"Q. Did you have a G5?
"A. G5? Yes, he had to take care of the families, responsibilities , civilian families, those who are going to carry loads and everything. Yes, we had a G5.
"Q. Who was he?
"A. It was this guy -- I don't know his real name. I don't know his real name but they call him Pikin. Pikin. And his deputy was a guy they called Six Fingers. He had six fingers. He is at Pademba Road. He was his deputy."
Is that not what you told the investigators in that statement?
A. I said so in one of my statements, but they were on two different places. I guess where you are reading from, if you continue reading you will find out that that is when all the honourables have been arrested at Gberibana and their positions were given to people like Terminator Pikin. At Mansofinia, G5 commander was Five-Five.
Q. Right. I will put it to you, Mr Witness, that in fact this was at Mansofinia and not those places Gberibana you are referring to. This was specifically at Mansofinia.[294]

256. Contrary to witness TF1-167's evidence, witness TF1-334 describes that in Mansofinia, Koinadugu, Santigie Kanu was Chief of Staff,[295] speaking of "[t]he chief of staff, Five-Five."[296] Witness TF1-334 is the only witness who uses this terminology "chief of staff." The conclusion is justified that the alleged structure of command was made up by witness TF1-334, who, similarly to witness TF1-167 but with contrary evidence, probably tried to make his evidence match the Prosecution's theory on command structure. Besides Kanu's alleged role as so-called 'chief of staff', witness TF1-334 said the Third Accused was also in charge of the women.[297]

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[294] TF1-167, Transcript 20 September 2005, p. 6-8.
[295] TF1-334 indicates the following about the term 'chief of staff:'
Q. Mr Witness, you have told us of chief of staff. Have you ever heard the words chief of army staff?
A. Yes, My Lord.
Q. Have you also ever heard the words chief of defence staff?
A. Yes, My Lord.
Q. As a member of the Sierra Leone Army what is the head of the army called?
A. The chief of defence staff.
Q. And what position does the chief of army staff hold?
A. Well, he is the commander of the army.
Q. So he is the boss, the chief of army staff?
A. The chief of defence staff.
Q. Is the boss?
A. Yes, My Lord. Apart from the President who is the commander in chief.
Q. Is there a chief of staff in the Sierra Leone Army?
A. Yes, My Lord.
Q. And what is his position?
A. He is the -- he is operate directly with the military.
Q. I am putting it to you that there is no such position as chief of staff?
(...)
Q. I am asking you about just chief of staff. Not defence staff or army staff, just chief of staff.
A. Chief of army staff; we cut it short. It's called chief of staff but it should chief of -- COAS, chief of army staff. (See Transcript 16 June 2005, p. 20-21).
[296] TF1-334, Transcript 23 May 2005, p. 7; Transcript 20 May 2005, p. 92; and Transcript 23 May 2005, p. 27.
[297] TF1-334, Transcript 16 June 2005, p. 59-60, where this witness states:
Q. Mr Witness, coming back to Santigie Borbor Kanu, apart from being chief of staff, being supervisor and you said third in command, was he ever given any other role to play whilst you were all together?
A. Yes, My Lord.

257. These discrepancies in the evidence in this regard, is also reinforced by another witness testimony, describing the G5 (albeit within an RUF structure) as follows:

> Q. Witness, what is the G5 office in Kailahun?
> A. G5 office was responsible for investigating civilians wherever they were. That was the place they called the G5 office.[298]
>
> A. Yes, sir. He was the G5 responsible for the civilian population there.[299]

258. It is to be concluded that this aspect of TF1-167's testimony is unreliable, and influenced by his strong wish to categorize people's positions and command structures in a clearer way than was actually the case.

259. Colonel Iron also describes the G5 position, but presents it in a completely different way. He states about the G5 position that "he is not personally in command."[300] This same witness indicates that the SLA groups (referred to by this witness as AFRC) were divided in separate groups and "some of them are individual commanders in their own right."[301]

260. Again, witness Colonel Iron explains that "within the AFRC, if I can continue the question, I found no single individual who was responsible and termed the G5."[302] However, this witness indicates, in corroboration with witness TF1-334's evidence, that there was a chief of staff in the army. Colonel Iron's testimony, however, is based on the evidence of witnesses TF1-167, TF1-334 and TF1-184. Although witnesses TF1-167 and TF1-334 contradict each other on this fundamental point, Colonel Iron clearly overlooked TF1-167's evidence concerning the alleged G5 position of the

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Q. What was that role?
A. He was in charge of the women.
Q. Was that role called by any name?
A. Well, at that time all I knew was that he was in charge of the women. I did not know the name that was given to that, but he was in charge of the women. If there was any complaint, he was the one who would take action.
Q. Mr Witness, you are saying now that this man, this Santigie Borbor Kanu, was at one and the same time the person responsible for the entire troops as chief of staff, and at the same time responsible for the women?
A. Yes, My Lord, as chief of staff.

[298] TF1-113, Transcript 18 July 2005, p. 84-85.
[299] TF1-113, Transcript 14 July 2005, p.130.
[300] Colonel Iron, Transcript 13 October 2005, p. 104-105.
[301] Colonel Iron, Transcript 13 October 2005, p. 104.
[302] Interestingly, witness Colonel Iron read the transcripts of witness TF1-167's evidence, in which TF1-167 indicates the position of G5. Either he missed that part of the transcript or Colonel Iron did not find that part of TF1-167's evidence reliable either. See Exhibit D12 for names of factual Prosecution witnesses of which Colonel Iron read the transcripts.

Third Accused, and to follow TF1-334's evidence on the alleged 'chief of staff' position of the Third Accused. One should question the probative value of Colonel Iron's evidence, who relied on a selection of the Prosecution evidence and witnesses. Some of which were clearly inconsistent with each other. As to position of a chief of staff, he comments as follows:

> Q. Perhaps, Witness, we can start with a chief of staff in a traditional army. What is their function?
> A. The chief of staff in a traditional army is literally 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, as well as the second in command -- sorry, he is not the second in command, but 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 across all armies (...).[303]

> Q. (...) My last question was: What does a chief of staff do within the AFRC, if you know?
> A. From the information I received from my sources, a chief of staff within the AFRC would conduct almost precisely the role of a chief of staff within a traditional military organisation which I explained to you yesterday (...).[304]

261. TF1-046 testifies that Kanu was Chief of Army Staff and Gullit was Chief of Staff. In the cross-examination of TF1-334, this witness said that there only was a Chief of Staff.[305] Then again, witness TF1-334 declares that SFY Koroma was chief of defence staff and SO Williams was chief of army staff:

> Q. What rank was SFY Koroma when you saw him at Makeni?
> A. At that time, as I said, he was the chief of defence staff. This time he was just with his military jacket and I didn't see any rank on it. But he was still the chief of defence staff.
> Q. Did you see SO Williams en route to Kabala?
> A. I didn't see him on the road, but at Kabala I saw him at the meeting; SO was there.
> Q. And he also continued to function as chief of army staff, SO Williams?[306]

262. From the above, it should be concluded that the evidence as presented by witness TF1-167 is at times misleading, and that the evidence presented by the Prosecution witnesses concerning the command structure, and more specifically the position the Third Accused allegedly took in that command structure, is unclear and diffuse. Such evidence can, in the humble submission of the Defence, not lead to evidence concerning any alleged command assumed by the Prosecution.

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[303] Colonel Iron, Transcript 12 October 2005, p. 59.
[304] Colonel Iron, Transcript 13 October 2005, p. 3.
[305] TF1-334, Transcript 23 May 2005, p. 7; Transcript 20 May 2005, p. 92; and Transcript 23 May 2005, p. 27.
[306] TF1-334, Transcript 20 June 2005, p. 109.

263. The testimony of witness TF1-227 is surrounded by miscommunication between the Prosecution and its own witness, and consequently between the Defence and the Prosecution witness. The evidence relates to Braima/Blama, where Kanu, according to witness TF1-227 was allegedly in charge of the particular SLA group.[307] The evidence of this witness is unclear, evidenced by the fact that throughout the testimony the actual place remains unclear. The next quote is illustrative for this kind of testimony:

> Q. Did anything happen to the civilians in Blama?
> A. Yes, one incident happened at Braima.[308]

264. Additionally, later on in the transcript after the testimony-in-chief was finalized, that the miscommunication finally became clear in cross-examination:

> Q. Do you know that Blama was a Kamajor controlled area?
> A. The town -- the name of that particular is Braima, it is not Blama at Kenema. I want to be very specific, it is Braima, B- R-A-I-M-A. So I mean you can correct it.
> Q. So we are not talking about Blama at all?
> A. At Kenema, it's not the Blama at Kenema.
> Q. You are talking about Braima.
> A. Braima. Do you know what district of Braima is? Well, from Newton the district that is in the -- put around Kuya Wula area.
> Q. Did you have to cross a bridge to get there?
> A. Yes, you have to cross a bridge to get at that place.
> Q. Was it an old metal bridge, iron bridge?
> A. It is the main road, now it's been modernised by the Roads Authority. You use the main Masiaka Old Road, the new road you can go to Braima. It is just at the main Masiaka highway.
> Q. I am asking about the bridge. Is it an old metal bridge?
> A. No, it is modern bridge. It is not the old metal bridge.
> Q. You have not crossed the old metal bridge?
> A. Mmm.
> Q. But you do know the old metal bridge?
> A. Yes, I know from the old road.[309]

265. The Defence respectfully contends that such testimony cannot be admitted into evidence of which the Prosecution did not even know the district where its own witness came from. The evidence-in-chief, and large part of the cross-examination assumed, based on the line of questioning by the Prosecution, that this witness came from Blama, which is in another district than Braima, where the witness actually came from and testified about. This testimony is full of miscommunications and vagueness, and should thus not be admitted as evidence.

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[307] TF1-227, Transcript 11 April 2005, p. 25.
[308] TF1-227, Transcript 11 April 2005, p. 26.
[309] TF1-227, Transcript 11 April 2005, p. 73-74.

266. The Defence holds that the evidence of these Prosecution insider witnesses should have no weight in the assessment of the Third Accused's alleged criminal responsibility. In the alternative, the Defence contends that the evidentiary sections set out above should be excluded from the weighing process in determining the Third Accused's criminal responsibility.

6.8 Kanu's Protective Role Concerning Women and Children: No Superior Reponsibility

267. During a certain part of his stay in the jungle (since his arrival in Koinadugu District in the beginning of 1998)[310], the evidence suggests that the Third Accused was responsible for protecting and taking care of the civilians, more specifically the women, who joined the soldiers for all sort of reasons, being a family member or looking for a safe haven in the jungle. These women were well protected[311] and could consult the Third Accused on certain problems and welfare issues.[312] This alleged role of the Third Accused did not in any way involve a (operational) command position over any operation by the SLA soldiers, including no command over the abduction and enslavement of civilians.[313]

268. DSK-113 described the assignment by SAJ Musa as to the alleged role of the Third Accused[314]:

> A. We were in a village. Well, I do not know the name of the village. Then we had known that SAJ Musa ordered some troops to attack Masiaka. But when the troops had gone, SAJ Musa came to the headquarters where we were. He came there. I was there some time when SAJ Musa came to the headquarter and told Five-Five that, "You, when I'm sending your colleagues, you are just after women. When women are quarrelling, you are there to settle that. That's your duties. You should settle their problems. You and the women should be together.

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[310] TF1-334 gives a good indication when describing the time frame of the protective role of the Third Accused (Transcript 16 June 2005, p.62-63):
Q. Mr Witness, do you know when Santigie Borbor Kanu was appointed to look after the women?
A. Yes, sir, My Lord.
Q. When was it?
A. Well, it was during the time when we were at Mansofinia up to the time that we came to Freetown and he was still in charge of them.
Q. Was he still in charge of the women whilst you were retreating from Freetown?
A. Yes, My Lord.

[311] See for example TF1-334, Transcript 14 June 2005, p.116 ("These civilians were well protected").

[312] Witness TF1-334, Transcript 15 June 2005, p.15-17.

[313] See for example TF1-334, Transcript 14 June 2005, p.119, where it was Gullit who gave the order for the abduction of civilians after the retreat of the soldiers form Freetown in January 1999.

[314] Transcript 13 October 2005, p.35.

269. On the contrary, according to this evidence the Third Accused was continuously with the group of families to protect them[315], and therefore not in position to join or command any operation. The testimony of TF1-334 that the Third Accused went with the first group of soldiers, the so-called advance group, from Koinadugu District to create a base at Colonel Eddie Town (Camp Rosos)[316] is therefore implausible, as the Third Accused, as protector of especially the women, joined the later movement of another group of soldiers and especially family members to join the group that already created Camp Rosos.[317]

270. The allegation made by witness TF-334 that the abducted civilians were called "family",[318] thus implying that all the families that moved along with the SLAs were abducted, ignores the fact that the soldiers indeed took their families with them in the jungle.[319] The fact that TF1-167 speaks of both abductees and civilians in his testimony is another proof of the fact that the civilians were not abducted, but joined the SLAs voluntarily or were family members.[320] Moreover, the soldiers had to take their families to protect them from reprisals after the fall of the AFRC regime in February 1998. Defence witness DBK-113, himself a civilian that voluntarily joined the SLAs to save his life, stated in this regard:[321]

> When I said that some were soldiers' affiliates because from the initial stage, when soldiers had been pulling out from Freetown most, because of the harassment which they had been receiving, and they had been burning soldiers, some were afraid to leave their children or their nephews, and nieces, so they went with them. So those kinds of people were in that group.

271. Even the evidence given by TF1-334, although overly inadequate in blaming the three Accused for almost all crimes that happened within the group of soldiers TF1-334 moved along with, and unjustly ascribing the Third Accused a senior military command position, contains indications of this specific role the Third Accused played

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[315] See for example the testimony of witness TF1-094, Transcript 13 July 2005, p.56-57.
[316] Transcript 23 May 2005.
[317] Witness DBK-113, Transcript 13 October 2006, p.22-25.
[318] Transcript 14 June 2005, p.115-116.
[319] See for example DAB-142, Transcript 19 September 2006, p.28-29; DBK-113, Transcript 13 October 2006, p.19-20.
[320] Transcript 15 September 2005, p.40
[321] Transcript 25 October 2006, p.19. See also p.20 of this transcript wherein DBK-113 explains that the civilians moved together during a certain time period, and that soldiers often came to check upon their wives and children.

within SAJ Musa's group. For example, when describing the role of the Third Accused at Camp Rosos, TF1-334 gives the following explanation[322]:

> A. As I said earlier, these women, Five-Five was in total control of them.
> Q. Pause. How do you know that Five-Five was in total control of them?
> A. After the Karina operation, Five-Five called the commanders and that everyone should sign for these women.
> Q. Pause. How do you know that Five-Five was in total control of these women at Rosos?
> A. Well, in my presence, anyone that had a problem with her husband or the husband a problem with the wife, he goes direct to Five-Five to report. From there, Five-Five would send to call the woman to call the mammy queen because we had a mammy queen in the camp.
> Q. Pause. Explain what you mean by "mammy queen"? A. Well, in the jungle, this mammy queen, she deals with the affairs of women in case a women becomes pregnant, wants to give birth, or if a woman has any bad sick like stomach ache and other things, this woman had vast knowledge on these women affairs.

272. This portion of the evidence given by TF1-334 explains to some extent the role of the Third Accused with regard to the protection of women[323], although the Third Accused's tasks would better be described as protecting than controlling the women. The evidence given by TF1-334 on the warning made by the Third Accused to the soldiers that they should take good care of the women[324] is a good characterization of the role of the Third Accused.

273. The fact that the Third Accused, even with regard to the women, did not hold a position of command and control becomes clear when witness TF1-334 is asked the following question[325]:

> Q. Pause. I'm not asking you about the jungle generally. But in particular, was there a mammy queen in particular with your troop?
> A. Yes. This was appointed by Gullit.

274. Furthermore, concerning the women in the SLA group the Third Accused operated within, TF1-227 provided the following evidence[326]:

> 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.

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[322] Transcript 24 May 2005, p.62.
[323] See also Transcript 15 June 2005, p.15-16 on Kanu's alleged role on protecting the women.
[324] Transcript 23 May 2005, p.76:
A. In fact, the soldiers came, they signed and Five-Five warned them that if there is any problem they should immediately report to him or he himself will monitor. If these soldiers disturb these women, he was going to retrieve them, to take them back from them. So he released these women to the various soldiers who had asked for them.
[325] Transcript 24 May 2005, p.62.
[326] Transcript 11 April 2005, p.15.

> 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.

275. This evidence proves that most of the women in the group of soldiers wherein the Third Accused participated were not abducted but belonged to the original families of these soldiers, and that the female civilians were protected by these soldiers. Moreover, the relationship between "captured women" and their "husbands" was more complicated than the alleged enslavement of these women.

276. Furthermore, as TF1-227 claims to be an abducted civilian, and was addressed by the Third Accused in a so-called muster parade[327], this witness developed the incorrect perception that the Third Accused was the overall commander of troops and "the boss"[328], instead of the person dealing only with civilians and families. This seems to be an overall problem with the Prosecution evidence given by civilians that joined the group of SLA soldiers the Third Accused was part of: these civilians, especially the women, had to deal with the Third Accused when problems occurred, and therefore grossly overestimated the role and position of the Third Accused within the troops.

277. Another important aspect in the proof of the fact that the Third Accused was responsible for the women and children, is his role in the release of the children after the ceasefire agreement in 1999. TF1-334 gave evidence in court that the Third Accused came to West Side to collect children which would be released in Freetown.[329]

278. In addition, DBK-113, a civilian moving along with the SLAs testified the following about this release:[330]

> Q. Mr Witness, I want you to -- if you can remember the month of May 1999. May 1999?
> A. No.

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[327] See Transcript 11 April 2005, p.9, wherein TF1-227 talks about a muster parade, an activity that it strictly reserved for soldiers, and thus can not involve any civilians.
[328] Transcript 11 April 2005, p.8, wherein TF1-227 inadequately describes the Third Accused as a member of the AFRC government, a body that was dismantled for almost a year.
[329] Transcript 16 June 2005, p.91-92.
[330] Transcript 13 October 2006, p.43.

Q. Mr Witness, did you ever hear that a cease-fire was signed between the honourable president, Ahmad Tejan Kabbah, and Foday Sankoh of the RUF?
A. Yes.
Q. Do you recall where you were at that time?
A. Yes.
Q. Where were you?
A. I was at Four Mile.
Q. And whilst you were at Four Mile, did anything happen to you?
A. Yes.
Q. What was it that happened to you?
A. When I was at Four Mile, when the government and the soldiers and the RUFs came into an agreement to cease-fire, most of us, the civilians, because they went with some religious group, and the group went and pleaded that most of the civilians, they had -- they wanted the soldiers to allow them to bring the civilians in town. They would be able to take care of them and sort their problems out and reintegrate them into the society again. I was rather fortunate, me and one of my friend. We came with the group and we came to Freetown.

279. In conclusion, the Defence holds that during a certain part of his stay in the jungle (since his arrival in Koinadugu District in the beginning of 1998)[331], the evidence suggests that Third Accused was responsible for protecting and taking care of the civilians, more specifically the women, who joined the soldiers for all sort of reasons, being a family member or looking for a safe haven in the jungle. Moreover, the evidence only suggests that he did not fulfil any position of command, but his task was strictly confined to the care of women and children, which is not tantamount to exercising superior responsibility with respect to the operations conducted by the SLAs

[331] TF1-334 gives a good indication when describing the time frame of the alleged protective role of the Third Accused (Transcript 16 June 2005, p.62-63):
Q. Mr Witness, do you know when Santigie Borbor Kanu was appointed to look after the women?
A. Yes, sir, My Lord.
Q. When was it?
A. Well, it was during the time when we were at Mansofinia up to the time that we came to Freetown and he was still in charge of them.
Q. Was he still in charge of the women whilst you were retreating from Freetown?
A. Yes, My Lord.

