criminal enterprise.[49] It is not enough that a broad allegation is made in the Indictment that the "joint criminal enterprise" complained of was "to gain and exercise control over the territory of Sierra Leone, in particular the diamond mining areas" and/or "included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise". This being a common or mutual objective/enterprise, which is denied, does not constitute a specific crime or criminal intention, whether direct or foreseeable, same or similar, basic or systemic within the context of the Indictment or of Article 6.1 of the Statute.

59. In order to prove the existence of a joint criminal enterprise, the Prosecution must establish the existence of a common plan, design, or purpose *specifically* aimed at committing a criminal act within the tribunal's jurisdiction.[50] The Prosecution must allege and prove that the defendant joined with others in a plan aimed at achieving an end that constitutes a crime contained in the indictment.[51] In the absence of evidence showing a criminal purpose, plan, design or intention between the AFRC and the RUF, the Prosecutor cannot rely on a theory of joint criminal enterprise between the two groups as a basis for the individual liability of each of the Accused.

60. In as far as the second category is concerned the Defence submits that it is not of any relevance to the case against the First Accused as there was no evidence of a concentration camp like existence at any time charged under the indictment.

61. In so far as the third category is concerned, in any campaign organised or participated in by the First Accused, (again this is denied) it could not have been reasonably

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[49] *Tadic* para. 227; and *Simic* para. 158, *supra* notes 49 and 77.
[50] *Tadic* para. 227, *supra* note 49.
[51] Id. See also *Brdanin & Talic 26 June 2001 Decision* para. 46 ("There must be a group bound together and organized for a common purpose. The group must be formed or used in connection with the commission of crimes denounced by the [court's] Charter. Since the declaration with respect to the organizations and groups will, as has been pointed out, fix the criminality of its members, that definition should exclude persons who had no knowledge of the criminal purposes or acts of the organization...Membership alone is not enough to come within the scope of these declarations.")

foreseeable that any or all of the crimes charged would be committed. The Defence would rely on the evidence of the Defence military expert General Prins, an analysis of which appears below, wherein he stated inter alia that the structure and hierarchy existed mainly on paper. There was only one level of command and that one man had to control 80-120 men and that was not good enough[52]. This he stated when looking at the span of command of group which was marching to Freetown. That being the case and this was not disputed by any of the insider witnesses called on behalf of the Prosecution, it could not be reasonable foreseeable that any commander would have control over what some or al of the men he was on paper in charge of, were doing. Moreover whilst Prosecution witnesses gave evidence[53] of orders, there was no evidence of any agreement at any level with the RUF to commit any of the crimes charged. There is admittedly evidence of some RUF amongst the group at Col Eddie Town, for example, but none as regards an agreement to act in accordance with a common plan. The Prosecution tried to link the AFRC group and the RUF by witnesses giving evidence of radio calls to the RUF – Sam Bockarie and Issa Sesay by the First Accused. The evidence of the witnesses who gave evidence of this notable TF1-334 and TF1-046 is analysed below, but for the purposes of this part, the Defence would say that any radio contact is insufficient to form a conclusion of a JCE. Moreover Kailahun and Kenema, two places where the Prosecution seemed to want to impute AFRC involvement or agreement were both places controlled and run by the RUF, a point reiterated by their own witnesses, who claimed that these places were controlled by Mosquito. The question must also be asked, as to how there could be a joint criminal enterprise with a person and organisation, Mosquito and the RUF, of whom Johnny Paul Koroma had said the SLA should now take orders. Also given that the evidence from Prosecution witnesses was that Sam Bockarie was of the view that the RUF ruled in the jungle, how can the Prosecution then say that the First Accused was acting in concert with someone who had stated openly that they ruled. One is either a partner or a subordinate being ruled and ordered. It is submitted that

[52] Evidence given in chief on the 17th October 2006
[53] See evidence of Prosecution witnesses TF1 – 045, TF1-334

in the areas where the two factions were present the latter was the case. There was therefore no joint criminal enterprise between the First Accused and anybody else.

62. Further whilst the AFRC government was in power, the Defence submits that it was a government and not a fighting force. The RUF were a part of that government although that was a relationship wrought with suspicions and mistrust. The RUF however kept their separate identity while governed together and were not fused. Indeed the RUF were able to leave the government when Mosquito felt he no longer wanted to be part of it.[54] The Defence will expand on this below.

VIII. Command Responsibility

63. International criminal doctrine must be responsive to notions of individual culpability if it is to maintain its legitimacy both in the realm of human rights and with regard to the aspirations of transitional justice. Both international criminal tribunals and domestic courts have rejected unequivocally the doctrine of guilt by association.[55] Culpability may not be derived from mere membership in an organization or from the simple title of rank, but rather guilt must be determined from individual actions (or omissions) with the requisite *mens rea*.

64. From the genesis of international law, the judgement of the International Military Tribunal at Nuremberg declared that the Tribunal's conclusions were made "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."[56] The

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[54] See evidence of TF1-046

[55] 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); citing both the IMT at Nuremberg and the U.S. Supreme Court *Uphaus v. Wyman*, 360 U.S. 72, 79 (1959) (stating that "guilt by association is a thoroughly discredited doctrine). See also, Report of the Secretary-General pursuant to Paragraph 2 of Security Council Resolution 808 (1993), 22 Feb. 1993, U.N. Doc. S/25704, para. 56. (Also rejecting guilt by association, "The criminal acts set out in this statute are carried out by natural persons; such persons would be subject to the jurisdiction of the International Tribunal irrespective of membership in groups.").

[56] 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).

ICTY Appeals Chamber further emphasized that the "basic assumption" in international and national laws is that "the foundation of criminal responsibility is the principle of personal culpability."[57]

65. Yet the evolving doctrine of command responsibility has the potential to lower the bar for individual culpability. Under the doctrine of command responsibility, the commander is punished for his failure to control those under his command and not for direct participation in the crimes which they commit. Yet, the commander is punished not for the distinct offence of failure to control, but rather as a principal actor for the actual offences committed by his subordinates. Under the most expansive interpretation of command responsibility, a commander can be held liable for the most serious of crimes under a mere negligence standard. Yet such an interpretation flies in the face of international community's commitment to avoid the spectre of arbitrary punishment. This memo will explore the recent jurisprudence regarding command responsibility in hopes of narrowing the doctrine and framing our factual case to show that Tamba Brima cannot be criminal liable for the acts of (those the Prosecution deems to be) his subordinates.

IX. Doctrinal Overview of Command Responsibility

66. Command responsibility doctrine under the case law of the ICTY and ICTR requires three elements:

a. The existence of a superior-subordinate relationship of effective control;

b. The existence of the requisite *mens rea*, namely that the commander knew or had reason to know of his subordinates'

[57] *Prosecutor v. Tadic*, Judgement, ICTY Appeals Chamber, at para. 186, Case No. IT-94-1-A (July 15, 1999) (The case continues: "[T]he basic assumption must be that in international law as much as in national systems, the foundation of criminal responsibility is the principle of personal culpability: nobody may be held criminally responsible for acts or transactions in which he has not personally engaged or in some other way participated (nulla poena sine culpa).") available at http://www.un.org/icty/tadic/appeal/judgement/index.htm

crimes; and

c. That the commander failed to take the necessary steps to prevent or punish the offences.[58]

67. The failure to meet any single element implies the absence of liability. The statutes of the ICTY and ICTR provide further textual guidance, stating that an accused is liable where she "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."[59] The statute for the Special Court echoes this language under Article 6(3):

> "The fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof."[60]

68. Thus, the ICTY, ICTR, and the Special Court statutes apparently endorse liability for something less than actual knowledge of a subordinate's crimes. As these tribunals grapple with the evolving interpretation of the phrase "had reason to know," the question of *mens rea* looms large. Nevertheless, it is submitted that the Prosecution has to prove exactly that which it alleges.

X. Mens Rea and Command Responsibility – a Closer Look

69. The reference to "culpability" generally means that a crime must be committed with

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[58] See *Prosecutor v. Blaskic*, Judgement, ICTY Trial Chamber, at para. 294, Case No. IT-95-14-T (Mar. 3, 2000); *Prosecutor v. Delalic*, Judgement, ICTY Trial Chamber, supra note 30, at para. 346; *Prosecutor v. Kordic*, Judgement, ICTY Trial Chamber, supra note 102, at para. 401.
[59] ICTR Statute at art. 6(3); ICTY Statute at art. 7(3).
[60] Statute for the Special Court in Sierra Leone at art. 6(3); see also, U.N. Transitional Administration in East Timor at art. 16 (using similar language).

intent or knowledge, in other words, with *mens rea*. Such a commitment to limiting punishment has its roots in the British common law system yet its influence extends throughout to other contemporary jurisprudence. In an oft-cited case, Lord Goddard wrote that "the court should not find a man guilty of an offence against the criminal law unless he has a guilty mind."[61] Yet doctrines of joint criminal enterprise and command responsible have the potential to negate this fundamental requirement.[62]

70. Allison Danner and Jenny Martinez thoroughly examined the recent jurisprudence in their 2005 article, *Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law.*[63] Below is an excerpt from their article:

> *Throughout much of the ICTY and ICTR case law, there has been evident concern with avoiding the possibility of strict liability and discomfort with liability based on ordinary negligence. One early decision in which such concern appears is the ICTR Trial Chamber's judgement in Akayesu.*[64] *There, the Trial Chamber emphasized that command responsibility derives from the principle of individual criminal responsibility and noted that such responsibility should be based on malicious intent, or at least negligence so serious as to be tantamount to acquiescence or even malicious intent."*[65]

71. The ICTY's judgement in the Celebici camp case, rendered a few weeks after the Akayesu decision, likewise rejected a standard of negligence.[66] The Celebici Trial Chamber held that the requisite knowledge could be shown by direct evidence or established by circumstantial evidence.[67] The Trial Chamber opined that "a superior

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[61] *Brend v. Wood*, 175 L.T.R. 306, 307 (1946); see also *Harding v. Price*, 1 All E.R. 283, 284 (1948).
[62] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015 (2003).
[63] 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 at 127-129 (2005).
[64] *Prosecutor v. Akayesu*, Judgement, ICTR Trial Chamber, Case No. ICTR-96-4-T (Sept. 2, 1998).
[65] *Id.* at para. 489.
[66] *Prosecutor v. Delalic*, Judgement, ICTY Trial Chamber, supra note 30, at paras. 386-89.
[67] *Id.* at para. 386.

is not permitted to remain wilfully blind to the acts of his subordinates," yet acknowledged that difficulties arise in situations where the superior lacks information of his subordinates' crimes because he failed to properly supervise them.[68] While recognizing that some of the post-World War II case law suggested that a commander may be held liable where he wilfully failed to acquire knowledge of his subordinates' activities,[69] the Chamber found that, at the time the offences occurred in the former Yugoslavia, customary international law allowed a superior to be held criminally responsible "only if some specific information was in fact available to him which would provide notice of offences committed by his subordinates."[70] Such information need not provide conclusive proof of the crimes, but must be enough to demonstrate that additional investigation into the subordinates' actions was necessary.[71] Thus, Celebici embraces something akin to a recklessness requirement. The Appeals Chamber of the ICTY ultimately affirmed the Celebici Trial Chamber's rulings on command responsibility, rejecting the notion that command responsibility was a form of strict liability or vicarious liability and holding that a commander is liable only if "information was available to him which would have put him on notice of offences."[72]

72. The Blaskic Trial Chamber decision triggered sharp criticism, prompting one commentator to argue that command responsibility doctrine was so insensitive to a defendant's "own personal culpability" that it had "no support in principles accepted by systems of national criminal law."[73] In a dramatic reversal, in July 2004, the ICTY Appeals Chamber overturned the Trial Chamber's conviction of Blaskic on most

