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SCSL-04-16-T
(19254 - 19483)

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SPECIAL COURT FOR SIERRA LEONE

Case No. SCSL-2004-16-T

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

Registrar: Mr. Lovermore G. Munlo SC

Date filed: 1st December 2006

THE PROSECUTOR

Against

ALEX TAMBA BRIMA

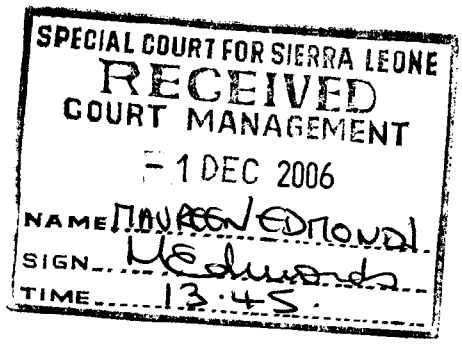
CONFIDENTIAL – BRIMA DEFENCE FINAL TRIAL BRIEF

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

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

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

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



Introduction

1. Alex Tamba Brima, Brima Bazzy Kamara, and Santigie Borbor Kanu were indicted on counts of Crimes Against Humanity, Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and Other Serious Violations of International Humanitarian Law. The three accused pleaded not guilty to all charges, a plea that they have maintained throughout.

2. This closing brief is filed pursuant to the order of the Trial Chamber on 30th October 2006 on the filing of Final Trial Briefs.

3. The First Accused in this case is charged as Alex Tamba Brima and like the other two Accused persons faces a 14 count indictment signed by the Prosecutor on the 14th February 2005 (hereinafter called the indictment). This indictment was the last and was entitled 'Further Amended Consolidated Indictment'. Mr Brima was arrested on the 3rd March 2003 and has been in the custody of the Special Court since then.

4. The First Accused faces charges of:
    - Counts 1-2 – Terrorizing the Civilian Population
    - Counts 3-4 Unlawful Killings
    - Counts 6-9 Sexual Violence
    - Counts 10-11 – Physical Violence
    - Counts 12 – Use of Child soldiers
    - Counts 13 – Abductions and Force Labour
    - Count 14 – Looting and Burning

5. Responsibility for these crimes is derived from Articles 2 to 6 of the Statute of the Special Court for Sierra Leone, (hereinafter called the Statute) and first Accused in

alleged to be jointly responsible and/or individually criminally responsible for those crimes alleged in the indictment.

6. The Prosecution filed a Pre-Trial Brief[1] and a Supplemental Pre-Trial Brief [2]. This set out the Prosecutions case and what they intended to prove. The Defence submits that this they have failed to do.

7. The Defence also filed a Pre-Trial Brief[3] in reply to the aforementioned Prosecution Pre-trial brief, setting out its case. The Prosecution has therefore always had full knowledge of the Defence case, yet the Defence will submit that the Prosecution failed to prove any of the allegations against the First Accused to the very high standard required.

8. The trial itself started on the 7th March 2005 with opening statements by the Prosecution. The Prosecution called a total of 59 witnesses before closing its case on the 7th November 2005. The Defence opened its case on the 5th June 2006 and called a total number of 87 witnesses including the first Accused.

9. Opening speeches are never evidence. Their purpose is to tell the court the charges, give a flavour of the evidence that the Prosecution has and how it intends to prove the allegations. On the 7th March the Prosecution opened its case with what can only be described as highly emotive language devoid of law. The Prosecutor for example used the phrase "oozing grave of Freetown"[4] to describe the invasion of Freetown on the 6th January 1996. The Defence will submit that this Trial Chamber is made up of professional Judges who should not be swayed by such flamboyant use of emotive language designed to give the maximum effect of horror.

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[1] Prosecution's Pre-trial brief SCSL-16-29 filed on the 5th March 2004
[2] Prosecution Supplemental Pre-Trial Brief SCSL 16-56 Filed 1st April 2004
[3] Defence pre-trial brief for Tamba Brima SCSL-16-145 brief filed on the 17th February 2005
[4] See Transcript pf 7th March page 28 line 22

10. The Defence will also submit at this point that much of what was stated in the Opening speech was never followed up with evidence in support. These are numerous to mention here, but the Defence will cite the following examples:

- The capture of a boy and his two brothers who were taken to a rebel base in front of a primary school in Kissy.[5]
- This was an international armed conflict[6]
- Alex Tamba Brima conducted operations throughout the north, east and central areas of Sierra Leone.[7]
- Through their direct involvement the three Accused persons acted in concert with Charles Taylor.[8]
- Through the First Accused, Mosquito gave instructions.[9]

11. To briefly comment on the above assertions, no evidence was led as to any boys who were sent to a rebel base in front of a primary school in Kissy.