VII LACK OF PROOF FOR JOINT CRIMINAL ENTERPRISE[332]

7.1 Introduction

280. This Brief now turns to the question whether the Third Accused can be convicted on the basis of responsibility through the alleged Joint Criminal Enterprise (JCE). In the following paragraphs a number of arguments will be discussed to refute this allegation.

281. Para. 33 of the Indictment states that "the AFRC, including Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu, and the RUF, including Issa Hassan Sesay, Morris Kallon and Augustine Gbao, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas."

7.2 Theory on JCE

282. The ICTY Trial Chamber in *Prosecutor v. Galic* concludes the following:

> Moreover, the fact that the acts and conduct of an accused facilitated or contributed to the commission of a crime by another person and/or assisted in the formation of that person's criminal intent is not sufficient to establish beyond reasonable doubt that there was an understanding or an agreement between the two to commit that particular crime. An agreement between two persons to commit a crime requires a *mutual* understanding arrangement with each other to commit a crime.[333]

283. In *Prosecutor v. Krnojelac*, the ICTY Trial Chamber held that a JCE:

> exists where there is an understanding or arrangement amounting to an agreement between two or more persons that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or

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[332] The Defence in its Trial Brief refers to the SLA (faction(s)). It is the Defence theory that the political organization AFRC ceased to exist in February 1998, and from then onwards the different groups formerly associated with the AFRC are now defined as SLA (groups). However, in this part of the Brief on alleged JCE with the RUF, the Defence will use the terminology as used by the Prosecution in its Indictment.

[333] *Prosecutor* v. *Galic,* Judgment, 5 December 2003, IT-98-29-T, para. 174, as cited in the Defence Pre-Trial Brief 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.

arrangement amounting to an agreement formed between them then and there to commit that crime.[334]

7.3 Alleged JCE between Organizations AFRC and RUF

284. In the first place, the Defence wishes to remark that the Indictment with respect to JCE relies upon an agreement between the AFRC on the one hand, of which the three Accused were allegedly members, and the RUF on the other.

285. It should be said that the inclusion within the Indictment of the AFRC and RUF as organizations as such is tantamount to a form of organizational (criminal responsibility). If it were to be accepted that the Third Accused, through the concept of JCE, was to be convicted for "any actions" of the AFRC/RUF as such, this would result in strict liability which is clearly outside the requisite criteria of JCE as set forth by the ICTY (see below). It should be observed that the Prosecution's case has failed to prove the existence of a common plan as set forth in paragraphs 31–35 of the Indictment, let alone that the Third Accused formed part of such a plan (see below).

7.4 Alleged Case against Third Accused Outside Scope JCE

286. The Defence holds that the doctrine of JCE can not be applied without more when the case concerns irregular forces. Moreover, in the absence of a highly disciplined military organization, the evidentiary requirements to establish JCE sould be more strict in that the Prosecution should prove why, in the absence of such structure, nonetheless a common plan would exist.

287. Although extensively developed by the ICTY, criticism has arisen in this respect, and not without foundation. Since the *Tadic* case, the doctrine was expanded ever since, including a more and more broad range of activities, persons and situations. This doctrine, if not limited appropriately, has the potential to lapse into a form of guilt by association.[335]

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[334] *Prosecutor v. Krnojelac*, Judgment, 15 March 2002, IT-97-25-T, para. 80.
[335] See Jenny Martinez, Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law, 2004 (URL address: www.berkeley.edu/students/curricularprograms/ils/workshop/fall04_Martinez.pdf).

288. The ICTY Trial Chamber in the *Brdjanin* case held that:

> JCE is not an appropriate mode of liability to describe the individual criminal responsibility of the Accused, given the extraordinarily broad nature of this case, where the Prosecution seeks to include within a JCE a person as structurally remote from the commission of the crimes charged in the Indictment as the Accused. (...) [I]t appears that, in providing for a definition of JCE, the Appeals Chamber had in mind a somewhat smaller enterprise than the one that is invoked in the present case. An examination of the cases tried before this Tribunal where JCE has been applied confirms this view.[336]

289. The Defence respectfully submits that the criterion developed by the *Brdjanin* Trial Chamber is also applicable in the underlying case, where the extraordinarily broad nature of the case far exceeds the broadness of the facts in the *Brdjanin* case.

290. Moreover, as opposed to the *Brdjanin* case,[337] in the case against the Third Accused, all three forms of JCE have been alleged.[338] The Defence thus submits that the extraordinarily broad case brought against the Third Accused, in combination with the actual position the Third Accused had, warrants a dismissal of the JCE count against the Third Accused. This especially counts in view of the nature of the AFRC as being irregular.

7.5 Three Distinct Categories in *Mens Rea* of JCE

291. In the Prosecution Rule 98 Response, the Prosecution indicated that it alleges all three forms of JCE.[339] The Defence respectfully submits that the Prosecution should have indicated its position on this at an earlier stage, and by only indicating this at the Rule 98 stage of the proceedings, the Prosecution out of time. As a result thereof, the Defence submits that only the third category of JCE should be taken into account. The Defence indicated already at an early stage in the proceedings that it understood the Indictment to mean that only the third category was applicable. Only at the Rule 98 stage did the Prosecution finally make a choice in this respect, which, in the humble opinion of the Defence, was out of time.

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[336] *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Case No. IT-99-36-T, para. 355 (footnotes omitted).
[337] *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Case No. IT-99-36-T, para. 259.
[338] See *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. 313.
[339] *Prosecutor v. Brima et al.*, Prosecution Response to Defence Motions for Judgement of Acquittal Pursuant to Rule 98, 23 January 2006, Case No. SCSL-2004-16-T-458, para. 27.

292. The Appeals Chamber in the *Tadic* case formulated the requisite *mens rea* for the three JCE categories as follows:

> With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which (...) is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk.*[340]

First JCE Category

293. The first category requires shared intent on the part of all co-perpetrators to perpetrate a certain crime.[341] The Defence will argue below that this basic category of JCE cannot be applied on the basis of the evidence brought forward in this case.

294. The Defence respectfully submits that no evidence has been brought forward during the trial against the Third Accused alleging that he shared any intention whatsoever with " all co-perpetrators to perpetrate a certain crime."

295. The Defence contends that the first category of JCE should be dismissed on the basis that there is no supporting evidence for the Prosecution remark that Kanu formed part of a JCE first category liability form for any of the crimes indicted.

Second JCE Category

296. The second form, a variant of the first category, and actually a sub-category thereof, requires (i) personal knowledge of the system of ill-treatment and (ii) the intent to

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[340] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see 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) page 269.

[341] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see 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) page 269.

further this common concerted system of ill-treatment.[342] The Defence submits that no evidence has been brought forward during the trial that there was a 'system of ill-treatment' such as envisaged by this specific form of JCE, intended for so-called concentration camp cases. The Defence first of all contends that, despite the fact that ill-treatment did occur during the conflict, there was no envisagement to "further this concerted system of ill-treatment," even if – *quod non* – such ill-treatment had been widespread and systematic. For this reason alone, the Defence submits that the second category is simply not applicable to the underlying case and not supported by the facts presented at trial, and should thus be dismissed.

Third JCE Category and requisite element of mens rea

297. The third category requires (i) the *intention* to participate in and further the criminal activity or the criminal purpose of a group and (ii) to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. If a crime falls outside of the agreement of the common plan, this only falls within the JCE if it (i) was foreseeable, and (ii) the accused willingly took that risk.[343] This third, extended, form of JCE is neither applicable, in the opinion of the Defence, as will be further substantiated below.

298. With respect to these *mens rea* requirements of the third category, it can be observed that no conclusive proof has been adduced for this on part of the Third Accused. In specific, the Prosecution case failed to prove that:
    1. It was foreseeable for the Third Accused that the alleged crimes in the Indictment were to be committed by one or other members of the AFRC and/or RUF; and
    2. The Third Accused willingly took that risk.

[342] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see 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) page 269.
[343] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see 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) page 269.

299. The Defence submits that the third condition for *actus reus* (participation of the accused in the common design) cannot be proven beyond reasonable doubt. Here the evidence adduced by the defence is decisive as to the absence of coherence between military-strategic level; operational level; and tactical level.[344] The inference of this conclusion is that in the absence of such coherence, individual members of the AFRC faction could realistically not have participated in a common plan, if any.

300. As noted, substantial proof has been adduced that the AFRC in the period February 1998 until June 1999 was merely a survival organization, conducting mainly defensive operations against, *inter alia*, ECOMOG.[345] As stated before, only on the advance to Freetown at the end of 1998, SAJ Musa allegedly stipulated a (tactical) plan to attack Freetown and reinstate the army (excluding the RUF). This situation reinforces the conclusion that no common plan or purpose existed, requisite for JCE. Here, reference can be made to the ruling of the ICTY in the *Brdjanin* case. The mere espousal of a strategic or political plan by the Accused on the one hand and many of the relevant physical perpetrators on the other is not equivalent to an arrangement between them to commit a concrete crime.[346]

301. The Defence respectfully holds that the *mens rea* element of JCE cannot be proven on the part of the Third Accused. As such, the JCE form of liability should be dismissed.

7.6 Required *Actus Reus* of JCE

302. JCE liability also presupposes several objective elements (*actus reus*). The ICTY Appeals Chamber in the *Tadic* case delineated these objective elements as follows:

(ii) A plurality of persons; these persons need not be organized in a military, political or administrative structure;

(iii) The existence of a common plan, a design or purpose, amounting to or involving the commission of a crime provided for in the Statute. There is

[344] See for this Defence evidence, report major-general W.A.J. Prins, Exhibit D36, p.65-71, in particular para. 151, saying that at the utmost one may conclude that there may have been some coherence between operational and tactical level.
[345] See also Colonel Iron's testimony thereto on 19 October 2005.
[346] *Prosecutor v Brdjanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, paras. 351-352.

no necessity for this plan, design or purpose to have been previously arranged or formulated and it may materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put into effect a JCE; and

(iv) Participation of the Accused in the common design is required, involving the perpetration of one of the crimes provided for in the Statute. This participation need not involve commission of a specific crime under one of those provisions (for example, murder, extermination, torture, rape, etc.) but may take the form of assistance in, or contribution to, the execution of the common plan or purpose."[347]

303. It has not been established beyond reasonable doubt that the element under (ii) is proven. After the AFRC had been ousted from Freetown in February 1998, the movement split up in various factions; their goal was purely survival.[348]

304. The notion of "common purpose" as a basis for criminal liability under international law was set forth by the Appeals Chamber in the *Tadic* case.[349] In particular, the third category of JCE merits attention. Within this category:

> [T]he notion of 'common purpose' only [applies] where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the forseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose.[350]

305. Also here the *Brdjanin* judgment lends support for this conclusion. In paragraph 347 of this judgment, the ICTY, addressing the third category of JCE, held that "it is not sufficient to prove an understanding or an agreement to commit a crime between the accused and a person in charge or in control of a military or para-military unit

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[347] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, Case No. IT-94-1-A, para. 228; see 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. 270.

[348] See testimony major-general W.A.J. Prins, 17 and 19 October 2006. See also testimony TRC-01 discussed above.

[349] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, IT-94-1-A, paras. 185-229.

[350] See *Prosecutor v. Tadic*, ICTY Judgment 15 July 1999, IT-94-1-A, para. 220; see 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. 269.

committing a crime."[351] Moreover, the ICTY held "that the accused could only be held criminally responsible if the Prosecution established beyond reasonable doubt that he had an understanding or entered into an agreement with the relevant physical perpetrators to commit the particular crime eventually perpetrated, or if the crime perpetrated by the relevant physical perpetrators was a natural and foreseeable consequence of the crime agreed upon by the accused and those perpetrators."[352]

306. It was only in November 1998, that SAJ Musa apparently formulated his intention to reinstate the army.[353] This mere intention of SAJ Musa cannot be equated with a common plan, design or purpose as mentioned by the ICTY Appeals Chamber. It is the Defence submission that from that time onwards, the goal of SAJ Musa's group was to further this purpose.

307. The reinstatement of the army and the decision to attack Freetown can at the utmost be seen as a decision at military-operational level, not in support of a high strategic military goal which in turn was part of a grand strategy.[354]

308. Additionally, no proof has been adduced that political oversight existed within the AFRC faction, a precondition for the proper functioning of a military force.[355] Although not a required element for establishing JCE's requirement of common purpose, in the underlying case, absence of such oversight is indicative of the absence of any common purpose. Support for this condition may be lend also from Colonel Iron's testimony, saying that: "You can formulate a commander's intent without a political oversight, but we teach our people that in order to be coherent within the strategic and operational and tactical levels, you have got to plan your military operations within your political mandate in a regular army. That is one of the ways we achieve that cohesion between strategic, operational and tactical levels."[356]

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[351] *Prosecutor v Brdanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, para 347.
[352] *Prosecutor v. Brdanin*, ICTY Judgment, 1 September 2004, IT-99-36-T, para. 347.
[353] See *inter alia*, testimony TF1-184, Transcript 27 September 2005, p. 40, 46, 47; DBK-113, Transcript 13 October 2006, p. 30-31.
[354] See report major-general W.A.J. Prins, Exhibit D36, p.70, para 150.
[355] See report major-general W.A.J. Prins, Exhibit D36, p. 67, par. 143.
[356] Transcript 13 October 2005, p. 104.

309. In the absence of proof of the existence of political oversight within the AFRC faction, a common purpose, plan or design, required for JCE, cannot be proven beyond a reasonable doubt. This means that the second criterion for the JCE *actus reus* is not met and acquittal should follow for the Third Accused with regard to the alleged JCE liability. Notwithstanding that a 'common purpose' may materialize during a certain course of action, the evidence does not indicate that this happened within the SLA factions. This is reinforced by the prosecution's military expert, testifying that:

> I am, although I – there is a difficulty with the AFRC in that the strategic aims were never articulated, certainly not on paper. Therefore, if one wants to look at the coherence from strategic operation to tactical level, one has to make certain inferences of what those strategic aims were, which I have done, essentially using the evidence and sources being made available to me, understanding the situation which the AFRC found itself in over time. (...) Now, strategic aims, I think, of the AFRC did change, did evolve.[357]

310. The evidentiary impact of this observation is that members of the AFRC were unfamiliar with any alleged strategic aims, if those existed at all, and thus no common purpose both as to *mens rea* and *actus reus* can be established.

311. Evidence has been presented at trial, indicating the differences between the AFRC and RUF, supporting the conclusion that the RUF had a different plan. Prosecution witness Gibril Massaquoi testified that "[t]he SLA were using infantry organizations while RUF were using guerrilla structures."[358] Later on in his testimony, he adds about the AFRC coming to Freeotwn in 1999: "Before I was arrested the structures I knew for RUF were quite different from the structures I saw when they came in January 1999."[359]

312. Prosecution witness TF1-045 stated that the overall plan of the RUF was to gain political power over the country. In court he stated:

> Q. Mr Witness, is it correct to say that this plan you talk about of the RUF, or the ideological goal of the RUF existed long before the AFRC came into play; is that correct?
> A. Yes, sir.
> Q. Is it fair to say that it was the ultimate goal of the RUF to be in power, to be in control of the whole country; is that correct?
> A. Yes, sir.[360]

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[357] Testimony Colonel Iron, October 2005, p. 48-49.
[358] G. Massaquoi, Transcript 7 October 2005, p. 105.
[359] G. Massaquoi, Transcript 10 October 2005, p. 98
[360] TF1-045, Transcript 20 July 2005, p. 11.

313. This is in clear contradiction to SAJ Musa's indication that his overall goal was to reinstate the army, as evidenced by all main Prosecution witnesses.[361]

314. The Defence respectfully holds that also the *actus reus* element of JCE cannot be proven on the part of the Third Accused. As such, the JCE form of liability should be dismissed.

7.7 No Evidence for Alleged Purpose of JCE: Control of Diamond Mining Areas

315. Paras. 33 and 34 of the Indictment assert that the AFRC, including the three Accused, "shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside of Sierra Leone in return for assistance in carrying out the joint criminal enterprise" and that this JCE "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographical control, and to use members of the population to provide support to the members of the joint criminal enterprise."

316. The JCE, in the Prosecution theory, thus mainly aims at gaining and exercising political power and control over in particular the diamond areas.

317. The Defence case supports that after the AFRC was ousted of Freetown, it did not have the plan, purpose or design to gain and exercise political power and control. As evidenced by several of the Prosecution witnesses, the goal of SAJ Musa's SLA was to reinstate the army in Freetown. There was no intention whatsoever, and neither is there evidence to support such allegation, that the SLA wanted to take over power after February 1998.[362] Also Junior Johnson states that he went to see Johnny Paul Koroma to give our demands about re-instating the Sierra Leonean Army."[363]

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[361] TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49.
[362] TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49.
[363] TF1-167, Transcript 16 September 2005, p. 82.

318. Besides absence of this political purpose to gain control over the country, the Prosecution asserts that in particular such purpose was directed at gaining control over the diamond mining areas. The Defence respectfully submits that the diamond mining areas, which are predominantly in the eastern part of the country, were not under control of the SLA, but rather under RUF control.

319. Witness TRC-01's testimony supports this Defence theory. He states:

> Q. So the SLAs were better trained than the RUF?
> A. They were not comparable. Those were two different groupings altogether. That was a military force against a group of -- I wouldn't call them rebels because they had no ideologies. Maybe a group of people who were power thirsty and had a lust for diamonds, that was all. Probably bandits.[364]

320. Witness DBK-117 testifies as follows:

> Q. Mr Witness, do you know who were actually mining the soil? Who actually did the mining?
> A. Yes.
> Q. Who were they?
> A. Well, the civilians, with whom the RUF commanders had, during that time, those civilians were the ones that -- that were digging.[365]

321. Witness TF1-045 declared that Johnny Paul Koroma had suggested to use some diamonds to go to Charles Taylor in order to obtain weapons. This upset Sam Bockarie.[366] The Defence submits that, first of all, at that time, in Kono District, Johnny Paul Koroma was not in charge of the AFRC anymore,[367] and in the second place, was Koroma's suggestion never taken over by any of the SLA groups, because once he arrived in Kono, Koroma immediately left for Kailahun, and SAJ Musa took over his position in one of the SLA factions.

322. The Defence submits that the evidence presented at trial does not prove beyond reasonable doubt that the AFRC had a common purpose as delineated in paras. 33 and 34 of the Indictment.

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[364] TRC-01, Transcript 16 October 2006, p. 114.
[365] DBK-117, Transcript 16 October 2006, p. 24-25.
[366] TF1-045, Transcript 19 July 2005, p. 95.
[367] TF1-334's testimony of 18 May 2005, p. 2-3, supports the Defence assertion that Johnny Paul Koroma went to Kailahun (through Kono), and did not stay in Kono District. Witness TF1-334 indicates that Johnny Paul Koroma "called all the other commanders and he was addressing them. He said now that he was about to go to Kailahun and he was telling us that Kono should be the defensive ground for the junta forces," see TF1-334, Transcript 18 May 2005, p. 2-4.

323. In case the Trial Chamber would find that, in spite of the above arguments on the absence of a common plan, purpose or design as presented in the Indictment, a joint criminal enterprise did exist between the AFRC and the RUF, the Defence submits that no evidence has been put forward during the trial that the Third Accused himself had such intention or shared the alleged common purpose.