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[68] *Id.* at para. 387.
[69] *Id.* at para. 388-89 (citations omitted).
[70] *Id.* at para. 393.
[71] *Id.* In addition, the Trial Chamber rejected the defense's argument that causation was a necessary element of liability: "Notwithstanding the central place assumed by the principle of causation in criminal law, causation has not traditionally been postulated as a conditio sine qua non for the imposition of criminal liability on superiors for their failure to prevent or punish offences committed by their subordinates." Id. at para. 398.
[72] *Prosecutor v. Delalic*, Judgement, ICTY Appeals Chamber, at paras. 400-413, Case No. IT-96-21-A (Feb. 20, 2001) (discussing approaches and ultimately adopting the test articulated in *Blockburger v. United States*, 284 U.S. 299, 304 (1932))
[73] Mirjan Damaska, The *Shadow Side of Command Responsibility*, 49 Am. J. Comp. L. 455 at 456 (2001).

counts, reducing his sentence from forty-five years to nine years.[74] The sprawling 300-page opinion overturned many of the Trial Chamber's factual and legal holdings, but of greatest interest for present purposes was its forceful rejection of the Trial Chamber's negligence-based articulation of the command responsibility standard. The Appeals Chamber concluded that the Blaskic Trial Chamber's description of the doctrine was incorrect and that the "authoritative interpretation of the standard of 'had reason to know' shall remain the one given in the Celebici Appeals Judgement."[75] A few months earlier, the ICTR Appeals Chamber in Bagilishema had signaled similar discontent with the possibility of a negligence standard, noting that "[r]eferences to 'negligence' in the context of superior responsibility are likely to lead to confusion of thought . . . ."[76] Thus, following the Blaskic and Bagilishema appeals judgements, the current state of the doctrine seems well-settled in the ICTY and ICTR, at least to the extent that something greater than ordinary negligence is required to trigger liability.

73. In his 2003 article, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, William A. Schabas argues that there must be some element of actual knowledge (a standard higher then negligence would admit). Revisiting the Celebici case, he writes: [77]

> *The Appeals Chamber examined the mens rea of command responsibility in the Celebici case. The judges dismissed an argument by the Prosecutor aimed at expanding the concept, noting that:*
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> > *A superior will be criminally responsible through the principles of superior responsibility only if information was available to him which would have put him on notice of offences committed by subordinates. This is consistent with the customary law standard of mens rea as existing at*

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[74] *Prosecutor v. Blaskic*, Judgement, ICTY Appeals Chamber, at paras. 257-58, Case No. IT-95-14-A (July 29, 2004).
[75] Id. at paras. 62-64.
[76] *Prosecutor v. Bagilishema*, Judgement (Reasons), ICTR Appeals Chamber, at para. 35, Case No. ICTR-95-1A-A (July 3, 2002).
[77] William A. Schabas, *Mens Rea and the International Criminal Tribunal for the Former Yugoslavia*, 37 New Eng. L. Rev. 1015 at 1028 (2003).

the time of the offences charged in the Indictment.[78]

74. Thus, although a literal reading of article 7(3) suggests the possibility of a superior being convicted who had no knowledge of the crimes, the Appeals Chamber has required that there be evidence that the superior have some amount of actual knowledge. This knowledge cannot simply be presumed because of the commander's position. Obviously sensitive to the charges of abuse that could result from an overly large construction of article 7(3) of the Statute, the Appeals Chamber said it "would not describe superior responsibility as a vicarious liability doctrine, insofar as vicarious liability may suggest a form of strict imputed liability."[79] Several of the judgements testify to this judicial discomfort with respect to the outer limits of superior responsibility, and reveal concerns among the judges that a liberal interpretation may offend the *nullum crimen sine lege* principle.[80]

75. Yet the Appeals Chamber in an *Aleksovski* contempt hearing did confirm that wilful blindness is "equally culpable" as actual knowledge.[81] It seems at the moment the question of mens rea is evolving and unsettled.

XI. The Particulars of the Case of the First Accused.

76. Judge Hunt of the ICTY recently opined in dissent from a procedural ruling on the admissibility of written witness statements, *"[t]his Tribunal will not be judged by the number of convictions which it enters . . . but by the fairness of its trials."*[82] Judge Hunt warned that decisions giving short shrift to the "rights of the accused will leave

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[78] *Prosecutor v. Delalic*, Case No.: IT-96-21-A), Judgement, 20 Feb. 2001, para. 241 (reference omitted); see also *Prosecutor v. Galic*, Case No.: IT-98-29-AR73.2, Appeals Judgement, 7 June 2002.
[79] *Prosecutor v. Delalic*, Case No.: IT-96-21-A, Judgement, 20 Feb. 2001, para. 239.
[80] See, for example, the opinion of Judge Bennouna, in *Prosecutor v. Krajisnik*, Case No.: IT-00-39, Separate Opinion of Judge Bennouna, 22 Sept. 2000. For a recent discussion of this point: *Prosecutor v. Had•ihasanovic* et al., Case No.: IT-01-47-PT, Decision on Joint Challenge to Jurisdiction, 12 Nov. 2002.
[81] *Prosecutor v. Aleksovski* (Case No.: IT-95-14/1-AR77), Judgement on Appeal by Anto Nobilo against Finding of Contempt, 30 May 2001, para 43.
[82] *Prosecutor v. Milosevic*, Dissenting Opinion of Judge David Hunt on Admissibility of Evidence in Chief in the Form of Written Statements, ICTY Appeals Chamber, at para. 22, Case. No. IT-02-54-AR73.4 (Oct. 21, 2003).

a spreading stain on this Tribunal's reputation."[83] In the spirit of strong support for the aims of international criminal law, Tamba Brima must not be judged by the actions of those over whom he no effective control. His guilt must not be presumed because of his title or rank if he had no reason to know of criminal activities afoot. The prosecution has consistently failed to prove that this information was available. And finally, Brima could not have taken measures to prevent or punish those activities of which he was not aware and could not have controlled.

XII. Individual Criminal Responsibility

77. The notion of individual criminal responsibility is derived form Article 6.1 of the Statute which reads as follows:

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

78. The Prosecution's case is therefore that the First Accused must have either directly or indirectly committed any or all of the crimes under Article 2 to 4 of the Statute. The key elements are that he either planned, instigated, ordered, committed or aided and abetted in the planning, preparation or execution of any of the alleged crimes. The Defence will look at each of these concepts separately borrowing from the definitions of this Trial Chamber in its Decision of Defence Motion for Acquittal pursuant to Rule 98. (hereinafter called Rule 98 Decision[84])

Planning

79. This Trial Chamber has defined planning as implying that:

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[83] *Id.*
[84] Decision on Defence Motion for Acquittal SCSL-04-16-PT

one or several persons contemplate designing the commission of a crime at both the preparatory and execution phases. The actus reus requires that the accused, alone or together with others, designed the criminal conduct constituting the crimes charged. It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct. The mens rea requires that the accused acted with direct intent in relation to his own planning or with the awareness of the substantial likelihood that a crime would be committed in the execution of that plan. Planning with such awareness has to be regarded as accepting that crime[85].

80. In the ICTY case of Prosecutor v. Brdjanin[86], the Court held that responsibility for planning a crime shall only lie if it is demonstrated that the accused was 'substantially involved at the preparatory stage of that crime in the concrete form it took, which implies that he possessed sufficient knowledge thereof in advance'.

81. Based on these definitions, the Defence submits that the First Accused could not have been guilty of planning or designing any of the acts he is accused of. Firstly, the Prosecution adduced no evidence of this. On the contrary the match to Freetown was said by Prosecution witnesses to be the brain child of SAJ Musa. Even where the Prosecution led evidence of the First Accused having planned attacks on places like Karina in the Bombali District, as will be addressed below, those pieces of evidence were discredited by those Defence witnesses who were in fact said by Prosecution witnesses to have either been killed or directly affected by the attack.

82. The Defence will also submit that even the attack on Freetown could not be said to have been planned by the First Accused. This was said by Prosecution witnesses to have been planned by SAJ Musa. There is no evidence that SAJ Musa and the First Accused were in a meeting or acted in together to execute the plan to Freetown. Even if the Prosecution's evidence is accepted (and the Defence submits that it should not) the First Accused was always a subordinate to SAJ Musa and was never said to have

[85] Id pages 6529 to 6281 para. 284.
[86] ICTY Judgment, Trial Chamber, 1 September 2004, IT-99-36-T, para. 357.

planned attack for SAJ Musa or others to follow. It follows that the Prosecution has failed to establish that the designing of the criminal conduct was accomplished by the First Accused at both the preparatory and execution phases.

Instigating

83. Again the Trial Chamber in its Rule 98 decision[87] motion as meaning:

prompting another to commit an offence. Both acts and omissions may constitute instigating, which covers express as well as implied conduct. A nexus between the instigation and the perpetration must be proved, but it is not necessary to demonstrate that the crime would not have been perpetrated without the involvement of the accused. The actus reus requires that the accused prompted another person to commit the offence and that the instigation was a factor substantially contributing to the conduct of the other person(s) committing the crime. The mens rea requires that the accused acted with direct intent or with the awareness of the substantial likelihood that a crime would be committed in the execution of that instigation.

84. The Defence respectfully submits that the Prosecution led no evidence on instigation either through its crime based witnesses or the insider witnesses. To that extent at least the Prosecution has failed to prove its case.

Ordering

85. As above the in the rule 98 decision the Trial Chamber defined ordering as requiring

proof that a person in a position of authority uses that authority to instruct another to commit an offence. A formal superior/subordinate relationship between the accused and the perpetrator is not required. It is sufficient that the accused possessed the authority to order the commission of an offence and that such authority can reasonably be implied.

[87] Id., para. 293.

There is no requirement that the order be given in writing or in any particular form, and the existence of an order may be proven through circumstantial evidence. It is not necessary for the order to be given by the superior directly to the person(s) who perform(s) the actus reus of the offence. What is important is the commander's mens rea, not that of the subordinate executing the order...The actus reus of "ordering" requires that the accused, as a person in a position of authority, instructed another person to commit an offence. The mens rea requires that the accused acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order.[88]

86. It follows that for the offence of "Ordering" , the accused should firstly, possess the authority, expressly or implicitly, to order the commission of the offence[89], and secondly, that the accused "acted with direct intent in relation to his own ordering or with the awareness of the substantial likelihood that a crime would be committed in the execution of that order"[90]. In this regard, it is important to categorised the evidence led by the Prosecution as follows:

a. Crime based witnesses who had personal experiences to tell – none of whom who could identify the First Accused and either by identification or recognition in court.

b. Crime Based witnesses who stated that they had heard the name of one of their commanders as Gullit – a name the Prosecution say the First Accused is known by and

c. Insider witnesses who claim to know the First Accused well and claim he was a leader and therefore ordered attacks.

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[88] Id para 295-296
[89] *Prosecution v. Kordic and Cerkez*, ICTY IT-95-14/2-T, Judgment, Trial Chamber 26 February 2001, para. 388; *Akayesu* Trial Chamber Judgment, *supra* note 33, para. 483.
[90] *Kordic and Cerkez*, ICTY Judgment, Appeals Chamber, *supra* note 31, paras. 29-30.

87. The Defence submits that given the quality and standard of evidence that emanated from the second two categories of witnesses, the Court cannot be satisfied so that it is sure that the Accused person ordered the commission of any crime. Much of the evidence is conflicting and contradictory and cannot be relied upon. This is expanded upon below, but for now the Defence will submit that the Prosecution has failed to prove the offence of ordering.