12. There was no evidence before this court that this was an international armed conflict. The Prosecution led no evidence of this.

13. Whilst the Prosecution led some evidence in its attempt to prove its case against the First Accused, this was in relation to parts of the North, parts of the East, and the Western Area. There is no evidence that the First Accused led operations throughout the North, East and Central areas of Sierra Leone. The Defence has had to ask which areas are being referred to as Central.

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[5] See Transcript of 7th March page 20 lines 23-29
[6] Id page 23 line 12
[7] Id page 24 line 10
[8] Id page 25 lines 9-12
[9] Id page 30 line 13

14. Whilst it is also stated in paragraph 32 of the indictment that the three Accused persons acted in concert with Charles Taylor, the Prosecution led no evidence of this. There is not a shred of evidence as to how the First Accused acted in concert with Charles Taylor. Were there conversations between them for example? Did they have any meetings? If so where did these take place? What did they agree to do? What did they do in furtherance of this joint plan? No witness gave evidence of this and the Defence submits that the Prosecution have failed to prove this. It is at best a theory they hoped to find the evidence to fit in order to be able to prove their case.

15. There is also no evidence that the First Accused received instructions from Mosquito. There is evidence (which is denied) of conversations between Mosquito and the First Accused. There is evidence of a promise by Mosquito to send troops to help the First Accused (again denied) in Freetown. Taking all these pieces of evidence together, the Defence submits that either by themselves or together do not amount to evidence in support of the Prosecution's assertion that the First Accused took instructions from Mosquito. Further this cannot be used as proof a supposed joint criminal enterprise with the RUF.

16. These are just a few of the examples of assertions made by the Prosecution for which they have led no evidence.

17. The Defence must state at the outset that it is the Prosecution who brought this case and it is for them to prove the guilt of the Accused. The Accused has nothing to prove and is not expected to prove his innocence. He could, quite rightly, have chosen not to give evidence or call any witnesses in his defence. The Trial Chamber must not expect him to prove his own innocence. Many a time, Prosecution questions in cross – examination tended to allude to a misplaced notion that the Defence could have or should have mentioned something, denied another or asked a particular question to show that the Defence denied this. The Defence is under no such obligation other than to call evidence in support of alibi, which was done as ordered.

Basic tenets of criminal law, domestic or international, dictate this. The burden is at all times on the Prosecution to prove its case.

18. Secondly as far as the burden of proof is concerned, the standard is a very high standard. The Prosecution must prove its case beyond reasonable doubt. It cannot be less than that. That is to say that the court must be satisfied so as to be sure of the Accused person's guilt. Any doubt must be exercised in favour of the Accused. In the present case, it is submitted that the Prosecution has not proved its case to the highest standard. The First Accused must therefore be found not guilty on all counts.

19. The Defence wishes to point out here, that the Prosecution made a fundamental error in the indictment and continued to perpetuate that error throughout its case. Paragraph 1 of the Indictment states that the Accused was born in Yaryah on the 23rd November 1971. The Accused has always denied that he was born in Yaryah, but rather that he was born in Freetown but that his family do indeed hail from Yaryah. It is therefore his hometown and a place he knows quite well.[10]

20. Perhaps most significantly, the Prosecution claims that the First Accused joined the Sierra Leone Army in April 1985 and rose to the rank of Staff Sergeant. Both these assertions are denied by the Accused. However, two points need to be made here. Firstly that if the First Accused had joined the Army in 1985, then his employers should themselves be facing an indictment for the use of child soldiers as he would have been 13 years 5 months at the time. Secondly, no documentary proof was produced to support the assertion that he rose to Staff Sergeant. On the other hand the Defence produced his discharge book exhibited as Exhibit D14.