7.8 No JCE Due to Absence of a Joint Military Structure between RUF/AFRC

324. As mentioned before, paragraph 33 of the Indictment primarily connects the existence of an alleged JCE to the AFRC/RUF as such and the assumption that these organizations shared a common plan. This connection is evidenced by the words in the Indictment in paragraph 33: "The AFRC, *including* Alex Tamba Brima (...) and Santigie Borbor Kanu (...)."[368] An additional argument arises for the lack of proof of the existence of a JCE.

325. The Defence submits that absence of a workable joint military structure is indicative of absence of a JCE between the organizations which are qualified as fighting factions. As observed by Professor Dinstein:

> The hallmarks of a military alliance are the integration of the military high command, the amalgamation of staff planning, the unification of ordnance, the establishment of bases on foreign soil, the organization of joint manoeuvres and the exchange of intelligence data.[369]

326. The Prosecution case failed to prove beyond a reasonable doubt that such a "military alliance," fulfilling these requirements, was established.

327. Unlike the Prosecution expert Colonel Iron, the Defence military expert Major-General Prins addressed this subject, which is of perennial importance in order to prove an alleged JCE between the AFRC and RUF. Several arguments exist why such a structure was not vested, contrary to the unmotivated statement of Colonel Iron that "on or around 20 February (1998) they entered into an existing RUF/AFRC command structure that worked well."[370]

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[368] Emphasis added.
[369] See Yoram Dinstein, War, Aggression and Self-Defence (2005), p. 260.
[370] See Report Col. Iron, Exhibit P36, sections C-3, C-4, C2.6.

328. The **first argument** is provided by the conclusions of Major-General Prins in his report[371] and corresponding testimony at trial[372] concluding in paragraph 171 of his report: "In order to establish a joint structure or joint force in military operational sense a few requirements (not limitative) have to be fulfilled: Trust and confidence, co-operation and mutual understanding, interoperability, joint operational procedures and a joint head quarters. The RUF and the AFRC did not meet any of the described requirements of a joint military operational structure or joint force during the period between May 1997 and February 1998 and following that period until the attack on Freetown in January 1999."[373]

329. **Secondly**, Prosecution witness Gibril Massaquoi refutes the assumption that the AFRC and RUF entertained a joint military structure. This witness, questioned about the interrelation between the structures of the AFRC/RUF, clearly said the following: "The SLA were using infantry organizations while RUF were using guerrilla structures."[374] Additionally, this witness confirmed the distinction between these two forces, stating:[375]

> [Y]es, you were referring to an incident the Prosecution asked me about Freetown when they came to Freetown in January 6. My response there is the same; I have not denied that. Before I was arrested the structures I knew for RUF were quite different from the structures I saw when they came in January 1999."

330. Gibril Massaquoi also testified that no form of (leadership) cooperation existed between the AFRC and the RUF from February 1998 onwards. At the trial session of 7 October 2005, he testifies as follows:[376]

> That was a time [after February 1998] when they left Freetown with the AFRC, and the RUF left Freetown and they were pushed by ECOMOG and they were now in the bush. So the new command structure was created by Sam Bockarie.
> At that time, the new command structure created didn't speak of Foday Sankoh being leader. It only talked about Sam Bockarie being CDS, Chief of Defense Staff. (...) And Sam Bockarie, who was (...) Issa Sesay, who was the battlegroup commander, now eventually became the battlefield commander.

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[371] See report of major-general W.A.J. Prins, Exhibit D36, p.71-82.
[372] Transcript 17 October 2006.
[373] See report of major-general W.A.J. Prins, Exhibit D36, p.71-82.
[374] G. Massaquoi, Transcript 7 October 2005, p. 105.
[375] G. Massaquoi, Transcript 10 October 2005, p. 98
[376] G. Massaquoi, Transcript 7 October 2005, p. 70.

331. The absence of a joint leadership or command structure between the AFRC and the RUF is reinforced by his observations regarding the period after February 1998:[377]

> Q. Is it correct that RUF, when reading this passage from your draft book, was not tolerating the AFRC.
> A. That is what I presumed because I was not there. That was what I learned from the fighters. The period I was referring to I was in prison. I was quoting what fighters told me what happened between them.

332. **Thirdly,** also Prosecution witness TF1-167 supports these conclusions, confirming that the SLA considered themselves superior to the RUF:[378]

> Well, the SLA, I thinking on it that they were well trained to be a soldier and in going to the bush. The RUF were civilians just trained a little tactics, so they should not be under the RUF.

333. **Fourthly,** TRC-01, who testified on 16 October 2006, confirmed this evidence, saying the following:[379]

> Q. So the SLAs were better trained than the RUF?
> A. They were not comparable. Those were two different groupings altogether. That was a military force against a group of -- I wouldn't call them rebels because they had no ideologies. Maybe a group of people who were power thirsty and had a lust for diamonds that was all probably bandits.
> Q. so it was essentially a well trained military organisation against a bunch of rebel forces who were coming to steal diamonds?
> A. Well I would call them bandits, Your Honour. Indeed, they were something like that. And so they never knew of the Geneva Convention and laws of war. So there were occasions they were using, probably, rocket-propelled grenades against human target. That's an anti-tank weapon. An Anti-tank weapon is meant to be used against equipment, not against human beings, but they were using such weaponry against human targets. And so it created the mayhem in the war.

334. Notwithstanding that these observations relate to the period 1992-1994, this certainly reflects on the viability of an alleged joint structure in military operational sense between AFRC and RUF in 1997-1999.

335. In conclusion, the Defence case has established that no joint military structure between RUF and AFRC could have existed and also for this reason the Prosecution case failed to prove the existence of a JCE between AFRC and RUF. Therefore the Third Accused should be acquitted for this form of reliability.

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[377] G. Massaquoi, Transcript 11 October 2005, p. 25-27.
[378] Statement witness TF1-167, transcript date 19 September 2005, p. 63.
[379] Transcript 16 October 2006, page 114.

7.9 No JCE – Deteriorated Relationship between RUF and AFRC in Provinces

336. Apart from these more theoretical arguments as to why no JCE existed between the AFRC (and the Third Accused within this organization) and the RUF, the Defence will sum up some of the available evidence supporting the allegation that also from a practical point of view, one could not speak of a JCE, requiring a common plan, purpose or design.

337. The Defence challenges the Prosecution assertion that a JCE existed, and holds that after February 1998, after the pullout from Freetown, one could no longer speak of 'one AFRC' group, but rather did former soldiers and persons allied to the AFRC split up in small groups throughout the country, with the sole purpose of getting out of Freetown, and out of the hands of their enemies and survive.

Freetown and Western Area

338. Already in Freetown, immediately after the 1997 takeover from power, the relationship between the RUF and the AFRC was affected. Junior Johnson in his testimony states:

> Q. Yes. I will come back to the issue of BS Massaquoi later. It is fair to say that the relationship between RUF and the AFRC was a strained relationship; not so?
> A. At the early stages the relationship was good. But as time goes on the relationship break between the two.
> Q. When you say the "early stages", would I be right in saying that that was when the AFRC invited the RUF to join them?
> A. Yes, because if the relationship was not too good, I believe when they invited them they should not have come.[380]

339. The following testimony also evidences the row between the two organizations, already in Freetown after the AFRC regime:

> Q. But it wasn't long before Gibril Massaquoi was arrested; not so?
> A. He was arrested -- I couldn't call the actual date he was arrested, but it was not too long after the AFRC regime, and they arrested him. I could remember it was during -- it was in the mid of the regime.
> Q. Were the RUF happy about this?
> A. I cannot tell, because after his arrest -- I would say they were not happy because Issa Sesay and some others were very angry about that.
> Q. Did they attend meetings with the AFRC after that?
> A. No.

[380] TF1-167, Transcript 19 September 2005, p. 57.

Q. They stopped going to meetings?
A. They stopped some time going to meeting after the looting of the Iranian Embassy. They stopped going to meetings.
Q. You mentioned the looting of the Iranian Embassy. After that looting Johnny Paul had ordered the arrest of Issa Sesay; not so?
A. Yes, after the looting Issa Sesay was ordered to be arrested.[381]

340. Witness TF1-045 also testifies that already in September 1997, the deteriorating relationship between the AFRC and RUF were discussed in a meeting in Freetown. The transcript reads:

Q. You testified earlier in your testimony that with respect to this first meeting there was no respect between the AFRC and the RUF commanders. That was one of the issues pertaining to one of the topics; is that correct?
A. Yes, it was within the topic of discussion.
Q. Can you please explain what you meant by the words "there was no respect for each other"?
A. Yes, sir. The respect that was not -- after the RUF and the AFRC have come together, the soldiers said they were trained soldiers. They were in charge of some ammunition and they had international recommendation, so RUF were just like civilians, so you see soldiers who is a sergeant, who is a lieutenant, he considers an RUF -- he belittle him, even if he is a captain or a major, there was no respect. So when the RUF and AFRC man made, the RUF man want to show that he's senior to the soldier and the AFRC soldier again says recognise I am a government soldier, whether you are major or captain, and I am a sergeant, so I am a above you, so that problem existed. It existed so much. That was one of the points that was discussed in order for respect to be mutual, no matter your position might be. As long as we had formed one government, so let us respect one another. That was the main problem. That was the problem between the AFRC and the RUF that was discussed.
Q. Thank you, Mr Witness. Do you recall whether this issue of mutual respect returned during the other meetings you talked about? The second meeting in - I believe it was October/November you refer to 1997 and the third meeting by the end of 1997. Was this issue of the problem of respect for each other, was that raised during the other two meetings as well?
A. Yes. Yes, sir.
Q. According to your own recollection, was that problem ever solved during these meetings?
A. Well, they talked about it. They reached a conclusion, but to stop the problem, I did not see where it stopped, by the way.[382]

Q. Witness, aside from the meetings we just talked about, did you encounter a similar power struggle between members of the AFRC and members of the RUF in the field as individuals?
A. Individually, yes, I saw that.[383]

Q. Coming back to my initial question, Mr Witness, is it fair to say that from the first meeting at the Wilberforce officers' mess in September 1997 till March 1998, the AFRC and the RUF tried to work together; is that correct?
A. Yes.

[381] TF1-167, Transcript 19 September 2005, p. 54.
[382] TF1-045, Transcript 21 July 2005, p. 27-28.
[383] TF1-045, Transcript 21 July 2005, p. 31.

(...)
Q. Do you agree that after this period of five to six months there was no cooperation between the RUF and the AFRC whatsoever?
A. After the ECOMOG intervention here in Freetown till 1998 until Johnny Paul was disarmed by Mosquito, the whole thing was fragile. There was no unity between the AFRC and the RUF.
Q. After this fragile period, I mean, after the disarmament of Johnny Paul Koroma, what happened then between the AFRC and the RUF? They were willing to share meetings?
A. Well, there was no unity. There was a final split. The AFRC soldiers were only loyal to AFRC commanders; RUF commanders were only loyal to RUF commanders at that time.

Kono

341. The Defence contends that in Kono District, the RUF was in control during the relevant indictment period. There were some SLAs present in the region, but those either worked under RUF command, or were completely independent from all other structures. A Third Accused's alleged role in this cannot be substantiated by the evidence presented at trial which, as will be shown, was at crucial points contradictory concerning Mr. Kanu.

342. Witness TF1-167 holds that in Kono District, it was the RUF who was in command.

Q. Would you say Mosquito was in control of the eastern province of Sierra Leone at that time?
A. Yes, when he went to the east he was in control.
Q. And that would include Kenema, Kono, Kailahun, Tongo Field?
A. Tongo, yes.
Q. And these were all mining areas?
A. Yes.[384]
(...)
Q. Yes. So I ask you the question again: Was Sam Bockarie taking orders from anyone?
A. They early stage of the revolution he was taking orders, and later he went up country. He was not taking orders from anybody.[385]

343. This evidence is corroborated by the evidence of Defence witness DBK-113, who states that:

While I was in Kono, the relationship between the soldiers, and the RUF, it -- it wasn't good with them because the RUFs were always saying that the soldiers, because when they were in Freetown, they were saying that they had AFRC but when they were in the bush, now, they were not in Freetown again. They were in the bush. It was the jungle. So their movements had started for a while. So all the soldiers believed that, all the soldiers should be under their command. No soldier should be under AFRC again. It was the RUF movement. The revolution to pursue. That was what the RUF were saying.[386]

[384] TF1-167, Transcript 19 September 2005, p. 55.
[385] TF1-167, Transcript 19 September 2005, p. 57.
[386] DBK-113, Transcript 13 October 2006, p. 14.

(...)
The nature of the relationship existing between the RUFs and the SLAs in Kono wasn't cordial (...). Superman gave order from Hill Station, said, gather some soldiers, and told them to go down where the soldiers were to go and burn -- burn all the vehicles belonging to the soldiers, and that wasn't any AFRC business. (...) [D]id you see any SLA soldiers being harassed and humiliated by RUF fighting forces? Yes. (...).[387]

344. Defence witness DAB-140 testifies about a certain pit in Buedu, Kono District, where people were thrown into and "each time they put somebody there, that person would never be seen again."[388] This same witness states the following:

> What I'm telling you about this pit, Johnny Paul was not there when this pit was dug. Johnny Paul came there, but he did had no knowledge about this pit, because Sam Bockarie had the command. He had power to do everything. Everything was in his care.[389]

345. It is the Defence submission that in the Kono District, Savage was completely separate from the other SLA's present in the area, and did not in any way cooperate with other SLA groups. He had his own group, which functioned partly under RUF, Superman's, supervision. It is furthermore the Defence contention that Staff Alhaji worked together with Savage in this district.[390]

346. Witness DBK-117 testifies that "the SLAs that were there, we fall in command of the RUFs. Those who were in the villages, that I knew about as SLAs, were Savage, Staff."[391] He also testifies:

> Q. And you said that Savage was in Tombodu; is that right?
> A. Yes. Savage was at Tombodu. Staff Alhaji was the commander and Savage was the deputy. But they were afraid of him more than the commander that was there.
> Q. And I put it to you that both of them, Savage and Staff Alhaji, were both SLAs; what do you say?
> A. We were all People's Army then because we were subject under the command of the RUFs.[392]

347. Savage was responsible for the most heinous crimes committed in that area during the relevant Indictment period, as is exemplified by the following incident:

> A. Yes. On arrival at Tombodu we met the battalion commander that was there by the name of Savage. And when we met he had already killed a lot of people, thrown in a pit.

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[387] DBK-113, Transcript 13 October 2006, p. 68-69.
[388] DAB-140, Transcript 19 September 2006, p. 80.
[389] DAB-140, Transcript 19 September 2006, p. 93.
[390] DSK-103, Transcript 13 September 2006, p. 30-31. See also: DBK-117, Transcript 16 October 2006, p. 24-25.
[391] DBK-117, Transcript 16 October 2005, p. 37. Whilst this witness states there were no battalions in the Kono structure, Junior Johnson's evidence indicates that there were in fact battalions operating in Kono. See TF1-167, Transcript 15 September 2006, p. 38.
[392] DBK-117, Transcript 16 October 2005, p. 38.

(...)
Q. And the people thrown in the pit, were they --
A. They were all civilians.
Q. Were they alive or were they dead?
A. They were dead.
Q. Did you see what had happened to them?
A. I met them dead, but I could see that they were killed by machetes.
Q. Could you estimate how many you saw in the pit?
A. I cannot give a right number, but there were plenty, more than 150 people in the pit.[393]

348. Another witness states: "we all knew that whosoever, whosoever meets with Savage you will not live afterwards, so we were all afraid not to ever see with that man."[394] There are many other examples of Savage's grievous behavior in Kono District.[395] Witness DAB-084 clearly indicates that Savage was in charge of the "juntas" in his village, Fadugu.[396] Later he refers to people in soldiers uniforms, Savage and Komba Gbundema and their groups attacking Fadugu village.[397] Savage had his own group in Kono District: "I understood that he was not alone. There were some other people, a group, his group."[398]

Q. This time you said that Savage was the commander of the battalion at Tombodu. Do you know what his rank was at this time?
A. He was a lieutenant.
Q. Do you know who appointed him to that rank?
A. Denis Mingo, aka Superman.[399]

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?
A. I did not see him with any communication equipment. That was my first time when they captured us, and he sentenced us.[400]

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?

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[393] TF1-167, Transcript 15 September 2005, p.44-45.
[394] DAB-107, Transcript 8 September 2006, p. 60.
[395] TF1-334, Transcript 20 May 2005, p. 13; DAB-078, Transcript 6 September 2006, p. 40-41; DAB-084, Transcript 8 September 2006, p. 14; DAB-108, Transcript 5 September 2006, p. 121; DAB-114, Transcript 4 September 2006, p. 92; DAB-115, Transcript 4 September 2006, p. 67-68; DBK-100, Transcript 17 July 2006, p. 70-71.
[396] DAB-084, Transcript 8 September 2006, p. 6-7; see also DAB-084, Transcript 8 September 2006, p. 14.
[397] DAB-084, Transcript 8 September 2006, p. 18-19.
[398] DAB-084, Transcript 8 September 2006, p. 19.
[399] TF1-167, Transcript 15 September 2005, p.47.
[400] DAB-107, Transcript 8 September 2006, p. 69-74.

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.[401]

349. Clearly, given the foregoing evidence, Savage was in charge of his own group of people. The following evidence suggests a form of cooperation or communication between Savage and 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.[402]

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.[403]

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. Thank you. Did you get to know the name of any other of the rebels?
A. I knew -- you know that all of them can't be in one place. They were scattered everywhere. You just wouldn't know all their names. Those that you live with, you would know their names.
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.[404]
(...)
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.
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.[405]

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[401] DAB-115, Transcript 4 September 2006, p. 73.
[402] DAB-098, Transcript 4 September 2006, p. 37.
[403] TF1-167, Transcript 19 September 2005, p. 41.
[404] DAB-098, Transcript 4 September 2006, p. 22-23.
[405] DAB-113, Transcript 7 September 2006, p. 118.

Q. There is no need to go into any further detail about that. Who was the commander on the operation to capture Koidu Geiya? Who was the commander in charge of you all?
A. Superman.
Q. And you have identified the operational commander for the RUF being on that operation. Was that Superman?
A. Yes.
Q. Who was in command of the -- What groups were in that operation, men from what groups?
A. It was the RUF group.
Q. Were there men -- also you identified that you were on the operation together with the operational commander for the SLAs. Were there other SLAs also on that operation?
A. Yes.
Q. Who was in command of the SLAs?
A. Operations commander A.
Q. Can you name any other SLAs who were involved in this operation?
A. Mohamed Savage was there.[406]

350. This is contrasted by the testimony of witness TF1-334, contradicting the foregoing, by testifying the following in court:

Q. While Johnny Paul Koroma was in Kono who was in command of the district of Kono?
A. Immediately Johnny Paul was the supreme head, who was the chairman of the AFRC, and he was the immediate commander in Kono.[407]
Q. In the hierarchy in Kono at this time when Johnny Paul was there still who was subordinate to him?
A. He had Issa Sesay. He was the other immediate commander under Johnny Paul.
Q. And what position did Issa Sesay hold in the RUF? You've described him as an RUF member earlier?
A. Well, he was second in command.
Q. Did you identify just then under who he was second in command?
A. Well, he was under Mosquito, General Mosquito 's command and he was second in command to General Mosquito.
Q. Now, you've described -- you've talked about the presence of Superman in Kono. Where did he fit in in the hierarchy in relation to Issa Sesay and Johnny Paul Koroma when those two were still in Kono?
A. Well, as Issa arrived he immediately -- he was the overall commander of the whole RUF whilst they were in Kono at that moment.[408]

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[406] TF1-334, Transcript 20 May 2005, p. 24.
[407] Here this witness contradicts himself, as he declares later on in his testimony:
Q. Mr Witness, you said that when you were in Kono there were two operational commanders; is that so?
A. Yes, My Lord.
Q. Who were the operational commanders?
A. You had an Operational Commander A for the SLA and you had operation commander for the RUF who was Superman, Denis Mingo alias Superman.
Q. You also said there was a joint command too; is that so?
A. A joint operation. That was what I said. We had a joint operation.
Q. Well, between Mr A and Superman who was superior?
A. Well, at that time Superman was the boss because it was from him that Operation A took command or ammunition that was sent.
See TF1-334 Transcript 16 June 2005, p.36-37. See also, DBK-117, Transcript 16 October 2006, p. 14-15, 16-17-19, who, in line with the evidence of TF1-167 states that in Kono the RUF in control, and not joined with the AFRC, as TF1-334 claims.
[408] TF1-334 Transcript 17 May 2005, p.115.