Committed

88. In its rule 98[91] decision, the Trial Chamber held that:
[a]n individual can be said to have "committed" a crime when he or she physically perpetrates the relevant criminal act or engenders a culpable omission in violation of a rule of criminal law.[92] *There can be several perpetrators in relation to the same crime where the conduct of each one of them fulfils the requisite elements of the definition of the substantive offence.*

89. Following the Appeals Chamber Judgment in *Prosecutor v. Tadic*[93], the Chamber proceeded in the subsequent Judgment of *Prosecutor v. Krnojelac*[94] to define "committed" as "first and foremost the physical perpetration of a crime by the offender himself". The *actus reus* is paramount to the existence and proof of the offence of "committed". It is clear therefore, that where physical perpetration of a crime by an accused is not present and there is doubts as to whether that accused person commanded a position of authority in a defined armed group(s) sufficiently weakens any submission that that accused should be held culpable for "committing" a crime.

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[91] See para. 277.
[92] *Prosecutor v. Tadic*, ICTY IT-94-1-A, Judgment, Appeals Chamber, 15 July 1999, para. 188.
[93] Ibid.
[94] ICTY Judgment, Appeals Chamber, 15 March 2002, para. 73.

90. The Defence submits that the evidence of actual commission by the First Accused is at best unreliable and at worse fabrication. This will be explore in more detail below, suffice it to say that the Prosecution has again failed to prove its case and this should therefore be dismissed.

Aiding and Abetting

91. This was also defined in the Rule 98[95] decision, wherein the Trial Chamber defined the ***actus reus*** of "aiding and abetting" as requiring:

the accused gave practical assistance, encouragement, or moral support which had a substantial effect on the perpetration of the crime...The mens rea requires that the accused knew that his acts would assist the commission of the crime by the perpetrator or he was aware of the substantial likelihood that his acts would assist the commission of the crime by the perpetrator. However, it is not necessary that the aider and abettor had knowledge of the precise crime that was intended and which was actually committed, as long as he was aware that one of a number of crimes would probably be committed, including the one actually committed.

92. It was held in the case of *Prosecutor v. Kunarac*[96], that presence alone is not sufficient to prove "aiding and abetting", unless it can be shown that such presence gave legitimacy or encouragement to the acts of the principal. Thus, to aid and abet by omission, the failure to act should have a significant effect on the commission of the crime in issue[97]. The *actus reus* of the offence is therefore a crucial element.

93. The Defence submits that there has been no reliable evidence adduced of the First Accused aiding and abetting anyone and that includes the RUF. As can be seen below, the Prosecution theory of the First Accused aiding and abetting the RUF in general and Mosquito was undermined by their own witnesses who gave evidence that Mosquito was controlled certain areas which were firmly under his control,

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[95] See paras. 301-2.
[96] ICTY Judgment, Trial Chamber, 7 May, 1997, para. 393.
[97] *Akayesu, supra*, note 32, para 705.

within which no other fighting faction exercised any control. This was corroborated by witnesses called on behalf of the Defence.

94. In so far as Article 6.1 is concerned, it is the Defence's submission therefore that the Prosecution has failed to prove its case beyond reasonable doubt.

XIII. Individual Criminal Responsibility under Article 6.3

95. The Prosecution further alleges in the Indictment that:

[i]n addition, or alternatively, pursuant to Article 6.3 of the Statute, ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, while holding positions of superior responsibility and exercising effective control over their subordinates, are each individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof[98].

96. In the case of the First Accused, the Prosecution, alleges that he was "in direct command of the AFRC/RUF forces"was, *inter alia*, "a commander of AFRC/RUF forces which conducted armed operations through out the north, eastern and central areas of the Republic of Sierra Leone..."[99]

97. Article 6.3 of the Statute specifically provides that:

[t]he fact that any of the acts referred to in articles 2 to 4 of the present Statute was committed by a subordinate does not relieve his or her superior of criminal responsibility

[98] See para. 36 of the Indictment.
[99] Id para 24

if he or she knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior had failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

98. Similarly, Article 6.4 of the Statute, though not quoted in the Indictment, provides that:

[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires.

99. As the Court itself acknowledges in its Rule 98 decision referred to earlier, "a three-pronged test for liability" should be established under Article 6.3, to wit, firstly, "the existence of a superior-subordinate relationship between the commander (the accused) and the perpetrator of the crime"; secondly, that "the accused knew or had reason to know that the crime was about to be or had been committed"; and thirdly, that "the accused failed to take the necessary and reasonable measure to prevent the crime or punish the perpetrator thereof". The Defence will look at each of these concepts individually.

Existence of a Superior-Subordinate Relationship:

100. The existence of a superior-subordinate relationship between the commander (herein allegedly the First Accused) and the perpetrator of the crime (his subordinate) is predicated upon the power of the said commander to "effectively" command and control the acts of his or her subordinate[100], assuming that the commander exercised any form of authority at all. Relying on Article 28 of the Statute of the International Criminal Court, any thing short of establishing and proving "effective command and control" by a superior over the conduct of his/her subordinate(s) ousts individual

[100] See *Prosecutor v. Delalic et al*, IT-96-21 "Celebici", ICTY Judgment, Appeals Chamber, 20 February 2001, para 256 [hereinafter called "the Delalic Appeals Judgment"]; see also Article 28 of the Statute of the International Criminal Court (ICC).

responsibility for the crimes perpetrated by such subordinate(s). "Effective control" is "a material ability to prevent or punish criminal conduct, however that control is exercised"[101]. In the case of *de facto* commanders, they must exercise such effective power and control over their subordinates that are substantially similar to the power and control exercised by *de jure* commanders, for individual criminal responsibility to lie.[102] Also, the superior should be able to exercise "substantial influence" over his or her subordinates in order to satisfy the requirement of effective control; failing which, liability cannot be grounded in superior command responsibility.[103]

101. In the *Prosecutor v. Kordic and Cerkez,*[104] the Trial Chamber, in its Judgment, set out the elements for a determination of "superior authority". It stated that the starting point is "the official position" held by the accused, noting however that the existence of a position of authority, whether *de jure* or *de facto*, will be based on an assessment of "the reality of the authority of the accused"[105]. The Court notes that "military positions will usually be strictly defined and the existence of a clear chain of command, based on strict hierarchy, easier to demonstrate. Generally, a chain of command will comprise different hierarchical levels starting with the definition of policies at the highest level and going down the chain of command for implementation in the battlefield. At the top of the chain, political leaders may define the policy objectives. These objectives will then be translated into specific military plans by the strategic command in conjunction with senior government officials. At the next level the plan would be passed on to senior military officials in charge of operational zones. The last level in the chain of command would be that of the tactical commanders which exercise direct command over the troops."[106] Quoting further from the "ICRC Commentary" on Additional Protocol I of the Geneva Conventions, the Court noted that "there is no part of the army which is not subordinated to a military commander at whatever level. [Consequently], responsibility applies from

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[101] Id.; see also para. 197 of the Appeals Judgment endorsing the finding of the Trial Chamber on the issue.
[102] Id., para. 197.
[103] Id., para. 266
[104] IT-95-14/2, ICTY Judgment, Trial Chamber, 26 February 2001, paras. 418-24 [the "Lasva Valley"case]
[105] Id., para. 418.
[106] Id., para. 419.

the highest to the lowest level of the hierarchy, from the Commander-in-Chief down to the common soldier who takes over as head of the platoon to which he belongs at the moment his commanding officer has fallen and is no longer capable of fulfilling his task"[107]. Significantly too, for criminal responsibility to lie, the Court held that it must be shown that the powers and duties exercised by the superior are "real"[108].

102. In view of the forgoing, the Defence will submit that the Prosecution hads faioled to adduce evidence to the high standard required that the First Accused held any position of responsibility which conferred on him powers which he exercised over subordinates.

103. The Defence Military Expert, in reviewing the evidence adduced by the Prosecution to the Court including the Military Expert Report by the Prosecution's Military Expert, firstly, concluded that "the history of the SLA shows a total breakdown of military organization". He went on to say the "during the AFRC regime all forms of discipline and regimentation of the RSLAF were brought down to zero and ultimately finished the image of the RSLAF. This was also the starting point of the AFRC faction when ousted from power in February 1998"[109]. This view was also corroborated by TRC 001[110], a Common Defence Witness and also serving officer of the Republic of Sierra Leone Armed Forces. The fact that the Prosecution's Military Expert failed to properly review the military structure and operations of the Army before and during the AFRC regime, confining himself extensively to the AFRC faction[111], means that his report and conclusions are highly deficient. Thus, regarding the SLA under the AFRC regime, the Defence submits that the First Accused, as a Corporal, performed no military function and wielded no military authority over any one; his role was at best 'political' within the AFRC Government, and nothing more.

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[107] Id. para. 420.
[108] Id. para. 422.
[109] *Supra,* Exhibit D36 note 112, para. 172. [SLA means Sierra Leone Army, and RSLAF means Republic of Sierra Leone Armed Forces].
[110] See Transcript of 16TH October 2006
[111] *Supra,* Exhibit D36 in its entirety, especially para. E6

Even if the Prosecution version is accepted, and he was a Staff Sergeant[112] that is a role that conferred on him the powers attributed to him by the Prosecution. It is submitted that in no way was he in a position of superior authority to command military or combat operations in any part of Sierra Leone or to order or supervise the commission of the crimes. As the Defence's Military Expert further concluded, "the AFRC", only had the semblance of a military structure and hierarchy. Specifically, the criteria of the *span of command* and the *span of control* were not fulfilled"[113].

104. Secondly, contrary to views expressed and conclusions reached by the Prosecution's Military Expert aforesaid, the Defence Military Expert concluded in his Report that "the AFRC faction did not exhibit the majority of the characteristics of a traditional military organization which therefore supports the view that the AFRC faction was an irregular military force"[114]. The Defence Military Expert also concluded that various groups within the AFRC faction were "not recognizable"[115]. The evidence led by the Prosecution, as well as the Defence maintained by the Second Accused and the other co-Accused, through Common and Individual Witnesses, altogether create a wry picture at odds with the purported existence of an "AFRC faction" with "a strong command capability", "functional characteristics of a military organization", "high levels of coherence between strategic, operational and tactical levels" as portrayed by the Prosecution's Military Expert[116].

105. Other than merely portraying the "AFRC-post-February 1998" and the "RUF" as one and the same, which evidence was challenged and denied by both witnesses for the Prosecution and the Defence, the Prosecution fails to provide any clear evidence as what the command and control structure of the SLAs as a combat unit was in Kono District, for example. Similarly, evidence of mutiny by junior soldiers at Colonel

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[112] This is not accepted by the Defence: see evidence of First Accused
[113] *Supra,* Exhibit....p 176.
[114] Id., para. 177.
[115] Id., para. 175.
[116] *Supra,* Exhibit D36 .in its entirety, especially para. E6 thereof.

Eddie Town leading to the arrest and long detention of the three Accused[117], among others, weakens any responsible chain of command and the existence of superior authority by the Accused over their subordinates. Furthermore, even the Prosecution's Military Expert concluded in his Report that "the AFRC faction had a strong command capability which failed on 6th January"[118]. This conclusion admits the absence of an effective command and control, if any, over the fighters that attacked Freetown on 6th January, 1999. Having stated this, it must be borne in mind that the Accused has maintained the defence of alibi.

106. It is the submission of the Defence that in so far as the Prosecution has attempted to prove that the First Accused held a position of responsibility, it has not dome so the high standard required.

