mrs. Bangura defines the absence of a legal minimum age stipulation in Sierra Leone as one of the critical issues in the current women's rights debates. Many other examples can easily be drawn from her report.
[66] For example, p.4, wherein she discussed UN and donor community programs, which according to Mrs. Bangura are in need of prolongation. Also 'bush wives' should get more access to specific services and facilities, such as medical care, according to Mrs. Bangura.
[67] See also the testimony of Dr. Thorsen in court (Transcript 25 October 2006, p.18) expressing similar concerns:

51. According to Dr. Thorsen the concept of forced marriage contains "implicit assumptions about the degree of force involved"[68], and although the use of this terminology among anthropologists is not common anymore, "the notion of 'forced marriage' is commonly used in studies from a rights-based perspective which rarely describe the particularities of such marriages or the actual experiences of the women entering them."[69]

52. Dr. Thorsen holds the opinion that a more nuanced view on the "contemporary social practices related to marriage in rural West Africa" should prevail.[70]It is this nuanced view that is absent in the Prosecution theory on the concept of forced marriage. The Prosecution evidence is lacking the detail required to really understand the relationship that existed between members of the SLA and their allegedly abducted wives.[71] In this regard, Dr. Thorsen presents an adequate analyses of the deficiencies in the evidence the Prosecution has led with regard to the alleged crime of forced marriages[72]:

> "The level of detail required to get a deeper understanding of the extent to which girls and young women are coerced into marriage by their seniors and how the degree of coercion has been shaped by institutional and economic changes requires long-term fieldwork that allows for building up personal relationships with women and men with whom such sensitive issues can be discussed. Mbilinyi's study of court cases in colonial Tanganyika quoted above suggested that women strategically moulded their account to the values that would make possible their goal. There is no reason to think that people being interviewed by researchers or activists should be less subjective or less strategic in portraying themselves in ways that guard their secrets, aim to shape the outcome of their accounts and suit their aspirations to particular identities, life-styles or representations of their culture (Caplan 1997, Lather 2000)."

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Q. In relation to your observations about the flaws in the methodology adopted by Mrs Bangura, apart from the lack of contextualisation, did you observe, in your opinion, are there any other flaws, that you observed with her report?
A. There is another flaw pertaining to the way she's speaking about arranged marriages, although she's making a very clear distinction after, arranged marriages during peace time are very different from the coerced bush wife situation. She's talking about arranged marriages with a rhetoric of thought all the way through and I think it becomes very contradictory, and that is one of my worries about this whole link between traditionally arranged marriages and the use of, the notion of bush wives in Sierra Leone is that you're making this link, rhetorically, even if you don't make it explicitly.

[68] Expert Report Dr. Thorsen, Exhibit D38, p.3.
[69] Expert Report Dr. Thorsen, Exhibit D38, p.4. See also her testimony in court, Transcript 24 October 2005, p.124-125.
[70] Expert Report Dr. Thorsen, Exhibit D38, p.4.
[71] See for example witness TF1-282, Transcript 13 April 2005, p.18, describing her alleged relationship with her new rebel husband as "Both of us stayed together, we slept together. He took me as his wife and every day we slept together." and "I never thought about it that I leave him, because I was afraid that if I say I should leave him, he was going to do any other thing to me." See also TF1-023, Transcript 9 March 2005, p.44-49.
[72] Expert Report Dr. Thorsen, Exhibit D38, p.5.

53. It can be imagined that the concept of forced marriage as applied by Prosecution in the underlying case against the Third Accused, can be a useful tool for women interviewed by Prosecution to fit their experiences in, without revealing the real or more nuanced views on their actual relationship with their 'husband'. Yet, such a artificial application of this concept should be avoided. In addition, this could equally apply on alleged victims of abductions.

54. The methodology used by Prosecution expert Mrs. Bangura is therefore seriously flawed, in that the interviewing of alleged 'bush wives' by women's rights activists, in view of the strategically moulding of the accounts by these interviewees, has major consequences for the outcomes of these interviews.[73] For example, the claim of this Prosecution expert that "[a]ll respondents claimed that domestic violence, and physical and psychological abuse are not accepted'[74], is a clear indication of the facts that these women gave socially acceptable answers, and were (unintentional) influenced by the question these interviewers posed them.

55. Dr. Thorsen description of the social practices of marriage in Sierra Leone in her expert report forms a vivid account of the actual relationships that can exist between men and women in rural Western African societies, including the dynamic of the mutual expectations, responsibilities and obligations, and stresses the important to see conjugal relationships in a longer term.[75] Dr. Thorsen therefore refutes the theory the Prosecution is trying to prove that the alleged phenomenon of 'bush wives' is a replication of customary marriage; this theory qualifies as a stereotyped perception of women.[76]

56. Conclusively, the Defence submits that the on the basis of the theory as provided by Dr. Thorsen in her expert report on forced marriages, forced marriages can not be

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[73] Expert report Mrs. Bangura, Exhibit P32, p.7-8. See also further in this chapter on the possible strategies of these 'bush wives' (paragraph 58 and further).
[74] Expert report Mrs. Bangura, Exhibit P32, p.13.
[75] Expert Report Dr. Thorsen, Exhibit D38, p.5-15. See also Dr. Thorsen her testimony in court, Transcript 24 October 2005, p.125-128. This in contract with Prosecution expert witness Mrs. Bangura, who provides in her report an overly generalized account of the practice of early or arranged marriages in Sierra Leone (Exhibit P32, p.9-10), leaving no room for difference within the country, and without even clarifying where she actually has gained this knowledge.
[76] Expert Report Dr. Thorsen, Exhibit D38, p.16. See also Transcript 24 October 2005, p.132.

qualified as an international crime (against humanity), as it is not of "a gravity similar to any other act referred to in Article 2 a. to h. of the Statute". In addition, also in view of the expert opinion given by Dr. Thorsen, the Prosecution evidence on the occurrence of the phenomenon of 'bush wives' if believed can not be qualified as forced marriage.

57. Furthermore, in the following paragraphs the Defence will explain why the Prosecution evidence on the phenomenon of 'bush wives', if the honourable Trial Chamber would accept that this phenomenon can not qualify as the crime of forced marriage (or that forced marriages do not constitute a crime against humanity), do not fulfil the requirement as been set out by the honourable Trial Chamber with regard to the crime of sexual slavery. These elements are:

(a) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty.
(b) The perpetrator caused such person or persons to engage in one or more acts of a sexual nature.
(c) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
(d) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[77]

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[77] *Prosecution v. Brima et al.,* Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, par. 109. In addition, count 7 includes as well any other form of sexual violence, with the following elements (see par.110):

(i) The perpetrator committed an act of a sexual nature against one or more persons or caused such person or persons to engage in an act of a sexual nature by force, or by threat of force or coercion, such as that caused fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent.
(ii) Such conduct was of a gravity comparable to the acts referred to in art 2g. of the Statute.
(iii) The perpetrator was aware of the factual circumstances that established the gravity of the conduct.
(iv) The conduct was committed as part of a widespread or systematic attack directed against a civilian population.
(v) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.

58. According to the Defence, the Prosecution evidence did not prove that the phenomenon of 'bush wives' can be categorized as the crime of sexual slavery, as the "powers attaching to the right of ownership" are absent. To this extent, Dr. Thorsen provides in her report a nuanced use of the terms 'bush wife' and 'bush husband', terms that[78]:

> [R]elate to the bundles of obligations and rights inherent in implicit conjugal contract. Consequently, when a Sierra Leonean man told (an abducted) girl that she would be his wife, he forced her into the relationship but also indicated that he was willing to taken on (some of) the responsibilities ascribed to a young husband. Whether he then fulfilled these responsibilities and whether he succeeded in overcoming the girl's contempt due to his initial use of force is a different question but may give an indication of why some women have remained with their 'bush husbands' and other have not. Along this line of inquiry we also need to raise questions about adolescent girls' and young women's ability to strategise during the civil war.

59. Dr. Thorsen further continues about the strategies of girls and young women[79]:

> Utas (2005: 9), for example, drew attention to moral and economic issues underpinning youngsters' representations of themselves as victims in a study of child and youth soldiers in Liberia and in another study of Sierra Leonean refugee women in northern Liberia. Firstly, it was difficult for the young soldiers to explain and justify their actions if they had participated in the war voluntarily and thus avoid to be stigmatised locally and internationally because of the atrocities committed in the course of the civil war. Secondly, the social position as victim enabled child soldiers and women refugees to make claims on humanitarian aid both during and after the war and they hoped, it could help them to re-integrate and be accepted in their communities. Statistics of abductions and rapes are therefore insufficient to depict the complexities of adolescent girls' and young women's location in the war.
>
> Through the life story of one Liberial girl, Utas (ibid) sketched the way in which many girls became involved with soldiers and commanders as a choice, albeit a choice on a continuum from a free choice because they aspired to the middle-class liberated life style that these men offered their girlfriends, or simply liked the man, to a strategic but constrained choice to safeguard themselves or their families. Some of these girls also became fighters in whatever army their boyfriend was involved. Mazurana & Carlson (2004) made a similar observation and pointed out that not all the young women were captives; some joined because their husband asked them to, others because the Paramount Chief of their area made it mandatory that each family contributed with a member, others agreed to join or to become 'wives' to survive. The degree of freedom in such choices is impossible to estimate since they depend both on the situation in which girls find themselves and on the alternatives available to them (McKay 2004).

60. Thereafter Dr. Thorsen further explains the base of power the position as a 'bush wife' could be[80]:

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[78] Expert Report Dr. Thorsen, Exhibit D38, p.16. See also Transcript 24 October 2005, p.128-129; Transcript 25 October 2005, p.10-11.
[79] Expert Report Dr. Thorsen, Exhibit D38, p.16-17.
[80] Expert Report Dr. Thorsen, Exhibit D38, p.17.

> Given that 'bush marriages' are embedded in cultural understandings of implicit conjugal contracts and the bundles of obligations and rights they outline for husbands and wives respectively, the position as a 'bush wife' was not only drudgery and sexual abuse but also the base of power.
>
> Captive 'wives' of commanders exerted substantial power within the RUF compounds. (...) When the commander was away, they were in charge of the compound. They kept in communication with the commander and would select and sent troops, spies, and support when needed. (...) In the absence of the commander, when food and loot were delivered to the camps, it was brought to his captive 'wife'. She would then decide how these goods were to be apportioned among those in the compound.
>
> Commander's 'wives' thus took the position of the first wife of a powerful man, something that few junior women would ever be in times of peace. Moreover, the loot gave some of the 'wives' and 'girlfriends' access to commodities on which they would otherwise never have laid their hands. As Utas (2005: 415) reasoned, being in a relationship with a high-ranking commander offered an attractive base for marginalised young girls of up-ward social mobility. However, the studies focusing on the multi-faceted roles of girls and young women during the war also point to their vulnerability and the ease with which they were discarded as girlfriends and pushed into insecurity if their partner was killed.

61. In the opinion of Dr. Thorsen, an expert on conjugal relationships in Western Africa, even "bush wives" and "bush husbands" had mutual rights and obligations. In addition, she explains the varies reasons that woman could have to represent themselves as victims, and the fact that becoming a "bush wife" could have a strategic reason, and the fact that this position was also the base of power.

62. The Defence asserts that the Prosecution evidence does not refute the theory of Dr. Thorsen, and that often Prosecution witnesses present themselves as victims, without being able to clarify what the actual relationship between the 'bush wife' and the 'bush husband' was. For example, witness TF1-282, testifying about the alleged marriage she was forced into, only give the following details concerning her relationship with her new 'husband':

> Q. After this first day when the rebel raped you, did you see him again?
> A. I saw him again; both of us stayed together.
> Q. When you say both of you stayed together, can you explain to us what you mean by that?
> A. Yes.
> Q. Please tell us what you mean that both of you stayed together?
> A. Both of us stayed together, we slept together. He took me as his wife and every day we slept together.
> Q. In the house where you stayed together with this rebel man, apart from the two of you, was there anyone else living with you?
> A. Yes, other rebels were there.
> Q. Were these rebels armed?
> A. Yes.

Q. With what?
A. Guns.
Q. During the time that you stayed in Sumbuya, did you ever feel that you could leave the rebel with whom you were staying with?
A. I never thought about it that I leave him, because I was afraid that if I say I should leave him, he was going to do any other thing to me.[81]

63. According to the Defence, this testimony does not clarify if the man, who took TF1-282 as his wife, accepted any responsibilities in the newly created conjugal relationship. Furthermore, this evidence is lacking the detail required to really understand the relationship that existed, and neglects the potential strategies of the woman who entered into this relationship. In addition, the evidence given by TF1-282 does not prove the element of ownership as a requirement for the crime of sexual slavery.

64. In addition, the evidence of TF1-023 actually points to some of the responsibilities a husband did accept:

Now, Madam witness, when this rebel handed you over to the rebel commander, did he tell you anything?
A. Yes.
Q. What did he tell you?
A. He told me that he wouldn't be able to take care of two women at the same time, so he decided to hand me over to the person's name that I've written down.[82]

Q. Now, you spent about a month at Four Mile. Correct?
A. Yes.
Q. And during this time, Madam Witness, who did you live with?
A. I was with the commander.
Q. Did you continue to be his wife?
A. No.
Q. You were staying with him, but you were not his wife?
A. No. He left us and went to Makeni, so he left me with somebody to take care of me.[83]

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[81] Transcript 13 April 2005, p.18.
[82] Transcript 9 March 2005, p.44.
[83] Transcript 9 March 2005, p.49. See also witness TF1-227 on the women in the SLA group the Third Accused allegedly was part of at Benguema:
Q. Were there other female civilians at Benguema?
A. Yes, there are many female civilians at Benguema.
Q. Did anything happen to those female civilians?
A. No.
Q. Can you describe the behaviour of the rebels towards female civilians
at Benguema?
A. Well, the female civilians at Benguema were protected because they -- some of them who have been captured have been with them and there is cordiality among them.
Q. What do you mean by "cordiality between them"?
A. Since there is a good relationship (Transcript 11 April 2005, p.15)

65. The Defence contends that the report by Mrs. Bangura neglects differences in conjugal relationships and the strategies of especially the women, and gives a very one-sided view on women being victims of the cruel behaviour of men, without looking into the possible responsibilities these men accepted, and the potential strategic reasons for a woman to enter into a certain type of marriage.[84] Dr. Thorsen points to this one-sidedness of the Prosecution expert report[85]:

> Q. Were there other female civilians at Benguema?
> A. Yes, there are many female civilians at Benguema.
> Q. Did anything happen to those female civilians?
> A. No.
> Q. Can you describe the behaviour of the rebels towards female civilians at Benguema?
> A. Well, the female civilians at Benguema were protected because they -- some of them who have been captured have been with them and there is cordiality among them.
> Q. What do you mean by "cordiality between them"?
> A. Since there is a good relationship.

> Q. And you would agree with me that there is no such form of consent as it relates to a forced marriage during armed conflict such as that which took place in Sierra Leone; is that correct?
> A. I cannot say anything about that because we have not -- Mrs Bangura does not interview any of the men. She doesn't interview the husband (...).

66. Accordingly, the Defence holds that the Prosecution evidence does not exclude this more nuanced view on "bush wives" and "bush husband", and therefore the Prosecution has not proven beyond reasonable doubt that their evidence on this phenomenon fulfils the elements of sexual slavery, especially the element of ownership. "Bush wives" strategies and husbands acceptance of their responsibilities are clear indication of the absence of the elements of ownership in the relationship between "bush wives" and "bush husband".

67. With regard to the Prosecution expert report, the Defence contemplates the following. Mrs. Bangura has based her research on a limited amount of interviews, mainly of alleged (ex) "bush wives" in Kailahun District, a RUF stronghold during the whole

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[84] See for example Expert report Mrs. Bangura, Exhibit P32, p.13, stating that "Forced marriage during the conflict had no security", "The 'husband' could abandon his 'wife' whenever he wanted to and get a new one whenever he felt like it". See further on p.15-16 where Mrs. Bangura claims that the use of the word 'wife' was a strategic act of the men (without even talking to any of these alleged 'bush husbands' or mentioning any source for these overall conclusions), to show that the woman belonged to the man. Dr. Thorsen, on the other hand, is of the view that this type of marriage involved as well responsibilities for the men (see p.10-11 of Exhibit D38).
[85] Transcript 25 October 2006, p.9.

war.[86] On the basis of this limited research, it is impossible to draw the general conclusions Mrs. Bangura did, who made general statements with regard to all "bush wives", for example "Being a 'bush wife' meant that the girl 'belonged' to one person and was not required to have sex with different rebels", " 'Forced marriage' became a means of survival for most girls in the bush" "when the 'husband' decided to take a second 'bush wife', the first one was thrown out and she no longer enjoyed protection' and "A 'bush wife' carried her 'husband's' possessions as they moved from place to place."[87] It remains unknown if, and to which extent, these conclusions apply to the conjugal relations that existed within the SLA. The Defence therefore respectfully submits that in view of the methodology of the Prosecution expert report and the lack of expertise of Mrs. Bangura, her expert report should not have any weight in the assessment of the evidence by the honourable Trial Chamber.[88]

68. In conclusion, no conviction can be entered for the charge as to counts 7 and 8.

69. In the alternative, no conviction can be entered on the basis of the defence of mistake of law, which will be addressed below.