351. The above again leads to a sharp inconsistency with another Prosecution insider witness, TF1-167, who testifies the following concerning the command structure in Kono District, and Superman's position therein:

> Q. How do you know that there was a meeting at the house of Denis Mingo?
> A. Because I went at the meeting.
> Q. Do you recall who else was there?
> A. Yes.
> Q. Who else?
> A. You have Morris Kallon, Johnny Paul Koroma, Rambo his CSO, Ibrahim Bazzy Kamara, Hassan Papa Bangura. Those I could remember.
> Q. Who chaired the meeting, do you remember?
> A. The meeting was chaired by Denis Mingo.
> Q. What happened at the meeting?
> A. In the meeting it was discussed that we should be under the RUF in Kono.
> Q. By "we", who are you talking about?
> A. The SLAs should be under the RUF.
> Q. Do you recall any response to that?
> A. Yes. When Johnny Paul told us at the meeting that we should be under the RUF, there was an argument that some other commanders refused, but at the end, they were all convinced to be under the RUF.
> Q. Did anything else happen at this meeting that you're able to recall?
> A. Yes.
> Q. What else happened?
> A. It was agreed upon so Johnny Paul could be at Kailahun.[409]

352. The Defence concludes that the testimony of witness TF1-334 is unreliable, as shown above, and that his testimony was bend in order to fit the Prosecution theory. As a consequence, the Defence submits his evidence should be excluded.

Kenema

353. There is ample evidence supporting the argument that the relationship between the RUF and the AFRC was not one in which they can be supposed to share a common purpose, also in Kenema District. For instance, TF1-045 testified about Kenema:

> A. Like I myself, I can make an example. I saw at one time when I heard -- I mean, I was in Kenema with Mosquito when I heard that Gibril Massaquoi, who was an RUF; Steve Bioh, who was a representative of the RUF made a plan to overthrow Johnny Paul Koroma and remove him from power. So I saw that. Then later I saw when Johnny Paul himself was flushed from Freetown and he went. I saw Mosquito, who I saw an RUF molested him. So I saw that. I heard about it again.[410]

> A. Okay. After Johnny Paul had spoken, he himself, Mosquito, stood. He thanked Johnny Paul with regards all what he has said and what he had done. He said the only problem now - he said Johnny Paul should forget about being a commander again. What ever

[409] TF1-167, Transcript 15 September 2005, p. 32-35.
[410] TF1-045, Transcript 21 July 2005, p. 32.

suggestions he was trying to put out with regards what he had discussed, he said it is now that he will take Johnny Paul Koroma, that, as of now, he was the commander.
(...)
A. Issa Sesay; Mosquito, Sam Bockarie, they used force on Johnny Paul. They ensured that where he was seated he stood up and ordered him to hand over whatever he had. They had arms, there were all armed men around. They had their pistols and they were talking to him. So they used force on him and took all that he had. They stripped the shirt off him. They took the diamond. Issa Sesay held his wife and said he was shouting for diamonds. He went and raped Johnny Paul's wife.[411]

Bombali

354. It is the Defence conclusion that in Bombali District, Savage cooperated with Brigadier Mani, and formed a separate SLA group, not allied to any of the other factions.

Q. Please tell the Court the names that you remember?
A. The heads I am going to name, those we knew to be head. They don't go anywhere but they were stationed there. One of them was called Savage.
Q. So do you know any other of them?
A. The second one or the third one, he was called Mani. The head, but they didn't go anywhere. They were stationed there."[412]

Q. Yes. And Mosquito, it is fair to say, was the de facto leader of the RUF; not so? In the absence of Foday Sankoh he was leader of the RUF?
(...)
Q. And he had men that he controlled, lots of men that he controlled?
A. Yes, anyone who is an RUF is under his supervision.
Q. And lots of ammunitions and arms?
A. Yes, he had arms and ammunition.
Q. The AFRC subsequently did not trust the RUF, did they? Nor the RUF the AFRC.
A. Yes, there was a trust on trust. The RUF don't trust the AFRC, the AFRC don't trust the RUF, when they had started being some fracas between them.
Q. Was there a fracas in Kabala in February 1998?
A. Yes, when we pull out, there was a lot of individual fighting with mid-level fighters.
Q. This mid-level fighters, you had the SLAs on the one side and the RUF on the other; not so?
A. Yes.
Q. Can you tell the Court how serious that fracas got? How serious was it?
A. Yes, that was why even SAJ did not join the troops to go to Kono. He decided to go on his own to Koinadugu.
Q. How serious did it get?
A. It was serious because there are killings that were going on secretly.
Q. Killing of whom by who?
A. RUF would kill SLA soldiers, SLA soldiers would kill RUF.
Q. Was there one particular fighting that lasted for one day?
A. Yes.
Q. A particular event, where fighting took place and lasted for one day?
A. Yes.
Q. That event, there was loss of life; not so?
A. Not plenty, a few.

[411] TF1-045, Transcript 21 July 2005, p. 95-96.
[412] DBK-101, Transcript 14 July 2006, p. 81-82.

Q. How many?
A. Both RUF and SLA. I cannot give a specific number.
Q. Now, can you recall what was this all about?
A. Well, the fighting between RUF and SLA was more on looted properties, vehicles.[413]

Q. Now, if I can just point out your statement of 6 May 2003, page 6.
MS PACK: It's 10418, Your Honour.
PRESIDING JUDGE: Thank you, Ms Pack.
MS THOMPSON:
Q. I will start from line 22,.
"A. Makeni. From Makeni, we took him to his village and then went to Kabala straight.
"Q. Okay.
"A. Yes, it was at night we took him there" - we are referring to Johnny Paul Koroma at these stages - "so when that message came, so there was some fracas between us, the RUF arresting some SLA guys, taking their guns from them, controlling the guns that -- they said we should be under them. So the split had to come, so some commanders came together like Ibrahim Bazzy, Papa, Kallay from the SLA side that we should go to Kono, that we should go to Kono. All that time Kamajor were at Kono, Kamajors."
Do you recall saying that?
A. Yes.
Q. And that was at Kabala?
A. Yes.
Q. It's fair to say the fight was about command and control between the RUF and SLA; not so?
A. Yes, I have already said that initially.
Q. It was at Kabala that you said earlier that Musa refused to join the RUF?
A. Yes.[414]

Koinadugu

355. The following evidence is an example of the deteriorated relationship between the AFRC and the RUF in Koinadugu District:

Q. You have spoken earlier about SAJ Musa going to Kubola with commanders Mani and Bropleh. Do you know where they were at this time that SAJ Musa arrived at Major Eddie Town?
A. SAJ Musa left them at Kubola.
Q. How do you know that?
A. Because when SAJ Musa came he told us that he was chased out from Kubola by Superman and he only came with a few fighters and all the remaining stayed at Kubola.[415]

Port Loko

356. It is the Defence submission that no evidence has been adduced supporting the allegation that a JCE existed between the AFRC and RUF in Port Loko District. Moreover, the Defence specifically argues that the Third Accused was not involved in the alleged activities taking place in this District, but rather that other people from

[413] TF1-167, Transcript 19 September 2005, p. 58-59.
[414] TF1-167, Transcript 19 September 2005, p. 59-61.
[415] TF1-167, Transcript 15 September 2005, p. 85.

within the SLA allegedly bore responsible for that, in spite of the fact that, during a limited period of time, the Third Accused was present in this district, and did not function in any command position.

357. Witness TF1-167 testifies that all honourables, except for Alex Tamba Brima, were present in Masiaka, Port Loko District, after the pullout from Freetown in 1999. He testifies:

> Q. Apart from these commanders that you have spoken about, apart from commanders in Masiaka, who else were was there?
> A. You have all honourables that pulled out, with the exception of Alex Tamba Brima, who was at Kono.[416]

358. This same witness testifies to a meeting held in Masiaka led by SAJ Musa to go and attack Bo. Five-Five was absent from this meeting, which can be seen as an indication of the Third Accused's position, or rather, lack thereof, during that time. The testimony reads:

> Q. Did anything happen when you were in Masiaka?
> A. Yes, in Masiaka there was an operation planned by SAJ Musa to go and attack Bo.
> Q. How do you know there was an operation planned?
> A. There was a meeting called. I was in the meeting with Ibrahim Bazzy Kamara and others.
> Q. Can you remember the names of anyone else at the meeting?
> A. Yes. Issa Sesay, AF Kamara, Hassan Papa Bangura, Foday Kallay. Those I can remember.[417]

359. Brima Bazzy Kamara, together with witness TF1-167, Hassan Papa Bangura and some securities went to visit Charles Taylor in Liberia after the signing of the peace process.[418] From Port Loko they traveled to Liberia to see Charles Taylor. This part of this witness's testimony provides further evidence for the fact that the Third Accused was not in any position of command in the West Side. This part of the testimony reads as follows:

> Q. Whilst in the West Side after the signing of the peace process, did you remain there?
> A. No.
> Q. Where did you go?
> A. We are called upon to go to Liberia.
> Q. Who was called upon? You say "we", who do you mean?
> A. I, Ibrahim Bazzy Kamara, Hassan Papa Bangura and a few other securities.
> Q. Who were you called upon by?
> A. By the -- we were to go and see Charles Taylor.

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[416] TF1-167, Transcript 15 September 2005, p. 27.
[417] TF1-167, Transcript 15 September 2005, p. 27.
[418] Notably, this falls outside the Indictment period.

Q. Did you go to Liberia?
A. Yes.
(...)
Q. On your return to Sierra Leone where did you go?
A. We came to Freetown. From there we went back to the West Side jungle.[419]

Bo

360. The Defence contends that SLAs were present in Bo District, but that this was a separate SLA group, of which the Third Accused at no time formed a part, neither was he in any way allied thereto.[420]

361. Moreover, the Defence submits that there was no form of cooperation between the RUF and the SLA group in Bo District, excluding a possibility for proving JCE applicable to the incidents in this district.

362. The evidence concerning this district is indicative of how fractured the AFRC was, and that, even during the time the AFRC was in power, there was not one single organization, which was in control of what happened throughout the country.

Kailahun

363. Also in Kailahun District, the Defence asserts that the relationship between the RUF and SLA was deteriorated.

7.10 Conclusion

364. For the reasons set out above, the Defence submits that the Prosecution has not met the evidentiary threshold of reasonable doubt in presenting evidence for its theory that there existed a JCE between the RUF and AFRC, including the Third Accused, to the extent that they shared a common plan, purpose or design "which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside of Sierra

[419] TF1-167, Transcript 16 September 2005, p. 81-83.
[420] See TF1-054, Transcript 19 April 2005, p. 77-79, 86-90, 92-94; Transcript 20 April 2005, p.32; Transcript 22 April, p.18-19; TF1-053, Transcript 19 April 2005, p.19-20, 22-25, 49.

Leone in return for assistance in carrying out the joint criminal enterprise" and that this JCE "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographical control, and to use members of the population to provide support to the members of the joint criminal enterprise."[421]

[421] See Indictment paras. 33 and 34.

VIII INDIVIDUAL CRIMINAL RESPONSIBILITY THIRD ACCUSED, OTHER THAN JCE

8.1 Alibi Defence: Time Spent in Prison

365. The Defence herewith refers to the evidence filed on 21 January 2005, concerning the detention of the Third Accused at Cockerill Barracks. Exhibit 1 attached to the "Kanu – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case"[422], a letter from Brigadier General M.K. Dumbuya of the Sierra Leonean Ministry of Defence, including certified copies of entries in the Cockerill Barracks detention register pertaining to SLA/18164955 Sgt. Kanu S.B., proves that the Third Accused was in custody during the period 12 June 2000 and 1 December 2000. Therefore, during this specific time frame, the Third Accused cannot be held responsible for any of the crimes as charged in the Indictment. Furthermore, the Prosecution has not led any evidence to prove that the Third Accused, although being incarcerated, was in position to exercise command and control over any SLA troops or (the intend) to participate in the alleged Joint Criminal Enterprise.

8.2 Third Accused's Presence

366. It is the humble opinion of the Defence that the Prosecution has indicted the Third Accused with crimes throughout the *whole territory* of Sierra Leone, whilst it has not been able to establish that the Third Accused was in command and control of the perpetrators of these alleged crimes throughout the whole country, nor that the Third Accused can be held responsible for these crimes through the assumed JCE. The Third Accused has never been in almost half of the Districts mentioned in the Indictment during the relevant time period, and the Prosecution has not even come close to proof that the Third Accused, whilst not being present, held a position that made him responsible for the alleged crimes committed in these Districts.

Absence of Evidence on Kanu's Presence and Independent SLA Command

[422] *Prosecutor v. Brima et al.*, Kanu – Defense Motion for Dismissal of Counts 15 – 18 of the Indictment Due to an Alibi Defense and Lack of *Prima Facie* Case, SCSL-2004-16-T-119, 21 January 2005, Exhibit 1.

367. The Prosecution failed to present any evidence that the Third Accused was ever present in Bo District, Kenema District or Kailahun District during the whole Indictment period. In the following paragraphs, the Defence will further elaborate on the position of the Third Accused vis-à-vis each of these two Districts.

368. The evidence provided by the Prosecution on the alleged crimes committed in Bo District all falls within the time span from 25 May 1997 until end of June 1997, the period just after the AFRC coup in Freetown. Witness TF1-004 has given evidence on pillage and killing by soldiers on 25th June 2005 in and around Tikonko[423], witness TF1-053 testified on pillage in Bo town just after the coup on 25 May 1997[424], and killing in Gerihun[425], and witness TF1-054 who gave a testimony in court about pillage in Bo town about June 1997[426] and killings in Gerihun.[427]

369. If these witnesses were to believed about the events in Bo District they testified on during the abovementioned time period, the Defence respectfully submits that most of these alleged crimes were committed by soldiers already stationed within the Bo District[428], even before the AFRC coup in May 1997. This is also corroborated by the evidence of witness TF1-054[429] and by the fact that witness TF1-053 already knew some of the soldiers.[430] These soldiers in the Bo District were operating under the command of the brigade commander of the Bo District, Boysie Palmer, who was participating in the crimes described by witness TF1-053 in Gerihun and TF1-054 in Bo town[431] and Gerihun.[432] Also participating in the crimes according to the evidence

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[423] Transcript 23 June 2005, p.7, 10, 12-13, 17-22, 25-27. This evidence however identifies the RUF as the perpetrators of the crimes, see Transcript 23 June 2005, p. 99, and the arguments on extermination in Bo District in paragraphs.
[424] Transcript 18 April 2005, p.97-99.
[425] Transcript 18 April 2005, p.107-111.
[426] Transcript 19 April 2005, p.80-85
[427] Transcript 19 April 2005, p.92-94.
[428] Excluding the evidence given by TF1-004 on the killings in Tikonko (see further footnote 423).
[429] Transcript 19 April 2005, p.78-79:
Q. Starting with Boysie Palmer, when was the first time you saw him?
A. Boysie Palmer is an old boy of Prince of Wales, my old school. And I knew him as the brigade commander in Bo Town.
Q. Do you recall the very first time you saw him in Bo Town?
A. Yes, he was just a brigade commander for a very long time before the AFRC.
[430] Transcript 18 April 2005, p.103-104, and Transcript 19 April 2005, p.19-20, where TF1-053 identifies three of the perpetrators: AF Kamara, AB Kamara and brigade commander Boysie Palmer.
[431] Transcript 19 April 2005, p.19-20, 22-25, and Transcript 19 April 2005, p.85.
[432] Transcript 19 April 2005, p.93

given by TF1-053 and TF1-054[433] was major AF Kamara, the number two in rank within the AFRC in Bo District.[434] Boysie Palmer and AF Kamara were both found guilty of treason and executed under the government of President Kabbah in October 1998.[435]

370. The evidence the Prosecution submitted with regard to Kenema District covers killings in Tongo town by soldiers in August, which were according to witness TF1-062 committed by soldiers who he "knew that they were government soldiers and that they were SLAs. They were the ones that protected Tongo from 1995 to 1996".[436] This proves as well that the alleged crimes committed by soldiers in Kenema were executed by soldiers who had been stationed in the District even before the AFRC coup in May 1997.

371. The evidence given by TF1-122 on alleged crimes committed in Kenema District during the AFRC regime fall clearly within the responsibility of the RUF, as both the crimes were committed by RUF members[437], and leaders of the RUF had the command over these crimes.[438] Although TF1-122 is sometimes speaking of both AFRC and RUF members that were committing the crimes, it becomes clear from his description of the perpetrators that these were RUF members led by amongst other, Sam Bockarie and Issa Sesay.[439] Furthermore, the witness is not able to mention a single SLA soldier that participated in these crimes, and is only able to mention that the "RUF and AFRC juntas" in general were responsible, without giving any foundation on his knowledge that both the RUF and SLA soldiers were involved in these crimes.[440] The Defence therefore concludes that the evidence given by TF1-122

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[433] Transcript 19 April 2005, p.19-20, and Transcript 19 April 2005, p.85.
[434] Transcript 19 April 2005, p.92-94. See evidence given by witness TF1-054, Transcript 19 April 2005, p.77-78 and p.107.
[435] Transcript 19 April 2005, p.109, and as referred to by Counsel in Transcript 19 April 2005, p.49.
[436] Transcript 27 June 2005, p. 12-13, 44.
[437] Transcript 24 June 2005, p.16-17, 25-26, 32-35, 71-76, 92.
[438] Transcript 24 June 2005, p.2-22, 25-26, 92, 7-9.
[439] Transcript 24 June 2005, p.2-22, 25-26, 92, 7-9. See also witness TF1-062, Transcript 27 June 2005, p.46 and witness TF1-045, Transcript 21 July 2005, p.37 for corroborating evidence that Kenema was in control of the RUF to at least a large extend. See also Defence witness DAB-142, Transcript 19 September 2006, p.13, testifying that Mosquito was based in Kenema.
[440] For example Transcript 24 June 2005, p.32-33, testifying about "Operation No Living Thing" and frequently ascribing the crimes to the "The AFRC juntas and the RUF rebels". Witness TF1-045 confirms the Defence view that this operation was led by Sam Bockarie, alias Mosquito (Transcript 21 July 2005, p.37). See also Transcript 24 June 2005, p.27.

is incredible when it concerns the identification of the perpetrators of the crimes in Kenema District as members of the AFRC junta.[441]

372. It is the Defence view that the SLA brigades in Bo and Kenema District operated independently from the AFRC government that was very recently established in the capital city. The following extracts from the statement of witness TF1-054 on a meeting with a delegation from the new AFRC government who had came from Freetown, supports this arguments:

> Q. And what were you doing in this classroom with these four men who said they had come from Freetown?
> A. They said they had come to speak to us, the people of Gerihun, for us to talk to the Kamajors in Gerihun so that they would be united with the soldiers in Gerihun, AFRC in Gerihun.
> Q. Were any of you in this classroom armed?
> A. No.
> Q. And was the meeting that you were having with these four gentlemen successful?
> A. No.
> Q. Why was the meeting not successful?
> A. During the meeting, we heard the sound of a gun from the junction of the town, the entrance of the -- the entrance to the town of Gerihun.[442]

> Q. What I am putting to you, when A F Kamara came, according to you, they did exactly the opposite of what the delegation went to the chief for; is that not so?
> A. It was against because what they did was bad.[443]

373. These extracts from the evidence of TF1-054 show a clear contradiction between the activities of the new AFRC government in Freetown, who had sent a delegation to hold peace talks with the people in Gerihun, and the acts of the members of the SLA brigade in Bo District, who allegedly committed serious crimes by killing members of communities in Bo District and looting Bo town. It can therefore be concluded that the SLA brigades in Bo District, committed these crimes independently from the AFRC government in Freetown. Furthermore, the alleged crimes that were committed in Kenema District by soldiers, although almost all crimes were committed by the RUF,

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[441] This argument is further reinforced by the fact that the witness does not seem to refer to AFRC junta members but to SLA soldiers already stationed in the Kenema District. Furthermore, the position, knowledge and foundation given by TF1-227 does not in any way justify the conclusion he often makes in his testimony, for example "From the circumstances, all I can tell this Court is that the killing of BS Massaquoi and others was well planned and coordinated by the organisation of AFRC juntas and the RUF rebels."
[442] Transcript 19 April 2005, p.87-88; See also witness TF1-053, 19 April 2005, p.13-14 giving corroborating evidence on this meeting between Kamajors and the AFRC delegation from Freetown.
[443] Transcript 22 April 2005, p.19

were occurring as well under control of the brigade command in Kenema District, and thus independently from the AFRC government in Freetown.