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

107. Apart from the requirement for superior-subordinate relationship noted above, a second limb of Article 6.3 is the *mens rea* requirement, namely, proof by the Prosecution that the Second Accused, among others, "knew or had reason to know that the crime was about to be or had been committed". Though "actual knowledge" may be proved through direct or circumstantial evidence, it must not be presumed[119]. Some of the indicia of superior knowledge may include: the number, type and scope of illegal acts; the number and nature of the troops involved; the geographical location of the acts; the widespread nature of the acts; and the *modus operandi* of similar illegal acts and location of the superior at the appropriate times[120].

108. Regarding indirect or circumstantial knowledge by the accused, superior criminal responsibility is not one of "strict liability"; each case has to be individually

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[117] (Transcript of cross examination of TF1- 334 by Counsel for the second Accused and evidence of TF1-167).
[118] *Supra,* Exhibit D36.para. E6.1.d.
[119] *Prosecution v. Blaskic*, ICTY Judgment, Trial Chamber, 3 May, 2000, p307.
[120] See *Archbold International Criminal Court: Practice, Procedure & Evidence*, 2003, edited by Dixon, Khan and May, para 10.35, p. 295.

examined to ascertain the requisite *mens rea*, taking account of the superior's situation at the appropriate time[121]. Customary international law observes that superiors are not under a duty to know; they are only liable when they had "information which should have enabled them to conclude in the circumstances at the time, that [the perpetrator] was committing or was going to commit such a breach and if they did not take feasible measures within their power to prevent or repress the breach"[122].

Failure of the Accused person to Prevent the Crime or Punish the Perpetrator:

109. This third limb of Article 6.3 of the Statute seeks to posit "culpable omission" as a crucial element of superior-subordinate individual criminal responsibility. In view of the foregoing analysis of this form of individual criminal responsibility, it is submission of the Defence that this third limb of Article 6.3 can only lie if the first two limbs are established. In order words, the accused has to be a commander over identified subordinates, he has to have effective command and control over them and their conduct, and more significantly, he has to possess the requisite *mens rea* of knowing or having reason to know that the subordinate has committed or is about to commit the crime outlined in the Indictment.

110. The Defence therefore submits that Article 6.3 of the Statute has not been established or sufficiently proven to the requisite standard against the First Accused and must be dismissed.

XIV. Greatest Responsibility

111. This new and in many ways ambiguous concept in international law was derived from the Security Council Resolution for the Special Court "should have personal

[121] *Supra* Delalic Appeals Judgment, p. 239.
[122] See Article 86(2) of the 1997 Geneva Protocol I Additional to the Geneva Conventions of 1949.

jurisdiction over those who bear the greatest responsibility."[123] It is also contained in Article 1.1 of the Statute from whence the Special Court derives its jurisdiction. According to Article 1.1:

[t]he Special Court [including the Trial Chamber] shall (...) have the power to prosecute persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996, including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone.

112. This notion of greatest responsibility is perhaps the most fundamental element of the indictment. There is however an absence of case law on this subject. The Defence will firstly look at the standard required and then the evidential requirement.

. **The Standard Required**

113. In constructing the standard of greatest responsibility as understood by the United Nations Security Council, the Trail Chamber in its Rule 98 Decision noted that the use of the word "including" in the phrase "persons who bear the greatest responsibility (...) including those leaders who, in committing such crimes, have threatened the establishment of and implementation of the peace process in Sierra Leone" inferred that "the category of "persons who bear the greatest responsibility" is by no means limited to "those leaders..." and that there may be other persons who fall into that category"[124]. At the minimum, the Special Court initially set the standard of inclusion into the category of "persons who bear the greatest responsibility" at *political* or *military leaders* "who, in committing [the crimes set out in the Indictment], have threatened the establishment of and implementation of the peace process in Sierra Leone". This is reinforced by Article 6.2 of the Statute, which

[123] UN Res 1315(2000) paragraph 3
[124] Id., para 35.

provides that *[t]he official position of any accused persons, whether as Head of State or Government or as a responsible government official, shall not relieve such person of criminal responsibility nor mitigate punishment*

114. It is difficult to see how the Prosecution intended to prove that the Fist Accused is one of those who carried the greatest responsibility when even on their own case he never attained a rank higher than a Sergeant and was merely a PLO11 in the government of the AFRC, with other officials above him. The Prosecution has failed to fully explore the categories of *political* or *military leaders* and it would be going beyond the prosecution evidence, if the Trial Chamber were now to broaden this category to include the First Accused. In other words it cannot be stretched to include low ranking military personnel in the position of the First Accused.

The Evidential Requirement:

115. The Defence submits that the evidence advanced by the Prosecution, does not prove beyond reasonable doubt that the First Accused is one of those who bear the greatest responsibility. Even on the Prosecution's own evidence there were other individuals within the AFRC government, military and the fighting faction who could well be said to bear the greatest responsibility.[125] The AFRC had a military structure that was recognized by even the Military Expert Witness for the Prosecution[126] and confirmed by the Military Expert Witness for the Defence[127]. Command and control hierarchy was similar to that which obtained in regular armies, at least within the AFRC government as distinct from "the fighting faction"

[125] See evidence of TF1-334, TF1-167, TF1-046 and TF1-296.
[126] See Prosecution exhibit P36
[127] Supra Exhibit D36

Conclusions of the Military Expert Witnesses:

116. The Defence will ask that the Trial Chamber takes particular note of the evidence of the Military Experts of the Prosecution and Defence. Although there is a separate section on experts later in this Closing brief, it is worth noting that as far as greatest responsibility is concerned the following should be borne in mind as regards the report and evidence of the Prosecution military expert.

117. The Prosecution's Military Expert Witness, describes the AFRC faction as having "a clearly recognizable military hierarchy and structure (...) similar to the conventional armies upon which it was modelled"; that it "demonstrated high levels of coherence between strategic, operational and tactical levels, although at times the strategic goals (...) were not clear"; and that it had "a strong command capability which failed on 6th January" 1999.[128] These conclusions were reached on the basis of interviews and statements by Prosecution witnesses like TF1-167. This approach does not lend itself to independent analysis and conclusion. Rather, it smirks of writer armed with a theory and seeking the most comforting and appropriate evidence to fit that theory. It is also potentially very dangerous, because, if the Trial Chamber were to find those witnesses' evidence devoid of any truth, then it follows that the report by the military expert will be found to be completely unreliable. It is a flawed methodology and in the end does little to aid the Trial Chamber in determining those who bear the greatest responsibility.

118. On the other hand, the Military Expert Witness for the Defence, conducting a historical research into the entire Republic of Sierra Leone Armed Forces, tracing its weaknesses and strength. This Expert's research was based on interviews with serving and current senior military officers, transcripts of witnesses who had testified before the court, the Report of the Truth and Reconciliation Commission also the

[128] Exhibit D36 supra note at E6.1.

benefit of reading and assessing the Prosecution's own Military Expert Report. This was supported by the work of academic writers on the war in Sierra Leone. The Defence submits that such independent research does more to aid the court in its determination of the question of greatest responsibility than the report and evidence of the Prosecution expert. In cross examination, Counsel for the Prosecution made much of the fact that the conclusions and opinions in the Defence experts source materials were untested. Whilst that may be true to an extent, it is worth noting that they were all independent, none with a theory they intended to prove.

119. The Defence therefore submits that the expert evidence to be relied upon is that of the Defence Military Expert.

120. On the basis of the above the Defence has to ask:

Who bears the greatest responsibility?

In trying to answer this question, the Defence will submit that it must be divided into three categories:

- The AFRC government and the Army
- The AFRC/RUF
- The AFRC faction

AFRC government and Army

121. Starting with the government the Trial Chamber need not look beyond the evidence of TF1-334 on the hierarchy and structure of the AFRC government and the Army during that period.[129] His evidence was that the Sierra Leone Armed Forces under the AFRC had a commander-in-chief in the person of Major Johnny Paul Koroma. He was a member of the Supreme Council of the AFRC which for reason which will be explored below was a body separate and distinct from the AFRC council to which the First Accused belonged. The AFRC had a Deputy Defence Minister in the person of Colonel Avivavo Kamara who assisted the commander-in-chief and the Supreme Council in initiating defence and security policies of the

[129] See evidence of 16th and 17 of May 1995

AFRC for action by AFRC military and battle-field commanders. He was a Supreme Council member of the AFRC but was not indicted. Colonel S.O. Williams was the Army Chief of Staff then, responsible for the running of the Sierra Leone Army under the AFRC government. Evidence before the Court shows that he is still a serving member of the Republic of Sierra Leone Armed Forces. He was not indicted. Brigadier Mani was also Director of Military Operations in the AFRC government, a position that speaks to its functions. He also commanded and controlled SLAs who served with him in the "Northern Jungle" during the period of the AFRC faction[130]. He continued to serve the Republic of Sierra Leone Armed Forces until his retirement this year

AFRC/RUF.

122. Within the RUF, Mr. Gibril Massaquoi is, among others, described as a senior commander of the RUF movement, who was aide and personal confidante to Mr. Foday Sankoh for many years prior to the latter's demise. He was one of the RUF senior officers that served on the AFRC decision-making body, contributing towards the political and military policies of the government. He, together with other RUF members, is alleged to have later attempted to overthrow the AFRC government, for which he was incarcerated at the Pademba Road Prisons. He by his own admission assisted the fighters that invaded Freetown on 6 January, 1999 once he was released from prison in at least an overseeing role.[131] Given his senior role in the RUF by his own admission and his part in the government AFRC and the role played in Freetown during the January 6th invasion when he was released from jail, the Defence would be forgiven for wondering why this Prosecution witness was not giving evidence in his own defence having walked from the dock. The same could equally be said of witnesses TF1-334, TF1-167, TF1-184 and others. If anything the fact that Gibril Massaquoi was a prosecution witness as opposed to an indictee shows how uncertain the Prosecution believes its own case on joint criminal enterprise with the RUF is.

[130] See transcript of 7th July 2005, evidence o f TF1-133 and generally evidence of TF1 -334
[131] See Transcript of 7th October 2005 – evidence given by TF1-046

123. The same could equally be said of another RUF personnel, Mike Lamin is described as a senior commander and officer of the RUF movement. He was also one of the RUF senior officers that served on the AFRC decision-making body, contributing towards the political and military policies of the AFRC, his name having appeared in gazettes tendered by the Prosecution. Prosecution witnesses also place Mike Lamin in Kailahun with Sam Bockarie at the time the First Accused was there and under arrest. He served the RUF throughout the period of the AFRC faction. Yet no charges have ever been proffered against this individual.

The AFRC faction

124. Under this category, it is not necessary to look beyond the evidence of all those witnesses Prosecution and Defence regarding Savage and his reign in Tombodu. This was an individual who all described as an outlaw who no one could exercise control over. He was not indicted. Similarly, although dead, SAJ Musa controlled a faction of soldiers, yet no blame has been attached to him as one of those who bear the greatest responsibility.

125. In view of the foregoing, it is submitted that the First Accused cannot be said to be one of those who bear the greatest responsibility.

XV. The Indictment

126. The Defence has from the outset questioned the lack of particularity of the indictment. The Defence herein repeats its concerns as it believes that this is of the utmost importance and has affected the case against the First Accused and how to meet it.

127. Throughout the case the Prosecution has referred to alleged AFRC/RUF alliance, thus making it impossible to distinguish what the AFRC is supposed to have done, what the individual accused is alleged to have done and what acts the RUF are said to

be responsible for. This meant that it the Accused was prejudiced by allegations of an "armed attacks" it relied upon by the Prosecution. This was notwithstanding the fact that the Prosecution's application for joinder of the AFRC and RUF cases was dismissed by Trial Chamber 1[132]. Notwithstanding that, the Prosecution appeared to have led evidence of crimes said to have been committed by the RUF in order to convict the AFRC accused persons, transferring responsibility for those crimes to them.