21. The Defence would say that these were elementary lapses on the part of the Prosecution, which could easily have been checked out and verified. It is submitted therefore that there is a clear confusion as to the identity of the First Accused. This

[10] See transcript of evidence of 5th June 2006 page 52 lines 11-16

was raised very early in the Defence Pre-Trial Brief[11], but the Prosecution carried on its case without any applications for amendment. This can only mean that the Prosecution's case is that a boy less than 14 years of age, joined the Sierra Leone Army as Private soldier and rose to be a Staff Sergeant. This Army was one in which he was trained and was not an irregular out fit or a vigilante outfit masquerading as the Sierra Leone Army. The Defence submits therefore that as the Prosecution does not have a clear picture or produced any evidence as to who the First Accused is, the Trial Chamber cannot rely absolutely and without question, on any evidence adduced by the Prosecution as regards:

a. The identity of the First Accused
b. His role, if any, in any of the events that took place for which he is standing trial

22. Effectively, the Trial Chamber has not conclusive knowledge as to who it is being asked to try. The Defence therefore submits that doubts do exist and must therefore be exercised in favour of the First Accused.

23. For the reasons which will be expanded upon below, the Defence submits that the Prosecution has not proved any of the counts against the First Accused. That being the case the Defence submits that a verdict of not guilty should be entered for all 14 counts.

24. The Defence will now look at other aspects of the case. These closing arguments have been divided into:

A. Legal Arguments

B. Factual Arguments, which contain a general part and comment and specific allegations,

C. Conclusions

[11] Filed 17th February 2005

25. Before doing so, the Defence will say that quite clearly some terrible atrocities were committed in Sierra Leone. The First Accused cannot however be made to answer for the guilt of others over whom he could no capacity to control. The Defence will ask the Trial chamber to recall the judgement of the International Military Tribunal at Nuremberg that "in accordance with well-settled legal principles, one of the most important of which is that criminal guilt is personal, and that mass punishments should be avoided."[12]

A. Legal Arguments:

I. Burden and Standard of Proof

26. As indicated above, the Prosecution has the burden of proving the case against the Accused and must do so to the very high standard. The Accused is presumed innocent until proven guilty. The Rights of the Accused as stated in Article 17 of the Statute guarantees that. This is further supported by the judgment of the Fick case.[13] It was stated that:

a. There can be no conviction without proof of personal guilt
b. Such guilt must be proved beyond reasonable doubt
c. The presumption of innocence follows each defendant throughout the trial
d. The burden of proof is at all times upon the prosecution
e. If from some credible evidence two reasonable inferences may be drawn, one of guilt and the other of innocence, the latter must be taken

[12] International Military Tribunal, Judgement, in Trial of the Major War Criminals Before the International Military Tribunal: Nuremberg, 14 November 1945-1 October 1946, at 256 (1947) [hereinafter Nuremberg Judgement].
[13] VI, IMT at 1189

27. The Defence therefore need only add this: The fundamental procedural safeguards like Article 17, which are designed to ensure fairness and equality in criminal proceedings, are also guaranteed in international human rights treaties and most domestic legal systems.[14] Because of the extreme character of the crimes alleged before this Court and the challenges inherent in war crimes tribunals, the question of the rights of the accused should be considered even more strongly then in domestic courts.[15] The nature of the indictments requires international tribunals to aspire to the highest human rights standards set by international treaties, customary international law, and general principles of law.[16] There need not be any deviation from this.

28. Also even where evidence has been left unchallenged by the Defence or has not been recalled in the closing brief, the Prosecution still bears the burden of proving the evidence and the Trial Chamber must consider if it has been proved. Where the Chamber considers that there are doubts, then notwithstanding the foregoing, those doubts should be exercised in the Accused's favour.

29. Also as stated above any finding must be beyond reasonable doubt. "It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is reasonably open from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[17] Where there is ambiguity such should be exercised in favour of the Accused.