374. Moreover, even if the honourable Trial Chamber would accept that the alleged crimes committed by the SLA soldiers in Bo District and Kenema District were under the direct control of the AFRC government, the Defence submits that the Prosecution did not present any evidence that the Third Accused was in command of the incidents happening in the different towns in Bo District and Kenema District, nor that the Third Accused held such a position within the AFRC government that he can be held responsible for the crimes allegedly committed in the Bo District in May and June 1997.

375. According to Prosecution evidence, the Third Accused was an honourable in the AFRC government and did not hold any ministerial position or responsibility with regard to the southern Districts. The Prosecution has led evidence that the AFRC junta had their Secretary of State for the East by the name of Eddie Kanneh[444], and their Secretary of State for the Southern Region AB Kamara.[445] Therefore, the Prosecution did not introduce any evidence that the Third Accused can be held responsible for, or was in any way involved in, the alleged crimes in Bo or Kenema District.

Kailahun District: In Control of RUF

376. The Prosecution has not led any evidence that the Third Accused was at any time during the relevant Indictment period, present in Kailahun District, nor that the Third Accused can be held responsible for the crimes that according to Prosecution witnesses have been committed in the Kailahun District. Furthermore, the Prosecution evidence does not provide any proof of the responsibility of any SLA commander for crimes committed in the Kailahun District,

377. Although witness TF1-045 provides evidence on the presence of Johnny Paul Koroma, the political leader of the late AFRC regime, in the Kailahun District after the fall of the AFRC regime in May 1997, this evidence proves that nor the AFRC nor the SLA

[444] Transcript 24 June 2005, p.7-8. See also TF1-114, 14 July 2005, p.127.
[445] Transcript 19 April 2005, p.78.

that fled from Freetown, were in control of (part of) Kailahun District, or were even allowed to operate within this District.[446] Defence witnesses DAB-142 and DAB-140 testify as well about that arrest by the RUF of the SLAs that came to Kailahun[447], followed by the disarming and pillaging of the SLA soldiers [448] and the tying up of Johnny Paul Koroma by the RUF.[449] Furthermore, witness DAB-140 provided evidence that Johnny Paul Koroma addresses an assembly in Buedu town, wherein Johnny Paul Koroma stated that he was leaving Kailahun District with his own group.[450]

378. Therefore, both Prosecution and Defence evidence proves that there existed no SLA command structure or organization of SLAs in Kailahun District. The soldiers that crossed the borders of Kailahun District had only one choice, and that is to join the RUF command and drop their SLA status, thus becoming a RUF fighter. The way the RUF and its leader treated the SLAs and their leader in Kailahun District, arresting and disarming them, forms important proof that no JCE could exist between the SLA and the RUF, especially after the fall of the AFRC government in February 1998. The leadership of RUF would not tolerate the command of the SLAs in the Districts under RUF control. DAB-140 gives the following lively account of this fact[451]:

> He [Sam Bockarie] disarmed all of them [the group of SLA that arrived in Kailahun District, including Johnny Paul Koroma], that – because they've come to my own area and, whatever power I have, I will inflict it on you. I am your custodian, so all the guns you have should be with me.

379. Prosecution witness TF1-114, a member of the SLA that fled from Freetown to Kailahun after the ECOMOG intervention in February 1998[452], and then became a member of the RUF, unambiguously testified about the position he took when he arrived in Kailahun:

> Who appointed you an adjutant whilst you were in Kailahun?
> A. Ex-general Mosquito.
> Q. What faction did General Mosquito belong to?
> A. At that time he was a leader of the RUF.

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[446] TF1-045, Transcript 19 July 2005, p. 95-96. In this testimony Mosquito makes it very clear to Johnny Paul Koroma that there is no room for him in the command structure in Kailahun District. See also witness TF1-113 Transcript 18 July 2005, p.86-87 on the arrival of Johnny Paul Koroma in Kailahun District.
[447] Transcript 19 September 2006, p.18, 28; Transcript 19 September 2006, p.71-72.
[448] Transcript 19 september 2006, p.77-78, 92.
[449] Transcript 19 September 2006, p.71-72.
[450] Transcript 19 September 2006, p.75-76.
[451] Transcript 19 September 2006, p.92.
[452] Transcript 14 July 2005, p.7-8.

Q. Am I therefore right to say that you were appointed as an RUF official?
A. Yes, sir.
Q. Am I also right to say that you were then a member of the RUF?
A. At that time now in Kailahun, yes. For all Kailahun District is RUF.
Q. Mr Witness --
A. Yes, sir.
Q. -- how long did you stay with the RUF?
A. Three years.[453]

380. The Defence holds that this witness, as member of the SLA that joined the RUF and thus became an insider within the RUF, should be in an especially good position to testify about the position members of the SLA that arrived in Kailahun.[454]

381. Additionally, Prosecution witness TF1-113 is very clear about the command structure in Kailahun District:

> Q. When you said they were all under the one command, did you mean they were all under the command of Sam Bockarie, General Sam Bockarie, alias Mosquito?
> A. When all of them came from here and went to Kailahun, they were all under Mosquito's order, as I saw it, because he was the General over all of them.[455]

382. This evidence is further corroborated by the evidence given by TF1-114[456] and DAB-143[457] who testified about the RUF command structure that existed throughout the whole indictment period in the Kailahun District.

383. Therefore, the evidence given by witness TF1-114 on rape and forced labour by RUF in Kailahun[458], and witness TF1-113 on mass killing in Kailahun District, by RUF under command of Mosquito[459], if believed, only can prove that these crimes fall under the criminal responsibility of certain members of the RUF. Furthermore,

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[453] Transcript 18 July 2005, p.12.
[454] Although TF1-114 is fairly consistent throughout his whole evidence about the position of SLAs that arrived in Kailahun District (they had to become RUF), at one point he contradicts himself, when identifying the perpetrators of rapes (see Transcript 14 July 2005, p.130):
Q. When you say that people tried to rape or people tried to marry, who do you mean by "people"?
A. Members of this organisation, members of this group, RUF and AFRC men.
However, when asked again about the position of the SLAs who arrived in Kailahun District, TF1-114 consistently
[455] Transcript 18 July 2005, 120-121. In addition, TF1-113 was not consistent in identifying both SLAs and RUF as the perpetrators of the crimes the witness testified on (see Transcript 18 July 2005, p.115-116, where Defence counsel confront the witness with her previous statement in which she only identified the RUF as the perpetrator of the crimes she testified about).
[456] Transcript 18 July 2005, p.59-60, where TF1-114 testified about the command structure in the Kailahun District, naming Sam Bockarie as the overall commander, and Issa Sesay as the second in command.
[457] Transcript 19 September 2006, p.56, testifying about the RUF leaders who came to Buedu Town.
[458] Transcript 14 July 2005, p.128-131,
[459] Transcript 18 July 2005, p.84-85, 87-90,

although TF1-113 is testifying about the Military Police being a combination of the two groups, SLAs and RUFs[460], Prosecution witness TF-114 further clarified that he, as a member of the SLA joined the Military Police in Kailahun District, and therefore had to join the RUF.[461]

384. Conclusively, both Prosecution and Defence witnesses have unambiguously testified that Kailahun District was under total control of the RUF, and that any member of the SLA that went to Kailahun had no other choice than to join the RUF, and operate under the command of the RUF. The Prosecution has not to any extent proved that the Third Accused was criminal responsible for these alleged crimes which took place in the Kailahun District.

8.3 Prosecution Evidence on the Third Accused's Route after the Fall of the AFRC Regime in February 1998

385. The Defence observes that, in addition to the fact that the role of the Third Accused within the group of SLAs he moved along was grossly exaggerated by Prosecution key insider witnesses such as TF1-334 and TF1-167, some of the Prosecution witnesses falsely claimed the presence of the Third Accused when certain villages were attacked or even the participation of the Third Accused in these attacks. In the following paragraphs the Defence will therefore refute some of the Prosecution evidence with regard to the presence and the route of the Third Accused after the fall of the AFRC regime, and thus, according to Prosecution evidence, the ending of the Third Accused's purported role as an honourable within this regime.

Kanu's Presence and Role in Kono

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[460] Transcript 18 July 2005, p.90.

[461] See paragraph 379 of this Defence Trial Brief, combined with Transcript 14 July 2005, p.128, where TF1-114 states that:

Q. Okay, Mr Witness, the question to you is this: When you got to Buedu, what were you doing there?
A. I was a military police adjutant, defence headquarter Buedu.
Q. Who did you report to in Buedu?
A. I report to at that time, to Mr Alex Alie, Captain Alex Alie.
Q. Was Captain Alex Alie from the Sierra Leone Army?
A. No, sir, he was in the RUF.

386. The Prosecution evidence fails to prove that the Third Accused stayed more than a few days in the Kono District after the fall of the AFRC regime in February 1998, or that the Third Accused had any command position within this District.

387. Defence witness DBK-117, who arrived in April 1998 with a group of SLAs, including Kallay, Hassan Papa Bangura (aka Bomblast), Junior Johnson (aka Junior Lion), Alimamy Bobson Sesay (Bobby), Staff Alhaji and Savage, in Kono District met a lot of RUF members in Kono District.[462] When asked about the presence and role of the Third Accused concerning Kono District, DBK-117, who stated with the only SLA group in Kono District based at Masingbi Road,[463] states the following[464]:

> Mr Witness, when you were there at that time, did you see the third accused there?
> A. No, I did not meet him there.
> Q. Thank you. Mr Witness, where in Kono did you stay?
> A. Well, I was there together with my SLA brothers at Masingbi Road. Whilst the RUF, they were all over in Koidu Town. Beware at Masingbi Road. That's what they called the place. That was where we deployed.
>
> Q. Now, do you know whether the third accused, Santigie Borbor Kanu, was involved in the capture of Kono, before you went there?
> A. No. They did not tell me and I did not see him. I did not see him and they did not tell me that they captured Kono. I never met them there and they did not go there.

This evidence is further corroborated by the testimony of other Defence witnesses.[465]

388. Furthermore, the evidence given by Prosecution witness TF1-167 that the SLAs and RUF that arrived in Kono District jointly took over the control of the town[466], is in clear contradiction with the evidence of DBK-117, who arrived together with this Prosecution witness. And Prosecution witness TF1-334 claims that the Third Accused

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[462] Transcript 16 October 2006, p.14-15.
[463] See DBK-117, Transcript 16 October 2006, p.15:
A. Well, I was there together with my SLA brothers at Masingbi Road. Whilst the RUF, they were all over in Koidu Town. Beware at Masingbi Road. That's what they called the place. That was where we deployed.
See also Prosecution witness TF1-334, Transcript 17 May 2005, p.103: "We and the SLA took out Masingbi Road, and Superman, the RUF took care of the road from Opera to Gandorhun route. They also took care of the Guinea Highway to go to us Jagbwema Fiama."
[464] Transcript 16 October 2006, subsequently p.15 and p.41-42.
[465] See for example Defence witness DAB-042, who had seen the Third Accused before, (Transcript 15 September 2006, p.80):
Q. After the overthrow of the AFRC, did you hear that Santigie Kanu was commanding AFRC troops in Koidu, Yengema or in the Kono District?
A. No.
See also DBK-113 (Transcript 13 October 2005, p.16), who confirms that the Third Accused was not in Koidu town.
[466] Transcript 15 September 2005, p.32-33.

took part in the operation to capture Kono[467], but both TF1-167[468] and DBK-117[469] gave evidence that the Third Accused took no part in this operation.

389. Prosecution witness TF1-033 testified about the presence of the Third Accused[470] in Tombodu town, when Savage and his troops, under the command of Gullit, attacked this town[471] in March 1998.[472] However, the reliability of TF1-033 is seriously hampered by the fact that the evidence of this witness showed that, instead of being an abducted civilian, this Prosecution witness played his own active role within the SLA group he joined, and thus was an active supporter of the AFRC[473] and a participant in the SLA.[474] In addition, witness TF1-334 does not mention the presence of the Third Accused during this alleged attack on Tombodu town.[475] Furthermore, TF1-334 only testifies about the SLAs moving through Tombodu town, when they left Kono District[476], and puts the attack on Tombodu town in a totally different time frame, as an alleged joint SLA and RUF attack taking place before the SLAs decided to leave Kono District, as well as the independent work of the troops under Savage.[477] Witness TF1-167 his evidence proves as well that the mass killings were done by Savage and his troops, and that the SLAs just moved through Tombodu town.[478]

390. Although the Defence refutes the evidence given by witness TF1-167 on the presence of the Third Accused at an alleged meeting in Koidu Town (but not during the alleged capture of Koidu town[479]) in the beginning of 1998 at Denis Mingo where members of

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[467] Transcript 16 june 2005, p.59.
[468] Transcript 15 September 2005, p.32-33.
[469] See paragraph 387 of this Trial Brief.
[470] This witness seems to identify the Third Accused as a commander (Transcript 11 July 2005, p.11-12) but no foundation has been laid how this witness could have known this. On the contrary, this evidence has been suggested by the Prosecution in examination-in-chief (Transcript 11 July 2005, p.11-12):
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.
[471] Transcript 11 July 2005, p.9-13.
[472] Transcript 11 July 2005, p.78-79.
[473] TF1-033 fled Freetown to escape from the mob justice, as he was an active supporter of the AFRC (Transcript 11 July 2005, p.68-69).
[474] The witness held the job of news reporter for Gullit (Transcript 11 July 2005, p.80).
[475] TF1-334, Transcript 20 May 2005, p.65-67.
[476] Transcript 20 May 2005, p.57-58, 65-67.
[477] Transcript 20 May 2005, p.11, 13-17.
[478] Transcript 15 September 2005, p.44-47.
[479] Transcript 17 May 2005, p.99-101.

the RUF and SLA set up a command structure to defence Kono District,[480] and that the Third Accused as a G5 supervised the civilians in Kono District[481], this Prosecution witness still does not proof that the Third Accused had any position of command within this District.

391. In addition, TF1-334 testifies that the Third Accused only came for a short visit to Kono District, in order to give SAJ Musa an update on what happened in this District[482]:

> Do you know how long Five-Five remained at Masingbi Road?
> A. Five-Five only spent a day and the other day he returned.
> Q. Do you know where he returned to?
> A. Well, as Five-Five came, he addressed myself in the presence of my operation commander and the other soldiers that were under the operation commander, that he came to see the security situation in Kono and that he would go back to SAJ Musa and reported to him about our strength in Kono.
> Q. You said SAJ Musa; you have said that before.
> S-A-J M-U-S-A. Now, you said that Five-Five would go back to report to SAJ Musa about what was going on in Kono. Do you know where SAJ Musa was based at t his time?
> A. Well, SAJ was based in Mongor Bendugu.
> Q. How do you know SAJ Musa was based in Mongor Bendugu atthis time?
> A. Well, Five-Five clearly explained this to me, that SAJ had withdrawn from Kono and now he is based at Mongor Bendugu.

Therefore, Prosecution evidence fails to prove that the Third Accused operated in the Kono District, or held a command position in this District.

Kanu's Movement from Koinadugu District to Camp Rosos

392. Defence witness DBK-113 has given convincing evidence in court that the Third Accused did not move together with Prosecution witness Junior Johnson from Koinadugu District through Karina and Mandaha to establish a new base, Camp Rosos.[483] This Defence witness formed part of a group of civilians that moved in the back rear of the SLA advance group with Junior Lion, Hassan Papa Bangura, Tito and FAT Sesay, amongst others.[484] The Third Accused did not join this group of soldiers

[480] TF1-167, Transcript 15 September 2005, p.35-37.
[481] Transcript 19 September 2005, p.39-41, Transcript 15 September 2005, p.39-40.
[482] Transcript 18 May 2005, p.19-20
[483] Transcript 13 October 2006, p.21-25.
[484] Transcript 13 October 2006, p.18-19.

and civilians at any stage during their movement from Mansofinia to Karina to Mandaha and eventually to Camp Rosos.[485]

393. As the Third Accused, according to Prosecution and Defence evidence, arrived before SAJ Musa in Colonel Eddie Town – more specifically, there is evidence that the Third Accused was already under arrest when the troop of SAJ arrived in Colonel Eddie Town[486] – there must have been more groups that moved separately from the base in Koinadugu District to the newly established Camp Rosos in Bombali District. This fact also fits in the Defence view on the SLAs after the ECOMOG intervention in February 1998, as a group of soldiers on the run for opposing fighting forces, and moving in different SLA groups.

394. The evidence given by both Junior Johnson and TF1-334, that the Third Accused moved as a commander with them from Koinadugu District to Colonel Eddie town, and that the Third Accused participated in the attack on Karina and surrounding villages, including Mandaha, in mid 1998[487] is clearly challenged by the evidence given by DSK-113 on this subject, as DSK-113 moved along with both Prosecution witnesses.[488]

395. Therefore this Prosecution evidence has not proved beyond reasonable doubt that the Third Accused was involved in, or in command of, any of the crimes committed by the troops that moved from Koinadugu District, to Colonel Eddie town.

8.4 OTP Evidence on Individual Crimes Allegedly Committed by Kanu

Count 1 - Terrorism

396. In all discussed definitions of terrorism, the ICTY *Galic* definition and the definition provided by Trial Chambers I and II, one of the constitutive elements is that the acts of violence were committed with the primary purpose of spreading terror amongst civilians.

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[485] Transcript 13 October 2006, p.21-25
[486] See DBK-113, Transcript 13 October 2006, p.27; TF1-167, Transcript 15 September 2005, p. 78-79.
[487] Transcript 23 May 2005, p.78-90.
[488] Although DSK-113 did not mention the presence of TF1-334 in this SLA group, the presence of Hassan Papa Bangura proves that TF1-334 must have been present as well.