128. Also the Defence would also submit that Paragraphs 33, 34, 35, 36, 37 and 38 are imprecise and non-specific in nature. Whilst the Defence case is that the accused person never involved himself in a common plan, purpose or design as alleged, or at all, the Defence was equally handicapped in not being able to decipher exactly what the case is against the Defendant. In particular it is submitted that paragraph 33 does not form the basis of an offence that falls within the mandate of this court. Furthermore paragraph 36 is particularly offensive in its all encompassing nature, rolling up the doctrines of superior, command and individual responsibility.

129. The Defence further submits that the Prosecution has compounded this by asserting alternative but mutually exclusive forms of liability all founded on the same facts. The Prosecution alleged that Tamba Brima's criminal liability is founded in command responsibility[133] and individual criminal responsibility[134] which also includes joint criminal responsibility. This uncertainty, clearly exhibited, was unfair to the First Accused.

130. The Defence relies on *Prosecutor v. Nsengiyumva*, wherein the Trial Chamber of the International Criminal Tribunal for Rwanda (ICTR) stated as follows: "It is a general principle of criminal law that all facts of a given offence attributed to an accused person are to be set out in the indictment against him or her. Thus, for an

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[132] See SCSL-03-09-PT-078
[133] Article 6(3) of the Statute
[134] Article 6 (1)

indictment to be *sustainable*, facts alleging an offence must demonstrate the specific conduct of the accused constituting the offence"[135].

131. The indictment was also vague in that there is no mention of specific dates when the offences are alleged to have taken place, for example. The reliance on expansive time frames exhibited a lack of confidence in their own case, by the Prosecution. For example in paragraph 44 of the indictment as

> '*between about 25th May 1997and about 19th February 1998……*'.[136]

The Defence relies on the case of *Blaskic*[137] and *Prosecutor v Issa Hasan Sesay*[138]

132. The First Accused is accused of a variety of offences for which there are no victims named. The victims of the unlawful killing in counts 3 -5 are not named nor are the victims of 'widespread physical violence, including mutilations' in Counts 10 to 11 or the victims of abductions and forced labour in Count 13. This demonstrates further the imprecise nature of the indictment. Whilst the Defence understands the need for reasonable precautions, accepting the existence of Witness Protection Orders, it is respectfully submitted that this vagueness in the indictment made it sufficiently difficult and unfair to the First Accused. The Accused can therefore not be convicted of an imprecise and vague offence.

133. The Defence submits that where an accused is alleged to have personally committed criminal acts the subject of the indictment, then the identity of the victim, the place and approximate date of the alleged acts and the means by which they were committed must be pleaded with great precision.[139]

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[135] Decision on the Defence Motion Raising Objections on Defects in the Form of the Indictment and to the Personal Jurisdiction on the Amended Indictment, *supra* note 73,
[136] See for example paragraphs 43 and 44. This is repeated throughout the indictment.
[137] Decision on the Defence motion to dismiss the indictment based upon defects in the form thereof (vagueness/lack of adequate notice of charges - dated 4th April 1997.
[138] Decision and Order on Defence Preliminary Motion for Defects in the form of the Indictment dated 13th October 2003
[139] Prosecutor v Naletic et al IT-98-34, Appeals Chamber 3 May 2006

134. Where an accused is charged in an indictment on the basis of a joint criminal enterprise, the pleadings must clearly and unambiguously specify (i)the form of forms of the joint criminal enterprise upon which the Prosecution intends to rely; (ii) the alleged criminal purpose of enterprise; (iii) the identity of the co-participants and (iv) the nature of the accused's participation in the enterprise.[140]

135. With regards to command responsibility, the accused must be clear not only of his own conduct which allegedly gave rise to liability as a superior, but also of the conduct of his supposed subordinates for whom he is said to bear responsibility.[141] In the Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution motion for a Ruling on the Admissibility of Evidence the case of Brdjamin was cited with approval. It was held that in pleading a case of superior responsibility, the relationship between the accuse and others is the most material and

> *...the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them*[142].

136. Indeed until evidence was led, it was impossible to identify the specific incidents to which the counts in the indictment referred. This in itself was unfair as the indictment should have better identified the events referred to. The Defence will rely on the case of *Rackham*[143].

137. The Defence submits that by the time of trial, the state of the Prosecution case should be such that the Defence should be in a position to be able to prepare its case[144] and the Chamber in a position to properly evaluate the charges.[145] The Prosecution's failure to proceed on "well-pleaded" allegations "would gravely

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[140] See Prosecutor v Ntagerura et al ICTR-99-46 Appeal Judgment 25 February 2004
[141] Prosecutor v Blaskic IT-95-14 Appeals Chamber , 29 July 2004
[142] SCSL-2004-14-T-434 p18
[143] [1997] 2 Cr App R 222
[144] Prosecutor v Blaskic IT-95-14, Appeals Chamber, Judgment, 29 July 2004
[145] See Naletilic, Appeal Judgment at page 26

undermine the procedural due process rights of accused persons and thereby bring the administration of justice into dispute."[146]

138. There is jurisprudence to support the assertion by the Defence that a failure to plead the following categories of information renders an indictment materially defective with regard to the particular allegation, location, date and/or victim of the alleged crime;[147] the location, date and specific nature of the accused's participation in the alleged crime;[148] the identity and activity of individuals and/or units allegedly subordinate to the accused;[149] the accused's particular acts of encouragement; the details regarding the nature of the accused's alleged orders; the names of principle perpetrators;[150] and the existence of international armed conflict.[151]

139. The Defence anticipates that the Prosecution would argue that these are matters which should have been raised pursuant to Rule 72 of the Rules and Procedure of the Special Court for Sierra Leone that is to say as a preliminary issue. Be that as it may, the Defence submits that the Prosecution, at all times and stages of the trial, bears a legal obligation not to confuse the accused by proffering an Indictment or amending the same in a manner that makes it complex or difficult for the accused to understand the charges against him.

140. The Defence relies on the decision of Trial Chamber 1 in Prosecutor v Sesay et al in which it was stated that challenges to the form of indictment are properly raised by an accused in his final submissions.[152] The Defence therefore submits that the issue of defects in the indictment can properly be raised in this Closing argument.

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[146] Prosecutor v Sesay et al, 25th October 2005 Id page 19
[147] Natetilic Appeal Judgment para 30-34,40-43 and also Ntakirutimana, ICTR-96-10 13 December 2004
[148] Prosecutor v Kamuhanda, ICTR-99-54, Appeals Chamber 19 September 2005
[149] Blaskic Id para 228-245
[150] Ntageruira Id p 40-64,69
[151] Simic para 115, 117
[152] SCSL-2004-15, Trial Chamber 1 'Oral Decision on Motion for Judgment of Acquittal. See Transcript of 25th October 2006 at page 8

141. The Defence also finds much weight in the observations of the Learned Justice Sebutinde in her separate but concurring opinion to the aforementioned Rule 98 Decision[153] raised two issues of defects in the form of the Indictment against the three Accused, feeling "compelled [to so do] in the interest of justice"[154]. These issues concerned firstly, Count 7 in the Indictment which the Learned Trial Judge held to "offend the rule against duplicity"; and secondly, Count 8 of the Indictment, which she rules to be "redundant".

142. The Trial Chamber has a duty to ensure that the process used to try the Accused person is fair. Given these defects, it could not be said that the Accused can be properly and fairly be convicted on an indictment such as this.

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

143. In the light of the foregoing, the Defence for the First Accused states that the Prosecution has failed in the Indictment to distinguish between *specific acts of the Accused,* for which he is alleged to bear greatest "individual criminal responsibility under Article 6.1 of the Statute", and *acts of the Accused's purported subordinates,* which have been transferred or attributed to him by the Prosecution, pursuant to Article 6.3 of the Statute. In the ICTR case of *Prosecution v. Joseph Kanyabashi*,[155] the Trial Chamber held that "the wording of charges" to the effect that "the accused incurs individual criminal responsibility based on the same facts, both under Article 6(1) of the Statute and that of Article 6(3) as hierarchical superior (...) makes it impossible for the Accused to understand the nature and the cause of the specific charges brought against him, since the same facts cannot simultaneously give rise to the two types of responsibility provided for under the Statute", that is to say responsibility for the Accused's direct acts (under Article 6.1) and/or responsibility for his omissions(under Article 6.3). As a result, the Court ruled that *the Prosecutor*

[153] See pp. 17987 to 17991 of the Court Records, dated 31 March, 2006
[154] Id., para. 2 of the Separate Concurring Opinion.
[155] ICTR-96-15-1, Trial Chamber II, Decision on Defence Preliminary Motion for Defects in the Form of the Indictment (Rule 72 (B)ii of the Rules of Procedure and Evidence)", 31 May 2000, paras. 5.8 to 5.11. See also Kamara – Defence Pre-Trial Brief, SCSL-2004-16-PT, filed 21 Feb. 2005, para. 23.

must clearly distinguish the acts for which the Accused incurs criminal responsibility under Article 6(1) of the Statute from those for which he incurs criminal responsibility under Article 6(3)[156].

144. The Defence also submits that the same deficient and conflicting evidence masquerading as facts have been used by the Prosecution to, firstly, express individual criminal responsibility by the First Accused under Article 6(1) of the Statute for 'his alleged direct acts' *(...by his act)* and, secondly, to infer individual criminal responsibility by the First Accused under Article 6(3) of the Statute for his alleged 'indirect acts', presumably meaning the acts of his purported subordinates *(...by his omission)*. The Prosecution cannot rely on this to convict the First Accused. The Prosecution cannot in such an awkward manner seek to join individual criminal responsibility" and "superior command responsibility" together based on the same facts and then use that as a basis for convicting the First Accused.

145. The Defence also submits that the Prosecution cannot merely refer to Articles 6(1) and (3) of the statute. The Prosecution failed to take cognisance of the fact that each of mode of liability has its own unique actus reus and mens rea requirements. It would therefore be expected that all allegations should include references to the physical deeds of the accused, his temporal and physical proximity to the crime scene, and the identity of any co-perpetrators and/or subordinates involved in the alleged crimes. Such facts, clearly material should be set forth unambiguously.[157] A failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity.

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[156] Id., para. 5.23 of the *Kanyabashi* Decision.
[157] Prosecutor v Kronojelac, IT-97-25, Appeals Chamber 17 September 2003

Count Seven

146. As already highlighted above, the Learned Justice Sebutinde, raised Count 7 as one of two legal defects in the form of the Indictment against the three Accused. In her ruling, she states that Count 7 offends the rule against duplicity; the Defence for the First Accused relies on this as support that Count 7 of the Indictment should be dismissed.

147. In considering Count 7 in its current form as "duplex and defective in as far as it does not enable the accused persons to know precisely which of the crimes (sexual slavery or sexual violence) they should be defending themselves against"[158], the Learned Trial Judge stated in her Separate Concurring Opinion as follows:

> "On the face of it, Count 7 appears to charge the accused with the single crime against humanity entitled "*Sexual Slavery and any other form of sexual violence, a crime against humanity punishable under Article 2.g of the Statute*". I am not aware that such a crime in fact, exists under International Humanitarian law. In reality, Count 7 in its current form encapsulates two separate and distinct crimes, namely the crime against humanity of sexual slavery and the crime against humanity of sexual violence. In essence, what the Prosecution has done is to charge the accused persons with the two distinct crimes against humanity in one count thereby offending the rule against multiplicity, duplicity, uncertainty or vagueness"[159].