30. The Defence relies on the case of *Limaj*[18] where it was held that:

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[14] *See*, U.S.C.A. Const. Amend. XIV (Due Process Clause); *Ungar v. Sarafite*, 84 S.Ct. 841 at 849 (1964) ("a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality"); *Powell v. State of Alabama*, 53 S.Ct. 55 at 71 (1932) (taking into account the circumstance of public hostility when deciding the question of adequate time to prepare the case); ECHR Article 6(3)(b); ICCPR Article 14(3)(b); Statute of the ICTR 20(4)(b); Statute of the ICTY 21(4)(b).
[15] Jacob Katz Cogan, *International Criminal Courts and Fair Trials: Difficulties and Prospects*, 27 Yale J. Int'l L. 111 at 114 (2002); *Prosecutor v. Tadic*, Appeals Chamber Judgment, July 15, 1999, para. 52.
[16] *Id.* at 117; citing Accord Decision on Preliminary Motions, *The Prosecutor v. Milosevic*, Case No. IT-99-37-PT, Trial Chamber, International Criminal Tribunal for the Former Yugoslavia, Nov. 8, 2001, P 38.
[17] Prosecutor v Delalic et al., IT-96-21, Appeals Chamber' Judgment- 20tth February 2001
[18] Prsosecutor v Limaj et al., IT-03-66, Trial Chamber, Judgment, 30 November 2005

Where.....more than one inference was reasonably open from these facts, the Chamber has ben careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that account.[19]

31. The Defence will submit that much of the Prosecution's evidence is based on innuendos, surmising, guessing and drawing outrageous conclusions from a set of circumstances put together hopelessly and without any in depth investigation. For the most part, the Prosecution has relied on circumstantial evidence. Where it has sought to adduce direct evidence, this has come mainly from self- serving witnesses, hopelessly trying to shield speculation as to their role and hoping for some reward at the end. Such evidence is therefore extremely unreliable and lacking veracity. It is therefore impossible to form any conclusion other than that they have failed to prove their own case.

32. In looking at the failure of the circumstantial evidence it best to look at how the Prosecution put its case. Throughout the trial, the Prosecution built its case on the basis that the First Accused was one of those responsible for the overthrow of the Government of President Kabbah in May 1997. This, which the Accused denies, is said to be one of the reasons for the Accused's senior position in the jungle, again denied. Every defence witness has been asked that question, with the Prosecution assuming, quite naively that a person in rural Sierra Leone has easy access to media outfits or news materials that will tell them who the coup plotters were. Moreover, the Prosecution seems to have found it strange that these witnesses did not bother to find out who was responsible for the coup. But the as the majority of the Defence witnesses were crime based witnesses who had no connection to the Accused persons at all. The Prosecution has imputed (or at least tried to) the curiosity of an educated elite, interested in the political machinations and dynamics of the country as the knowledge and interest of simple people going about heir daily lives. With the

[19] Id at page 10

greatest respect to the Prosecution, even ordinary people in most western countries do not know the names of those who rule them, let alone the work they do. This naivety permeates the Prosecution's case and raises more doubts about the case against the Accused person than it provides answers.

33. It is the Defence's submission that the circumstantial evidence adduced by the Prosecution, upon which they now require the Trial Chamber to return a verdict of guilty is based on rumour, embellishment and the fertile imaginations of their witnesses. None of these can be relied on as facts and are therefore baseless.

34. Where there was what the Prosecution sought to adduce as direct evidence, this ended up being utterances of an over active imagination of witnesses who suddenly had realised that they could recoup some benefit from the war after all. Witnesses TF1-334, TF1-167, TF1-184 were all out of work, former soldiers or vigilantes. Witness TF1-046, the able lieutenant of Foday Sankoh, had reinvented himself and had written a book for which he was seeking a publisher and which formed the basis of his evidence, whislt witness TF1-033 was also an out of work member of the fugitive Johnny Paul Koroma's party. All of them had rather a lot more to gain than lose by coming to the Special Court to testify. That testimony would only be of benefit to them, the more spectacular and outrageous it was. It was perhaps more revealing that though each claimed to be present when certain acts took place, the roles of all other actors were either minimised or non-existent, but rather the roles of three Accused persons were made prominent. One would be forgiven sometimes if, it was thought that this AFRC was made of a three man hierarchy, above whom was no one and below whom was everyone else. This lends itself to the accusation that those pieces of evidence were embellished to suit a certain theory. The evidence given by each of these witnesses is examined below.

II. Weight to be attached to Evidence

35. It is submitted that the Trial Chamber may admit evidence that is deemed to be relevant, probative and reliable pursuant to Rule 89 (C). Rule 89 (C) is limited by Rule 89 (B) which says "that the rules of evidence applied by a Chamber must be those which best favour a fair determination of the matter before the Chamber and which are consonant with the Tribunal's Statute and the great principles of law; the exercise of discretion under Rule 89 (C) ought therefore to be in harmony with the Statute and the other Rules to the greatest extent possible."[20]

36. The threshold for admissibility is low, which affords the Trial Chamber a large degree of latitude. That being the case, the Chamber is not bound to accept all or any evidence it admitted. The Chamber is free to disregard admitted evidence.