397. In *Prosecutor v. Galic*, the ICTY Trial Chamber held that the 'primary purpose' element entails the *mens rea* of the crime of terror. "It is to be understood as excluding *dolus eventualis* or recklessness from the intentional state specific to terror. Thus the Prosecution is required to prove not only that the Accused accepted the likelihood that terror would result from the illegal acts – or, in other words, that he was aware of the possibility that terror would result – but that that was the result which he specifically intended. The crime of terror is a specific-intent crime."[489]

398. No evidence has been adduced at trial, supporting the Prosecution allegation that the Third Accused had a special intent to commit the crime of terror, nor that he actually did so.

399. There is no evidence that the Third Accused, in any form of liability, committed acts of violence with the primary purpose of spreading terror.

400. The Prosecution case suggests that SAJ Musa was the overall AFRC commander from the time the AFRC was ousted from Freetown by ECOMOG in February 1998. As evidenced by several Prosecution witnesses, SAJ Musa time and again indicated that the overall goal of the AFRC was to reinstate the army in Freetown.[490] The route to Freetown was made with this goal in mind. Thus, not only did the Prosecution not lead any evidence that the AFRC's or Kanu's primary goal was to spread terror during this period of time, but to the contrary, Prosecution witnesses testified that there was another overall goal: to reinstate the army, and that all crimes allegedly committed were in furtherance of this primary goal.

401. Kanu was part of this group of SAJ Musa, and no evidence has been led to the effect that the Third Accused would have had the primary purpose of spreading terror amongst the civilian population.

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[489] *Prosecutor v. Galic*, Judgment & Opinion, 5 December 2003, Case No. IT-98-29-T, para. 136 (footnotes omitted).
[490] TF1-167, Transcript 20 September 2005, p.12; TF1-184, Transcript 27 September 2005, p. 9, p. 15, p. 41, p. 46; TF1-334, Transcript 13 June 2005, p. 49; DBK-113, Transcript 13 October 2006, p. 30-31.

402. The Defence furthermore contends that outside of the abovementioned time period (from February 1998 until the end of 1999), the Prosecution did not lead any evidence supporting the required element that the primary goal should have been to spread terror amongst the civilian population.

403. For the above reasons, the Defence respectfully submits that the required elements of terrorism have not been met, and no evidence has been led to this end.

Count 2 - Collective Punishments

404. Furthermore, the Prosecution failed to adduce any evidence in this regard against Kanu individually.

405. As regards the liability form of superior responsibility, the Defence submits the following.

406. Witness TF1-033 states that in 1998, Kanu was one of the commanders present in Tombodu. This witness also testifies as follows:[491]

> 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 Gullit. Bazzy, Ibrahim Bazzy Kamara was also again. Ibrahim Sesay, alias Biyoh, was also there. And Abdul Sesay also.
>
> Q. Witness, do you know the reason why Tombodu Town was attacked by the AFRC?
> A. Well, precisely, according to the AFRC guys under the command of Gullit, Gullit said to them that they all know what befell on their sympathisers, loved ones and colleague soldiers, when ECOMOG militarily removed them from power. Civilian also were involved in the killing -- in the killings of their colleague soldiers, sympathisers and relatives. So, the same fate they are going to return to civilians.

[491] Transcript 11 July 2005, p. 11-12.

407. Again, TF1-334 testifies that Five-Five was present in Western Area while an order was given to burn and kill. No evidence is brought forward by this witness that this order was followed up by either the Third Accused or the others present.[492]

408. The Defence respectfully contends that this evidence is insufficient in holding the Third Accused responsible for superior responsibility of the crime of collective punishments, as his mere presence as a commander, one of many, is mentioned.

Count 3, 4 and 5 – Extermination and Murder

409. The evidence presented on no occasion links the Third Accused to any act of extermination.

410. One witness testifies that Brigadier Five-Five shot a woman in Waterloo, who died consequently. He states 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 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. [493]

411. This evidence is to be qualified as absolutely unreliable. The witness, on the question who killed this woman, asserts that it was the Third Accused. Yet, when questioned about the foundation of his alleged knowledge, this witness failed to provide any plausible answer. Based upon this unreliable (hearsay) testimony, which was not supported by any other evidence, no conviction can be entered here.

412. At another occasion, Prosecution evidence has been submitted to the shooting of a mosque in Kissy. Gullit allegedly ordered the Third Accused to shoot and kill people inside a mosque, of whom he had received information "that the civilians were harbouring ECOMOG forces in the mosques. That was information he had got on that

[492] Transcript 14 June 2005, p. 83-84.
[493] TF1-277, Transcript 8 March 2005, p. 50.

area and that the troops, as they go down, should not see a mosque and think that they were housing civilians." Gullit moreover said that "if a troop reaches the mosque which houses people, they should be shot and killed," and "it was housing collaborators. He has found that they were harbouring Nigerian soldiers in the mosque." Witness then testifies that Five-Five ordered the shooting of this mosque, "[w]e shot at the mosque and people died and I saw it myself."[494] Also witness TF1-046 testifies of ECOMOG soldiers being shot by, *inter alia*, the Third Accused.[495]

413. The Defence respectfully submits that such shooting of ECOMOG soldiers, if it were to be proved (quod non) cannot be qualified as extermination, because the second requirement, the killing or destruction constituted part of a mass killing of members of a civilian population, is not fulfilled. This same argument goes for the crime against humanity of murder, and murder as a violation of Common Article 3 (counts 4 and 5 respectively).

414. For the above reasons, the Defence respectfully submits that the required elements of extermination and murder have not been met, and no evidence has been led to this end.

Count 6 – Rape

415. The Defence submits that the only Prosecution witness that has actually testified about the involvement of the Third Accused in the crime of rape is highly unreliable. Witness TF1-282, who testified about being raped by a person named Five-Five[496], was in cross-examination confronted with her previous inconsistent statement, and could not even describe the way the Third Accused looks, whilst according to her statement she described him before:[497]

> Witness was in Sumbuya for two weeks before Sumbuya was attacked. Witness was raped during these two weeks. Witness was vaginated by Five-Five when she arrived in Sumbuya. Witness was about 14 years old at the time and had not yet been initiated. Witness was raped in a house by Five-Five who threatened to kill her if she cried. Witness said that Five-Five had a pistol on him, and she did not see it clearly." I'm sorry, "although she did not see it clearly. Five-Five made her take off all her clothes. Witness said that

[494] TF1-334, Transcript 14 June 2005, p.87-88.
[495] TF1-046, Transcript 7 October 2005, p. 115-116.
[496] Transcript 13 April 2005, p.6-14.
[497] Transcript 14 April 2005, p.3-5.

Five-Five penetrated her vagina and made her bleed vaginally. Witness pleaded with Five-Five for him to stop, but he said that she should wait until he was finished. After he had finished, he dismissed witness, who returned to the house where the other group of rebels who captured her were staying. Witness described Five-Five as tall, slim, and fair in complexion, which means not too black. She heard him speak Krio. Witness knew he was a big commander, as he passed orders to his men. Witness heard him order his men to jah-jah or loot. They would go looting, and then come back with the loot which they brought to him."
Q. Witness, I want to ask you first of all, did you tell the Prosecution that you were raped by the person called Five-Five at Sumbuya?
A. I did not say that he raped me at Sumbuya. I said he raped me in the bush.
Q. Is it the case that what I've just read to you, that part of what I've just read to you is not true?
[....]
THE WITNESS: It was not in Sumbuya.
MR MANLEY-SPAINE:
Q. Witness, did you describe the person called Five-Five as tall, slim, and fair in complexion?
A. I was not able to describe him because I only saw him once. That was the time that he raped me. So I wasn't able to describe him, how he was and how he wasn't.
Q. Are you saying that you did not tell the Prosecution that he was tall, slim, and fair in complexion?
A. Not at all.

Q. Witness, how long -- how many times did you see this person that you were told was Five-Five -- was called Five-Five?
A. I saw him only once.
Q. Where was that?
A. That was the time that -- that was the time that we were in the bush. The very day I was captured.

416. Accordingly, the Defence concludes that the evidence of witness TF1-282 should have no weight in the determination of the guilt of the Third Accused. In addition, according to the Defence to Prosecution has not proved beyond reasonable doubt the criminal responsibility of the Third Accused for the crime of rape, charges as count 6 in the Indictment.

Count 10-11 mutilation

Defence Theory

417. Regarding count 10, the Defence respectfully holds that no conclusive evidence has been adduced regarding the specific incidents the Prosecution witnesses testified upon, that the following element has been fulfilled: the perpetrator's conduct caused death or seriously endangered the physical or mental health of the victim (element b).

418. With regard to count 11, the Defence submits that no evidence has been introduced at trial, supporting the Prosecution allegation that mutilations and other inhumane acts as described in count 11 were committed as part of a widespread and systematic attack. This requirement of crime against humanity has not been met by the Prosecution evidence, and accordingly, count 11 should be dismissed.

Crime Base

419. Prosecution witnesses have made some assertions relating the Third Accused's behaviour to the tenth and eleventh counts. The Defence submits that this evidence needs to be refuted, on the basis of the following.

420. Witness Junior Johnson describes that at Kissy mental home, when he got there, Santigie Kanu gave an order to go to the eastern part of Freetown, "to amputate up to 200 civilians." The Defence first of all contests the fact that the Third Accused made such a statement. Junior Johnson was not in the direct presence of the Accused at that time, and even if the Third Accused would have made such an order, he was not present and could not have known. This witness is asked where he was when the order was given. He states he was with Ibrahim Bazzy Kamara, "at the *environment* of the Kissy mental home."[498] In the second place, without proper basis, it is not possible to understand the meaning of the Third Accused's words, if he uttered them at all – *quod non* –, and assuming that this simple sentence led to the crimes indicated in counts 10 and/or 11 is an oversimplification of the facts. In the words of honorable Judge Lussick during the examination-in-chief of witness TF1-334: "Amputation could mean just cutting a lock of their hair off."[499]

421. When confronted with this incident several days later, Junior Johnson, when confronted with the allegation that it was not the First Accused who made this order, he did not deny this, but rather states that more people came and ordered the amputation of 200 civilians.[500]

[498] TF1-167, Transcript 16 September 2005, p.53-55 (emphasis added).
[499] Transcript 14 June 2005, p. 69.
[500] TF1-167, Transcript 19 September 2005, p.87.

422. Prosecution insider witness TF1-184 indicates that Five-Five showed how amputations were to be carried out.[501] The Defence respectfully submits that this provides no conclusive evidence of the elements of counts 10 and 11, even not in combination with the other allegations made by these insider witnesses, whose reliability the Defence in this Brief has seriously contested.

423. Witness TF1-334 also provides evidence for Mr. Kanu's alleged participation in the amputation of people's hands.[502] The Defence submits that this witness's testimony as a whole is unreliable, and that also this part of the evidence should not be taken into account.

424. Remarkably, it is these two witnesses, TF1-184, TF1-334, who testify to the alleged participation of Kanu in these crimes. The Defence holds that this evidence is not reliable, because of the fact that these two witnesses were in prison together, also with Defence witness DBK-113. In prison, they were approached by Special Court investigators, and had all the time in the world to discuss and adjust each others evidence. DBK-113 indicates of inappropriate promises made to them, and "They told us that we were to testify against Bazzy, Santigie Kanu and Tamba Brima."[503] This witness moreover states that the Special Court's investigators told him: "'You boy, you are senseless. You just come and say this, the bosses that had been held were the one who gave the order to commit crimes.' That was what they said."[504]

425. As shown above, the only evidence that has been alleged against the Third Accused, was in the Freetown District. The time period for this count is restricted to "[b]etween 6 January 1999 and 28 February 1999."[505] The Defence contends that no evidence has been put forward substantiating the allegation that such facts happened on or after 6 January 1999. As such, this evidence relating to the Freetown area should also be dismissed. For all other districts, the Defence contends that no evidence has been adduced relating the Third Accused, either individually or through his alleged position as a superior, to the crimes embedded in counts 10 and 11 of the Indictment.

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[501] TF1-184, Transcript 27 September 2005, p. 74.
[502] TF1-334, Transcript 14 June 2005, p.69-71.
[503] DBK-113, Transcript 13 October 2006, p. 58-59 and p. 64-65.
[504] DBK-113, Transcript 13 October 2006, p. 126.
[505] See para. 63 of the Indictment.

426. For the above reasons, the Defence respectfully submits that the required elements of mutilation have not been met, and no evidence has been led to this end.

Count 12 – Child Soldiers

427. The Defence holds that the Prosecution has not led any evidence on the involvement of the Third Accused in the actual recruitment of child soldiers. Furthermore, the Prosecution evidence about the involvement of the Third Accused in the training of child soldiers is often vague, and does not specify the alleged role of the Third Accused. For example, witness TF1-158 gives the following evidence[506]:

> Q. When you told us about the training in Rosos, you indicated that Gullit and Five-Five they go there and stand by during the training. Can you recall?
> A. Yes. Yes.
> Q. Did you recall whether Five-Five did anything while standing by during this training?
> A. He did not do anything.

428. In addition, Prosecution witness TF1-167 describes the role of the Third Accused in the training of men and boys as follows:

> A. The men were used -- some were used to carry arms and ammunition and food, and some were choosed [sic] to be trained as fighters.
> Q. Were the women used for anything?
> A. The women always are there to help cook. To cook.
> Q. When you were at Rosos did you have any particular role?
> A. Yes, at Rosos there was a training organised at Rosos, which Santigie Kanu was overseeing the training and FAT Sesay, the G1 in charge of admin, was also in charge of the training.

429. The hearsay evidence of TF1-180, if believed, does also not prove that the Third Accused held any position, or was in charge of, the recruitment, training or use of alleged child soldiers[507]:

> A. So unfortunately, at that moment, we took some weeks -- two weeks. That was the time our commander said -- he said, "Those small boys are supposed to go and fight in Kabala." That was the time that Brigadier Issa and some other bras – Brigadier Five-Five, Gullit, O-Five - they said they had given an order that all of us should be captured, the smaller boys in the street, that we should go and fight.

430. The Defence holds that the evidence of witness TF1-227's testimony should not be followed. In the testimony of this witness, a clear inconsistency can be detected with respect to the assertions of this witness on the issue of so-called 'child combatants.' At

[506] TF1-158, Transcript 26 July 2005, p. 72.
[507] TF1-180, Transcript 8 July 2005, p.14.

the outset of his testimony this witness asserts: "Brigadier Five-Five he has a child combatant."[508] Yet, later on, this same witness purports something totally different, namely:

> Q. How many child combatants did you say Brigadier Five-Five had?
> A. Ten.[509]

431. The Defence holds that this is an indicative inconsistency within the witness's testimony, not between a prior statement and the testimony, but within the testimony itself. From the wording used by Prosecution counsel, "How many child combatants did you say Brigadier Five-Five had?", it seems that the Prosecution counsel had to remind witness of something he should say in court, and which he had failed to mention earlier on when this topic had already been discussed.

432. With reference to the previous discussion of the reliability of TF1-227, the Defence contends that the evidence of witness TF1-227 should consequently not be taken into account, as it has been shown that this witness' testimony is on crucial parts unreliable.

433. Furthermore, as previous mentioned, the age of these "children" remains often unclear.

434. Conclusively, in the absence of other conclusive witness testimony, the Prosecution has not led sufficient evidence to prove beyond reasonable doubt that the Third Accused can be held criminal responsible for the crime of recruitment and use of child soldiers, charged in count 12 of the Indictment.

[508] TF1-227, Transcript 11 April 2005, p. 21.
[509] TF1-227, Transcript 11 April 2005, p. 75.

IX CONCLUSIONS

435. This trial brief arrives at the following overall conclusions.

History of the SLA

436. The defence has first of all shown that there was such failure of state responsibility on part of the Republic of Sierra Leone from the 1970s onwards up to 1997 as to the endorsement of all forms of discipline, education and training within the army. It also showed that this was not without substantive effects on the state of the army. It is established that Defence that the marginalization and deterioration of the army in all its aspects undermined the three liability modes as embedded in the indictment. The defence case has specifically set forth:

(a) The history of the SLA shows a total breakdown in terms of military organization. Before and during the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image and military nature of the RSLAF, affecting command and control.

(b) Junior ranks in the SLA were totally neglected by the politicians and (senior) officers. It was this neglect that was one of the major factors that led to the AFRC coup. The defence case has also shown that this led to the disintegration of the army as a coherent unit, deteriorating command and control.

437. Furthermore, the Defence has established that at that time the AFRC came into power, no integrated / coherent army force existed which reasonable could have been functioning as one unified fighting force in military sense.

438. Additionally the Defence case has provided evidence that:

(a) The precondition, assumed by the OTP, that recognizable groups need to exist to establish a military organization, was not fulfilled during the conflict in which the AFRC faction participated. Evidence has been adduced the various groups were not recognizable.

(b) The AFRC at the maximum may have had the semblance of a military structure and hierarchy. However, since the essential criteria of the span of command and the span of control were not fulfilled, it was far from a regular force, if any.

(c) The AFRC faction did not inhibit the majority of the characteristics of a traditional military organization.

(d) Within the AFRC faction any form of strategic military level and the grand strategy level was absent.

(e) Fifth, it has been shown that the AFRC faction can not be qualified as a military organization in military-doctrinal sense.

(f) The Defence case also adduced evidence that the AFRC, during the war, was never one single unit, but comprised of various groups with constantly changing compositions, not related to each other with different commanders; a chameleonic movement. All these different commanders had different supporters operating in different parts of the country, pledging alliance not to the larger coalition, but to specific commanders.

(g) Finally, a joint force or joint structure in military operational terms between the RUF and the AFRC was never established. The Defence case has provided prove that this conclusion undermines the liability theory of JCE.

(h) As a result it is the Defence case that Common Article 3 of the Geneva Conventions is not applicable in the instant case. It has been argued that some of the individual prohibitions of this provision demand an administration and organization of discernable proportions on part of both parties to the conflict.[510] Within international law, the view has also been transpired that an "armed conflict," even if it is "not of an international character," requires some degree of military organization and political control on both sides.[511] It is exactly this

[510] See Draper, "The Status of Combatants and the question of Guerilla Warefare, o.c., at 234
[511] Draper, o.c. at 335

organization and political control which is absent in this case as shown by the evidence.

The Defence case has provided evidence as to the total downfall of the Sierra Leone Army from 1961 to 1997 and the total negligence of the junior ranks in the Army by politicians and senior officers. It has also shown the disintegration of a military organization at the time of the Coup of 1997 as a result of this negligence. It is established that as a result hereof the following consequences emerged: low morale, 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 last but not least, no hope for improvement. And: no political oversight as required for the applicability of common article 3.

As a result, this history has had important implications as to the assessment of the existence of "effective command and control" and the presence of joint enterprise in military and legal criminal sense.

Absence of JCE

439. The Defence case has led evidence as to the following five conclusions on the issue of JCE:

(a) It has been shown by the Defence that the three accused may and can not be held accountable for alleged crimes committed by other persons, such as alleged conduct of any member of the AFRC or RUF, not even based upon the concept of JCE.

(b) Secondly, the Defence case has furthermore shown that the three accused can not be held criminally liable for acts or omissions which are attributed to the AFRC and RUF as such, i.e. the organizations to which they allegedly belong. "Organizational crime" does not warrant the current indictment.

(c) Thirdly, the Defence case has shown that the three accused, to be part of the purported JCE, lacked the requisite "frame of mind."