### 1.6 Count 9 – Outrages upon Personal Dignity

[86] Expert report Mrs. Bangura (Exhibit P32), p.7-8.

[87] Expert report Mrs. Bangura (Exhibit P32), p.14. See also p.16 where Mrs. Bangura provides an overview of the alleged tasks of 'bush wives' and non 'bush wives'. Furthermore, the expert report contains overviews on the consequences for the victims of forced marriage and the stigmas associated with having been a bush wife, again providing conclusions that according to the Prosecution expert apply to all 'bush wives'.

[88] See also testimony of Dr. Thorsen on the methodological problems in the report of Mrs. Bangura:
Q. Now, as it relates to this particular issue, did you consult the report of Mrs Bangura?
A. I read the report. I found it very flawed on the methodological issues and I found that the quotes she gives in her report, it talks a lot about the circumstances of these -- well not even circumstances -- it tells a lot about -- that women were abducted and that they were being coerced into being bush wives and that they left or stayed with the husband after the war. But inasmuch as she didn't analyse her data, inasmuch as she didn't discuss it but left it to speak on its own, it is actually very difficult to know what she wanted to say with this material. And also, she does not contextualise the whole situation of these women and she collected the data from a large amount of regions. How can we know that everything is the same in those regions? There is a lack of contextualisation (Transcript 25 October 2005, p.7).
Q. Now, if I understand correctly, the basis of your report is that there are questions that still must be answered as it relates to the issue of forced marriage and bush wives; is that correct?
A. I think they must be asked in any case where you are talking about arranged marriages and where you want to make any conclusions about the degree of force. You need to ask a lot of questions. And I even doubt you would be able to say anything about the degree of force, because you would get a very diverse picture (Transcript 25 October 2005, p.12).

70. Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3.e. of the Statute comprise the following elements of crimes:

(iv) The perpetrator humiliated, degraded or otherwise violated the dignity of one or more persons.

(v) The severity of the humiliation, degradation or other violation was of such degree as to be generally recognized as an outrage upon personal dignity.

(vi) The conduct took place in the context of and was associated with an international armed conflict.

(vii) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[89]

71. The Defence respectfully contends that the arguments set out above, relating to counts 6 to 8, are also applicable to the crime alleged under count 9. The Defence will thus not separately go into this.

### 1.7 Counts 10 and 11 – Mutilation

72. The Trial Chamber adopted the following elements for the crime of mutilation:

> Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II occurs where the perpetrator intentionally cause death or seriously endangers the physical or mental health of a person by permanently disabling or disfiguring or removing an organ or appendage of that person, during an international or internal armed conflict. The Trial Chamber adopts the following elements of the crime of Mutilation as a violation of Article 3 Common to the Geneva Convention and of Additional Protocol II, as charged under Count 10, namely that:

(a) The perpetrator subjected the victim to mutilation, in particular by permanently disfiguring the victim, or by permanently disabling or removing an organ or appendage of the victim;

(b) The perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim;

(c) The perpetrator's conduct was neither justified by the medical, dental or hospital treatment of the victim, nor carried out in the victim's interest;

(d) 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;

(e) The violation took place in the context of and was associated with an armed conflict; and

[89] John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587 p. 311.

(f) The perpetrator was aware of the factual circumstances that established the protected status of the victim.[90]

73. The Trial Chamber describes the elements for count 11 as follows:

(a) The perpetrator inflicted great suffering, or serious injury to body or to mental or physical health, by means of an inhumane act;

(b) The act was of a gravity similar to the acts referred to in Article 2.a to h. of the Statute;

(c) The perpetrator was aware of the factual circumstances that established the character or gravity of the act;

(d) The act was committed as part of a widespread and systematic attack directed against a civilian population; and

(e) 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.[91]

### 1.8 Count 12 – Use of Child Soldiers

74. The honourable Trial Chamber has decided that conscripting or enlisting children under the age of 15 years into the armed forces or groups, or using them to participate actively in the hostilities, an other serious violation of international humanitarian law punishable under Article 4.c. of the Statute, requires proof of the following elements of crimes:

(i) The perpetrator conscripted or enlisted one or more persons into the national armed forces or used one or more persons to participate actively in hostilities.

(ii) Such person or persons were under the age of 15 years.

(iii) The perpetrator knew or should have known that such person or persons were under the age of 15 years.

(iv) The conduct took place in the context of and was associated with an international armed conflict.

(v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[92]

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[90] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 172.

[91] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, para. 174.

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75. The Defence respectfully submits that within the African context the age of 15 years, under which age the conscription or enlisting of persons is a war crime according to the honourable Trial Chamber, is arbitrarily in that "the traditional African setting offers a different conception of childhood as chronological age as an indicator for the termination of childhood is an arbitrary concept. In this sense, the ending of childhood has little to do with achieving a particular age and more to do with physical capacity to perform acts reserved for adults."[93]

76. In addition, under Sierra Leonean law the recruitment of a child below the age of seventeen and a half is allowed if "the person's parents or guardians or other competent authority gives consent."[94] The age limit for recruitment into the military in Sierra Leone is thus not fixed, and the government practice of recruiting children into the army, even under the government of president Kabbah from 1996 until the AFRC coup[95], further reinforce the vagueness within the Republic of Sierra Leone on the legality of the recruitment of persons under the age of 15 into the military. It is evident that the group of ex-AFRCs and SLAs that fled into the bush after the ECOMOG intervention in February 1998, must have included persons under the age of 15 that were recruited by previous governments. Furthermore, this government practice to recruit children in the army must have had an influence on the possible involvement of children within the groups of SLAs within the bush.[96]

77. Within this context the Defencfe would like to draw special attention to the practice under the NPRC military regime of "enlisting vigilantes including the Sierra Leone Border Guards (SLBGA) into the military. Most of these members were under 15 years."[97] This led to "the infiltration of a number of children into the military through a variety of ways including backdoor enlistment."[98]

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[92] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 194. John Jones & Steven Powles, *International Criminal Practice* (2003), section 4.2.587, p. 314.
[93] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 9-11. See also par. 39 of this Report.
[94] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 30.
[95] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 33-39. See also par. 48-51 of this report, in which it is further explained under which circumstances persons under the age of fifteen voluntarily joint government forces and/or the SLAs in the bush.
[96] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 38.
[97] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 36.
[98] Exhibit D37 (Expert report on Child Soldiers by Mr. Gbla), par. 37.

78. Although the Defence is aware of the fact that these circumstances do not go into the Special Court's jurisdiction to try the alleged use of child soldiers by the AFRC faction[99], the Defence holds the opinion that the abovementioned circumstances should have a major influence on the alleged level of responsibility of the Third Accused's alleged involvement in the crime of conscripting or using child soldiers.

79. In paragraph 65 of the Indictment the Prosecution charges the Accused with the training of (abducted) children in AFRC/RUF camps. According to the Defence, no evidence has been led that these combined AFRC/RUF camps existed.

80. Most of the Prosecution witnesses were not able to properly estimate the age of the soldiers they regarded as child soldiers. For example, TF1-023, when asked how old the boys of the Small Boys Unit were, answered with "They were about 14 -- 13, 14, 15"[100], thus excluding a substantial, or possibly even all, members of this unit from the definition of child soldiers. TF1-167 does the same when giving evidence that the "children" trained by the SLAs were roughly between the age of 10 and 15 years.[101] In addition, witnesses TF1-153[102] and TF1-157[103] both do not give any evidence about the age of the members of the Small Boys Unit or even do not know the age of the boys that were trained. Conclusively, the Prosecution did not proof beyond reasonable doubt that the "small boys" allegedly fighting along with the former SLAs were under the age of fifteen.

81. In conclusion, in the absence of proof beyond a reasonable doubt, the Third Accused should be acquitted for count 12. In addition, the Defence concludes that the elements of this particular crime are incorrect, and should be altered. Moreover, the practical circumstances of the country at that time should be taken into account in assessing the Accused's alleged responsibility in this regard.

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[99] See also, *Prosecutor v. Norman et al.*, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, SCSCL-04-14-AR72(E).
[100] Transcript 9 March 2005, p.35.
[101] Transcript 15 September 2005, p. 67.
[102] Transcript 22 September 2005, p.83; Transcript 23 September 2005, p. 64-65.
[103] Transcript 25 July 2005, p.3-4. Even the own age of the witness could slightly differ from the evidence he gave (20 years in July 2005 - see Transcript 22 July 2005, p.56-57, - thus possibly 13 or 14 when the witness allegedly was kidnapped), as TF1-157 derives his age from the knowledge of his sister, a person that very likely can not even remember herself the birth of this witness.

## 1.9 Count 13 – Enslavement

82. Enslavement, a crime against humanity, punishable under Article 2.c. of the Statute requires proof of the following elements of crimes:

(i) The perpetrator exercised any or all of the powers attaching to the right of ownership over one or more persons, such as by purchasing, selling, lending or bartering such a person or persons, or by imposing on them a similar deprivation of liberty;[104]

(ii) The conduct was committed as part of a widespread or systematic attack directed against a civilian population;

(iii) The perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack against a civilian population.[105]

83. In order to meet the requirements of the crime of enslavement as charged under count 13 of the Indictment, the Prosecution evidence first of all needs to prove that the exercise of any or all of the powers attaching to the right of ownership over a person were exercised; this includes as well the intentional exercise of such powers.[106] The ICTY Appeals Chamber adopted a set of indicia of enslavement, as developed by the ICTY Trial Chamber in the same case, including "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour."[107]

84. As sexual slavery has been separately indicted by the Prosecution (see count 7 of the Indictment), the following paragraphs will be focusing on forced labour as a form of enslavement. In the case of *Prosecutor v. Krnojelac*, referring to the definition of enslavement as set out in the *Kunarac* case[108], it was established that "it is clear from

[104] See also *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 539.
[105] *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-16-T, par. 214; John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587, p. 293.
[106] *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 540.
[107] *Prosecutor v. Kunarac*, Appeals Chamber Judgement, 12 June 2002, IT-96-23-A, par. 119.
[108] *Prosecutor v. Kunarac et al.*, Trial Chamber Judgement, 22 February 2001, IT-96-23-T, par. 542-543.

the Tribunal's jurisprudence that "the exaction of forced or compulsory labour or service" is an "indication of enslavement", and a "factor to be taken into consideration in determining whether enslavement was committed".[109] Evidence on forced labour by itself is thus not enough to establish that the crime of enslavement has been committed by the Accused or any other person for whom the Accused can be held criminal responsible.[110] In addition, "the detainees' personal conviction that they were forced to work must be proved with objective and not just subjective evidence."[111]

85. It is evident that some of the Prosecution evidence on enslavement for the purpose of forced labour, falls short of meeting the abovementioned requirements. First of all, the evidence given by witness TF1-184 proves that not all civilians that joined, or were forced to join, the various groups of SLA soldiers that operated within the territory of Sierra Leone after the ECOMOG intervention of February 1999, were forced to stay with this group. According to TF1-184, the civilians within the group of SAJ Musa (Commander C in the evidence of this witness) in Koinadugu were free to leave, as is evidenced by the following evidence given by this witness in Court:

> Q. Those young boys who were with you, were they free to go if they wanted to?
> A. Yes.
> Q. The women who were with you, were they free to go if they wanted to?
> A. Yes.
> Q. Those who you asked to carry your loads, were they free to go if they wanted to?
> A. Yes.
> Q. They could put the load down and say, "Sorry, I've had enough, I'm going"; is that what you're saying?
> A. No. Commander C -- to assist you further, Commander C asked them that whosoever wants to go, he should go. He gave that order when we were -- I don't know the place, when we were by Kabala. That was the time he gave that order. When most of them left, unless those that had contact with the soldiers that were willing to go.
> Q. Okay, so they were given one opportunity to go. If they didn't go when they were in Kabala, were they given any other opportunity to leave before you got to Rosos?
> A. Yes. Before we left he gave order that no soldiers should beat a civilian and they too would prove me right if they can say the truth. (...)[112]

86. It becomes clear from this part of the evidence of TF1-184 that these civilians were free to leave if they wanted to, and thus certainly were not subject to the crime of

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[109] *Prosecutor v. Krnojelac*, Trial Chamber Judgement, 15 March 2002, IT-97-25-T, par. 359.
[110] See also article 5 of the Slavery Convention, which entered into forced on 9 March 1927, wherein it is agreed that the contracting parties to this Convention "to take all necessary measures to prevent compulsory or forced labour from developing into conditions analogous to slavery", thus making a clear distinction between forced labour and the crime of enslavement.
[111] *Prosecutor v. Krnojelac*, Appeals Chamber Judgement, 17 September 2003, IT-97-25-A, par. 159.
[112] Transcript 29 September 2005, p.36-37.

enslavement. The indicators of enslavement "control of someone's movement, measures taken to prevent or deter escape, force, threat of force or coercion" as established by the ICTY Appeals Chamber, are therefore in this instance absent.[113] This evidence is also important in view of the fact that the Third Accused mainly operated within the group of SLA soldiers commanded by the so-called "Commander C" during the period the Third Accused stayed in the jungle, a group wherein, according to the abovementioned evidence, civilians were not forced to stay.

87. Secondly, a lot of the evidence the Prosecution has introduced with regard to the crime of enslavement is insufficient to prove this crime, as it merely deals with the abduction or kidnapping of civilians, without any details about what happened to these civilians thereafter. For example, Prosecution witnesses TF1-055[114] and TF1-058[115] provide no further information on the subjection of civilians who were taken away by rebels or soldiers to the crime of enslavement.

88. Although this evidence, according to the honourable Trial Chamber, should be "considered together with the other evidence available to prove the count"[116], the Defence is of the opinion that the fact that in another instance an abducted civilian was subject to the crime of enslavement, it is speculative to assume that this happened to other abducted civilians as well. The faith of the civilians who were taken away by soldiers or rebels in the abovementioned Prosecution evidence is unknown, and can not be inferred from crimes occurring against other civilians. The Defence submits that evidence on alleged victims of the crime of enslavement in which not all elements of the crime of enslavement with regard to that specific victim are proved, should not be taken into account when considering the occurrence of the crime of enslavement.

89. In the third place, the Prosecution evidence far from conclusive to establish the occurrence of the crime of enslavement. For example, Prosecution witness TF1-320 made the following statement in court:

> Q. Mr Witness, you mentioned that you were with your elder son when you were captured by the rebels. What happened to your son?

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[113] *Prosecutor v. Kunarac*, Appeals Chamber Judgement, 12 June 2002, IT-96-23-A, par. 119.
[114] Transcript 12 July 2005, p.137.
[115] Transcript 14 July 2005, p.64-66.
[116] *Prosecutor v. Brima et al*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-16-T, par. 233.

A. They held my son. They held him for two years, five months. Except when the [inaudible] attacked Rogberi, they were the only people who freed him. They took him to Raka. I sent a message to Raka when we heard the news. I sent to Mohammed. I said, " Mohammed, please go to stadium and find my son. If you see him, please bring him." He went there and saw him and brought him. They held him for two years, five months.
Q. Mr Witness, who kept your son for two years?
A. The one who held my son for two years, five months, is the commando. Who was -- he was at his house. He was staying with him.
Q. Which group did this commando belong to?
A. Well, at Gberibana he called themselves outside -- West Side.

90. According to the Defence, this evidence is insufficient to prove the crime of enslavement.

91. Fourthly, a substantive portion of the civilians that moved along with a group of SLAs, had joined these SLAs voluntarily, as this was the safest option at that time. This was the case after the ECOMOG intervention in February 1998 and the retreat of the AFRC and SLA soldiers into the jungle, but does apply to other situations as well, for example the retreat of the soldiers from Freetown in January 1999.[117] In addition, civilians, including women and children, joined their relatives and close associates within the SLA during the retreat from Freetown both in February 1998 and January 1999.[118]

92. For the above reasons, the Defence is of the humble opinion that the evidence presented during the trial does not substantiate a conviction on this count.

### 1.10 Count 14 – Pillage

93. In Count 14 of the Indictment the Accused is charged with pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute. It is alleged that during the whole period covered by the Indictment "AFRC/RUF engaged in widespread unlawful taking and destruction by burning of civilian property.", thus assuming that both burning and looting are crimes covered by the crime of pillage.

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[117] See for example witness TF1-334, Transcript 15 June 2005, p.10:
Q. So the civilians that you met in Benguema, what happened to them?
A. Whilst the troops were retreating most of them joined the troops because they said that their lives were not safe. So they joined the troops in retreating.
[118] See for example Exhibit D37 (Expert report on child soldier by Mr. Gbla), par. 51, wherein Mr. Gbla describes this phenomenon with regard to children.