37. In order to attach any weight to admitted evidence, it must be relevant to the charges and credible. In the *Kayishema Appeal Judgment*, it was stated that "it is neither possible not proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner"[21] Evidence must be both reliable and reasonable.

38. The Defence submits that where there is more than one accused, the evaluation of guilt of each of the Accused persons should be considered in the light of all the evidence presented by the Prosecution and each of the Accused. It should not be confined to the evidence of the Prosecution against one particular Accused[22]. Moreover where one Accused has succeeded in discrediting a Prosecution witness, another Accused person can take advantage of that discrediting evidence. This is

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[20] Prosecutor v Brdjanin, IT-99-36, Trial Chamber, 1 September 2004; See also Rule 89(B)
[21] ICTR-95-1, Appeals Chamber 1 June 2001
[22] Prosecutor v Simic, IT-95-9, Trial Chamber, 'Judgment, 17th October 2003

particularly important in the present case where there were common witnesses and individual witnesses.

III. Hearsay

39. Hearsay evidence is allowed in international tribunals and it is for the Trial Chamber to decide the weight to attach to the evidence. The Defence will submit, that the evidence of witness TF1-334 is based for the most part on hearsay. No weight should be attached to this evidence at all. This is a witness who claimed to have been present everywhere at all times, not to have left the side of his superior at any time. This as will be explored later is almost impossible. This leaves his whole evidence in doubt. Moreover witness TF1-184 claimed to have been told things by others when he got to Eddie Town. That, which he claimed to have been told is not corroborated by those Prosecution witnesses who claimed to have been present in Eddie Town. This can be seen in his account of a scenario wherein he states that on reaching Eddie Town, the person he referred to as the First Accused, wanted a sniper in the possession of Tito who gave it to Commander 'C' and that the First Accused had arrested some Commanders like Colonel Bomb Blast and Col Bioh and he had heard that this was because they planned to bewitch the movement[23]. None of this is corroborated by TF1-167 or TF1-334 both of whom were in Eddie Town, nor by TF1-033, who also claimed to be present there.

40. The Defence submits that the Trial Chamber must treat the hearsay evidence with caution and must subject each such evidence to tests of relevance, probative value and reliability[24].

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[23] See evidence of 27th September 2005
[24] Musema, Judgment and Sentence, Jan. 27th 2000 at page 51

IV. Mens Rea and Actus Reus

41. Also criminal responsibility requires that the Accused has the *mens rea* to commit the *actus reus.* These two concepts must always be present. The Prosecution must prove that the First Accused committed the offences and at the time of doing so, he had the necessary mind set, to commit those offences. For reasons which will be explored later, the Defence submits that the Prosecution has failed in this respect.

V. Documentary Evidence

42. The Prosecution tendered numerous documents in support of its case. The threshold for admitting these is low. There must however be proof of authenticity, source, and/or author.[25] The Trial Chamber must consider the reliability of the documents and the probative value of it.

VI. Credibility of Witnesses

43. In determining the credibility of the witnesses, the Trial Chamber must consider the demeanour, conduct and character of each witnesses as well as the "probability, consistency and other features of their evidence, including the corrobation which may be forthcoming from other evidence and circumstances of the case", as well as "the knowledge of the facts upon which they give evidence, their disinterestedness, their integrity, their veracity."[26] In Akayesu it was stated that the Trial Chamber should consider "inconsistencies in the light of its evaluation of the overall credibility of each particular witness".[27]
44. There is case law to support the proposition that though the Chamber should excuse memory lapses regarding exact dates and sequences of events,[28] discrepancies in relation to matters peripheral to the charges may be said to undermine the credibility

[25] Prosecutor v Brdjanin and Talic, IT-99-36, Trial Chamber, Trial Chamber, 15 February 2002
[26] Brdjanin Id page 25. see also Prosecutor v Akayesu ICTR-96-04, Appeals Chamber Judgment, 1 June 2001
[27] Akayasu Id page 136
[28] Akayesu Id page 267 See also Delalic Appeal Judgment page 497

of the witnesses in question.[29] The fact that a witness gave evidence honestly is not in and of itself sufficient to establish the reliability of that evidence. The evidence must be objectively reliable.[30]