148. The Trial Chamber in *Prosecutor v. Karemera*[160] equally held as follows in, *inter alia*, considering issues of defects in the form of the Indictment against the accused:

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[158] *Supra* note 162, para. 8 of Separate Concurring Opinion.
[159] Id., para. 6.
[160] Decision on the Defence Motion, pursuant to Rule 72 of the Rules of Procedure and Evidence, pertaining to, inter alia, lack of jurisdiction and defects in the form of the Indictment, 25 April, 2001.

"The Chamber notes that allegations within an indictment are defective in their form if they are not sufficiently clear and precise, in the way they are spelt out and with respect to their factual and legal constituent elements, so as to enable the Accused to fully understand the nature and the cause of the charges brought against him"[161].

149. Thus, the Defence for the submits that Count 7 in its current state has made it difficult for the First Accused to "fully understand the nature and the cause of the charges brought against him" and can, therefore, not be *sustained* as part of the Indictment for any purposes of the trial. Since the Prosecution found it duplex and objectionable to charge the three Accused with "sexual slavery" and "rape" or "other inhumane act" together, so must they now find it objectionable to charge "sexual slavery" and "sexual violence" together[162]. Again, by failing to fully utilize the caveat in the Learned Trial Judge's direction in her Separate Concurring Opinion that the defect in Count 7 "could be cured by an amendment pursuant to Rule 50 of the Rules"[163], the Prosecution can be said to have taken a conscious and deliberate decision to ignore the defect.

Count Eight

150. The Defence also relies on the Learned Trial Judge's conclusion in her Separate Concurring Opinion that Count 8 of the Indictment is "redundant"[164]. Her Honour stated

"Count 11 is sufficient to cover any alleged incidents of "other inhumane acts" envisaged under the Indictment (...) all sex-related or gender crimes envisaged in the

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[161] Id. para 16.
[162] See also the Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence in the SCSL case of *Prosecutor v. Sam Hinga Norman*, Trial Chamber, 24 May, 2005, para. 19.
[163] *Supra* note 162, para. 9.
[164] Id. para. 10.

Indictment are adequately covered by Counts 6, 7 and/or 9 of the Indictment and should not be charged under the general regime of "other inhumane acts"[165].

151. This the Defence submits sufficiently addresses the point. The Defence will however add the force of the arguments and conclusions reached by Trial Chamber I of the Special Court in the case of *Prosecutor v. Sam Hinga Norman et al* that:

"it is impermissible to allege acts of sexual violence (other than rape, sexual slavery, enforced prostitution and forced pregnancy) under Article 2.i since "other inhumane acts", even if residual, must logically be restrictively interpreted as covering only those acts of a non-sexual nature amounting to an affront to humanity"[166].

152. For the foregoing reasons the Defence would ask that submissions in respect of that Count 8 of the Indictment be upheld and for it to be struck out for being "redundant" and "offending against the rule against multiplicity and uncertainty"[167].

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

153. The Defence of the First Accused submits that it is necessary to restate the objection of the three Accused in their Joint Legal Part of the Defence Motion for Judgment of Acquittal under Rule 98 filed on 13 December 2005. The Defence submits that the elements of the offence of "pillage" do not envisage and are not meant to include "burning". The Trial Chamber's Decision on the Rule 98 Motion[168], the offence of "pillage" firstly, anticipates and includes the 'appropriation of private or public property'; secondly, it connotes the *mens rea* of 'deprivation of the owner' of the use of his property as well as 'appropriation by the taker' of the same; and

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[165] Id.
[166] *Supra* note 171, para. 19 (iii).
[167] Id.
[168] Supra note, paras 240-43.

finally, the offence assumes a lack of 'consent by the owner' of the 'appropriation by the taker'. "Burning", or when legally used as an offence, "arson" or "malicious damage", does not form an element of "pillage", which is more akin to "looting". The same or similar facts may lead to the two offences of pillage and malicious damage/arson, but not the legal ingredients for that offence.

154. Article 5.b of the Statute provides for "wanton destruction of property under the Malicious Damage Act, 1861", a "crime under Sierra Leonean law", and enumerates the same to include:

i. Setting fire to dwelling houses, any person being therein, contrary to section 2 of the Act;

ii. Setting fire to public buildings, contrary to sections 5 and 6 of the Act;

iii. Setting fire to other buildings, contrary to section 6.

155. Yet the Prosecution did not charge Count 14 under Sierra Leone law. Having failed to do so, the Prosecution cannot now seek to infer provisions of the Statute of the Court where they are so clearly expressed.

156. It is submitted that he Prosecution had ample opportunity to amend Count 14 of the Indictment to include the offence(s) enumerated under Article 5.b of the Statute in order to legally define and confine "burning". Having failed to do so, the Defence that Count 14 of the Indictment is defectively. The Defence for the First Accused therefore, ask that Count 14 be dismissed

B. Factual Arguments:

I. General Arguments on the Prosecution Case

AFRC/RUF – Who are they?

157. Throughout the Prosecution case starting from the indictment served, the words AFRC/RUF was used as a description two factions working together. It necessarily assumes that there were two organisations working together. However the AFRC government contained RUF members and was a government as opposed to a fighting force. The evidence of Prosecution witnesses 334 and 046 support this assertion. Further the prosecution exhibit P34 Minutes of the Emergency Council Meeting held on the 16th August 1997 which minutes include members of the RUF as members of the AFRC government – these so identified by 334 and 046. In Exhibit P7, Foday Sankoh is listed as a member of the AFRC as was Sam Bockarie, Morris Kallon, Issa Sesay, Gibril Massaquoi and Mike Lamin. For the purposes of government there was just the AFRC of which these RUF members were a part.

158. The Defence submits that there is no evidence of there existing a joint enterprise between the AFRC and the RUF ever. This will be expanded upon below.

159. The issue goes a lot further than this and borders on the very identity of the fighting faction the Prosecution have alleged that the three Accused persons belong to. The indictment makes reference to the AFRC Forces as "Junta", "soldiers", "SLA" and "ex-SLA"[169] and to the RUF as "rebels" and "People's Army"[170]. The Indictment also conjoins the two Forces and refers to them as ""Junta", "rebels", "soldiers", "SLA", "ex-SLA" and "People's Army"[171].

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[169] See para. 12 of the Indictment.
[170] Id., para. 9.
[171] Id., para. 13.

160. However, the evidence before the Court suggests not only that the AFRC was different from the "soldiers", "SLAs" or "ex-SLAs" as well as the "RUF" or "rebels" or "People's Army"[172], but that the AFRC operated as a separate, governing *de facto* entity distinct from the "soldiers", "SLAs" or "ex-SLAs" commanded by SAJ Musa[173]. Perhaps this may have led to the confused and misunderstood situation which was exhibited in the lack of understanding by the Prosecution and its witnesses as to what name or label to attach to the soldiers under SAJ Musa's command. It was therefore unsurprising that the Prosecution's Military Expert Witness himself was laboured by this confusion and in fact called Musa's group "the AFRC faction"[174]. Other Prosecution witnesses referred to them as "SLA's" or "SLAs". The Defence can only assume that he too found it difficult to name them as did those Prosecution witnesses who called them.

161. The Defence submits that the AFRC, also known as the "Junta", was a government which became extinct in February 1998. Whilst evidence exists of an understanding between the AFRC and the RUF during the former's reign, that understanding and the activities resulting from it remained largely political[175]. There was also evidence that that relationship was rather strained to the point that Sam Bockarie left Freetown to set up his own enclave in Kenema and two RUF members were arrested and held in detentyion on suspicion of plotting to overthrow the government. The relationship between the AFRC and RUF was at best strained and clouded by mutual suspicion at least few months to ECOMOG's invasion[176].

Fighting Force

162. The AFRC was a government. There is no evidence of it being re-established into a fighting force and all that that entails. There is similarly no evidence that the

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[174] *Supra* note 40, Exhibit...para. A4 c.
[175] See testimony of TF1-045, for example, in Transcript of the 19th July, 2005 The joint meetings attended by the RUF and the AFRC were political in nature, and so were their activities. Positions held by the RUF were also political.
[176] TF1-334, TF1-167,TF1 045

AFRC government established a force of its own. Therefore the Defence submits that it is a misrepresentation of the facts to suggest otherwise.

Supreme Council

163. The Prosecution's case is that the Defendants were senior members of the AFRC government and were members of the Supreme Council. Yet apart from the oral testimony of witness 334 (whose evidence the defence will argue is not reliable), the Prosecution have failed to produce any evidence of a body referred to as Supreme Council of which the 1st Accused was a member. Exhibits adduced in court included Press Releases, Gazettes and Minutes of meetings do not refer to a Supreme Council. Exhibit P6 and P8 both refer to Council Members. P7 refers to Armed Forces Revolutionary Council. Neither of these refer to a Supreme Council. The Emergency Meeting of the 16th August refers to a Council Meeting not a Supreme Council Meeting. Further paragraphs 8, 9, 14, 16 refer to a Council. The Prosecution cannot superimpose Supreme Council or the functions thereof to a body the exhibits constantly refer to a Supreme Council. The Defence also says that the Press Release dated 3rd January 1998, reveals the names of people sacked from the Supreme Council of State, the AFRC (which appears synonymous with what is referred to in Exhibit P6 and P8) and the Armed Forces. This firstly tells us that there were three separate bodies one of which was referred to as the Supreme Council. The other two were the Armed Forces Revolutionary Council and the Armed Forces. The Supreme Council it appears was distinct from any of the bodies referred to in the Prosecution exhibits. We find support for this proposition by the fact that Exhibit P6 refers to "Armed Forces Revolutionary Council (hereinafter called "the Council")" P6 was therefore referring to a body called the council and not the Supreme Council as the Prosecution contends. The Press release talks about sackings not about the membership of that body, we cannot therefore assume its composition and membership from a list of those who have been sacked from it.

164. It is the Defence position therefore that no Gazette, Press release or any document emanating from the AFRC government names the First Accused as a member of a body know as Supreme Council. Even Exhibit P5.2 which established the office of Public Liaison Officer does not state that they will serve in the Supreme Council. The issue of the First Accused being a member of any such body cannot simply be culled out of a set of circumstances or the fertile imagination of a witness, who was not even a member of the lowest body of the government.

165. The Prosecution may wish to rely on the article in the Pool newspaper dated July 11th 1997, which became Exhibit P93. Whilst presenting their case, the Prosecution relied on documents from the AFRC government. Realising later that none of these talk about the establishment of a Supreme Council and/ or that the First Accused was a member of it, the Prosecution sought to correct this remedy by producing during cross examination of the First Accused a newspaper article as proof that the First Accused was a member of that body. The defence would submit that firstly, Exhibit 93 is hearsay. It was a journalistic piece, the source of which is unknown. The Trial Chamber is therefore urged to dismiss Exhibit P93 is irrelevant, lacking in probative value and totally unreliable. The Defence contends that if there as a Supreme Council, then the 1st Accused was not a part of it.

166. The Prosecution also tendered exhibit P34 to which the First Accused responded that the Council made recommendations and not decisions.[177] P34 indicates that the decisions had already been taken by some other body.

The Coup of May 27th 1997

167. It is the case of the Defence that whether or not the First Accuse was a member of the coup makers of May 1997 has no bearing on his guilt or innocence of the allegations against him. That having been said, despite the number of evidence adduced by the Prosecution on the coup makers, none refers to the Accused save the

[177] See evidence of the 3rd July 2006

oral evidence of some prosecution witness, who the Defence say were self serving. Further the Accused was never charged with any offence of treason by the Government of Sierra Leone despite the fact that twenty four military personnel were charged, convicted and executed for their role in the coup. The Prosecution in support of its case adduced Exhibit P88 and P89. Both these exhibits were confessional statements of two soldiers Abu Turay alias Zagalo and Tamba Gborie. They appear to implicate the Accused in the plans and execution of the coup. The Defence contends that both are unreliable for the following reasons:

1. The accounts of what transpired at a place and time they were both supposed to be present differ.
2. They are the accounts of two people who had been arrested for their involvement in the coup. The penalty is death and they knew that and therefore had nothing to lose by implicating others. Despite that the Accused was not charged and never had been arrested by the Government of Sierra Leone in relation to those events.
3. No weight should be attached to those exhibits.