94. According to both Trial Chamber I and the ICC's elements of crime, the crime of pillage enhances the following constitutive elements:

(i) The perpetrator appropriated certain property.

(ii) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use.

(iii) The appropriation was without the consent of the owner.

(iv) The conduct took place in the context of and was associated with an international armed conflict.

(v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.[119]

95. According to the Defence this definition should apply to count 14 of the Indictment, thus explicitly including the element of appropriation for private or personal use. The Defence therefore disagrees with the definition given by the honourable Trial Chamber in its Rule 98 Motion, and the Trial Chamber's argument that it follows from the *Celibici* Trial Judgement[120] that "the requirement of 'private or personal use' is unduly restrictive and ought not to be an element of the crime of pillage".[121]

96. In the *Celibici* case the ICTY Trial Chamber, setting an important standard for the interpretation of the crime of pillage, noted that the "prohibition against the unjustified appropriation of public and private enemy property is general in scope, and extends both to acts of looting committed by individual soldiers for their private gain, and to the organized seizure of property undertaken within the framework of a systematic economic exploitation of occupied territory".[122] This general scope of the crime of

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[119] *Prosecutor v. Norman et al.*, Decisions on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-14-T- 473, par. 102; John Jones & Steven Powles, International Criminal Practice (2003), section 4.2.587, p. 309.
The Prosecution in its Pre-Trial Brief made use of a totally different set of elements; it is not clear what the Prosecution's basis for this specific set of elements is, but they do not concur with the ICC elements of crime nor with definitions given by both Trial Chamber I and Trial Chamber II (see *Prosecutor v. Brima et al.*, Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73*bis*) of 13 February 2004, 5 March 2004, SCSL-2004-16-PT-29, par. 175).
[120] *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T.
[121] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 241-243.
[122] *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T, par. 590.

pillage seems to imply an extensive interpretation of the element "*private or personal* use", including as well private or personal use within the broader context of a systematic exploitation of certain property.

97. However, the conclusion of the honourable Trial Chamber in its Rule 98 Decision that the words "and to appropriate it for private or personal use" should not be included in the constitutive elements of the crime of pillage, is not warranted by the judgement rendered by the ICTY in the *Celibici* case. This follows from the fact that the element "use", including both personal use and organized exploitation according to the *Celibici* Judgement[123], forms an essential component of the pillage offence. The Defence is therefore of the humble opinion that the interpretation of the crime of pillage as set forth by the ICTY in the *Celibici* case, can only lead to the conclusion that the constitutive elements of the crime of pillage should include the "appropriation for private or personal use". According to the Defence, the deletion of this element alters and expands the character of the crime of pillage in a significant and unjustified way. This view is also in accordance with the opinion delivered by Trial Chamber I in its Rule 98 Motion.[124]

*Crime of Pillage Does Not Include Burning*

98. Furthermore and directly related to the previous arguments regarding the constitutive elements of the crime of pillage, the Defence submits that the evidence of burning as such does not fulfil these elements. The constitutive elements of the crime of pillage require the occurrence of appropriation, a component that forms no part of the act of burning of civilian buildings and houses, as laid down under Count 14 in the Indictment.

99. In *Prosecutor v. Delalic et al.*, the ICTY Trial Chamber observed that "the offence of unlawful appropriation of public and private property in armed conflict has varyingly been termed 'pillage', 'plunder' and 'spoliation'."[125] Therefore, pillage requires

[123] *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T, par. 590.
[124] *Prosecutor v. Norman et al.*, Decisions on Motions for Judgement of Acquittal Pursuant to Rule 98, 21 October 2005, SCSL-2004-14-T- 473, par. 102. It should be noted that Trial Chamber I explicitly included the Judgement of the ICTY in the Celibici case in its reasoning on the constitutive elements of the crime of pillage.
[125] *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, IT-96-21-T, par. 591.

appropriation, while the burning of property is something different: no property is appropriated, and there is certainly no intent of appropriation.

100. This difference results from the fact that the *mens rea* for burning is different from the *mens rea* for appropriation of property. The Prosecution argument in its response to the Defence Motions for Judgement of Acquittal that "before third party property can be burnt it must be appropriated in the sense that the owner is no longer in control of his property,"[126] is artificial and thus negates the fact that burning is legally different from the crime of pillage, both as to the *mens rea* as well as the *actus reus*. The objective of appropriation is future possession and/or use of the object, whilst the objective of burning is destruction thereof.

101. This is also the case if the definition of the honourable Trial Chamber in its Rule 98 Decision would apply, in that the crime of pillage does not include the requirement of "private or personal use".[127] This element of use requires the possibility that the property can still be used after the appropriation; this is clearly not the case after the burning of a building, nor is the object of the act of burning to use the property afterwards. Even after the removal of this element, the crime of pillage still encompasses the appropriation of property, as can be derived from the phrasing of element 1 and 2 in the definition of the honourable Trial Chamber.[128]

102. This argument becomes even stronger now that the Special Court Statute specifically provides in Article 5(b)(i), (ii) and (iii) for wanton destruction of property, more specifically "[s]etting fire to dwelling – houses, any person being therein (...)," "[s]etting fire to public buildings (...)," and "[s]etting fire to other buildings (...)." The Prosecution thus deliberately chose to categorize burning, as charged in the Indictment, not under this category but as the international crime of pillage. The fact that ICTY has the separate and distinct crime of "wanton destruction of cities, towns or villages or devastation not justified by military necessity" and clearly distinguishes

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[126] *Prosecutor v. Brima et al.*, Public Version of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, par. 109.
[127] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 242.
[128] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 243.

in its case law between pillage and destruction, further reinforces the Defence position.[129]

103. Additionally, the Defence is of the humble opinion that the suggestion made by the honourable Trial Chamber in its Rule 98 Decision that burning can be brought under other articles of the Statute, including the articles covering collective punishment and terrorism[130], is at variance with the Indictment and violates the rights of the Accused, especially the right "to be informed promptly and in detail (...) of the nature and cause of the charge against him or her" (article 17(4)(a) of the Statute of the Special Court). The classification of the act of burning under a different charge in the Indictment leads to the introduction of a new *mens rea* and *actus reus*. This means that even if the honourable Trial Chamber would accept jurisdiction under international law to prosecute persons who have committed offences relating to the destruction of property by burning, this right of the Accused to know the content of the accusations against him excludes the possibility of an alteration of the Indictment at this stage of the proceedings, with both the Prosecution and the Defence case closed.

104. Conclusively, it is the Defence view that burning does not fall within the definition of pillage, and therefore that the acts relating to the destruction of property by burning are not covered by the Indictment.

[129] See for example *Prosecutor v. Blaskic*, Judgement, 3 March 2000, IT-95-14-T, par. 367, 558.
[130] *Prosecutor v. Brima et al.*, Decision on Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 31 March 2006, SCSL-2004-16-T-469, par. 263.

## II GREATEST RESPONSIBILITY

### 2.1 Standard of Greatest Responsibility

105. Article 1(1) of the Statute of the Special Court for Sierra Leone "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."

106. Article 15(1) of the Statute prescribes the role and function of the Prosecutor, where it states that, insofar relevant, the 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."

107. Trial Chamber I in the case of *Prosecutor v. Norman* held that the issue of personal jurisdiction is a jurisdictional requirement.[131] This was affirmed by Trial Chamber II in the Rule 98 Decision. Trial Chamber II moreover held that the Rule 98 stage was not the right moment to consider this issue.[132]

108. Trial Chamber II in its Rule 98 Decision considers the formulation of "persons who bear the greatest responsibility" by referring to the discussion between the UN Secretary General and the UN Security Council.[133] The Security Council interprets the wording "most responsible" as denoting the political or military leadership or authority of the accused.[134] Trial Chamber II held that the standard thus, at a

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[131] *Prosecutor v. Norman et al.*, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction Filed on Behalf of Accused Fofana, 3 March 2004, para. 27.
[132] *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 31.
[133] *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 32-33.
[134] Report of the Secretary General on the establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 30.

minimum, includes "at a minimum, political and military leaders and implies an even broader range of individuals."[135]

109. This threshold also affects the evidentiary burden to be met by the Prosecutor.[136] The Defence respectfully contends that the Prosecution has not met such evidentiary standard in the presentation of its case, and that as a result, the Trial Chamber does not have the jurisdiction to try the Third Accused. As an alternative argument, the Defence submits that the evidentiary threshold of greatest responsibility has not been met, resulting in an acquittal for the Third Accused on all counts of the Indictment.

## 2.2 Greatest Responsibility: Other Persons' Responsibility

110. It is the Defence contention that one of the evidences of the fact that the Third Accused does not belong to "those who bear the greatest responsibility," as is evidenced by the following observations.

111. On 3 March 2003, the following persons were indicted:
   a. Charles Taylor – SCSL-2003-01-PT[137]
   b. Foday Sankoh – SCSL-2003-02-PT[138]
   c. Johnny Paul Koroma – SCSL-2003-03-PT[139]
   d. Sam Bockarie – SCSL-2003-04-PT[140]
   e. Issa Hassan Sesay – SCSL-2003-05-PT[141]
   f. Alex Tamba Brima – SCSL-2003-06-PT[142]
   g. Morris Kallon - SCSL-2003-07-PT[143]
   h. Sam Hinga Norman - SCSL-2003-08-PT[144]

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[135] *Prosecutor v. Brima et al.*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, para. 34.
[136] See Luc Côté, Reflections on the Exercise of Prosecutorial Discretion in International Criminal Law, 1 Journal of International Criminal Justice 184-185 (2005).
[137] *Prosecutor v. Taylor*, Indictment, 3 March 2003, Case No. SCSL-2003-01-PT.
[138] *Prosecutor v. Sankoh*, Indictment, 3 March 2003, Case No. SCSL-2003-02-PT.
[139] *Prosecutor v. Koroma*, Indictment, 3 March 2003, Case No. SCSL-2003-03-PT.
[140] *Prosecutor v. Bockarie*, Indictment, 3 March 2003, Case No. SCSL-2003-04-PT.
[141] *Prosecutor v. Sesay*, Indictment, 3 March 2003, Case No. SCSL-2003-05-PT.
[142] *Prosecutor v. Brima*, Indictment, 3 March 2003, Case No. SCSL-2003-06-PT.
[143] *Prosecutor v. Kallon*, Indictment, 3 March 2003, Case No. SCSL-2003-07-PT.
[144] *Prosecutor v. Norman*, Indictment, 3 March 2003, Case No. SCSL-2003-08-PT.

112. On 16 April 2003, the following person was indicted:

i. Augustine Gbao - SCSL-2003-09-PT[145]

113. On 26 May 2003, the following person was indicted:

j. Brima Bazzy Kamara - SCSL-2003-10-PT[146]

114. On 24 June 2003, the following persons were indicted:

k. Moinina Fofana - SCSL-2003-11-PT[147]

l. Allieu Kondewa - SCSL-2003-12-PT[148]

115. And on 15 September 2003, again almost three months later, the last person was indicted:

m. Santigie Borbor Kanu - SCSL-2003-13-PT, the Third Accused.[149]

116. The Defence respectfully submits that the above overview provides a clear indication of the Prosecution's view on greatest responsibility. It started with Charles Taylor who was the first to be indicted for this Court, Foday Sankoh the second, Johnny Paul Koroma the third, and Sam Bockarie the fourth. Kanu was the thirteenth, the very last one to be indicted, more than six months after the first list of eight accused had been indicted. It is the Defence submission that the Prosecution made its list of persons they considered to be the most responsible. However, after it turned out that Sam Bockarie died on 5 May 2003, and Foday Sankoh died on 23 July 2003, also after realizing that it would be difficult if not impossible to arrest Charles Taylor and Johnny Paul Koroma, the Prosecution must have realized that they needed to expand the category of "greatest responsible" so as to include a wider selection of persons who played a role during the conflict.

117. The Defence holds that it was this circumstance of several persons who bore the greatest responsibility whom the Prosecution, for one reason or another, could not

[145] *Prosecutor v. Gbao*, Indictment, 16 April 2003, Case No. SCSL-2003-09-PT.
[146] *Prosecutor v. Kamara*, Indictment, 26 May 2003, Case No. SCSL-2003-10-PT.
[147] *Prosecutor v. Fofana*, Indictment, 24 June 2003, Case No. SCSL-2003-11-PT.
[148] *Prosecutor v. Kondewa*, Indictment, 24 June 2003, Case No. SCSL-2003-12-PT.
[149] *Prosecutor v. Kanu*, Indictment, 15 September 2003, Case No. SCSL-2003-13-PT.

arrest, which made the Prosecution decide to indict the thirteenth person before this Court.

118. Interestingly, and in corroboration of the foregoing, the following witness, when interviewed in January 2003, did not mention the name of the Third Accused. What was his reason? Because, when he was confronted with this fact in cross-examination, he stated: "Yes, sir. But during that time [January 2003], when I say I knew most of them, I was not concerned about. The major people who were commanders, during that time, on top, superior to these people, those were the only people I stated during that time.[150] This Prosecution witness therefore indicates that Five-Five, whom he had not mentioned in his interview in January, did not belong to this group of "major people who were commanders (...) on top, superior to these people."

119. It is of course remarkable to see how in January 2003, when the Third Accused was obviously not yet in the Prosecution's picture, this witness does not yet mention Kanu's name. Only after Kanu was indicted did this witness come up with the name of the Third Accused, whilst indicating that he was not one of the top people.

120. It is the Defence submission that the Third Accused cannot be held to bear the greatest responsibility for the conflict, for the crimes committed during the relevant period of the Indictment. The evidence brought forward by the Prosecution cannot sustain such assertion beyond reasonable doubt seen from the perspective of a reasonable trier of fact. To the contrary, that evidence introduces the existence of genuine prominent individuals bearing greatest responsibility, other than the Accused.[151]

121. Persons who do bear the greatest responsibility within the AFRC, although the Defence holds that of the warring parties, the AFRC as such is not the group which bears the greatest responsibility for the conflict, but rather the RUF. Within the AFRC/SLA it was Johnny Paul Koroma, SAJ Musa who bore the greatest responsibility, and of the three Accused, the Third Accused was undoubtedly the lowest in rank and factual position. Even persons such as Junior Lion, Savage and

[150] TF1-045, Transcript 21 July 2005, p. 24.
[151] See for instance testimonies of OTP witnesses TF1-046 (Gibril Massaquoi) and TF1-296.

Colonel Mani, Staff Alhaji bore a substantial greater responsibility than the Third Accused did.

122. The Prosecution case has even adduced evidence to the contrary, i.e. exculpatory for the Third Accused when it concerns the threshold of 'greatest responsibility.' The Defence holds that at no time did the Third Accused have a position of command; rather was his role during the conflict to take care of the women and children.

> Q. Did you ever meet with this person called Santigie Kanu, alias Five-Five?
> A. During the AFRC I met with him.
> Q. And can you tell this Court where you met with him?
> A. Well, during the AFRC, when things were going on normal, he summoned a meeting in the community centre which was for youths. He spoke about progress, cleaning and other caretaking of the town, and that was the time I knew that this was the man. That was the time I met with him.[152]

## 2.3 Conclusion

123. For these reasons, the Defence respectfully holds that for the reasons elaborated on above, the threshold of the 'greatest responsibility' requirement has not been met, that the jurisdictional requirement has not been fulfilled, and that consequently the Trial Chamber has no jurisdiction to try the Third Accused. In the alternative, the Defence submits that the evidence presented at trial does not substantiate the Prosecution allegation that the Third Accused formed part of the group of persons who bear the greatest responsibility for the conflict.

[152] DAB-042 Transcript 15 September, p. 89.

## III DEFENCE OF MISTAKE OF LAW

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### 3.1 Mistake of Law Regarding Count 12 – Impact on *Mens Rea*

124. As to count 12 (child soldiers) the Defence specifically holds that an acquittal is warranted on the basis of the following. On the basis of the reports and testimony of both the Prosecution and Defence expert on child soldiers, evidence has been adduced as to the existence of a governmental practice, even within the SLA on conscripting and enlisting children below the age of 16 within the army, up to 1997.