45. Where a witness is found by the Trial Chamber to have lied on one issue, the Chamber should be sceptical about the remainder of that witness' evidence. In *Limaj* the Trial Chamber was "left with the distinct impression that [a witness] did indeed give false testimony ion [an] issue".[31]

46. The Trial Chamber in *Limaj* also considered how to treat the evidence of an "insider" who himself had committed crimes and was offered inducements in return for his testimony. As regards on such insider who appeared before the Chamber, the Chamber had this to say:

> *The Chamber has not been prepares to act on the evidence of [the witness] alone regarding any material issue and has only given weight to those parts of his evidence which are confirmed in some material particular by other evidence which the Chamber accepts.*[32]

47. The Defence therefore submits that evidence from such witnesses, should be treated with care, before accepting it as reliable. This is particularly important in relation to the evidence given by witnesses like TF1-334, TF1-167, TF1-184, TF1-046, and TF1-033. Even where such evidence is corroborated, it is submitted that this should not preclude the Trial Chamber from rejecting it. Corrboration does not of itself render any evidence reliable or credible.

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[29] Simic Trial Judgment Id page 22
[30] Delalic Id page 491, 506
[31] Limaj Id Trial Judgment, page 26
[32] Id page 28

48. The Defence will also address the credibility of First Accused giving the aspersions cast on the veracity of his evidence and therefore its reliability.

49. The Prosecution in cross examination of the First Accused put to him that his whole evidence was lie. The Defence wishes to put on record that this assertion is denied by the First Accused. On the contrary those who were put before the court by the Prosecution as insider witnesses were the liars, and this was obvious from the type of evidence given the demeanour and the answers provided even when they could easily have said they did not know or were not present. However, the Defence here assumes that as put by the Prosecution, they intend to suggest that if the First Accused is shown to have told lies then those lies must be seen as evidence of guilt, rather then merely being a reflection of the credibility of the Accused. The Defence accepts that the Trial Chamber is made up of fully qualified Judges, sitting without a jury, who can dispense their duty without directions as to law and fact. However, the Defence owes a duty point out to the Trial Chamber matters which it believes might count against the First Accused if left un-touched.

50. The Defence implores the Trial Chamber to find that the First Accused has not lied or embellished his evidence in any way and that he was a credible witness. If, on the other hand, the Trial Chamber were to come to the conclusion that the First Accused may have lied in a part or parts of his evidence, then the Chamber is asked to consider these propositions and case

51. The Defence will rely on some English authorities on this point. Firstly, the case of **R v Lucas**[33]. Lies can only strengthen or support evidence against the Accused person if the jury (here Judges) are satisfied that the lie was deliberate, it relates to a material issue and there is no innocent explanation for it.. In the case of **R v Studwick and Merry**[34], it was held that although lies if told through a consciousness of guilt, support other evidence, they cannot on their own make a prosecution case. The most

[33] (1981) QB 720
[34] 99 Cr App R 326

important of these authorities is the case of **R v Burge and Pegg**[35] wherein it was held that lies must be proved beyond reasonable doubt. The mere fact that a defendant lies is not of it self evidence of guilt since defendants may lie for innocent reasons. The jury (here Judges) must be sure that the defendant did not lie for an innocent reason to support the Prosecution case.

VII. Joint Criminal Enterprise (JCE)

52. The Prosecution alleges that all 3 Accused persons and the RUF shared a common plan, purpose or design (joint criminal enterprise).[36] The concept of JCE seems to have been culled and developed from the case of Tadic[37], which divided JCE into three categories. Firstly in category one the Prosecution must prove that the perpetrators acted pursuant to a common design and share the same criminal intention[38]. The prosecution must prove that the common plan was to do the specific act charged as a crime and that the Defendant participated in at least one aspect of his common design, and that the defendant intended to assist himself in the commission of the crime. In the case for example of murder, the Prosecution must show that the First Accused intended to assist in the commission of murder, even if he did not himself perpetuate the killing.[39]

53. The second category of JCE relates to "systems of ill-treatment," primarily concentration camps.[40]For this category, the prosecution need not prove a formal or informal agreement among the participants, but must demonstrate their adherence to a system of repression.[41]