168. 145. The Defence further submits that despite the numerous exhibits adduced by the Prosecution, no evidence or exhibit was adduced that showed the announcement of the name of the First Accused as a member of the coup plotters or the AFRC. Indeed in cross examination of every defence witness, the Prosecution developed a standard form of questioning which included questions to whether witnesses had not heard that the Accused persons were members of the group which overthrew the government of President Kabbah. Some witnesses gave evidence of having heard his name being announced over the radio, yet though the recordings and transcripts of radio announcement were brought before the court, none such was adduced as regards any supposed announcement of his involvement in the AFRC. The Defence submits that no such radio announcement was made, nor does any press release exist which included the names or in particular the name of the First Accused as one of the

members of those who staged the coup. As the Prosecution was able to obtained transcribed addresses of Foday Sankoh and Johnny Paul Koroma, both of which were tendered in court, it could equally have obtained the transcribed address from SLBS wherein the name of the First Accused was announced. Failing that, it could have called evidence from SLBS, an outfit that still exists, to give evidence of such a broadcast having been made. It is submitted that all who claimed to have heard the name of the First accused over the radio, are guilty of fabricating evidence, tailoring it to fit the theory of the Prosecution. All the Prosecution has to go on is the records of meetings which took place after the overthrow, at which the Accused was said to be present. Moreover it was not a prerequisite that all citizens of Sierra Leone must ask who was involved in the coup and to know the functionaries of the AFRC government created thereafter. Therefore to assume that those who said they had not heard that the First Accused was involved in the coup are being less than honest, is misleading and erroneous. It cannot be said that the acceptance of an appointment in the military government is tantamount to being part of the original coup plot.

169. The Defence also wishes to put on record that the First Accused or any of the Accused persons in this case are charged with being members of the Supreme Council. Even if they were, and this is denied by the First Accused, it has no bearing on the guilt or innocence of the Accused. Moreover, there is evidence before this court that 24 military officers were charged, convicted and sentenced and executed by a Court Marshall for their involvement in the coup which brought the AFRC to government. The First Accused or any of the other Accused persons were not amongst them, though they were present in the jurisdiction at the time. The Prosecution have led extensive evidence on their alleged role and have systematically put it to each witness in cross examination that the three were amongst the coup plotters. Whether they were or not, the Defence submits that this is totally irrelevant and bears no weight when judging the guilt or innocence of the Accused. The same can also be said of the Prosecution's reliance on evidence which suggests that the Accused persons were referred to as Honourables.

Membership of the AFRC and the ROLE of the ACCUSED

170. The Prosecution tendered Exhibit P93 – list of members named in the Pool Newspaper of July 11th 1997. This article for the reasons dealt with above is unreliable and should be dismissed. Moreover it does not reflect those in other exhibits or in P88 and P89.

171. We have therefore got to ask the question 'What particular exhibit is the Prosecution intending to rely as definitive evidence of the membership of the AFRC?' Indeed P93 serves no evidential purpose save that it is a wish list of those the AFRC intended to have in their government.

172. Exhibits P88 and P89 are confessional statements by two people subsequently executed for their part in the coup. Accounts of the involvement of Tamba Brima differ. This is said to be a first hand account of Brima's involvement – yet they differ as to who planned it and what transpired on that day.

173. Unity Now Newspaper, P95, mentions a change in the designation from PLO 1-3 to CO 1-3. Yet the indictment does not mention CO and until the cross examination of the First Accused, this was a part of the Prosecution's case no one had heard of. . The Accused is charged as a PLO as his position throughout. The Accused under cross examination on the 3rd July 2006, maintained that he was unaware of any such change.[178] Indeed no prosecution witness testified about any such change taking place, therefore in so far as the witness' credibility is an issue both the indictment and the evidence of TF1-334 and the exhibits P88 and P89 corroborate the Accused on this issue. Further the Defence is left to wonder what evidence the Prosecution intended to put before the court and to what extent the court should rely on exhibit P95. The defence submits that this piece of evidence is again hearsay, the origin of the information is unreliable. Above all, the question needs to be asked as to what it

[178] See transcript of 3rd July 2006 page 56 lines 1-25

is probative value. The Defence suggests that it has none and therefore, no weight should be attached to it.

174. Further Exhibit P96 – newspaper article upon which the Prosecution has relied, the defence would submit that very little weight if any should be attached to it. At best it is unreliable. In any event it talks about security men acting on Tamba Brima's behalf. It doesn't say that Brima ordered them. Also the fact that it mentions that this is to the dismay of Lt Eldred Colllins suggest that Collins was a superior to Brima in the AFRC hierarchy. The article also says that Brima had left for Kono, which indicates that he did indeed leave for Kono as he had said in his evidence.

175. The First Accused has never denied being appointed PLO11. This however does not confer on him the powers attributed to him by the Prosecution. It certainly does not means that he bears the greatest responsibility for the crimes charged. The Prosecution must have proved that Tamba Brima acted or held positions which render him one of the persons who bear the greatest responsibility for the crimes committed in Sierra Leone. If the Prosecution fails to prove this, and the Defence submit they have, then Tamba Brima falls outside the jurisdiction of the Court and there need not be any further consideration of his culpability for the offences charged.

Lome Accord

176. The Defence wishes the court to note that the AFRC was not a signatory to the Lomé Accord. This is clearly evident from Exhibit which neither names them as party nor bears the signature of any of those said to have been part of the AFRC. In so far as the Lomé Accord was binding it could not have bound the AFRC faction and could not be impliedly or explicitly blamed for the continuation of hostilities. Any such blame, insinuated by the indictment or by Prosecution cross examination and evidence in court in misplaced. In any event the Defence submits that this has no bearing on the guilt or innocence of the 1st Accused.

The Use of Natural Resources

177. The Prosecution alleged in paragraph 33 that the three Accused persons shared a common plan with others who were RUF members to:

"...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 Sierra Leone in return for assistance in carrying out joint criminal enterprise"

178. The issue of joint criminal enterprise has been dealt with above. It must be mentioned here however, that there is no evidence of the three accused using diamonds in exchange for assistance. Whilst the Prosecution led evidence (challenged by the Defence) of AFRC mining, there was no evidence of exchange for assistance or indeed that this was done as part of a joint criminal enterprise. The Defence submits that in so far as this goes to prove the guilt of the First Accused, it is an irrelevance and should be dismissed.

The identity of the First Accused

179. The issue of whether the First Accused is or is not Gullit goes to the heart of the Prosecution's case. The Prosecution alleges that the person whom the charged as the First Accused used the alias 'Gullit' and was responsible for all the crimes alleged on the indictment. This has always been vehemently denied by the First Accused. The Defence called a number of witnesses who had known the First Accused. In cross examination by the Prosecution each denied ever hearing the First Accused being referred to as Gullit. The Defence also called a number of witnesses simply referred to as crime based witnesses. That is to say that they were witnesses who had no connection however loose to any of the accused and were just ordinary citizens who came to say what happened in their village or town. None of these had ever heard of the name Gullit as one of those who was responsible for the coup or was a senior

member of the AFRC. The Defence submits that rather than the self serving witness who were only too ready to agree to any prosecution theory in a vain attempt to find evidence, these crime based witnesses were more reliable and therefore credible.

180. Similarly, the First Accused also denied ever using the name Alex and stated that he had been known simply as Tamba Brima and was sometimes referred to as 'T-Man'. In cross examination of the First Accused by the Prosecution,[179] several documents were put to him, the purported aim being to prove that he had indeed accepted the names Alex Tamba Brima by signing documents with those names. These included P81, P82 and P83. The First Accused gave explanations as to why he signed P81 and P82, but denied signing P83.

181. The Trial Chamber should also note that the First Accused has always denied attaining the rank of Staff Sergeant. Support for this can also be found in his Discharge Book, exhibit D14.

182. There was an attempt by prosecution witness TF1-024 to describe the person who he referred to as Gullit and whom the Prosecution say is the First Accused.[180] That is someone this witness said he came in contact with and who he heard being referred to as Gullit. The Defence submits that this witness was merely guessing and it was a poor attempt to fit the theory of the Prosecution. The description was flawed and in no way resembled the First Accused. It must be stated that this was the witness who when told the events of January 8th about which he had testified would have been traumatic for him, he replied "At all".[181] This is also the witness whose description of State House was challenged by the First Accused in his evidence, having worked there himself previously.

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[179] See transcript of 28th June 2006
[180] See transcript of 7th March 2005 page 68-70 – cross examination by Counsel for the First Accused
[181] Id page 62 lines 21-22

Prosecution's Position

183. The Defence will show elsewhere in this Closing Argument that the Prosecution appeared towards the end of the case to shifting ground and abandoning some of its own proposition. One example is during Cross-Examination of the 1st Accused Counsel put to the witness as a matter of fact and as part of putting the Prosecution's case that the Chief of Defence Staff was Brigadier Mani[182]. This marked a deviation in the Prosecution's case as the Court had been led to believe that the Prosecution was putting forward the organogram given by witness 334 in his evidence and that contained in exhibit P84.

184. The Defence also submits that in the Prosecution's haste to dismiss all Defence witnesses as liars, it rejected pieces of evidence which were the same as those given by Prosecution witnesses. The evidence of witness DBK 059 is a case in point. This witness who was cross examined on the 21st October 2006, gave evidence of the fact that Johnny Paul Koroma was in Freetown during the intervention by ECOMOG and that they had all fled to Masiaka[183]. This is just one example of evidence he gave that was exactly the same as evidence given by some Prosecution witnesses amongst them TF1-334. Yet at the end of cross examination, Prosecution Counsel stated that the whole evidence had been a lie. This is another demonstration of the Prosecution shifting its case and leaving the Defence in a situation where it finds it difficult to know which pieced of evidence the Prosecution is abandoning and therefore, need not be met, and which ones it continues to hang on to.

185. The Prosecution also tendered a number of exhibits in support of their case. One such exhibit was P85 an article by Eric Beauchem entitled "A Day in Rebel Territory." This one sided piece seems to have been deigned with a theory in mind and as excursion to find evidence to fit the theory. No weight can be attached to an article where the identification of the First Accused is a best vague and written in a

[182] See transcript of 4th July 2006 page 5 lines 8 to the end and page 6 lines 1- 12
[183] See evidence given on the 27th September 2006

language more geared to sensational journalism aimed at backing up a theory about the actors in a savage war. The Trial Chamber is therefore urges to dismiss it in its entirety.

186. Further the Prosecution on the 30th June appeared to be painting a picture of falsification by the First Accused in relation to the circumstances of his father's death. The Prosecution tendered P90, P91 and P92. Firstly none of these goes to discredit the First Accused. His evidence was that his father died as a result of the effects of the bomb, having fallen into a coma, not that he was killed by the bomb at the sight. P92 the in patient case sheet stated that the Sergeant Brima was admitted on the 1st May 1997, but the only entry of any treatment is the 31st May 1997. At the bottom of the first page is an entry DOA 31.5.97. There is no explanation of what DOA means, it could for example mean Date of Admission. The point here is that the prosecution is using a confusing document to challenge the credibility of the First Accused. This document in no way goes to satisfy that purpose.