125. An example hereof forms the cross-examination of OTP expert witness TF1-296.[153] Confronted with para. 50 of the expert's report, this expert confirmed that the children at Brookfields Hotel (February – March 1999), were amongst the fighting forces, which happened under the auspices of the Government of Sierra Leone, and were even paid by that Government. On numerous occasions, the expert witness testified to this fact.[154]

126. In particular, the Defence expert Mr. Osman Gbla, in his report of 11 October 2006, which report was not contested by the Prosecution and the contents thereof thus accepted by the Prosecution, provides strong support for this conclusion. Reference can be made to the following passages in this report:

> Despite its track record of having ratified a number of international legal instruments bordering on the prevention of underage recruitment into the military, the Sierra Leone Government has not done much to prevent the recruitment of children into the Sierra Leon military. This is the case because the Sierra Leone military at various periods has a record of child recruitment. This is not necessarily out of a clearly thought out policy but one dictated by various circumstances at certain period of the country's history. One senior Sierra Leone military officers interviewed confirmed this point in noting that: the recruitment of children into the Sierra Leone military is not a deliberate government or military policy. The war circumstances created a fertile ground for the practice of involving children in the military. This latter view is not implying that the war started the practice of recruiting children into the Sierra Leone military.[155]
>
> As far back as to the days of one party rule especially under the reign of the late President Siaka Stevens (1978-1985) voluntary enlistment into the military slowly gave way to enlistment through political connections. Politicians and well-connected persons were given a number of cards, which they gave out to young men of their choice to join the

[153] Transcript 4 October 2005, p. 114 (lines 11-29) - 115, (lines 1-13).
[154] The expert gave many examples that the Government of Sierra Leone itself did not comply with international standards on the prevention of child soldiers; see *inter alia* Transcript 5 October 2005, p. 14 (lines 5 – 9).
[155] Report Mr. Gbla, Exhibit D37, page. 15, para. 33

> Army. This system produced a serious diminishing of military standards as characters of all shades were recruited into the force irrespective of prevailing military requirements.[156]
>
> Recruitment of children into the military however assumed an unprecedented character during the war first under the reign of Joseph Saidu Momoh. President Momoh did not only inherit a military that was underpaid, indisciplined, demoralised and poorly trained but one that was also confronted with a rebel war. The Army at the time was about 3000 in strength and 364 of these were in Liberia as part of the ECOWAS Ceasefire Monitoring Group (ECOMOG). This precarious situation among other things compelled Momoh to embark on a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedures.[157]
>
> The military regime of the National Provisional Ruling Council (NPRC) under the leadership of Captain V.E.M. Strasser inherited the legacy of sidestepping military recruitment procedures in his bid to swell up the military force to face the rebels. He continued the practice of enlisting vigilantes including the Sierra Leone Border Guards (SLBGS) into the military. Most of these members were under 15 years.(...).[158]
>
> This background saw the infiltration of a number of children into the military through a variety of ways including backdoor enlistment. This was an enlistment practice that encouraged the replacement of deceased soldiers with child recruits that were given official status in the payroll. What was even more disturbing was the fact that these recruits were given crash training for three months instead of the nine months minimum period for such normal trainings. In most cases, they were trained only in the four rules of war-planning, advance, attach and retreat.[159]
>
> The practice of recruiting children into the military continued even during the period of the democratically elected government of Alhaji Ahmad Tejan Kabbah of the sierra Leone People's Party that came to power in 1996.[160]

127. It is therefore fair to conclude that this established practice of recruiting children into the military up to 1997 clearly impacts on the awareness within the military and specifically within the minds of individual military servicemen as to the alleged unlawfulness of recruiting children under the age of 18 or 16 within the military. Additionally, the absence of a proper training as to the (international) laws prohibiting the conscription and enlistment of children under 15 years into the army as an alleged war crime, also affects this awareness.

128. The report of Mr. Gbla lends support for the latter observation. Noticeably, this expert (unlike Prosecution expert TF1-296) relied upon primary sources, namely military and civilian official currently serving within the Administration of Sierra Leonean. The footnotes 17, 18, 23-27 of his report reveal that this expert conducted interviews with

[156] Report Mr. Gbla, Exhibit D37, page 16, para. 34.
[157] Report Mr. Gbla, Exhibit D37, page 16, para. 35.
[158] Report Mr. Gbla, Exhibit D37, page 16, para. 36.
[159] Report Mr. Gbla, Exhibit D37, page 16, para. 37.
[160] Report Mr. Gbla, Exhibit D37, page 16, para. 38.

inter alia, the senior military officer attached in the Ministry of Defence, lieutenant-colonel working for the Sierra Leonean Ministry of Defence and other senior officials of the Government of Sierra Leone. Therefore the foundation of the report of Mr. Osman Gbla is highly relevant. It is therefore that also his conclusions on this issue have a considerable probative value, including his observation on p.18 in para. 39:

> It is however noteworthy that the Government of Sierra Leone during the pre-conflict period did not seriously monitor the practice of recruiting children below the minimum age of seventeen and the half years into the military and that laws pertaining to this issue were hardly enforced. Furthermore, the laws pertaining to the definition of a child are confusing and contradictory with no uniform age and most are outdated and not in tune with modern international legal standards.[161]

129. Moreover, one of his major conclusions and findings in his report, which is, as noticed not contested the Prosecution, can be read in paragraphs 54 and 55:

> The study also confirms that the role of the Sierra Leone government in recruiting child soldiers especially during the war in an attempt to bolster government forces to face the rebels sidestepped recruitment procedures and undermined efficient training and this in a way influenced the composition of the SLA faction that withdrew into the jungle. The study also reveals that prior to the on-going British-led military training programme, there was very little serious and consistent efforts to infuse child rights issues in the training of the security forces in the country especially the military.[162]

130. Aside from adducing evidence that the inclusion of children that followed the AFRC members after being ousted from power in February 1998 was mainly caused by the fact that they were family members and other associates "that were afraid of reprisal" (see also para. 51 of his report), this expert report supports the conclusion that the requisite *mens rea* element for count 12 can not be proven beyond a reasonable doubt.

131. The defence of mistake of law is, under certain circumstances, accepted under contemporary international criminal law, evidenced by Article 32 (2) of the Rome Statute on the ICC. Dinstein, discussing this defence, observes that in certain conditions "there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated."[163] This author furthermore states that "*mens rea* can not be negated if the illegality of the war crime is obvious to any reasonable man."[164]

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[161] Report Mr. Gbla, Exhibit D37, page 18, para. 39.
[162] Report Mr. Gbla, Exhibit D37, page 23, paras. 54-55.
[163] Joram Dinstein, The Conduct of Hostilities under the Law of international Armed Conflict (2005), 245.
[164] Dinstein, The Conduct of Hostilities under the Law of international Armed Conflict (2005), 245.

132. Based upon the foregoing submissions by Mr. Gbla, it can be said that the alleged illegality of conscripting children below the age of 15 in order to participate in active hostilities was *not* "obvious to any reasonable man." The combination of a continued governmental practice in this regard with absence of an adequate and effective training on this issue within the military up to 1997 clearly vests the basis to accept that in all reasonableness the third accused can not be held accountable for this charge in terms of *mens rea.* It can be observed that on the basis of these facts and the evidence adduced by both the Prosecution and Defence expert, the alleged unlawfulness of the activities described in count 12 were not on its face "manifestly illegal" for the Third Accused.[165] Accordingly, no conviction can be entered for count 12.

### 3.2 Mistake of Law Regarding Count 8 – Other Inhumane Act as a Crime against Humanity

133. If the Trial Chamber would not accept the primary Defence argument that forced marriages cannot be categorized as a crime against humanity, the Defence respectfully contends that as an alternative argument, the Accused was not aware of the existence of such crime.

134. The Prosecution failed to prove beyond reasonable doubt the element of forced marriages. In specific the testimony of Dr. Thorson at the trial on 24 and 25 October 2006, has adduced evidence that:

- only with detailed information about inter alia the decision making process about marriage and the underlying negotiations between women and men, it can be assessed the degree of force involved in these marriages. The Prosecution failed to provide particulars in this regard and as a result no conviction can be entered for this specific count.
- Various reasons may underlie a marriage which could be qualified on its face as "forced," including strategic reasons for the particular women in order to be protected.[166] Accordingly, the element of free will, which is fundamental for proof of "forced marriage" should be established beyond a reasonable doubt. The element of "coercion" is far more complex and nuanced as the prosecution case tends to believe. Dr. Thorson's report on the pages 16 and 17 mentions several

[165] Dinstein, The Conduct of Hostilities under the Law of international Armed Conflict (2005), 245.
[166] See also report dr. Thorson, 21 August 2006, p. 16.

sources indicating that, given that bush marriages are embedded in cultural understandings, the position as a bush wife was not only drudgery and sexual abuse but also the base of power. Furthermore, it can not be excluded that commanders' "wives" took the position of the first wife of a powerful man which gave them access to commodities on which they would otherwise never laid their hands.

The Prosecution case failed to adduce evidence of this nature which justifies a conviction for the alleged participation of the third accused on the aspect of "forced marriages" within the regions and within the timeframe as mentioned in the indictment. The degree of freedom in such choices is impossible to estimate "...since they depend both on the situation in which girls find themselves and on the alternatives available to them (Mackay, 2004)."[167] Also this observation justifies an acquittal since the prosecution case did not eliminate any evidence which enables the Trial Chamber to make such estimation.

135. In this regard, the submissions of the prosecution expert Mrs. Bangura can not serve as a proper counterargument since her research can not be qualified as a conclusive and persuasive study.[168]

136. Alternatively, also with respect to this count the requisite *mens rea* element on part of the third accused can not be established beyond reasonable doubt. Similar to the defense of mistake of law invoked with respect to count 12 (child soldiers) the arguments developed in the latter situation can be applied to the charge of forced marriage. As a result, the accused should be acquitted on the basis of mistake of law, in particular the absence of *mens rea*, reinforced by the observation that "forced marriage" can not be qualified as an international crime on the basis of customary international law. Reference can also be made to the observation by Dr. Thorson in her report on page 1 observing that she does not support the view that "forced marriage" in West-Africa endorses a general view on rural populations as backwards and on their divers social practices as the primary source of malevolence, sexual abuse and war atrocities.

[167] See report Dr. Thorson, 21 August 2006, p. 17.
[168] See Testimony Dr. Thorson, Transcript 25 October 2006.

## IV INADEQUATE OR INSUFFICIENT EVIDENCE PRESENTED BY OTP

### 4.1 Lack of Prosecution Evidence on Certain Location in the Indictment

137. The Prosecution has led no evidence on certain specific villages and locations pleaded in the Indictment. In the following paragraph an overview will be given of the villages and locations for which, according to the Defence, with regard to certain counts in the Indictment, and in view of the relevant time period mentioned in this Indictment, no evidence has been led by the Prosecution. If the Prosecution already agreed with this lack of evidence on certain locations (see Annex A to its response to the Defence Rule 98 Motion),[169] this will be indicated.

138. In the table concerning count 14 (pillage) a distinction will be made between evidence on looting and evidence on burning, as the Defence is of the opinion that the evidence on burning can not be classified as pillage as charged in the Indictment. Therefore, if the Prosecution has only led evidence on acts related to the burning of property with regard to a certain location mentioned in the Indictment, and thus no evidence on the occurrence of any acts of looting at this same location, it is the Defence view that the Prosecution has led no evidence regarding count 14 at this location.

139. According to the Defence it is undisputed that with regard to the following counts and locations the Prosecution has not led any evidence in its case[170]:

| **Count(s)** | **District** | **Location** | **Named in OTP Annex A**[171] |
|---|---|---|---|
| 3-5 | Bo | Telu<br>Sembehun<br>Mamboma | Yes |

[169] *Prosecutor v. Brima et al.*, Public Versions of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, Annex A; Villages and Locations pleaded in the Indictment in respect of which the Prosecution has no Evidence.
[170] Prosecution evidence that has been led with regard to certain locations and counts, but does not fulfil one of the elements of the crime according to the Defence, will be discussed separately in this Trial Brief.
[171] See *Prosecutor v. Brima et al.*, Public Versions of Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, SCSL-2004-16-T-459, Annex A; Villages and Locations pleaded in the Indictment in respect of which the Prosecution has no Evidence.

| Count(s) | District | Location | Named in OTP Annex A[171] |
|---|---|---|---|
| 3-5 | Kono | Foindu<br>Willifeh<br>Biaya | Yes |
| 3-5 | Koinadugu | Heremakono<br>Kumalu<br>Katombo<br>Kamadugu | Yes |
| 3-5 | Bombali | Mafabu | Yes |
| 3-5 | Port Loko | Tendakum | Yes |
| 6-9 | Kono | Tomendeh<br>Fokoiya<br>Superman Camp<br>Kissi Town Camp | Yes |
| 6-9 | Koinadugu | Heremakono | Yes |
| 8-9 | Kono | Tombodu | No |
| 8-9 | Bombali | Mandaha | No |
| 10-11 | Koinadugu | Konkoba | Yes |
| 10-11 | Bombali | Lohondi<br>Malama<br>Mamaka | Yes |
| 13 | Kono | Tomendeh | Yes |
| 13 | Koinadugu | Kamadugu<br>Heremakono | Yes |
| 13 | Freetown | Peacock Farm | Yes |
| 13 | Port Loko | Tendakum | Yes |
| 14: looting and burning | Bo | Telu<br>Sembehun<br>Mambonma | Yes |
| 14: looting | Bo | Tikonko | No |
| 14: looting and burning | Koinadugu | Heremakono<br>Kamadugu | Yes |
| 14: looting | Koinadugu | Fadugu | No |
| 14: looting and burning | Kono | Foindu | Yes |

| Count(s) | District | Location | Named in OTP Annex A[171] |
|---|---|---|---|
| 14: looting | Freetown and the Western Area | Calaba Town<br>Fourah Bay<br>Upgun area<br>Pademba Road | No |

## 4.2 Reliability of Prosecution Evidence in General: Witnesses and Their Evidence

*Prosecution Witness TF1-033*

140. The Defence submits that the evidence of Prosecution witness TF1-033 is unreliable, and as such should be excluded from the evidence which will be used in the assessment of the Third Accused's alleged responsibility. The following examples are indicative of the unreliability of this particular witness.

> A. Well, eventually I was in bondage, I was in their hands. But in Tombodu there was a subordinate commander to Gullit by the name of Savage, alias Mr Die.
> (...)
> A. Well, through the orders given to Savage by Gullit to kill, burn the town, Savage really adhered to that order he received from Gullit.
> Q. Witness, how do you know that Gullit gave those orders to Savage?
> A. It was given in my presence.
> Q. Did you hear him give the orders?
> A. I heard them in my presence.
> Q. Witness, what happened after the orders were given?
> A. The orders were carried out. There was chaos in the township. Civilians were killed, houses were burnt, hundreds of them, amputations were carried out by the AFRC fighters. Many civilians were locked up in houses and fire set on the houses by Savage and the AFRC fighters.
> Q. Witness, how do you know this?
> A. I was present when all those atrocities were carried out.[172]
>
> Q. Witness, were any of the AFRC commanders present in Tombodu during that time?
> A. Yes.
> Q. Can you tell the Court who was present?
> A. Hassan Papa Bangura was there. Five-Five was also there.
> Q. Witness, when you say Five-Five, who do you mean? Can you tell the Court his full name?
> A. Santigie Borbor Kanu.
> Q. Proceed, Witness, who else?
> A. Franklyn Woyo Conteh, Franklyn Conteh, alias Woyo, was also there. Savage, I said was there, he was the subordinates' commander implementing the orders given to him by

[172] TF1-033, Transcript 11 July 2006, p. 11.

> Gullit. Bazzy, Ibrahim Bazzy Kamara was also again. Ibrahim Sesay, alias Biyoh, was also there. And Abdul Sesay also.[173]

141. Whilst Prosecution and Defence witnesses testied that an attack took place on Karina, Bombali District, around May 1998 and that six to seven people were killed,[174] TF1-033 speaks of "500 civilians were killed." In addition to that this witness asserts that, "about 300 were also amputated in both towns [Karina and Bonoya]. Many rapes,over 200 -- over hundreds of women were raped in that town."[175] The evidence of TF1-033 is unreliable in this regard, especially when compared to the other evidence available. Particularly given the size of the town of Karina (and Bonoya) the estimates given by Witness TF1-033 seem to be inconsistent with the other available evidence. This same witness testifies of 200 people being killed in Rosos,[176] whilst indicating: "This is an approximation. It could be more than or less than."[177]

142. TF1-033 at some point admits that he had not counted the corpses he mentioned, and states:

> Q. The figures you have given, Mr Witness, did you count them?
> Well, I saw a large number of -- [Overlapping speakers].
> Q. Please, just answer my question.
> No.[178]

*Prosecution Witness TF1-277*

143. Also with regard to this Prosecution witness, the Defence holds that his testimony is entirely unreliable, and should thus not be used in the weighing of the evidence available against the Third Accused. The following evidence supports this assertion.