(d) Fourthly and in specific, the Defence case has established that no reasonable trier of fact can arrive at the conclusion that the three accused had an understanding or entered into an agreement with the relevant physical perpetrators to commit acts which were a natural and foreseeable consequence of the crime agreed upon by the accused and those perpetrators.[512]

(e) Fifthly, the Defence case has provided proof that, as is set forth by the ICTY judgments in the Blagojevic and Jokic cases, in the event that the objective of an alleged JCE changes such that the objective is fundamentally different in nature and scope from the common plan or design to which the participants originally agreed, then a new and distinct JCE (within the third category) can be established.[513] However, any "escalation" of the original objective must either be agreed to if a person is to incur criminal liability for the first category of JCE, or that "escalation" must be a natural and foreseeable consequence of the original enterprise.[514] The Defence case has shown that the latter was not the case. In specific, the Defence case has provided proof for the following:

(c) Firstly, the conflict in general and fighting factions in particular were of chameleonic nature. Military conduct, if any, shifted from offensive and defensive operations to "survival of the fittest" actions. Evidence is adduced, that those that joint SAJ Musa's group only did so to protect themselves and their families from the variety of threats from ECOMOG and Kamajors.

(d) Secondly, the composition of the factions, due to internal rivalry and escalation within and between AFRC and RUF, constantly changed and fragmented; there was a considerable degree of "factional fluidity", all processes which were unforeseeable for the accused. We will prove that by end 1997 / early 1998 there was a complete breakdown of relations between SLA soldiers and RUF directly after looting of the Iranian Embassy.

[512] See ICTY Judgment Prosecutor v. Brdanin, 1 September 2004 case no. IT-99036-T para. 347
[513] ICTY, *Prosecutor v. Blagojevic and Jokic*, Judgment, 17 January 2005, Case No. IT-02-60-T, paras. 700, 2155-2156.
[514] Ibid.

(e) In-fights between AFRC, RUF and even amongst SLA soldiers occurred on many occasions during the timeframe of the Indictment.

440. Therefore no conviction can be entered on the bases of JCE.

Absence of Superior Responsibility

441. The Prosecution case failed to proof that the third accused from the time of the retreat from Freetown to the time of the advance on Freetown, had any command authority. Furthermore it failed to proof that a leadership structure existed, even in Mansofinia. It has been shown that the nature of the retreat from Freetown was so disjointed and disorganized such that there was no central authority. It has been proven that at that time a breakdown of command and control occurred.

442. The Prosecution case failed to proof that even at Col. Eddie Town under SAJ Musa no operational structure existed nor was such a structure established, bearing in mind that only SAJ Musa and FAT Sesay were educated staff officers. No one else. Additionally, it has been shown that the accused even were ostracized after being accused by AFRC / SLAs of trying to subvert the movement.

443. The evidence has shown that third accused was detained or put under house arrest by Commander "0-Five" throughout the period they were in "Colonel Eddie Town" in 1998. It has been shown that this house-arrest was imposed due to internal strife and because the third accused were trying to subvert the movement. After the house arrest, the position of the third accused was considerably marginalized on the advance to Freetown. Accordingly, it has been established that the third accused reasonably could not have exercised any form of effective command and control.

444. Additionally, it has been established that "control" must be effective to bear superior responsibility. Mere appearance of an official's name on a list, i.e. the presented list with honourables, as such does not qualify superior responsibility of this nature.[515] The Prosecution failed to proof that the movement at all material times was such that there was no effective control.

[515] Ibid.

445. Furthermore, it has been established that as a result of these events the third accused could not have been endowed with any military authority. In this regard, it should be noted that his alleged qualification as "honourable" can not serve as proof for de facto or de jure military authority.

446. Finally, the evidence led by the Defence as to the element of superior responsibility has indicated that unlike the third accused, other individuals were exercising command and control during the relevant times in the relevant districts, if any. Witnesses have appeared before your Court indicating that other individuals then the third accused were exercising command and control, if any. In specific, witnesses have testified before the honourable Trial Chamber speaking about the control by the RUF of (the diamond areas in) Kono almost throughout all 1998, thus excluding the asserted control by the AFRC, let alone the third accused.

Absence of Individual Criminal Responsibility

447. The Defence case, addressing the alleged individual criminal responsibility has provided evidence for the following conclusions:

a.) common Article 3 applies only "if the hostile action, directed against a legal government, is of a collective character and consists of a minimum amount of organization".[516]
b.) The third accused was not present in <u>all</u> of the districts at the relevant times.
c.) It is not proven in the instant case that alleged unlawful attacks on civilian or civilian objects actually *resulted* in serious damage in all the districts and with its magnitude as asserted in the Indictment.

448. With respect to the latter evidence reference can be made to the ICTY Appeals Chamber judgment in the *Kordic and Cerkez* case of 17 December 2004.[517]

449. The Appeals Chamber concluded that a serious *result* of the attack must be shown for liability to attach under Article 3 ICTY Statute:

[516] See the 1962 ICRC Commission of Experts and various scholars; see Steven Ratner and Jason Abrams, Accountability for Human Rights Atrocities in International Law 97 (2001).
[517] Case No. IT-95-14/2-A.

> [T]he Appeals Chamber is not satisfied that at the relevant time, a violation of Articles 51 and 52 of Additional protocol I incurred individual criminal responsibility under Article 3 of the Statute without causing death, serious injury to body or health, or results listed in Article 3 of the Statute, or being of the same gravity. Therefore the Appeals Chamber will consider in the Judgement that criminal responsibility for unlawful attack on civilians or civilian objects does require the proof of such a result emanating from an unlawful attack.

450. In this respect the Prosecution case failed to proof that such result emerged from all the alleged attacks. The Prosecution case failed to provide forensic evidence whatsoever which determines the existence, nature and scope of the purported injury and damage inflicting upon civilians and civilian objects relative the various districts / villages. The defence is mindful that the ICTR in its judgment of 27 January 2000 in *Prosecutor v Musema* held that the absence of forensic evidence of killings may not be decisive in case where there is convincing eyewitness testimony of crimes; yet, in the AFRC case, all the alleged killing and destructions in terms of quantity and occurrence are not supported by conclusive eyewitness testimony. Hence, this renders the element of "widespread or systematic" attack moot and also the qualification "widespread looting and burning of civilians homes" (count 14 of the Indictment).

451. Addressing the particular position of the third accused in the conflict, the evidence led by the defence has shown that he did not fulfil a role as a commanding officer in military-operational sense, neither de jure nor de facto Further, the Prosecution case failed to proof that Mr. Kanu did actively participate in the crime neither as a civilian nor as a combatant.

452. The Prosecution case failed to proof that the third accused functioned as a commander responsible for military operations. Therefore no conviction can be entered.

Defences of Mistake of Law

453. The Defence case also has established the defence of mistake of law. It has shown that concurrence of moral and legal culpability does *not* count for at the least these alleged crimes of recruiting child soldiers, forced marriages and the alleged violation of Common Article 3 of the Geneva Conventions seen in connection with the established chaos, in military-operational and military legal terms, within the SLA just before the *coup d'etat*. Recruiting of child soldiers, as is shown by the defence, which was part of an official governmental policy in Sierra Leone at the relevant times and subsequently

can not justify criminal liability of the serviceman or citizens involved therein. Additionally, recruitment of child soldiers was only internationally accepted as an international crime in July 1998 by 122 states, at the moment of acceptance of the Rome Treaty.

454. The Defence case has provided the foundation for the defence of mistake of law relying upon the notion that there is a limit to the knowledge and attribution of criminal liability to the military. The tribunal in the *High Command* (Von Leeb and other, US military tribunal sitting at Nuremberg, judgment 28 October 1948) admitted this when it determined that a military commander:

> [c]annot be expected to draw fine distinctions and conclusions as to legality in connection with orders issued by his superiors. He has the right to presume in the absence of specific knowledge to the contrary, that the legality of such orders has been properly determined before their issuance. He cannot be held criminally responsible for a mere error in judgement as to disputable legal questions.[518]

455. The words expresses in the *Peleus* trial in 1945 by the Judge Advocate are supportive in this regard:

> It is quite obvious that no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject."[519]

456. As a result the Defence case has proven that, contextualized in the chaotic movements and breakdown of military structures, *mens rea* could reasonably not have been established on part of the third accused with respect to, at the least, the mentioned charges of forced marriages and child soldiers.

Conclusion

457. This Trial Brief finally wishes to conclude with the following words of Justice Murphy of the U.S Supreme Court saying in his dissent in *Yamashita:*

> An uncurbed spirit of revenge and retribution, masked in formal legal procedure for purposes of dealing with a fallen enemy commander, can do more lasting harm than all of the atrocities giving rise to that spirit. The people's faith in the fairness and objectiveness of the law can be seriously undercut by that spirit.[520]

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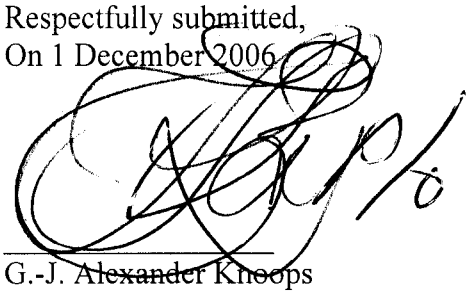
[518] *High Command* case in Freidman (1972), Vol. II, p.1433.
[519] *Peleus* Case by a British Military court, Hamburg 1945, 13 ILR 248, p. 249.
[520] In re *Yamashita*, 327 U.S. 1, per J. Murphy, at 41 (1946). Yamashita, a Japanese General, had been tied by an American Military Commission for crimes committed in the Philippines and appealed to the U.S. Supreme Court.

458. Additionally the reasoning of Justice Murphy in *Yamashita,* while referring to the "brutal atrocities inflicted upon the helpless Filippino people", held that:

> The immutable rights of the individual (...) belong not alone to the members of those nations that excel on the battlefield or that subscribe to the democratic ideology. They belong to every person in the world, victor or vanquished, whatever may be his race, colour, or beliefs (...). No exception is made as to those who are accused of war crimes or as to those who possess the status of an enemy belligerent. Indeed, such an exception would be contrary to the whole philosophy of human rights (...).[521]

459. The defence for the third accused wishes that these notions will be reflected in the judgement in this case.

Respectfully submitted,
On 1 December 2006



G.-J. ~~Alexander~~ Knoops

[521] Ibid, at 26

Case Law

Special Court for Sierra Leone

Indictments

- *Prosecutor v. Taylor*, Indictment, 3 March 2003, Case No. SCSL-2003-01-PT.
- *Prosecutor v. Sankoh*, Indictment, 3 March 2003, Case No. SCSL-2003-02-PT.
- *Prosecutor v. Koroma*, Indictment, 3 March 2003, Case No. SCSL-2003-03-PT.
- *Prosecutor v. Bockarie*, Indictment, 3 March 2003, Case No. SCSL-2003-04-PT.
- *Prosecutor v. Sesay*, Indictment, 3 March 2003, Case No. SCSL-2003-05-PT.
- *Prosecutor v. Brima*, Indictment, 3 March 2003, Case No. SCSL-2003-06-PT.
- *Prosecutor v. Kallon*, Indictment, 3 March 2003, Case No. SCSL-2003-07-PT.
- *Prosecutor v. Norman*, Indictment, 3 March 2003, Case No. SCSL-2003-08-PT.
- *Prosecutor v. Gbao*, Indictment, 16 April 2003, Case No. SCSL-2003-09-PT.
- *Prosecutor v. Kamara*, Indictment, 26 May 2003, Case No. SCSL-2003-10-PT.
- *Prosecutor v. Fofana*, Indictment, 24 June 2003, Case No. SCSL-2003-11-PT.
- *Prosecutor v. Kondewa*, Indictment, 24 June 2003, Case No. SCSL-2003-12-PT.
- *Prosecutor v. Kanu*, Indictment, 15 September 2003, Case No. SCSL-2003-13-PT.

Norman et al.

- *Prosecutor v. Norman et al.*, Appeals Chamber Decision on Preliminary Motion Based on Lack of Jurisdiction, 31 May 2004, SCSCL-04-14-AR72(E).
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Brima et al.

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responsibility if it negates the mental element required by such a crime, or as provided for in article 33.[82]

The implication is that the norm *ignorantia juris non excusat* – widely accepted within national legal systems – does not apply automatically in war crimes trials. As put by the Judge Advocate in the *Peleus* case of 1945, 'no sailor and no soldier can carry with him a library of international law, or have immediate access to a professor in that subject'.[83] The Geneva Conventions, as well as Protocol I, obligate the Parties to the conflict to disseminate their texts, both in peacetime and in wartime, so that they become known both to the armed forces and to the civilian population[84] (see *supra*, Chapter 1, VI). But even if fully implemented, no programme of instruction in I.O.I.A.C. can be widespread, comprehensive and meticulous enough to cover all combatants and all contingencies. In certain conditions there may be no choice but to admit that, as a result of mistake of law, *mens rea* is negated.

Mens rea cannot be negated if the illegality of the war crime is obvious to any reasonable man. When an act is objectively criminal in nature, the accused will not be exculpated on the ground of an alleged subjective belief in the lawfulness of his behaviour. One can say that, when an act is manifestly illegal, an irrebuttable presumption (a *praesumptio juris et de jure*) is created, and no evidence will be allowed as regards the subjective state of mind of the accused.[85]

(c) Duress The defence of duress is incorporated in Article 31(1)(d) of the Rome Statute:

> 1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person's conduct:
>
> . . .
>
> (d) The conduct which is alleged to constitute a crime within the jurisdiction of the Court has been caused by duress resulting from a threat of imminent death or of continuing or imminent serious bodily harm against that person or another person, and the person acts necessarily and reasonably to avoid this threat, provided that the person does not intend to cause a greater harm than the one sought to be avoided. Such a threat may either be:

[82] Rome Statute, *supra* note 5, at 1019. Article 33 of the Statute will be examined *infra*.
[83] *In re Eck and Others* (*The Peleus* case), [1946] *AD* 248, 249.
[84] Geneva Convention (I), *supra* note 1, at 391 (Article 47); Geneva Convention (II), *ibid.*, 417 (Article 48); Geneva Convention (III), *ibid.*, 475 (Article 127); Geneva Convention (IV), *ibid.*, 546 (Article 144); Protocol I, *supra* note 13, at 670 (Article 83).
[85] See Y. Dinstein, *The Defence of 'Obedience to Superior Orders' in International Law* 29–30 (1965).

meeting the attack in the exercise of the inherent right of individual or collective self-defense recognized by Article 51 of the Charter of the United Nations.[34]

When an armed attack occurs, Article 3(2) permits response on two levels: (i) at the request of the attacked State, each Contracting Party may take immediate measures individually; (ii) a central Organ of Consultation of the American States may put in motion measures of a collective character.[35] The distinction between collective self-defence exercised individually (as a first stage) and collective self-defence exercised collectively (as a second stage) is plainly discernible.[36] On both levels of response, actual recourse to collective self-defence depends on the free will of each Contracting Party. Under Article 17, resolutions of the Organ of Consultation are to be adopted by a two-thirds majority.[37] But the minority cannot be dragged into hostilities against its wishes. Article 20 clarifies that no Contracting Party is 'required to use armed force without its consent'.[38] The obligation of mutual assistance is in effect. Yet, assistance in the only form that really counts is not automatic.

(b) Military alliances

An acute practical problem in the field of mutual assistance is that, in the absence of prior coordination, it is immensely difficult for separate armed forces of sovereign States (with divergent command structures, equipment, training and usually languages) to act in unison against an aggressor, even if the political decision to resort to collective self-defence has been taken. This is why a peacetime military alliance becomes a natural extension of a mutual assistance arrangement. Such an alliance is motivated by the concept that 'if you want peace, prepare for war (*si vis pacem, para bellum*)'. A treaty of alliance goes beyond an abstract commitment for mutual assistance in the event of an armed attack. Induced by the apprehension of a future armed attack, the parties undertake to start preparing their common defence right away.

The hallmarks of a military alliance are the integration of the military high command, the amalgamation of staff planning, the unification of ordnance, the establishment of bases on foreign soil, the organization of joint manoeuvres and the exchange of intelligence data. The political decision whether or not to use force (and especially to go to war), in support of a State subjected to an armed attack, is retained by each of the

[34] *Ibid.*, 95. [35] *Ibid.*, 95–7.
[36] See J. L. Kunz, 'The Inter-American Treaty of Reciprocal Assistance', 42 *AJIL* 111, 120 (1948).
[37] Rio de Janeiro Inter-American Treaty, *supra* note 33, at 101. [38] *Ibid.*, 103.

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Antonio Cassese

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Cappellini and others the Milan Court of Cassation held that a superior who in fact had been deprived of his authority although he still was formally vested with his position could not be held responsible for crimes perpetrated by his subordinates unbeknownst to him or even in breach of his orders, for lack of the required intent (at 86–7).

It is interesting to note that in *Kordić and Čerkez*, the Trial Chamber found that one of the accused, Kordić, a civilian leader and politician having 'tremendous influence' and playing an important role in military matters, nevertheless did not possess the authority to prevent the crimes that were being committed or to punish the perpetrators. It therefore acquitted the accused of charges involving command responsibility, while nonetheless convicting him of various offences on the basis of perpetration under Article 7(1) of the Statute (§§838–41).

2. The superior *knew*, or *had information which should have enabled him to conclude in the circumstances at the time that crimes were being committed or had been committed*, or owing to the circumstances prevailing at the time, *should have known*, and consciously disregarded information indicating that his subordinates were going to commit (or were about to commit, or were committing, or had committed), international crimes.

3. He *failed to take the action necessary* to prevent or repress the crimes, thereby breaching his duty to prevent or suppress crimes by his subordinates.

It is clear from the above that command responsibility, or responsibility by omission of superior authorities, *is not a form of strict or objective liability*, that is, liability for offences for which one may be convicted without any need to prove any form or modality of *mens rea*.[14] Even for this category of crimes a mental element is required, as we shall soon see.

10.4.4 THE SUBJECTIVE ELEMENT OF THE CRIME AND THE VARIOUS CLASSES OF OMISSION

The objective element of the crime is apparent from what has just been set out. As for the subjective element, it would seem that intent is not required.[15]

statements, and thus as exercising some authority, may be relevant to the overall assessment of his actual authority although not sufficient in itself to establish it, without evidence of the accused's overall behaviour towards subordinates and his duties. Similarly, the participation of an accused in high-profile international negotiations would not be necessary in itself to demonstrate superior authority. While in the case of military commanders, the evidence of external observers such as international monitoring or humanitarian personnel may be relied upon, in the case of civilian leaders evidence of perceived authority may not be sufficient, as it may be indicative of mere powers of influence in the absence of a subordinate structure' (§424).

[14] Recently ICTY Trial Chambers rightly took this view in *Delalić and others*, §239, and in *Kordić and Čerkez*, §369.

[15] In *Baba Masao*, the Judge Advocate summed up the law for the Australian Military Court trying the case: 'In order to succeed [in proving charges of command responsibility] the prosecution must prove . . . that war crimes were committed as a result of the accused's [Commanding General of the Japanese Army in

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DARYL A. MUNDIS*

Crimes of the Commander: Superior Responsibility under Article 7(3) of the ICTY Statute

International law provides two primary bases for holding an individual criminally responsible: individual or personal criminal responsibility; and superior or command responsibility.[1] Article 7(1)[2] and Article 7(3)[3] of the Statute of the International Criminal Tribunal for the former Yugoslavia (ICTY) respectively reflect these two modes of criminal responsibility. This chapter will discuss and analyse the jurisprudence of the ICTY relating to superior responsibility under Article 7(3) of the Statute. The doctrine of superior responsibility[4] differs from other forms of criminal liability in that it is a form of liability based on *omission*. Thus, the alleged perpetrator must have affirmatively done a certain act, such as ordering or committing the alleged criminal act, to be responsible under Article 7(1) of the ICTY Statute. Under the doctrine of superior responsibility, the accused may be convicted based on failure to prevent the crime from occurring in the first place, or to punish the

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1. In addition, instruments proscribing genocide often provide for additional modes of liability (which are alternatively considered as inchoate crimes in many jurisdictions), including conspiracy to commit genocide, attempt to commit genocide and complicity in genocide. See, for example, ICTY Statute, Article 4(3), and ICTR Statute Article 2(3),. The basis for these forms of liability may be found in the Convention on the Prevention and Punishment of the Crime of Genocide, (1951) 78 UNTS 277, Article III.
2. ICTY Statute, Article 7(1), which is identical to ICTR Statute, Article 6(1), states: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime referred to in Articles 2 to 5 of the present Statute, shall be individually responsible for the crime."
3. ICTY Statute, Article 7(3), which corresponds with ICTR Statute, Article 6(3), provides: "The fact that any of the acts referred to in Articles 2 to 5 of the present Statute was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."