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[35] (1996) 1Cr App R 163
[36]Paragraph 33 of the indictment
[37] Prosecutor v Tadic, Judgement ICTY Appeals Chamber, Case No. IT-94-1-A(July 15, 1999)
[38] Id at paragraph 196
[39] Allison Marston Danner and Jenny S. Martinez, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law*, 93 Cal. L. Rev. 75 (2005)
[40] Prosecutor v Tadic, Judgement ICTY Appeals Chamber, Case No. IT-94-1A (July 15, 1999) at Paragraph 202
[41] Prosecutor v Krnojelac, Judgement ICTY Appeals Chamber at para 96, Case No IT-97-25-A

54. The third category of JCE involves criminal acts that fall outside the common design. The Tadic Appeals Chamber concluded that a defendant who intends to participate in a common design may be found guilty of acts outside that design if such acts are a "natural and foreseeable consequence of the effecting of that common purpose."[42] The Appeals Chamber did not clearly specify whether foreseeability in the context of this category should be assessed objectively or subjectively,[43] and indeed it would be problematic to prove subjective forseeability. As an example of the kind of act that would fall within this third category, the Appeals Chamber offered the illustration of a common, shared intention on the part of a group to forcibly remove members of one ethnicity from their town, village or region . . . with the consequence that, in the course of doing so, one or more of the victims is shot and killed. While murder may not have been explicitly acknowledged to be part of the common design, it was nevertheless foreseeable that the forcible removal of civilians at gunpoint might well result in the deaths of one or more of these civilians.[44]

55. The Appeals Chamber also noted that all participants in the common enterprise would be guilty of this murder if the risk of death was a "predictable consequence of the execution of the common design" and if they were "reckless or indifferent" to that risk[45].

56. Applying these concepts to the case against the First Accused, the Defence would first of all submit that there has been insufficient evidence adduced that would support or prove the Prosecution's case that a joint criminal enterprise existed. Dealing firstly with category one, it the Prosecution has failed to prove that there was a joint plan to do certain specific acts. Witness after witness stated that there was a

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[42] Tadic V, supra note 111, at para. 204

[43] The Appeals Chamber used somewhat contradictory language about the foreseeability inquiry. It stated that the defendant, "although he did not intend to bring about a certain result, was aware that the actions of the group were most likely to lead to that result but nevertheless willingly took that risk," but the Chamber also noted that "everyone in the group must have been able to predict this result." Id. at para. 220.

[44] Tadic V, supra note 111, at para. 204.

[45] Id

plan to reinstate the army by SAJ Musa. Even if the campaign was said to be campaign by the First Accused to reinstate the AFRC government (and this is denied) then that could not be said to be evidence of a joint plan to do certain criminal acts as charged in the indictment. There is no evidence of a common plan existing to commit rape or any sexual violence, murder, physical violence, forced labour or any of the acts charged in the indictment. There must exist an agreement to commit the crime. Whist case law is silent as to what the agreement must entail, it is submitted that mere membership of a group will not constitute an agreement. The Prosecution, it is submitted have failed to show that there was an agreement between the First Accused and any other person or by persons under the command of the First Accused.

57. In order to convict a defendant under this category, the Prosecution must prove that each individual defendant voluntarily participated in at least one aspect of the common design and that he intended the criminal act even if he did not perpetrate it himself.[46] It thus appears in the current case that the Prosecution indicted the three Accused by using this category of "joint criminal enterprise" when it asserted in the Indictment that all crimes alleged therein were "actions *within* the joint criminal enterprise."[47] The Prosecution has chosen however to allege a joint criminal enterprise only between the AFRC and the RUF, and not among the three Accused within the AFRC.

58. The Prosecution seeks to make the Accused liable as co-perpetrator for acts carried out by the RUF at all times of the Indictment; yet, the evidence before the Court indicates that during much of that period, the AFRC and the RUF were at odds and often ill-treated each other[48]. The case law from which the joint criminal enterprise doctrine emerged requires that a prosecutor establish the existence of a criminal "common plan, design, or purpose" in order to assign guilt on the basis of a joint

[46] Id., paras. 196 and 220; *Prosecutor v. Simic*, IT-95-9-T, ICTY Judgment, Trial Chamber, 17 October 2003, para. 157.
[47] See para. 34 of the Indictment.
[48] See generally the evidence of TF1-046, TF1-334, TF1-045