144. During his testimony in court, witness TF1-277 testified the following:

> Q. Do you know how she died?
> A. Well, she died by gunshot.
> Q. And who shot her?
> A. It was one Brigadier Five-five.
> Q. How do you know Brigadier Five-five shot her?
> A. Well, SAJ Alieu came, and he came and told us that -- he told our father that there he fired at a woman and my father came and collected the lady and brought her to our house

[173] TF1-033, Transcript 11 July 2006, p. 12.
[174] DBK-089, Transcript 14 July 2006, p. 7-8; DBK-094, Transcript 11 July 2006, p. 38-39; TF1-058, Transcript 14 July 2005, p. 78-80. At a later stage this witness mentions six corpses, see TF1-058, Transcript 14 July 2005, p. 104.
[175] TF1-033, Transcript 11 July 2005, p. 19.
[176] TF1-033, Transcript 11 July 2005, p. 28-29.
[177] TF1-033, Transcript 11 July 2005, p. 20.
[178] TF1-033, Transcript 11 July 2005, p. 79.

and said, "who shot this lady?" And he said it was our boss. And he said it was because of this woman that we did not go to fight.[179]

145. Defence counsel confronted this witness with his earlier statement to the Prosecution:

> Q. (...) If I'm correct, Mr Witness, you indeed stated that you heard that a person referred to as Five-five shot Mrs Zainaib. Is that correct? That is today your testimony?
> A. Yes.
> Q. Again, I ask your patience for the following sentence I draw from your statement from September 2003. It's a statement which can be found on page 6300, last paragraph. I will first quote the full portion, and then come back to you with the relevant question.
> To the Prosecution in September 2003, you stated, I quote: "At Waterloo, I saw Brigadier Five-five killed a 20-year-old girl Zainaib. He killed her because he met the lady seated by one rebel who had refused to fight against ECOMOG. He said he killed the girl because their fighting men are reluctant to go to the front because of women. After the incident at Waterloo, Five-five went to Lumpa where I was told he killed eight people, including my aunt's husband, Mr Victor."
> Q. (...) Now, today, Mr Witness, you testified that you confirmed your change of statement which is to be found in the notes of the 17th February 2005, and you testified that you heard that a person referred to as Five-five killed your -- killed Mrs Zainaib. What made you change your statement on this particular point?
> A. That question, I give my final statement today.
> Q. Was there a specific reason why you gave a different statement on this topic in September --
> A. I have no reason. I have no reason. I didn't mention in the statement, but I say that he killed. I said it this morning. I was at the house when SAJ Alieu came and said they've shot my woman. And that's when the Pa went and collected her and brought her to the house and interviewed her, and I've sworn.[180]

146. Witness TF1-277 asserted at trial under oath, *inter alia*, that he was present when Mr. SAJ Alieu made a report to his uncle (the witness's uncle) which report contained the allegation that a person referred to as Five-Five shot a woman named Zainab.

147. Witness TF1-277 states that he was present during the making of such report from SAJ Alieu to witness's uncle. Whilst it is not established that those persons, SAJ Alieu and witness's uncle, are not available as witnesses within these proceedings, the witness as such was therefore not the addressee of the alleged report. The Defence holds therefore that this particular form of hearsay evidence factually amounts to a form of indirect hearsay. Hearsay evidence, especially such a form, the admissibility of which may seriously affect the administration of justice pursuant to Rule 95 of the Rules.

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[179] Witness TF1-277, Transcript 8 March 2005, p. 50.
[180] Witness TF1-277, Transcript 8 March 2005, p. 116-117.

148. It is the opinion of the Defence that this testimony in its entirety should not be taken into account in determining the reasonable doubt threshold, considering both the context and the character of this evidence in question. Two foundations are laid for such requested exclusion: one is the prior inconsistencies relating to the evidence, and the second relates to the indirect hearsay evidence presented by this witness.

*The element of hearsay*

149. In the Blaskic Appeals Chamber's Decision, the Chamber defined a witness statement as "an account of a person's knowledge of a crime, which is recorded through due procedure in the course of an investigation into the crime."[181] The ICTY Appeals Chamber established the admissibility of hearsay, but held nonetheless that the Trial Chamber must be satisfied that it is reliable for that purpose, in the sense of being voluntary, truthful and trustworthy, as appropriate.[182] Decisive parameters for this admissibility are both the content of the hearsay statement and the circumstances under which the evidence arose.

150. In *Prosecution v. Marques et al.*, the Special Panel for Serious Crimes of the East Timor Court of 11 December 2001, it was held that hearsay evidence from witnesses who had heard from other witnesses that the accused was involved in the crime, should be given little weight and did not result in any certainty about the conduct of the accused.[183] The Defence respectfully submits that this same reasoning should apply to the underlying witness TF1-277.

*The argument of Prior Inconsistencies*

151. In the ICTR case of *Ruzindana*, the Court ruled that when a contradiction is preserved between the written and oral statement of a witness, this should be raised by putting to the witness the exact portion in issue and counsel should formally exhibit it, so as to form part of the record of the Tribunal.[184] In *Prosecutor v. Kayishema* et al.,[185] the

[181] See *Prosecutor v. Blaskic*, Appeals Chamber Decision on the Appellant's Motion for the Production of Material, Suspension or Extension of the Briefing Schedule, and Additional Filings, 26 September 2000, Case No. IT-95-14, paras. 15-16.
[182] *Prosecutor v. Aleksovski*, Appeals Chamber Decision on Admissibility of Evidence, Case No IT-95-14, February 16, 1999.
[183] See for further jurisprudence on this issue: Archbold International Criminal Courts, Practice, Procedure and Evidence 2003, p. 263.
[184] See *Prosecutor v. Ruzindana*, order on the Probative Value of Alleged Contradiction Between the oral and Written Statement of a Witness During Examination, Case No. 95-I-T, 17 April 1997.

ICTR ruled upon the admissibility of inconsistent statements, saying that "inconsistencies may raise doubt in relation to the particular piece of evidence in question or, where such inconsistencies are found to be material, to the witnesses' evidence as a whole."

152. In the instant case, it is clear that the inconsistencies regarding the statement of witness TF1-277 compared to his evidence given in Court, are to be found material. Whilst the witness stated in his written statement that he saw the particular shooting, at trial he alleges this to have heard, while listening to a conversation between two other individuals.

153. In this respect, the ICTR in the aforementioned *Kayishema* case held in para. 78 that the doubt in relation to the particular piece of evidence in question based on an inconsistency, may be removed by "an explanation of substance rather than mere procedure" and that an explanation to the extent that the witness alleges that the interviewing investigator did not accurately reflect in the written statement what the witness said, "(...) is generally not enough to remove doubt." As the Trial Chamber noted, it is not for the Trial Chamber "to search for reasons to excuse inadequacies in the Prosecution's investigative process." Only if the witness is able to "provides a convincing explanation of substance (...) then this may be sufficient to remove the doubt raised."[186]

154. The Defence observes that any reasonable "explanation of substance" for the aforementioned inconsistencies, were not given by witness TF1-277 during cross-examination, despite repetitious questions of the Defence counsel to obtain an answer of the witness which could explain this material discrepancy. In the absence of such explanation, the statement of witness TF1-277 both given to the Prosecution on 4 September 2003, as well as given at trial, should be excluded.

155. The second particularity pertains to the existence of two so-called will-say statements of this particular witness, as evidenced by p. 6302 and the Interview notes of 17 February 2005 (p. 6816). Both "will-say" statements or interview notes were not

[185] *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgment of 21 May 1999, paras. 77 – 80.
[186] *Prosecutor v. Ruzindana*, Case No. ICTR-95-1-T, Trial Chamber Judgment of 21 May 1999, par. 79.

signed by the witness and in any event the notes on p. 6302 did not specify the sentence "*he clarified the circumstances surrounding the killing of Zainab by 55.*"

156. In light of these specific circumstances, it cannot even be said that the evidence given by the particular witness qualifies under the standard of "any relevant evidence" as meant by Rule 89(C). In fact, the two mentioned will-say statements referred to in para. 11(b) of this Motion, cannot be considered as "clarification" now that any specification of this clarification is absent, particularly with respect to the notes found on p. 6302.

157. In its decision on admissibility of proposed testimony of witness DBY, the ICTR in *Prosecutor v. Rutaganda*, ruled as to the arguments of the Defence raised with respect to the exclusion of hearsay evidence: "This discretion [in admitting hearsay evidence] is not unlimited, considering that the test to be met before ruling evidence inadmissible is rigorous. It was thus ruled that 'a piece of evidence may be so lacking in terms of the indicia of reliability that it is not 'probative' and is therefore inadmissible. The Appeals Chamber is of the opinion that this principle should not be interpreted to mean that definite proof of reliability must necessarily be shown for evidence to be admissible. At the stage of admissibility, the beginning of proof that evidence is reliable, in other words, that sufficient indicia of reliability have been established, is quite admissible."[187]

158. The Defence holds the view that the evidence given by witness TF1-277, seen in the perspective of his previous inconsistent statement, given to the Prosecution on September 4, 2003, at least as far as hearsay evidence concerning the alleged incident in the house of Mr. SAJ Alieu and the events surrounding this incident, are so lacking in terms of the indicia of reliability that it is not deemed probative and should therefore be excluded. Even the "beginning of proof" that the evidence of TF1-277 is reliable is absent.

[187] *Prosecutor v. Rutaganda*, Case No. ICTR-96-3-A, Appeals Chamber Judgment, 26 May 2003, para. 33 (footnotes omitted from citation).

159. Moreover, in the landmark decision on hearsay evidence given by the ICTY Trial Chamber in *Prosecutor v. Tadic* of August 5, 1996,[188] hearsay evidence was in principle admitted within international criminal proceedings, yet, the ICTY ruled that "relevant evidence tending to prove an issue must have some component of reliability." In the instant case, it can be observed that both the uncle to whom witness TF1-277 refers as well as the person referred to as SAJ Alieu, were never interviewed by the Prosecution (although it is never established that these persons are not available as witnesses),[189] so that therefore any form of verification of the reliability of the hearsay statement of said witness is absent. In addition, witness TF1-277 testified that he could not indicate the address of the house where the alleged shooting took place. All these conditions result in the presence of a lack of reliability of his hearsay statement. After all, the ICTY in the mentioned Tadic ruling upheld the condition that "both the circumstances under which the evidence arose as well as the content of the statement" must be taken into account in order to admit hearsay evidence. It is these surrounding circumstances and content which should disqualify the evidence given by witness TF1-277.

160. The Defence submits that the evidence of this witness should have no weight in the assessment of the Third Accused's alleged criminal responsibility.

*Prosecution Witness TF1-227*

161. In the third place, the Defence contends that the evidence of Prosecution witness TF1-227 is to be considered unreliable, on the basis of the following arguments.

162. This witness states the following about the Third Accused, in the period from January 1999 onwards:

Q. You mentioned about one Brigadier Five-Five at Benguema?
A. Yes.
Q. When was the first time that you met this person you refer to as Brigadier Five-Five?
A. It was at Benguema the first time. I saw him in person then. It was a long time now.
Q. Did you say he wore civilian clothes?
A. Yes, I saw him with civilian clothes.
Q. How many times did you see him during your captivity?

[188] See *Prosecutor v. Tadic*, Case No. IT-94-1-T, Decision on Defense Motion on Hearsay, para. 9.
[189] The witness indicated at trial that his uncle is still living, but has been traveling, and that no details of this uncle were given to the OTP. Furthermore, the witness indicated that he does not know where SAJ Alieu is.

A. Three times. It was a far distance, I just saw him passing.
Q. It was a far distance, you just say him passing. Okay. Was he always dressed in civilian clothes on those three occasions?
A. Yes.
Q. You have referred to him as Brigadier Five-Five. Did you hear people calling him that?
A. Yes.
Q. Did you hear at any time people call him just Five-Five?
A. No, they called the title Brigadier Five-Five.
Q. They always called him Brigadier Five-Five?
A. Yes.[190]

163. Contrary to the evidence of witness TF1-277, witness TF1-227 testifies to the following evidence, in the same period of time and the same area:

Q. When did you leave your hiding area?
A. On the 6th of January 1999.
Q. And where did you go to when you left your hiding area?
A. I went to Lumpa.
Q. And did you remain in Lumpa throughout the month of January?
A. No.
Q. Where did you go after you left Lumpa?
A. I went to Waterloo.
Q. Mr Witness, do you know the accused Santigie Kanu?
A. Yes, I used to see him in the Benguema barracks during the AFRC government.[191]

Q. Do you recall how he was dressed that day?
A. Yes. I could remember.
Q. How was he dressed?
A. He was dressed in combat, military uniform, green combat.[192]

Q. In what capacity was he there? Can you describe what you saw.
A. I saw him dressed in full military uniform, combat.[193]

164. Also insider witness TF1-046 testifies that in Freetown/Western Area, "I saw Brigadier Five-Five wearing his ranks, pips and a crown on his shoulder here as a brigadier."[194]

165. The Defence respectfully holds that the evidence presented by these Prosecution witnesses is contradictory. Whilst the one witness states Kanu was always dressed in civilian clothes, the other witnesses indicate he was dressed in full military combat.

166. Again another inconsistency presents itself within this witness's testimony. He states:

[190] TF1-227, Transcript 11 April 2005, p. 53-54.
[191] TF1-277, Transcript 8 March 2005, p. 45.
[192] TF1-277, Transcript 8 March 2005, p. 57.
[193] TF1-277, Transcript 8 March 2005, p. 110.
[194] TF1-046, Transcript 7 October 2005, p. 125.

A. About 200 people I met at Magbeni.
Q. Now, out of those 200 people you met at Magbeni, approximately how many of them were soldiers?
A. Well, hundreds --[195]

167. Later on during his testimony he states the following:

Q. Out of the 200 people you met at Magbeni, how many were soldiers?
A. Seventy-five were soldiers.
Q. And who were the others?
A. They were civilians.[196]

168. Again, this is an example where the Prosecution cross-examines its own witness, resulting in an inconsistency within this witness's own testimony, affecting the reliability of this witness's testimony as a whole.

169. Furthermore, witness TF1-227 testified that Brigadier Five-Five was the overall commander at Benguema[197], in clear contradiction with the evidence given by TF1-167 on the identity of the overall commander at that time[198], and the evidence given by TF1-334 that Five-Five was never an overall commander.[199]

170. Witness 227 indicates that Five-Five was the commander at Benguema.[200] However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.

Q. (...) Did you see him give any command at Blama?
A. I did not see him giving any command.[201]

171. This witness has not indicated how it was possible that whilst in Benguema Five-Five was the overall commander, while traveling to the next village, he was not in a position to give command anymore, which is, to say the least, remarkable and sheds doubt on the reliability of this witness's evidence.

*TF1-085*

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[195] TF1-227, Transcript 11 April 2005, p. 38.
[196] TF1-227, Transcript 11 April 2005, p. 39.
[197] Transcript 11 April 2005, p.19.
[198] Transcript 16 September 2005, p.12, where TF1-167 gives evidence that Alex Tamba Brima took over the overall command after the death of SAJ Musa.
[199] Transcript 16 June 2005, p.4.
[200] TF1-227, Transcript 11 April 2005, p. 19.
[201] TF1-227, Transcript 11 April 2005, p. 77.

172. The Defence asserts that the evidence given by witness TF1-085 can not be deemed reliable. TF1-085 describes many atrocities, including killings, rape, cannibalism and the alive burying of a child[202], and ascribes most of these crimes to a big boss named Five-Five. However, TF1-085 gives the following description of Five-Five, which most certainly does not correspond to the Third Accused[203]:

> A. Yes, the day that I saw him he was huge, he was tall, he was fat and he carried a walking stick that he was walking with.
> Q. What was his complexion?
> A. It was fair and he was black, he was huge.
> Q. What was he wearing when you saw him?
> A. I wore ronko clothes.
>
> You've spoken about a walking stick. What was this walking stick like?
> A. The walking stick that he carried had bombs inside. If you see it you wouldn't know. You wouldn't know there were bombs inside when he opened it there were bombs inside.
> Q. Did you ever see it being used?
> A. Yes.
> Q. Try and describe what it did?
> A. He used it to kill people. He would just use it and point it and anywhere he points it at bombs would come out to kill civilians and --

173. In addition, the evidence given by TF1-085 on these cruelties and the composition of the group of rebels she joined is not corroborated by any other Prosecution witness.[204]

174. The Defence therefore contends that evidence of Prosecution witness TF1-085 should not have any weight in the assessment by the honourable Trial Chamber if the Prosecution has proved beyond reasonable doubt the counts as charged in the Indictment.

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[202] Transcript 7 April 2005, p.30-36.
[203] Transcript 7 April 2005, p.16-17.
[204] See for example Transcript 7 April 2005, p.38, 46-47.

# V ORGANIZATIONAL STRUCTURES OF THE AFRC AND SLA

## 5.1 AFRC Was a Political Body, Not a Military Organization

175. The AFRC was in power from May 1997 until February 1998, when they were ousted from power by ECOMOG, and chased out of Freetown into the provinces. It is the Defence theory that the honourables who were in charge of the AFRC government did not have a leading role during the conflict after February 1998. A very clear example hereof can be seen in the complete disappearance of Johnny Paul Koroma after the end of the AFRC regime. Although the political leader of the AFRC movement, his role had practically ended when pushed out of Freetown. He went with one SLA group to Kono, but immediately left the district and headed back to his home province Kailahun, where his active participation came to a complete standstill.

176. It was SAJ Musa who took over the role of Johnny Paul Koroma, and became the military leader of the SLA group. His overall goal was to reinstate the army in Freetown, and not a political goal to gain power, as alleged by the Prosecution.