Boas & Schabas, eds, International Criminal Law Developments in the Case Law of the ICTY, 249–275.

ple of command responsibility to be applicable, it is necessary that the superior have effective control over the persons committing the underlying violations of international humanitarian law, in the sense of having the material ability to prevent and punish the commission of these offences".[63] The *Aleksovski* and *Blaškić* Trial Chambers further refined the concept of "material ability":

> Although the Trial Chamber agrees with the Defence that the "actual ability" of a commander is a relevant criterion, the commander need not have any legal authority to prevent or punish acts of his subordinates. What counts is his material ability, which instead of issuing orders or taking disciplinary action may entail, for instance, submitting reports to the competent authorities in order for proper action to be taken.[64]

In the *Čelebići* Appeal Judgment, the Appeals Chamber adopted the "effective control" standard,[65] and rejected the suggestion that the notion of effective control can be met by proof of "substantial influence" alone.[66] The "effective control" standard has been subsequently followed in the *Kunarac*,[67] *Kordić & Čerkez*,[68] *Krstić*[69] and *Kvočka* et al.[70] This standard has also been applied by

62. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 370; *Prosecutor* v. *Blaškić*, *supra* note 50, paras. 300-301. See also Rome Statute, *supra* note 5, Article 28(1); W.H. Parks, *supra* note 4, at p. 102; Additional Protocol I, Article 86(2).

63. *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 378. See also *ibid.*, paras. 364-377 and Article 87 of Additional Protocol I.

64. *Prosecutor* v. *Blaškić*, *supra* note 50, para. 302; *Prosecutor* v. *Aleksovski*, *supra* note 49, para.78. See also *Prosecutor* v. *Delalić* et al., *supra* note 5, para. 395 ("a superior may only be held criminally responsible for failing to take such measures that are within his powers") and Article 86(2) of Additional Protocol I which limits criminal responsibility of superiors to "feasible measures within their power to prevent or repress".

65. *Prosecutor* v. *Delalić* et al., *supra* note 57, para. 196.

66. *Ibid.*, para. 266:

> 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.

See also *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52, paras. 412-3.

67. *Prosecutor* v. *Kunarac* et. al., *supra* note 51, para. 396.

68. *Prosecutor* v. *Kordić & Čerkez*, *supra* note 52,. 405-406.

69. *Prosecutor* v. *Krstić*, *supra* note 53, paras. 648-649.

70. *Prosecutor* v. *Kvočka* et al., *supra* note 54, para. 315.

a joint criminal enterprise in the ICTY practice and how it has developed in the jurisprudence of the ICTY.

The "notion of common purpose" as a basis for criminal liability under international law was fully discussed by the Appeals Chamber in the *Tadić* appeal.[148] In that case, the Appeals Chamber held that under international law, there were three categories of cases in which courts and tribunals had accepted a joint criminal enterprise theory. In the first category of cases involving co-perpetration, "all participants in the common design possess the same criminal intent to commit a crime (and one or more of them actually perpetrate the crime, with intent)".[149] Cases involving World War II concentration camps, "where the requisite *mens rea* comprises knowledge of the nature of the system of ill-treatment and intent to further the common design of ill-treatment", constitute the second category of cases.[150] In the third category of cases, "it is appropriate to apply the notion of 'common purpose' only where the following requirements concerning *mens rea* are fulfilled: (i) the intention to take part in a joint criminal enterprise and to further – individually and jointly – the criminal purposes of that enterprise; and (ii) the forseeability of the possible commission by other members of the group of offences that do not constitute the object of the common criminal purpose".[151] The Appeals Chamber summed up the requisite *mens rea* for these forms of liability as follows:

> With regard to the first category, what is required is the intent to perpetrate a certain crime (this being the shared intent on the part of all co-perpetrators). With regard to the second category (which...is really a variant of the first), personal knowledge of the system of ill-treatment is required (whether proved by express testimony or a matter of reasonable inference from the accused's position of authority), as well as the intent to further this common concerted system of ill-treatment. With regard to the third category, what is required is the *intention* to participate in and further the criminal activity or the criminal purpose of a group and to contribute to the joint criminal enterprise or in any event to the commission of a crime by the group. In addition, responsibility for a crime other than the one agreed upon in the common plan arises only if, under the circumstances of the case, (i) it was *foreseeable* that such a crime might be perpetrated by one or other members of the group and (ii) the accused *willingly took that risk*.[152]

148. *Prosecutor* v. *Tadić*, Judgment, Case No. IT-94-1-A, 15 July 1999, paras. 185-229.

149. *Ibid.*, para. 220.

150. *Ibid.*

151. *Ibid.*

152. *Ibid.*, para. 228. With respect to the *actus reus*, the Appeals Chamber stated:

> The objective elements (*actus reus*) of this mode of participation in one of the crimes provided for in the Statute (with regard to each of the three categories of cases) are as follows:

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The International Criminal Tribunal for the Former Yugoslavia

Daphna Shraga * *and Ralph Zacklin* **

I. Introduction

The key to an understanding of the Statute of the International Tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia (hereinafter International Tribunal or Tribunal) is the context within which the Security Council took its decision of principle to establish it.[1]

By the end of February 1993 the conflict in the former Yugoslavia had been underway for more than 18 months, the principal focus of the conflict shifting from Slovenia to Croatia and then to Bosnia. United Nations involvement, through UNPROFOR, which at its inception had been conceived of as a protection force to shield pockets of Serbs in a newly independent Croatia (the United Nations Protected Areas) had gradually evolved into a multi-dimensional peace-keeping force whose main activities then centred on Bosnia. The character of the conflict had also evolved. While from the very beginning great brutality had marked the conduct of the parties, it was in Bosnia that the first signs of international crimes began to emerge: mass executions, mass sexual assaults and rapes, the existence of concentration camps and the implementation of a policy of so-called 'ethnic cleansing'. The Security Council repeatedly enjoined the parties to observe and comply with their obligations under international humanitarian law but the parties systematically ignored such injunctions. In October 1992 the Security Council, unable to control the wilful disregard by the parties for international norms, sought to create a dissuasive effect

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The views expressed in this Article are exclusively those of the authors and do not necessarily reflect any opinion of the Office of Legal Affairs or of the United Nations.

1 SC Res. 808, 22 February 1993, UN Doc. S/RES/808 (1993).

by asking the Secretary-General to establish a Commission of Experts to report on the evidence of grave breaches of international humanitarian law in the former Yugoslavia.[2] The unspoken understanding was that this Commission would be a step towards the establishment of an international tribunal to prosecute individuals if the parties did not conform to Security Council resolutions. The establishment of the Commission served to illuminate the crimes which were being committed but did nothing to arrest them. Public opinion, particularly in the Western permanent members of the Security Council, demanded accountability and action. Among European countries, in particular, the events in the former Yugoslavia bore uncomfortable reminders of fascism and nazism. By February 1993 the pressure of public opinion compelled these countries to call for the establishment of the tribunal.

If such a step was taken reluctantly by some or indifferently by others, it was because of the perceived political and legal factors which made the effective establishment of such a tribunal difficult if not improbable.

To begin with, the conflict was still underway. This meant that, unlike Nuremberg, the tribunal would have to function without having effective control over the territories in which the perpetrators of the crimes were to be found. Furthermore, since the conflict was still being waged, the negotiations to end the conflict were still being conducted and representatives of the United Nations, the European Union and the United States and the Russian Federation would be required to meet and negotiate with the very leaders of the parties who, at the same time, might bear responsibility for the crimes being committed. Indeed, in December 1992 the United States Secretary of State had declared a number of such individuals to be war criminals.

If the political factors were daunting, the legal factors seemed insuperable. No international criminal code existed, although the ILC had sporadically examined such a code for a quarter of a century. Neither, needless to say, was there an international criminal tribunal, although once again various proposals for such a tribunal had been made in the years following the Nuremberg and Tokyo Tribunals. The adoption of a code and the establishment of a tribunal through a treaty-making process were, of course, technically possible but the consideration, negotiation, signature and ratification of an international instrument to bring this about would take years. The Security Council, however, was not interested in an academic exercise but required immediate action which would have a preventive and deterrent effect on the conflict. The Secretary-General was, therefore, asked to prepare a report within 60 days on the establishment of a tribunal which would be effective and expeditious.[3] If the use of Chapter VII of the Charter as the legal basis for the establishment of the Tribunal is perhaps the most visible and innovative aspect of the Secretary-General's report from

2 SC Res. 780, 6 October 1992, UN Doc. S/RES/780 (1992).

3 Report of the Secretary-General Pursuant to Paragraph 2 of Security Council Resolution 808 (1993), UNSC, UN Doc. S/25704 (1993) (hereinafter *Secretary-General's Report*), reprinted in 32 ILM (1993) 1163.

an international law perspective, many other aspects of the report are equally innovative. In the present article, an attempt is made to provide some insight into and an explanation of the underlying concepts and philosophy of the Secretary-General's report with regard to the jurisdiction, structure and procedure of the Tribunal.[4]

The report was very much the Secretary-General's report. It was the Secretary-General's decision to provide the Security Council with a Statute which could be approved and which indeed was approved without change.[5] This is not to say that in drawing up the report the Secretary-General did not have the benefit of the suggestions and drafts proposed by States, intergovernmental and non-governmental organizations and individuals. However, while these voluminous suggestions provided the raw material for the Secretary-General, the final product was a result of the choices he made. In doing so, he endeavoured to meet the requirements laid down by the Security Council while remaining within the legal and political mainstream of the international community. Like all human endeavours, the work is far from perfect but its unanimous approval by the Security Council is an indication that the Secretary-General at least met the expectations of the Organization's principal political organ.

II. The Scope of Jurisdiction of the International Tribunal

A. Territorial and Temporal Jurisdiction

In establishing the International Tribunal under Chapter VII of the United Nations Charter for the purpose, *inter alia*, of restoring peace and security in the territory of the former Yugoslavia, the Security Council has created an organ of limited duration and scope of jurisdiction. As a form of Chapter VII enforcement measure, the Tribunal's jurisdiction could not have extended beyond the territorial bounds of the former Yugoslavia,[6] nor could it extend in time, beyond the restoration of peace and security as eventually to be determined by the Security Council.

The temporal jurisdiction of the Tribunal extends, pursuant to Security Council Resolution 808 (1993), to the period beginning in 1991, and is fixed, by Article 8 of the Statute, to begin on 1 January of that year. In the search for a specific date within the general reference to 1991, three dates were considered, each referring to a specific event to which the beginning of the dissolution process of the former Yugoslavia could have been attributed: 25 June 1991 – the proclamation of

4 See generally, Meron, 'The Case for War Crimes Trials in Yugoslavia', 72 *Foreign Affairs* (1993) 122; Meron, 'War Crimes in Yugoslavia and the Development of International Law', 88 *AJIL* (1994) 78; O'Brien, 'The International Tribunal for Violations of International Humanitarian Law in the Former Yugoslavia', 87 *AJIL* (1993) 639; Szasz, 'The Proposed War Crimes Tribunal for Yugoslavia', 25 *New York University Journal of International Law and Politics* (1993) 405.

5 SC Res. 827, 25 May 1993, UN Doc. S/RES/827 (1993), reprinted in 32 *ILM* (1993) 1203.

6 Article 8 of the Statute.

independence by Croatia and Slovenia; 27 June 1991 – the intervention of the Federal Army in Slovenia, and 3 July 1991 – the outbreak of clashes between Serbian and Croatian militia.[7] The Secretary-General opted, however, for a neutral date which would not carry with it any political connotation as to the international or internal character of the conflict, with the legal implications that such a determination would have entailed for the choice of the applicable law. In addition, information made available by the Federal Republic of Yugoslavia to the Secretary-General pursuant to paragraph 1 of Security Council Resolution 780 (1992), suggested that crimes falling within the jurisdiction of the Tribunal might have been committed against Serbian populations before June 1991.[8] The choice of 1 January 1991 was, therefore, intended to embrace all crimes by whomsoever committed in the territory of the former Yugoslavia in 1991, and to convey an image of complete neutrality and impartiality in the Yugoslav conflict.

B. Subject-matter Jurisdiction

The establishment of the Tribunal under Chapter VII of the United Nations Charter delimited not only its territorial and temporal jurisdiction, but also circumscribed the scope of its subject-matter jurisdiction and imposed strict criteria on the choice of the applicable law. The fact that the Security Council is not a legislative body mandated that the subsidiary organ it created would not be endowed with competence the parent body did not have. Likewise it could not be seen as creating a new international law binding upon the parties to the conflict.

The Tribunal was, accordingly, empowered to apply only those provisions of international humanitarian law which are beyond any doubt part of customary international law, irrespective of their codification in any international instrument, and regardless of whether the State or States in question had adhered to them and duly incorporated their provisions into their national legislation. The list of international humanitarian law violations that are of an undoubtedly customary international law nature, was further limited to those which have customarily entailed the criminal liability of the individual, and includes, according to Articles 2 to 5 of the Statute: grave breaches of the Geneva Conventions, violations of the laws or customs of war, the crime of genocide and crimes against humanity.

1. Grave breaches of the Geneva Conventions

7 *Letter from the Permanent Representative of France to the Secretary-General*, 10 February 1993, UN Doc. S/25266 (1993), paras. 77-81 (hereinafter *French Letter*).

8 *Letter from the chargé d'affaires a.i. of the Permanent Mission of Yugoslavia to the Secretary-General*, 15 March 1993, UN Doc. S/25421 (1993) 16, 17, 30, 34.

The 'grave breaches' of the four Geneva Conventions[9] are set out in common Articles 50/51/130/147, and are reproduced in Article 2 of the Statute. They include any of the following acts, when committed against persons or property protected under the Conventions:[10] wilful killing, torture and inhuman treatment, wilfully causing great suffering or serious injury to body or health, extensive destruction or appropriation of property not justified by military necessity, compelling a prisoner of war or a civilian to serve in the forces of a hostile power, wilfully depriving a prisoner of war or a civilian of the rights of fair and regular trial, unlawful deprivation or transfer or unlawful confinement of a civilian, and the taking of civilians as hostages.

Unlike breaches of the Geneva Conventions, in respect of which the High Contracting Parties undertake an obligation to suppress them, grave breaches entail an additional obligation to prosecute and try persons alleged to have committed or to have ordered the commission of the crimes, regardless of their nationality, before their courts or the courts of other States. 'Grave breaches' thus entail for the perpetrator of the crime an individual criminal liability irrespective of the responsibility of the State of which he is a national.

Additional Protocol I to the Geneva Conventions Relating to the Protection of Victims of International Armed Conflicts, 1977 (hereinafter Protocol I), supplements the list of 'grave breaches' established in the Conventions, and extends the application of the repression system i.e., the establishment of universal criminal jurisdiction, to new categories of persons and objects protected under the Protocol.[11] Given, however, the undisputed customary international law nature of the Geneva Conventions, recourse has been had to the list of 'grave breaches' enumerated therein, and not to the one established in Protocol I. The latter, notwithstanding the customary law nature of most of its provisions, was, as a whole, not yet qualified as indubitably part of customary international law.[12]

9 Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949, 75 UNTS 31 (hereinafter First Geneva Convention); Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 12 August 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287.

10 Namely, wounded, sick and members of medical personnel, prisoners of war and civilians in the hands of the adverse power, hospitals, medical equipment and ships, and civilian movable and immovable property in occupied territory.

11 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 8 June 1977 (Protocol I), 1125 UNTS 3, 11-12 and 41-42 (Arts. 11 and 85).

12 For this reason, the perfidious use of the distinctive emblem of the red cross, red crescent or red lion and sun or of other protective signs, which is a newly-added 'grave breach' under Protocol I (Article 85, paragraph 3(f)), was not included in the list of 'grave breaches' contained in Article 2 of the Statute. This, notwithstanding the fact that Article 53 of the First Geneva Convention recognized the unauthorized use of the 'Red Cross' or the 'Geneva Cross' or any designation thereof, as a breach of the Convention. On the legal status of the two Additional Protocols, see Abi-Saab, 'The 1977

2. Violations of the Laws or Customs of War

The catalogue of war crimes established in Article 3 of the Statute draws upon the Regulations annexed to the 1907 Hague Convention Respecting the Laws and Customs of War on Land,[13] as re-affirmed in the Nuremberg Charter[14] and the Judgment of the Nuremberg Tribunal.[15] It includes the use of poisonous weapons or other weapons calculated to cause unnecessary suffering (Regulation 23(a) and (e)); the wanton destruction and devastation of cities not justified by military necessity (Regulation 23(g) and Article 6(b) of the Nuremberg Charter); attack, or bombardment of undefended towns (Regulation 25) the seizure of or destruction and damage to institutions dedicated to religion, charity, education, historic monuments or works of art and science (Regulation 56) and the plunder of public or private property (Article 6(b) of the Nuremberg Charter).

The customary international law nature of the Hague Regulations, and the characterization of violations thereof as war crimes entailing the individual criminal liability of the perpetrator, were firmly established by the Nuremberg Tribunal. In rejecting the argument that the Hague Convention applied in the relationship between its Contracting Parties only,[16] the Tribunal held that although the rules of land warfare represented an advance over existing international law at the time of their adoption, by 1939, these rules were recognized by all civilized nations, and were regarded as being declaratory of the laws and customs of war.[17]

As for the individual criminal liability they entail, the Tribunal added that methods of land warfare prohibited under the Hague Convention, such as the inhumane treatment of prisoners, the employment of poisoned weapons, the improper use of flags of truce, and similar matters, 'had been enforced long before the date of the Convention; but since 1907 they have certainly been crimes,

Additional Protocols and General International Law. Some Preliminary Reflections', in A.J.M. Delissen and G.J. Tanja (eds), *Humanitarian Law of Armed Conflict; Challenges Ahead* (1991) 115.

13 Regulations Respecting the Laws and Customs of War on Land annexed to the Hague Convention (IV) Respecting the Laws and Customs of War on Land, 18 October 1907, in Carnegie Endowment for International Peace, *The Hague Conventions and Declarations of 1899 and 1907* (1915) 100; 1 Ch. I. Bevans, *Treaties and Other International Agreements of the United States of America 1776-1949*, 643 (hereinafter *Bevans*).

14 Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 280 (hereinafter Nuremberg Charter).

15 Judgment of the International Military Tribunal at Nuremberg, in *Nuzi Conspiracy and Aggression. Opinion and Judgment* (1947) (hereinafter *Nuremberg Judgment*).

16 Article 2 of the Hague Convention (IV) provides as follows:
'The provisions contained in the Regulations referred to in Article 1, as well as in the present Convention, do not apply except between Contracting Powers, and then only if all the belligerents are parties to the Convention.'

17 *Nuremberg Judgment*, 83.