177. This theory is also applicable to the Third Accused, and is supported by the example of several of the honourables being arrested in Major Eddie Town by the end of 1998. Witness DBK-113 indicates that the Third Accused did not have any military or operational position whilst in Colonel Eddie Town.[205]

178. Witness DBK-113 was in Major Eddie Town with an SLA group in 1998, when another SLA group, led by SAJ Musa, joined them there. A little later, in October or November 1998, the group honourables was arrested.[206] This witness indicates that SAJ Musa had them arrested because "they were an obstacle to the movement. They did not want them to achieve the goals of the movement, they were afraid that they wanted to run away, so they were being punished."[207]

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[205] DBK-113, Transcript 13 October 2006, p. 29. Witness TF1-334 testifies that before the arrest of the Third Accused and his co-Accused in Major Eddie Town, witness TF1-334 alleges that Gullit was the commander, Bazzy his second-in-command and Five-Five the third-in-command. See TF1-334, Transcript 24 May 2005, p. 87. On another occasion, this same witness provides a different picture of the command structure, indicating that Bazzy, and not Kanu, was the third-in-command. See, TF1-334, Transcript 13 June 2005, p. 26.
[206] DBK-113, Transcript 13 October 2006, p. 27. TF1-167, Transcript 15 September 2005, p. 79.
[207] DBK-113, Transcript 13 October 2006, p. 32.

179. Even the fact that the Prosecution has led evidence that the Third Accused addressed civilians in Koidu Town on behalf of the AFRC government, and that the Third Accused sometimes stayed in Koidu Town during the AFRC regime,[208] does not prove that the Third Accused held any responsibility within the AFRC government for the Kono District. Moreover, this certainly does not proof that Third Accused held at any time a command position in Kono District, nor that he was present in Kono District in 1998.

### 5.2 AFRC / SLAs on the run and subject to reprisals

180. It is the Defence theory, that in February 1998, the AFRC was ousted from Freetown, and that they were subjected to reprisals, forcing them to flee from the area. The picture the Prosecution has drawn, not only in its opening statement, but throughout the whole trial, is that the AFRC, when pushed out of Freetown, was fighting its way back into the provinces, whilst killing, mutilating, raping, etc. the civilian population. The Defence theory is that this is an oversimplified picture of the situation, and is not a correct reflection of the true story. Whilst fleeing out of the capital, the AFRC allies and SLA soldiers were severely attacked throughout the region, and they suffered harsh and brutal behaviour by the civilians, ECOMOG and Kamajors.[209]

181. The AFRC in this rush to get out of Freetown, split up into various SLA factions, which operated independently from each other, without any overall structure.[210]

182. This situation also nuances the intent with which certain acts were committed. The intent required for several of the alleged crimes cannot be substantiated with facts of

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[208] Witness TF1-019, Transcript 30 June 2005, p. 85-88; see also DAB-042, Transcript 15 September 2006, p. 89.

[209] See for instance DBK-113, Transcript 13 October 2006, p. 11. See also testimony TF1-114, p. 50-51, who states that:
Q. What was the reason for this mass exodus that you are referring to. Why were all the soldiers fleeing Freetown? Why? You were with them. Why. What was the reason? Please, tell us.
A. Thank you, very much, sir. One, there was poor communication in the army. The army was not recognised. Even you come attest story here, say story, somebody believe you. So the army was not much all to that extent at that time. As compared to --

[210] See for instance DBK-113, Transcript 13 October 2006, p. 14. Junior Johnson testifies that "we diverted into the jungle," see TF1-167, Transcript 20 September 2005, p. 60-61.

this specific period of time, because no sufficient evidence has been adduced indicating the goals of the AFRC and SLA groups at this time.

183. Witness DBK-113 provides a very clear picture of such development. In his home village, people started pointing fingers at him, and telling him they knew him and his father who was a soldier.[211] Witness testifies that at Wellington "[s]ome Kamajors and some ECOMOG soldiers went to the house [of witness's stepfather]. So they removed us and burned the house and seized his car."[212] He also testifies of Kambia where Guineans had started capturing people in Kambia, referring to soldiers.[213] Moreover, he states about the ECOMOG attack on Makeni in March/April 1998.

184. Witness DAB-079 indicates the following in his testimony:

> Q. I want you to take it step by step. After the lynching or the shooting and burning of these two officers, what happened?
> A. We held a meeting at the barri where the civilians were told not to repeat the action. It was during that time that those people in the interior, some SLAs officers, were told that their brothers are being killed in Kabala, they are being burnt alive, so some of them attacked the town.[214]

185. The Defence submits that the evidence presented during the trial, by both Prosecution and Defence nuances the Prosecution theory concerning the incidents after February 1998.

[211] DBK-113, Transcript 13 October 2006, p. 7 and p. 92.
[212] DBK-113, Transcript 13 October 2006, p. 5.
[213] DBK-113, Transcript 13 October 2006, p. 8.
[214] DAB-079, Transcript 28 July 2006, p. 24-25, 31.

# VI NO COMMAND RESPONSIBILITY THIRD ACCUSED

## 6.1 Introduction

186. Several reasons emerge for an acquittal as to superior responsibility on part of the Third Accused. When it concerns the assessment of alleged superior responsibility in the case of the Third Accused two principal issues arise:

187. In the first place, the question whether this form of responsibility can be based on the mere alleged participation or membership of the AFRC. This subject relates to the question raised in the opening statement of the Defence as to non-validity of the notion of collective responsibility within international criminal law.

188. In the second place, the observation that, based on the evidence presented by the Prosecution and Defence at trial, it is not established that the Third Accused ever functioned, throughout the period charged, as an operational commander, i.e., as a military leader in command and control of a fighting unit.

189. In the following paragraphs the Defence will further elaborate on these two crucial issues regarding the alleged superior responsibility of the Third Accused.

## 6.2 Collective Responsibility

190. "Collective responsibility" is what the Prosecution is *de facto* advocating in its case. In paragraph 31 of the Amended Indictment, it is said that the three Accused individually or in concert with others (among which Mosquito, and the RUF defendants Issa Sesay, Morris Kallon and Augustine Gbao) "exercised authority, command and control over all subordinate members of the AFRC, Junta and AFRC/ RUF Forces." The Defence submits that such evidence, supporting the allegation that the Third Accused, in cooperation with the mentioned persons, exercised command and control over all AFRC, Junta and AFRC/RUF forces, has not been presented by the evidence at trial. In the absence of proof for this, a conviction of the Third Accused would be tantamount to strict liability on the basis of organizational responsibility.

191. Article 6 of the ICTY Statute (in analogy with Article 6(1) of the SCSL Statute) provides that the international tribunal shall have jurisdiction over natural persons, with the exclusion of legal persons, organizations and States. The possibility of extending the personal jurisdiction of the tribunal to organizations for the purpose of establishing membership thereof as an offence – in analogy with the Nuremberg precedent – was discarded, mainly because the notion of guilt by association, implicit in the crime of membership, does not comport with the underlying principle of the Statute that criminal liability is personal.[215]

192. Additionally, within international criminal law, *objective and strict* criminal liability is ruled out.[216] It follows from the first notion that among other things no one may be held answerable for acts or omissions of *organizations* to which he belongs, unless he bears personal responsibility for a particular act, conduct, or omission. This means that mere membership of the AFRC does not justify criminal liability of the accused as set forth in the indictment.

193. Recently, the ICTY Trial Chamber in *Prosecutor v. Oric*, reinforced the notion that "[n]evertheless, superior criminal responsibility by no means involves the imposition of 'strict liability,' for even if it may be described as the "imputed responsibility or criminal negligence," a mental element is required at least in so far as an accused must have been aware of his position as a superior and of the reason that should have alerted him to relevant crimes of his subordinates."[217]

### 6.3 No Operational Command

194. Exemplary for the Third Accused's lack of operational command and control, or absence of him having functioned as a commander operationally in charge of individuals, forms the evidence of one of the Prosecution's key witnesses, TF1-334, who declares:

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[215] See for these arguments, Daphna Shraga and Ralph Zacklin, *The International Criminal Tribunal for the Former Yugoslavia*, EJIL Vol. 5 1994, no. 3, at 370; for these reasons both New Zealand and Belgium in their submissions to the Secretary-General of the U.N. expressed opposition to including membership in criminal organization as an offence under the Statute.
[216] Cassese, *International Criminal Law*, 2003, at 209.
[217] See *Prosecutor v. Oric*, ICTY Judgment, 30 June 2006, IT-03-68, para. 318.

> Q. Mr Witness, it is a simple question. Was he ever in overall command? I did not ask you for his position.
> A. He was not the overall commander.[218]
> Moreover, witness TF1-045 indicates that Five-Five was not one of the group of "[t]he major people who were commanders (...).[219]

195. Essential for command responsibility is proof of "command authority," meaning the authority to command forces. In *Prosecutor v. Halilovic*, the ICTY acquitted the accused Sefer Halilovic, a former general and supreme commander of the army of Bosnia and Herzegovina (ABiH) which accused was charged with command responsibility for murder (Articles 3 and 7(3) ICTY – Statute). This case concerned murders allegedly committed during military operations conducted by the ABIN. The following two conclusions of this ICTY judgment draw attention:

(i) Notwithstanding the finding that it was established that many of the murders alleged in the indictment had been committed by soldiers of the ABIH, the court held that the prosecution had failed to prove that the accused had effective control over these troops.[220]

(ii) The Trial Chamber held that the accused Halilovic was the team leader of an inspection team and was (therefore) not entrusted with command authority.[221] The ICTY established that, instead, the duties of Halilovic were limited to coordinating and monitoring functions in the areas of responsibility of the ABIH 4th and 6th Corps, the corps that carried out military operations in the specific areas.[222]

196. Projected on the case against the Third Accused, the Prosecution evidence suggests that the Third Accused would have acted as a G-5 or Chief of Staff, both clearly functions and positions without command authority. As will be argued below, no conclusive evidence has been presented that the Third Accused was commanding units or forces during the combat operations which are alleged to have had happened in the period of the indictment. Yet, effective command and control encompasses operational command. Command must entail the exercise of real "powers of command," reflected

[218] Transcript 16 June 2005, p.4.
[219] TF1-045, Transcript 21 July 2005, p. 24.
[220] *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 747, 751.
[221] *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 752.
[222] *Prosecutor v. Halilovic*, ICTY Judgment, 16 November 2005, IT-01-48-T, paras. 735-742.

by the "actual possession (...) of powers of control"[223] over the acts of others. Thus, effective control "is the material ability to prevent and punish the commission of offences."[224] In *Prosecutor v. Bagalishema,*[225] the Trial Chamber stated that "the decisive criterion in determining who is a superior is his or her ability, as demonstrated by duties and competence, to effectively control his or her subordinates."[226] Accordingly, *de facto* control refers to the right of superiors to exert control over subordinates.[227]

### 6.4 Absence of Superior Responsibility Third Accused

197. The Prosecution case failed to prove beyond reasonable doubt superior responsibility on part of the Third Accused. The following evidence supports this conclusion.

198. Witness TRC-01 states that he knew that SAJ Musa was a senior commander, and that the First Accused was a commander in the jungle. He does not have knowledge about command positions of the Second and Third Accused.[228]

199. The exact position of the Third Accused remains unclear throughout the evidence, mainly because of a lack of clear command structure. Whilst at times, as set out in, some witnesses indicate that Kanu's position had been that of a G5, whilst other witnesses do not support this contention. Those other witnesses, mainly TF1-334, indicated that his position was that of a chief of staff.

200. A G5 is a staff position (not an operational function), responsible for communication between the military and civilians. This position is incompatible with the position of chief of staff, described by Colonel Iron as "the chief of the staff officers who support the commander. He is responsible for the management of their output of all their work, he is (...) another close advisor to the commander in chief, and is really responsible for running and implementing the commander in chief's decisions. This is typical

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[223] *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 370.
[224] *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, February 20, 2001, IT-96-21, para. 378.
[225] *Prosecutor v. Ignace Bagalishema,* ICTR Judgment, 7 June 2001, ICTR-95-1A-T.
[226] *Prosecutor v. Ignace Bagalishema,* ICTR Judgment 7 June 2001, ICTR-95-1A-T, para. 39.
[227] See I. Bantekas, *The Contemporary Law of Superior Responsibility*, AJIL Vol.93:573, 1999, at 577.
[228] TRC-01, Transcript 16 October 2006, p.105-106.

across all armies (...)."[229] In any case, whichever role Kanu allegedly played, he did not act in a position of command, and thus was not in a position to exert superior responsibility.

201. A G-5 is thus not a function in the command line. Also, in the diagrams of Colonel Iron on page C-12 of his report, the third accused is not positioned within the command line (see also page D3, definition of Chief of Staff). Accordingly, no superior responsibility can be vested." Also the testimony of the defence military expert major-general Prins is supportive of this view. At the trial this expert concluded that:

> Q. General, you have also -- did you encounter in the transcripts you've read the term "G5"?
> A. Yes, I certainly did.
> Q. And can you please tell the Court whether the terminology, G5, has any bearing, in your professional opinion, as to the five criteria you mentioned?
> A. Only the criteria that G5, or J5, it's a matter of wording, is a function that is established in a staff. Now G5 or J5 is established in a joint headquarters but when I was commandant of the marine corps I had a J5 because I had a general staff but again, that is wording, so yes, indeed, if you then look at the criteria I described, and you ask me point blank the question:
> Did you see J5 somewhere in the transcripts, or in the study by Colonel Iron? The answer is yes.
> Q. Suppose that you have a G5 in an organisation irrespective whether it's regular or irregular, leave apart that discussion, you have a G5, is that, in your opinion, sufficient to speak about staff structure or joint staff structure?
> A. Absolutely not. Of course, for -- if -- for a staff structure, or a joint staff structure, you need more than a G5. You need a G1, a 2, a 3, a 4, a 5 and after that, as I indicated relating to NATO, you know, you have -- you may have a G8 and not a G7. For example, you may not have a G9 which relates to civil military co-operation. If you operate in Iraq and you want to rebuild the country you need a G9 who does civil military co-operation with the local population, but if that is not one of your missions you may not have a G9, so back to your question. If you just say there is a G5 it doesn't tell me much.
> Q. General, the conclusions you've just put before the Court, do they change, in your view, when we speak about the situation when the AFRC was on the advance to Freetown?
> A. It should not have a relation with your operations, as such. You are still relating to staff structure. You do have a staff structure or you don't.[230]

202. In conclusion, in the absence of the position of a G-5 within the operational command billet, no superior responsibility can be vested.

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[229] Colonel Iron, Transcript 12 October 2005, p. 59.
[230] See Transcript Major-General Prins, 19 October 2006, page 22-23.

203. Some of the Prosecution witnesses testify to the fact that Kanu was a 'leader' or a 'big man.' The Defence holds that such vague and unsubstantiated assertions can not serve in support of the allegation that the Third Accused filled a position of superior responsibility. Some examples of such evidence are presented below.

204. Witness TF1-282 indicates that a rebel told her that "Five-Five was a big man." When asked whether she could tell the circumstances under which the rebel told her that Five-Five was a big man, she said "At one time he told me that Five-Five said they were to go and jah-jah." This is the only reason she provides for her knowledge that Five-Five was allegedly "a big man."[231]

205. Witness TF1-227 indicates that Five-Five was the commander at Benguema.[232] However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.

> Q. (...) Did you see him give any command at Blama?
> A. I did not see him giving any command.[233]

206. This witness has not indicated how it was possible that whilst in Benguema Five-Five was the overall commander, while traveling to the next village, he was not in a position to give command anymore.

207. Witness TF1-158 testifies that in Karina SAJ Musa, Gullit, Five-Five and O-Five were "the leaders." The basis for his knowledge is that "one boy" who made an introduction, told witness so.[234] The Defence respectfully submits that such testimony of hearsay that the Third Accused was one of the 'leaders,' cannot lead to the conclusion that the Third Accused was in a position of superior responsibility.

208. Witness TF1-094 testifies that the Third Accused "used to command everybody."[235] And when asked: "Let me put it another way. Was he always close to where you were walking?" this witness answers "Well, he used to command everybody." And when asked more specifically: "And do you mean the captured men and women?" she

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[231] TF1-282, Transcript 13 April 2005, p. 21.
[232] TF1-227, Transcript 11 April 2005, p. 19.
[233] TF1-227, Transcript 11 April 2005, p. 77.
[234] TF1-158, Transcript 26 July 2005, p. 31-32.
[235] TF1-094, Transcript 14 July 2005, p. 3.

answers: "Both sides because he was a big man."[236] The Defence submits that such evidence referring to "a big man" cannot support the allegation that the Third Accused was in a position of superior responsibility.

209. Assessing the evidence of these witnesses, TF1-282, TF1-227, TF1-158 and TF1-094, it cannot be said that their interpretation of the situation could lead to a determination of alleged superior responsibility of the part of the Third Accused.

210. Witness TF1-167's story about the last part of the march to Freetown in 1999 is indicative of the role the Third Accused played in the alleged so-called command structure. At Orugu village, Western Area, a meeting was called and chaired by Alex Tamba Brima, "to put in place on our move to Freetown."[237]

> Q. Why did Santigie Kanu remind the battalion commanders of the orders?
> A. Because he was very close to the commander of the whole troops which was Alex Tamba Brima.[238]

211. This quote is indicative of the Third Accused's position, he was able to communicate to the army personnel "[b]ecause he was very close to" Alex Tamba Brima.[239] The Defence contends that he did not have any command position of his own within the any of the SLA structures.

212. Insider Prosecution witness Gibril Massaquoi provides evidence for the fact that the objective of the Third Accused was mere political, and that any issues relating to other objectives than political, were not relevant to him. He provides the following evidence:

> Q. You said that Five-Five was in the house?
> A. Yes.
> Q. Did you see him?
> A. Yeah, we saw him later. He came to the parlour, we all sat and discussed.
> Q. Who sat and discussed?
> A. Myself, Steve Bio, Five-Five.
> Q. What was discussed?

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[236] TF1-094, Transcript 14 July 2005, p. 3.
[237] TF1-167, Transcript 16 September 2005, p. 17.
[238] TF1-167, Transcript 16 September 2005, p. 17.
[239] TF1-167, Transcript 16 September 2005, p. 17. This same witness states:
Q. Was there anyone amongst the commanders to whom he was particularly close?
A. Yes, Santigie Kanu, aka Five-Five, was very close to Alex Tamba Brima.

A. The discussion was basically on to release these nuns and the bishop as they were religious people, they have nothing in the politics of Sierra Leone.[240]

213. When confronted with his earlier statements, witness TF1-045 declares the following in his testimony:

Q. Now, why is it then that your interview in January 2003 did not mention the names Five-Five and Bazzy as belonging to those individuals you had an opportunity to know?
A. Yes, sir. But during that time, when I say I knew most of them, I was not concerned about. The major people who were commanders, during that time, on top, superior to these people,
those were the only people I stated during that time. But you know as questions were going on, that was -- I included their names as how I knew them because we just met, but this latter
part, I came back and what I saw and what I remembered I place it -- I place it on the paper. So if I say so, I say that is what I saw.[241]

214. This Prosecution witness therefore indicates that Five-Five, whom he had not mentioned in his interview in January, did not belong to this group of "major people who were commanders (...) on top, superior to these people."[242]

215. Furthermore, witness DBK-113 gave the following evidence in court:

Q. Thank you, Mr Witness. Mr Witness, do you know whether, at that time, at Colonel Eddie Town, the third accused, Santigie Kanu, had any military position, or operational position in Colonel Eddie Town?
A. No.
Q. Thank you. Why do you say that?
A. Because I have never seen him. Like, anybody who had a
position, they were active. So the group would have known that
this individual had a position.[243]

216. Witness 227 indicates that Five-Five was the commander at Benguema.[244] However, when they moved to Blama from end of January 1999 onwards, the witness states he did not see Five-Five giving any command.

Q. (...) Did you see him give any command at Blama?
A. I did not see him giving any command.[245]

217. This witness has not indicated how it would be possible that whilst in Benguema Five-Five was the commander, while traveling to the next village, he was not in a position to give command anymore. The Defence respectfully submits that, if Kanu had been

[240] TF1-046, Transcript 10 October 2005, p. 19.
[241] TF1-045, Transcript 21 July 2005, p. 24.
[242] TF1-045, Transcript 21 July 2005, p. 24.
[243] Transcript 13 October 2005, p.29.
[244] TF1-227, Transcript 11 April 2005, p. 19.
[245] TF1-227, Transcript 11 April 2005, p. 77.

in a position of command at Benguema, his position would not have suddenly changed in Blama, and that the perception of this witness is not objective, and should thus not be taken into account in assessing alleged superior responsibility of the Third Accused.

218. In conclusion, the Defence submits that for this reason no conviction can be entered on the basis of superior responsibility for the Third Accused as set forth in the Indictment.

### 6.5 Absence of Effective Command and Control

*Absence of 'Material Ability'*

219. The indictment asserts, as mentioned, that the Third Accused exercised (effective) authority, command and control over "all subordinate members of the AFRC, Junta and AFRC/RUF forces."[246]

220. In the first place, no evidence has been presented that Mr. Kanu was in command and control of "all subordinate members of the AFRC."[247] Notably, the SLA split into several factions after their pulling out from Freetown in February 1998, with different groups under command of different commanders. Therefore, only for this reason the assertion in paragraph 31 of the Indictment cannot be upheld.

221. In the second place, on the basis of recent case law of the ICTY, the requisite element of 'effective command and control' cannot be proven on part of the Third Accused. The findings of the Appeals Chamber in the *Celebici* case confirm this assertion: "Although the degree of control wielded by a *de jure* or *de facto* superior may take different forms, a *de facto* superior must be found to wield substantially similar powers of control over subordinates to be held criminally responsible for their acts." [248] To this effect, Prosecution witness Junior Johnson testified that the position of the

[246] See paragraph 31 of the Indictment.
[247] See paragraph 31 of the Indictment (emphasis added).
[248] *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, 20 February 2001, IT-96-21 para. 197.

Third Accused was mainly characterized by the fact that he was close to Alex Tamba Brima,[249] i.e. a factual position rather than any rank or military appointment.

222. In the third place, one should observe that the mere alleged position of the Third Accused as an 'honourable' or his alleged involvement in the AFRC coup in May 1997, does not constitute an element for vesting superior responsibility for events which took place in the period thereafter. As to superior responsibility, what counts is the "material ability" of the particular accused to endorse the obligations as a commander, such as the ability to prevent and punish the commission of crimes by subordinates.[250] In the *Celebici* case, the Appeals Chamber of the ICTY did not accept the notion that the element of "effective control" can be met on the basis of proof of the Accused having "substantial influence" alone.[251]

223. In specific, the ICTY Appeals Chamber in the *Celebici* case held in paragraph 266 thereto: "It is clear, however, that substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions. Nothing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed."[252]

224. Projected on the case of the Third Accused it can be observed that any potential inference from the Prosecution evidence that the Third Accused may have had a form of 'substantial influence' on the AFRC and SLA factions which fled Freetown in February 1998, is not sufficient for a conviction in this regard, i.e., proof of exercising

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[249] TF1-167, Transcript 16 September 2005, p. 17. This same witness states:
Q. Was there anyone amongst the commanders to whom he was particularly close?
A. Yes, Santigie Kanu, aka Five-Five, was very close to Alex Tamba Brima.
[250] *Prosecutor v. Delalic et al.*, ICTY Judgment, 16 November 1998, IT-96-21-T, para. 378, paras. 364-377; see also *Prosecutor v. Blaskic*, ICTY Judgment 3 March 2000, IT-95-14-T, para. 302.
[251] *Prosecutor v. Delalic et al.*, ICTY Appeals Chamber Judgment, 20 February 2001, Case No. IT-96-21-A, par. 266.
[252] See also Daryl A. Mundis, Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute, in: International Criminal Law Developments in the Case Law of the ICTY (Gideon Boas & William A. Schabas, eds., 2003) p. 251, footnote 66.

command responsibility. Especially in this period of time, witnesses testify to an overall lack of command. Junior Johnson's testimony reads as follows:

> Q. In other words, what I am trying to put to you is that the army was still operating as an established institution, as a unit.
> A. When we pulled out, it was not established as an institution, because they were chasing us out from Freetown. So, there was no military orders going on, or no military operations, until we reach Masiaka, we reach Kabala.[253]

225. And witness TF1-033 states the following, also affirming that there was no control after the 1998 pullout, and under those circumstances, it would have been impossible for the Third Accused to exert 'substantial influence' on the AFRC and SLA factions fleeing from Freetown:

> Q. That is not what I am asking you about. I said was there any control? I am only confirming what you said this morning, that there was no control so you were able to go your own way.
> A. Yes. That is the tail end of the occupation of Freetown so.
> Q. There was no control?
> A. Yes, by then everybody was running for his life.[254]

226. TF1-033 moreover states that in February 1998, there was "mob justice" in Freetown, where the AFRC was violently pushed out of Freetown.

> Q. Okay, thank you. Mr Witness, in February 1998, you said you escaped from Freetown because there was mob justice in Freetown; is that so?
> A. Yes.
> Q. What do you describe as mob justice?
> A. Lynching.
> Q. By whom?
> A. By opponents' group.
> Q. Who are you referring to as opponent group?
> A. In this context, I am referring to pro-SLPP supporters by that time. They branded us, who were involved in rallies denouncing a military intervention to the AFRC issue.[255]

*No Proper Disciplinary and Command Structure*

227. Requisite for exercising effective command and control is the existence of:

    a. A proper disciplinary system within a force,[256] and

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[253] TF1-167, Transcript 20 September 2005, p. 111.
[254] TF1-033, Transcript 11 July 2005, p. 125.
[255] TF1-033, Transcript 11 July 2005, p. 68, and see also on p. 69, where it reads as follows:
Q. No, I am talking about what you saw. You said people were lynched.
A. Yes.
Q. Did you see any other thing being done to people who were branded supporters of the --
A. They were killed, they were killed.
Q. In what manner?
A. They were hacked to death, they were burnt with tyres -- tied and burned with tyres alive.

b. The existence of a proper command structure.

The evidence adduced by the Prosecution and Defence shows that these two elements were not in place in the period February 1998 – June 1999. Accordingly, effective command and control in this sense can not be proven beyond reasonable doubt.

Absence of a Disciplinary System

228. *De facto* control requires the existence of a goal-directed hierarchy, coupled with a general awareness of a chain of command. Also, there must be a widely accepted exercise of issuing and receiving orders, as well as an expectation that insubordination will trigger disciplinary reaction. This entails a mutual expectation that orders will be obeyed. Moreover, the superior must possess effective means enabling him to suppress an illegal act and punish the perpetrators.[257] Within guerrilla warfare a disciplinary system and command and control do not automatically follow from the nature of this kind of combat. The problematic nature of these requirements within irregular forces is reinforced now that "effective control" demands a certain degree and quality of control. Thus, a purely *de facto* position, without the specific traits of *de jure* command, will remain at the level of a powerful influence over an unstructured, intimidating and oppressive force. Hence, in order to distinguish superiors in the meaning of Article 6(3) from a mere bully or agitator, *de facto* authority must present the traits of *de jure* control.[258] The findings of the Appeals Chamber in *Celebici* confirm this assertion.

229. In the case against the Third Accused, the Prosecution case failed to prove beyond reasonable doubt that a "strict military disciplinary system, based on the Provost Marshall who would investigate wrongdoing and be responsible for punishment of malefactors"[259] would have existed within the SLA factions from February 1998 onwards.

230. Notably, Prosecution witness TF1-167 testified on 20 September 2005:

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[256] See also the third requirement for superior responsibility.
[257] See Alexander Zahar, Command Responsibility of Civilian Superiors for Genocide, in 14 *Leiden Journal of International Law* 591-616 (2001), at 598.
[258] See Alexander Zahar, Command Responsibility of Civilian Superiors for Genocide, in 14 *Leiden Journal of International Law* 591-616 (2001), at 612.
[259] This is assumed by Colonel Iron in his expert report of 5 August 2005, page E-3.

> On arrival at Gberibana there were not laws that were placed. No laws were given by the senior commander. There were no laws that were given to fighters at Gberibana like us, Mansofina to Camp Rosos.[260]

231. Witness TF1-167 testified that when the SLA faction left Kono and moved to Mansofina, he was "promoted" to captain and assumed a position as "provost marshal."[261] However, this individual did not have any form of (military) training to seriously fulfil such a position.[262] In the absence of conclusive evidence for the presence of a provost marshal system within the AFRC faction or an equivalent thereof, no effective command and control could reasonably be exercised.

232. As clarified in the report of Major-General Prins, the absence of a disciplinary system also emerged from lack of any structural military training both within the other ranks and officer ranks. Discipline has to be instilled in military training from the outset and soldiers need to be trained and lectured on all aspects regarding discipline and rules of combat. Moreover, officers and non-commissioned officers need to lead by example and set the example to act themselves in a disciplined manner. Lastly, the organization as such needs to be set up in a way that discipline can be maintained and enforced.[263] The Prosecution case failed to prove all these aspects beyond a reasonable doubt. As to the element of discipline within the other ranks, witness TF1-184, in addition to witness TF1-167 testified about the use of drugs while in the jungle.[264] These circumstances clearly are indicative for the lack of a proper discipline within the specific timeframe.

233. Furthermore, the expert report of Mr. Gbla provides an overview of the lack of proper training and discipline within the Sierra Leonean army until the AFRC coup in May 1997. For example, Dr Gbla describes the inheritance of "a military that was underpaid, indisciplined, demoralised and poorly trained"[265], where after the President Momoh embarked on "a crash military recruitment drive advocating for vigilantes to join the force thus sidelining military recruitment standards and procedures."[266] As the

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[260] Statement witness TF1-167, Transcript 20 September 2005, p. 59.
[261] Witness TF1-167, Transcript 15 September 2005, p. 6.
[262] Witness TF1-167, Transcript 15 September 2005, p. 6.
[263] See report major-general Prins p. 57, para. 114, and his testimony on 17 and 19 October 2006.
[264] Transcripts 19 September 2005, p. 36, and Transcript 30 September 2005, p.21.
[265] Expert Report Mr. Gbla, Exhibit D37, par.35.
[266] Expert Report Mr. Gbla, Exhibit D37, par.35.

Prosecution did not contest the contents of the report of Mr. Osman Gbla, the lack of a disciplinary system can assumed to be an agreed fact.

*Absence of a Proper Command Structure and Its Impact on Superior Responsibility*

234. Both the Prosecution and Defence military expert concluded that the AFRC faction qualified as an irregular force or guerrilla force. In specific, colonel Iron admitted this during his testimony at the trial on 13 October 2005, saying that the AFRC faction is to be characterized as a non-regular army which does note have government authority.[267] One of the features of a paramilitary and irregular militia force is that it most often lack formal military chains of command.

235. No conclusive proof has been adduced by the Prosecution for the existence of a formal military chain of command requisite for the functioning of an army. In particular, it has not been refuted that within the SLA faction(s) at the utmost only one or two level(s) of span of command have existed. Reference can be made to, *inter alia*:

i. The report of major-general Prins on pages 38-42[268] and his corresponding testimony at trial.[269] In specific major-general Prins concludes on page 38 of his report that: "In every military organization it is therefore essential that sub-units are established within the battalions. A battalion is further broken down into companies and platoons with subordinate (junior) commanders at every level in order to limit the *span of command*. For example, a battalion consisting of 700 men may have 4 companies of 140 men each and a Headquarters and Logistics element. The companies are further broken down into 3 manoeuvre troops (platoon) of 35 men each, 1 manoeuvre support troop of 20 men and a company staff. The manoeuvre troop is then further broken down into manoeuvre sections of 8 men. All western armies know similar breakdowns of their organization. Witness TF1-334 stated that the battalions were different in size. "Well, some battalions had 80, some had 90, some even had hundred." In a later statement witness TF1-334 was questioned on the size of a battalion and stated: "well, a

[267] Transcripts 13 October 2005, p. 35.
[268] Exhibit D36.
[269] Transcripts of 17, 19, 20 and 24 October 2006.

battalion could have 100 men. 150 could make a battalion. 150 could make a battalion.""[270]

ii. The expert report by colonel Iron, pages C-12 (Figure 8, which only refers to battalions) and D-3 (likewise merely speaking about battalions).

iii. The fact that the evidence produced by the Prosecution did not establish a further breakdown of these battalions into the requisite levels, such as companies, platoons and squad size units. Neither witness TF1-334 nor witness TF1-167 referred to such a breakdown of military levels, requisite for a proper and an effective chain of command and span of command. In the absence of a three or four level span of command within the SLA(s) faction, no proper chain of command existed.[271]

iv. In addition to the absence of a three or four level span of command within the AFRC faction, the alleged battalion commanders did not receive any (staff) training necessary to fulfil the function of an officer. Although some of the SLAs who testified indicated that they received a form of basic military training, none of them testified that they received specific training to fulfil the rank of an officer. Yet, the AFRC faction was allegedly led by "battalion commanders." Major-general Prins in his report concludes on page 61 (para 125) inter alia that "promotions were handed out at random and were not based on a proper selection, training or qualification."

v. The absence of a proper command structure also arises from the following. Essential for a military hierarchy and command structure is the existence of a staff structure.[272] No evidence has been adduced for proof of such a structure, let alone proof that the SLA-faction(s) was composed of qualified staff officers to fulfil fundamental staff functions.[273]

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[270] See military expert report of major-general W.A.J. Prins, Exhibit D36, p.38.
[271] See military expert report major-general W.A.J. Prins, Exhibit D36, p.40, para. 69.
[272] See military expert report major-general W.A.J. Prins, Exhibit D36, p.41, para. 71.
[273] See military expert report major-general W.A.J. Prins, Exhibit D36, p.49, para. 89.

vi. Even the Prosecution expert colonel Iron conceded during his testimony on the 13th October 2005 that "I don't know the precise number, but I know it was a small handful compared to the majority and that the AFRC coup essentially was a junior ranks coup and most of the senior ranks were excluded from it."[274] His evidence shows that[275]:

> The trained officers that were available were of a very junior rank (Lieutenant). As concluded before, SAJ Musa as the overall commander made a very simple structure of "battalion commanders" as his subordinates. These battalions were under command of former non-commissioned officers, or other ranks, now being "promoted" to lieutenant-colonel or colonel. For example witness TF1-167, who only had one month of military training, had apparently a startling "career." "Promoted" to sergeant in 1997, to Lieutenant, Captain, Major and Lieutenant-Colonel in 1998 and further promoted to Colonel after the attack on Freetown.

vii. Additionally, major-general Prins' report clearly shows the lack of substantive and sufficient military knowledge and education to properly fulfil staff functions which are prerequisite for exercising effective command and control.[276]

viii. Defence witness TRC-01, after being cross-examined by the Prosecution on the AFRC period, adduced evidence in re-examination which clearly undermines the assumption of effective command and control, when testifying to the following elements:

> Your Honour, the AFRC was unable to operate as a traditional military organisation by virtue of the fact they married up with the RUF and referred to themselves as a people's army. There was no hierarchal structure respected or put in place. There were issues where those who came and married up with them wore wigs and military uniforms, and were parading in the streets of the capital.

That was no proper for regimentation and discipline. Furthermore, *there was nothing like command and control wherein proper command was managed from top to bottom.*[277] Instead, it was other ranks giving commands to officers, which is not allowed anywhere in the world, or for any army in the world, so that was not a military organization. It was disorder.[278]

This testimony clearly supports the Defence case as to absence of effective command and control. Moreover, on another subject (albeit attached to this lack of command and control), TRC-01 testifies:

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[274] See Transcript 13 October 2005, p. 83.
[275] See military expert report major-general W.A.J. Prins, Exhibit D36, p.42, para. 74.
[276] See the examples derived from the evidence given in the report of General Prins, Exhibit D36, p.42-44, paras. 74-78.
[277] Emphasis added.
[278] See Transcripts 16 October, p. 115-117.

> Your honour, nothing strategical occurred during that period, unfortunately. I think things were happening more on the tactical level, not even on the operational level. As a tactical it was a small bunch and body of personnel, not in a formed and cohesive unit, operating on their own. So the issue of organising plans for operations, battle plans was not clear cut and did not manifest even in the way they operated and carried themselves along.
>
> Who was to dish out orders, who was to take orders, those things did not exist, thereby limiting the issue of strategy, because when you say grand strategic plan, you are looking at the national interest and the core values. Now what are the core values. Their own values were survival. It was merely survival that they were working on, because they had to survive, by all means. So there was nothing like saying the values, the territorial integrity or the sovereignty of sierra Leone are to be protected and defended at all costs or that we will have to stay here and make sure we protect here.
>
> It was running from point A to B, you know, to stay alive. So I don't think there was anything strategic about the movement from Freetown of the AFRC. [279]

236. In conclusion, an organization merely focussing on survival on order to stay alive maybe effective in surviving and staying alive. Yet, this does not say anything about the existence of effective command and control.

237. Additionally, TRC-01 testified that in August 1997 when he was in Freetown, he observed 'resentment' within the army "due to the fact that the extra militia group was abusing and misusing their privileges, which caused destruction and carnage."[280] Importantly, in this context TRC-01 states that at that time:

> there was weak command and control at the level of the leadership then. And also the lack of the terms and conditions of service document which was not updated, it brought about resentment in the minds of the personnel who were then serving in the Sierra Leone army. Those facts I was able to gather when I returned back. It created some problems.[281]

238. These observations reinforce the conclusion that no proper command and control existed.

239. In conclusion, no superior responsibility on part of the Third Accused can be entertained. This conclusion is supported by the reasoning of the ICTY in the *Oric* case. In its judgment, the ICTY applied a higher evidentiary threshold for superior responsibility in favour of the Accused when it concerns informed command

[279] See Transcripts 16 October, p. 115-117.
[280] Transcripts 16 October 2006, p. 91; see p. 50 regarding his presence in Sierra Leone.
[281] Transcript 16 October 2006, p. 91-92.

structures, in holding that "Although the required knowledge is in principle the same, both for military and civil superiors, the various indications must be assessed in light of the accused's position of command. This may, in particular, imply that the threshold required to prove knowledge of a superior exercising more informal types of authority is higher than for those operating within a highly disciplined and formalised chain of command with established reporting and monitoring systems."[282]

240. The evidence adduced by both the Prosecution and Defence at the least suggests that in the instant case the AFRC faction, in the period February 1998 – January 1999, did not operate "within a highly disciplined and formalized chain of command with established reporting and monitoring systems." As a result, no superior responsibility on part of the Third Accused can be accepted.

241. Also, the *Galic* Trial Chamber Judgment of the ICTY (of 5 December 2003) may shed light on this issue. In this case the Chamber concluded that when an accused exercises *informal* authority over the perpetrator(s), the standard of proof is higher than that applicable to an accused holding an official position of command, serving within a formal and structured system of organization.[283] But even informal authority should meet the standard of "effective control and authority over the alleged perpetrators of the crimes" before holding an individual responsible on the basis of superior responsibility.

242. In conclusion, the Third Accused should be acquitted for criminal responsibility for the alleged crimes on the basis of superior responsibility.

### 6.6 Downfall SLA and Impact on Superior Responsibility

243. An analysis of the question whether effective command and control existed within the AFRC faction within the timeframe mentioned in the indictment, can not be seen without looking into the history of the SLA in terms of (mis)management in political and military aspects.

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[282] *Prosecutor v. Oric*, ICTY Judgment 30 June 2007, IT-03-68-T, para. 320.
[283] *Prosecutor* v. *Galic,* ICTY Trial Chamber Judgment, 5 December 2003, IT-98-29 , para. 174, as cited in *Prosecutor v. Brima et al.,* Kanu – Defense Pre-Trial Brief and Notification of Defenses Pursuant to Rule 67(A)(ii)(a) and (b) – filed on March 22, 2004, Case No. SCSL-2004-16-PT-39, para. 60.

244. Contrary to the Prosecution expert Colonel Iron, the Defence expert Major-General Prins conducted a detailed historical analysis of this issue on the pages 8 to 23 of his report. During his testimony before the court on 17 October 2006, he provided a further overview of his research in this regard.

245. His conclusion was unequivocally clear, namely that the history of the SLA and the People's Army from May 1997 onwards shows a disintegration of a military organization due to unprecedented political and military mismanagement. This expert also came to the conclusion, which was not refuted by any expert evidence adduced by the Prosecution, that this form of mismanagement resulted in a total neglect by the political and military leaders of the junior and other ranks.[284]

246. Furthermore, the analysis of the Defence expert shows that at the time of the coup in May 1997, there was low moral, no discipline, no training, no leadership, no hierarchy, no equipment, no organization, no welfare system for rank and file, no prospect, no military command and control, and no hope for improvement.[285]

247. In light of this organizational background, it is not comprehensible that at the time of May 1997, the AFRC was equipped with the ingredients necessary to have a proper and effective command and control in place. Accordingly, considering the fact that the AFRC while in the jungle had no training system and structured system of discipline (at the least after February 1998), these fundamental military deficiencies have considerable ramifications on the question whether an effective command and control existed within the AFRC after May 1997 till January 1999. In view of the Defence, this forms a *prima facie* basis for the absence of effective command and control which basis and presumption could be rebutted by the prosecution when conclusive evidence would have been adduced for the opposite. However, the Prosecution case failed to rebut this presumption and therefore it is fair to say that the Defence has made probable the absence of effective command and control.

### 6.7 Reliability Prosecution Insider Witnesses on Command Structure

[284] See also Report General Prins, Exhibit D36, p. 22, para. 42-43.
[285] Expert Report major-general Prins, Exhibit D36, para. 44.

248. Additionally and exemplary for the lack of proof of a command structure within the SLA forms the element of unreliability of the Prosecution insider witnesses testifying on this issue. The Defence submits that the evidence presented by the Prosecution insider witnesses is on crucial parts contradictory. Below some examples hereof are provided.

249. Witness TF1-167 explains in his testimony an alleged command structure in Kono:

> Q. I'm going to ask you just a little about the command structure that you have described being set up in this meeting that you attended. Firstly, was there anyone in overall command?
> A. Yes, Denis Mingo was the overall commander.
> Q. Was there anyone who was second to him?
> A. Second to him was Ibrahim Bazzy Kamara. Then you have –
> Q. Pause a moment. Was he, to your knowledge, always in the position of being second to Denis Mingo whilst you were in Kono?
> A. Yes, but the last days on our pull-out from Kono, Alex Tamba Brima came from Kailahun with some reinforcement and on their arrival to Kono, when going to Mansofinia, Alex Tamba Brima was in command and Bazzy was two to him.
> Q. When you say on his arrival he was in command, who was he in command of, Alex Tamba Brima, on his arrival in Kono?
> A. On his arrival at Kono, you have Denis Mingo who was the overall commander. Then next to him is Alex Tamba Brima, because he was senior than Ibrahim Bazzy.
> Q. As far as you know, did Ibrahim Bazzy Kamara have any other position, apart from the --
> A. Yes, he was in charge of the G4.
> Q. What do you mean by the G4?
> A. Keeping arms and ammunitions.
> Q. Now, you have said that Denis Mingo was in overall command in Kono. Do you know if there was anyone to whom he reported?
> A. Yes, Denis Mingo at that time reports straight to Sam Bockarie, aka Mosquito, at Kailahun.
> Q. How did you know that?
> A. Because there was a VHS communication set at his house and we used that VHS communication set to send messages to Kailahun.
> Q. How do you know that messages were sent to Kailahun on the VHS communication set?
> A. Because at that time I was chief security to Ibrahim Bazzy. At all time when he goes to the radio communication, I go with him. So I'm always there when some messages are sent.
> Q. Do you know any other positions that were held by any others as a result of the command structure?
> A. Yes, you have the G5.
> Q. Who was that?
> A. It was Santigie Kanu, aka Five-Five, he was in charge of the civilians and abductees. Then you have the medical.
> Q. Who was that?
> A. It was Biorbo Sesay. And you have the battalion at Tombodu being commanded by Savage. You also have another battalion at Mamudo.
> Q. Pause a moment. Just repeat the name you have just mentioned. Repeat the name.

A. You have Tombodu.
Q. Okay, and you said there was another battalion somewhere else that you recall.
A. The one at Tombodu was Savage commanding it.
Q. Pause a moment. I'm just going to ask you a little about Savage. Who was he?
A. He was an SLA soldier.
Q. Was Savage his full name?
A. No. I only knew that name for him.
Q. Apart from the appointments that you have told us about, do you recall any others specifically from the command structure as a result of that meeting?
A. You have Morris Kallon who was in charge of creating obstacles -- obstacles, to create obstacles on the road leading to Koidu Town.
Q. Witness, you have mentioned another battalion at Mamudo.
A. Yes, which was commanded by Salifu Mansaray, aka Tito.
Q. Perhaps if you just spell Salifu Mansaray, aka Tito.
A. S-A-L-I-F-U M-A-N-S-A-R-A-Y.
Q. Can you spell Mamudo, please, for the Court?
A. M-A-M-U-D-O.
Q. Witness, you have mentioned a G4 and a G5. Were there other appointments in this category, the G category that you've described, that you're able to recall?
A. You have Hassan Papa Bangura who was in charge of operations too.
Q. Apart from a G4 and a G5, was there a G1, 2 and 3?
A. You have FAT Sesay who was in charge of G1, administration.
Q. It's not a name that we've had before from you. Who was FAT Sesay?
A. FAT Sesay was an SLA officer.
Q. Had you come across him before Kono?
A. Yes.
Q. Where had you come across him before?
A. I know him even before the AFRC junta.
Q. Was there a G2 or a G3, or didn't those positions exist?
A. No.[286]

250. The Defence respectfully submits that the above evidence of witness TF1-167 is seemingly characterized by this witness's apparent strong desire to categorize persons into certain ranks and positions. In the first place, this witness testifies to a clear command structure, in which Savage had a clear place, and was in charge of 'the battalion' assigned to Tombodu (in the time period February until April 1998). Other available evidence suggests, however, the contrary. There was no clear evidence what exactly Savage's role was, and in no way was he linked to any SLA group. If he was linked at all, it was to Superman's RUF group who was in command in Kono District.

Q. Okay. And, Mr Witness, during the time that you were in Tombodu did, and I'm referring to the period when you were captured and taken to Tombodu by the guards who were under the command of Savage, did you know -- did you hear during this period whether Savage was taking instructions from anyone else?
A. No. They were all calling him boss. He was the boss.
(...)
Q. Thank you. Mr Witness, finally, during the period that you were in Tombodu, that you saw Savage, did you observe him using any form of communication equipment?

[286] Witness TF1-167, Transcript 15 September 2005, p.38-43.

A. I did not see him with any communication equipment. That was my first time when they captured us, and he sentenced us.[287]

251. This latter evidence clearly indicates Savage's independence from any form of command structure. This is again evidenced by the following witness:

Q. Do you, in furtherance to that, do you also know if Savage was answerable to anyone?
A. If he used to answer? What do you mean?
Q. Was there anyone to whom Savage was reporting or to whom he was taking command or orders; do you know?
A. No. I only heard about Savage. I only heard his name. I don't know any answer.[288]

252. The following evidence indicates that Savage was somehow connected to Superman's RUF, but does, in support of the previous evidence, not indicate of him forming part of any command structure, other than that he worked under the RUF:

Q. Thank you, Mr Witness. Mr Witness, you mentioned that -- earlier, that Superman went to visit Savage?
A. Yes.
Q. Do you know who Superman was?
A. He was even -- he was even superior to Savage. Savage's boss was him.289

Q. Tombodu Savage was in charge of Tombodu; not so?
A. Yes.
Q. Did he take any orders from anyone?
A. He took orders from Superman.[290]

Q. Did you ever find out the name of this big man that you are talking about?
A. Yes, I know his name. Later on, they showed his name.
Q. What is his name?
A. His name is Semi Saffi [as interpreted].
Q. Please say it again.
A. Savage. Savage.
(...)
Q. Yes. Apart from Wounded, did you get to know any other name?
A. Yes, I knew the name of another person.
Q. Please tell the Court that name.
A. His name is Superman. One of their big men that come from Koidu.
Q. Thank you. Apart from Superman, did you get to know any other name?
A. I knew another person's name. He was in Bendu II.[291]
(...)
Q. Do you know where Savage was based, during that time?
A. Yes. It was in Tombodu. He was in Tombodu.
Q. Do you know if Savage was also working under anyone?
A. Yes.
Q. Who was Savage working under?
A. Well, Savage said he was working under General Issa. That was what he said.

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[287] DAB-107, Transcript 8 September 2006, p. 69-74.
[288] DAB-115, Transcript 4 September 2006, p. 73.
[289] DAB-098, Transcript 4 September 2006, p. 37.
[290] TF1-167, Transcript 19 September 2005, p. 41.
[291] DAB-098, Transcript 4 September 2006, p. 22-23.

Q. Do you know if General Issa belonged to any group of fighters?
A. Yes, he's in one of the groups.
Q. What group was it?
A. RUF.[292]

253. This Prosecution witness, TF1-167, examined about an alleged command structure, asserted that Savage would fall within this command structure, and that he was in charge of 'the battalion' assigned to Tombodu. This is in clear contradiction to all other evidence regarding Savage's role in this District and that this is indicative of TF1-167's overall attempt to draw a clearer picture of the structure of the groups, organizations, and individuals than reality depicted.

254. This Defence submission is again substantiated by the following. TF1-167 indicates the following:

Q. Do you know any other positions that were held by any others as a result of the command structure?
A. Yes, you have the G5.
Q. Who was that?
A. It was Santigie Kanu, aka Five-Five, he was in charge of the civilians and abductees.[293]

255. During his testimony, witness TF1-167 was confronted with prior inconsistent evidence. This further strengthens the Defence submission that this witness bent his evidence in such a way that it matched the Prosecution theory. This is illustrated by his following testimony:

Q. At Mansofinia you told this Honourable Court that the G5 commander was Santigie Kanu. That was your evidence-in-chief to this Court.
A. Yes.
Q. Mr Witness, do you recall giving statements to the investigators on 6th May?
(...)
Q. I put to it you that in fact on 6 May 2003 - that was two years ago - you told the investigators that in fact at Mansofinia the G5 commander was Pikin and not Santigie Kanu. Was one Pikin.
A. No.
Q. That was what you told them.
MR KOROMA: Your Honour, with your leave I will refer the witness to statement made to investigators. On 6 May 2003 at page 23, page 22 and 23.
MS PACK: That is 10434, Your Honour.
MR KOROMA: Very grateful.
PRESIDING JUDGE: Thank you.
MR KOROMA: Your Honour, I will start to read from lines 32 page 22 on the said statement.
Q.

[292] Witness DAB-113, Transcript 7 September 2006, p. 118.
[293] Witness TF1-167, Transcript 15 September 2005, p. 39-40.