Prosecution witnesses generally

187. One noticeable feature about this case was the number of Prosecution witnesses and the frequency with which witnesses dissociated themselves from their original statements, leaving doubts as to the witness' reliability, veracity and truthfulness. These inconsistencies could not be explained by mere typographical errors as they went to the heart of the evidence given by the witnesses. This was so in the case of witness TF1-334, TF1-122,[184] TF1-074,[185] In the case of TF1-074, whose purpose was to show a joint criminal enterprise between the RUF and the AFRC culminating in the inscription of the letters of the two factions on his chest had said in his statement at page 8208 that he had heard RUF army to attack Dumbardu. This changed at trial to soldiers some in full combat and others in civilian clothes. He had

[184] See cross examination of 24th June 2005
[185] See evidence of 5th July 2005, in particular cross examination on behalf of the 1st Accused

also stated in his statement at page 8209 that RUF Sergeant Katta had said they should be executed, but stated in evidence that a man called Bangali had said this.

188. The Defence also submits that certain inducements given to witnesses may have influenced the quality of their evidence. This may not necessarily be financial. The Defence recalls the evidence of TF1-282[186] who during cross examination by Counsel for the First Accused admitted in effect that by giving evidence at the Special Court, his lifestyle had changed. He had was placed in rent free accommodation with food in a modern facility, whereas he had come from a house of two rooms and a parlour with an outside "wash yard" housing 9 people. The Defence makes bold to say that this was not the only witness who would have enjoyed such a vast improvement to his state of existence. This in the submission of the Defence, must cast doubt as to whether their evidence is reliable, credible and objective.

189. TF1 -033, who in what can only be excitement to carve out a story appeared to have contradicted his own witness statement. It is significant for this witness, as he claimed to have been educated and was one of the insider witnesses who could not be said to have misunderstood either the process of statement taking or the questions put to him. His demeanour in the witness box exuded excitement to give an account and the Defence submits that it was any account, no matter what.[187] His evidence was full of exaggerated accounts giving estimates and numbers far exceeding those given in his statement and perhaps more importantly, not corroborated by anyone else.

190. TF1 -045[188] also appeared to have abandoned large portions of his statement. In effect his statement was left unreliable and this was made even worse by the fact that he even contradicted the Prosecution's own theory by saying that the PLO 1 was Gullit and was in Tongo field.

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[186] See Transcript of 14th April 2005 at page
[187] See evidence of 11th July 2005. Cross examination on behalf of the 1st Accused elucidated a number of inconsistencies between the evidence given in court and the statement given to investigators working for the Office of the Prosecutor.
[188] See cross examination on behalf of the 1st Accused on the 21st July 2005

191. TF1-153 also abandoned portions of his statement. Where he did not mention the 1st Accused in his statement, be suddenly recaptured his memory by mentioning and putting the Accused in places he previously had not been. It is the case that this witness [189] had said in his statement at page 10363 line 31 that SAJ Musa had said he should be sent to Kono, but in evidence he said that it was SAJ and the 1st Accused. Similarly, at page 9999, he did not mention the 1st Accused, but in evidence mentioned the 1st Accused as having visited Koidu to check on him. The evidence of this witness is also significant for the fact that the witness appeared to be trying to give an impression which left his evidence completely unreliable and perhaps devoid of any truthfulness. He stated that at Eddie Town, SAJ Musa apart from warning about committing atrocities in Freetown also stated that he was in London and he had heard of the Special Court of Sierra Leone.[190] This is 1998 when the concept of the Special Court had not even been devised. The Defence submits that this is just another piece of evidence by a Prosecution witness desirous of impressing a bench and a court from whom they had earned some money in the name of witness allowances and at the same time content to cause as much damage to the Accused persons as possible.

192. The Defence will submit that the TF1 – 184 is also unreliable for the fact that portions also were different from his statement. Further this witness appeared to have harbour a deep dislike for the 1st Accused which is manifested by his belief that the 1st Accused was responsible for the death of SAJ Musa. This was clearly stated in his evidence and in cross examination when he accepted that he considered the First Accused a politician and not a soldier.[191]

193. The Defence cannot speculate as to the reason or reasons why witnesses abandoned their statements. The Defence can say though that the demeanour of the witnesses in court whilst giving evidence was very revealing. In short it showed that

[189] Evidence of the 22nd September 2005
[190] See transcript of 22nd September 2005 at page lines
[191] See transcript of 29th September 2005.

the evidence could not be relied upon and it was impossible to be sure that witnesses were being true to the oath they took.

194. During the Prosecution case, evidence was led to support one version of the events and cross examination of witnesses was done on that basis. It is an established practice that a party in cross examination puts its case to the witness called by an opposing party. It is also accepted that those questions form the basis of the case for that side. Bearing this in mind, it appeared during cross examination of defence witnesses that the Prosecution was shifting ground and indeed cherry picking those portions of the it's evidence which it finds most favourable and discarding the portions it cannot now rely on. As this is evidence which came from the lips of its own witnesses, the Prosecution is effectively distancing itself from its witnesses. On the 5th July 2006, during cross examination of the 1st Accused, Counsel put a series of questions to the witness on the issue of the command structure at Eddie Town.[192] It became apparent that Counsel had accepted the evidence of witness TF1-334[193] and not that of witness TF1-167. The 1st Accused had testified that he was under arrest from Eddie Town to Benguema when he escaped. This account was corroborated in so far as their arrest and detention in Eddie Town and on the march to Freetown[194]. However the cross examination dismissed witness TF1-167. This was also the line followed by Counsel in his cross examination of DAB 023, thereby accepting the version of TF1-334 and dismissing TF1-167.[195]

195. The Defence believes that something must be said about certain witnesses called on behalf of the Prosecution, starting with TF1-334:

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[192] See Transcript of 5th July 2006 at page 52 lines 6-14
[193] See the evidence of witness TF1-334 in the transcript of 13th June 2005, wherein he describes the command structure in Eddie Town naming the 1st Accused as second in command to SAJ Musa.
[194] See the evidence of TF1-167 in transcript of the 15th September 2005 at page 64 lines 17-29. Here the witness said that the Accused persons were under arrest and were not released till they got to Newton on the way to Freetown.
[195] See Transcript of proceedings of 3rd August 2006 at page 90 lines 8- 15

TF1-334

196. This witness was perhaps the most important for the Prosecution. He was the first of the so called insider witnesses and whose evidence spanned the entire indictment and beyond. Peculiarly, his role was simply that of a security officer to a one time member of the AFRC government. In the Sierra Leone Army he had only attained the rank of a Corporal whose primary role was that of a driver. The Prosecution has not claimed that he had any role within the AFRC government, yet all decrees and documents emanating from that government were tendered through him. This witness however claimed to have either been shown all of these documents for interpretation by his Superior whom he claimed was illiterate for him to interpret and/or to have been present each time a call was made or any important matter was discussed or decision taken. It appears that this witness had claimed a level of importance far exceeding his confessed role at the time. He also claimed to have heard every radio broadcast about the coup. This does not need a legal interpretation, but common sense would dictate that it is impossible for one man to virtually be everywhere all the time which by some strange coincidence always happens to be when a decision is being taken or an important matter is being discussed.

197. In so far as witness TF1-334 was an interpreter for his Commander 'A', simply belies common sense. The Prosecution is asking the Court to believe that 'A' was an illiterate, and yet his colleagues trusted a position in the government to him and gave him minutes written in English Language about meetings at which he had been present and gave him decrees about decisions taken at meetings at which he was present. Several points arise from this. Firstly, 'A' was present at these meetings, he would therefore not need anyone to interpret the minutes of the meetings for him. Secondly, as a member of the government, he would have either been a party to or been informed of decisions and in any event he was present at these meetings. Thirdly, decrees tend to be decisions made into law. 'A' would either have been a party to those or would have been present when they were made. Fourthly when 'A' was given these documents at the meetings, the question needs to be asked as to

whether is it the Prosecution's claim that they were not explained to him or that he did not participate at the meetings for a lack of understanding of the written documentation. Fifthly, it seems impossible that the educational shortcomings of 'A' a hitherto serving soldier, would not have been obvious to colleagues themselves serving soldiers either then or before he was appointed. The defence would submit that 'A' was not as deficient as was stated by TF1-334 or at all. Witness TF1-334 embellished this in order to give his evidence the level of importance it would not otherwise have had. Much of his evidence was a fabrication based on fantasy and wishful thinking, with the hope of some reward attached to it. Much must be attached to the fact that this witness was incarcerated with the Accused persons and whether by design or otherwise he was released after he began cooperating with the Special Court. It is the Defence submission that such release is bound to play on the mind of the witness and may in fact feel under some pressure, implied or otherwise to give any information which he thinks might either ensure his release or when release ensure that his continued freedom is assured. The Defence would submit that his evidence should be dismissed as being unreliable and lacking in any truth.

TF1 -167 – George Johnson (Junior Lion)

198. The Defence submits that this witness was far from being a truthful witness even down to the question of when he became known by the alias 'Junior Lion'. The Defence submits that contrary to the version given by the witness that it was after the war that Foday Sankoh gave him that name,(something which the Prosecution themselves relied upon in cross examination) he was in fact known as such during the period he spent in the jungle. Support for the Defence can be found in the evidence of witness TF1-334, who referred to this individual as Junior Lion throughout his evidence and in particular during the period in the jungle when TF1-167 was a commander.[196]. Subsequent witnesses have referred to TF1-167 as Junior Lion when talking of his involvement in events prior to this supposed crowning of him as Junior Lion by Foday Sankoh. The Defence therefore submits that far from

[196] See Transcript of 23rd May 2005 line 18 refers to Capt. Junior Lion - George Johnson alias Junior Lion

attaining the name in or around 2000, he had been using that name all along in the jungle and it is for that reason that the others knew him as such.

199. Further the Accused stated in his evidence that Junior Lion had shot his brother in Kono. This was confirmed by the witness TF1 -334 in his evidence of 20th June 2005. However when this allegation was put to Junior Lion, he flatly denied this although he admitted knowing the brother. The ensuing dispute between this witness and the family of the 1st Accused as confirmed by TF1-334 is the reason enough for this witness to attempt to fabricate evidence against the 1st Accused.

200. It is perhaps also worth noting that in his pre-trial statement this witness had said that he was n informer for the Sierra Leone police. Yet when this was put to him in cross examination by Counsel for the First Accused, he at first denied that he ever was, then accepted that he had said that to the investigators, but denied he was an informer, then later stated that he was with the police for his own protection, before eventually accepting that he was an informer. This is the evidence of a witness who is prepared to lie in order to attract the attention of anyone who would buy his story and rely on it. There was no reason for him to deny what he had in fact told the investigators, yet he moved around the issue in order to avoid telling the truth.

TF1-184[197]

201. This witness was a security to commander 'C' and by his own admission very close to him. It was obvious that this witness had an unqualified loyalty to commander 'C', and his memory. Underlying his evidence is his annoyance, to put it mildly with the First Accused, whom he blamed for the death of 'C'. He also felt that the First Accused was trying to undermine the leadership of 'C' throughout. The demeanour of this witness was very important. He had to be warned to stop looking in the direction of the Accused persons after complaints for Defence Counsel who had observed the menacing looks at the Accused persons. This appeared to be a way

[197] Evidence starting on the 26th September 2005. More particularly the evidence of 27th September 2005

of emphasising his superiority over them as he gave evidence against them, the people he blames for the fate of 'C'. His dislike for them was clear when cross examined by Counsel for the First Accused. He accepted that he had made a statement that the Accused persons were nit soldiers and that they were politicians and would not speak to them.[198]

TF1-046[199]

202. Simply put, this witness is undergoing a process of reinvention after years of being the able lieutenant to Foday Sankoh of the RUF. He has produced the draft of a book upon which he based much of his evidence. It cannot be said that this witness' evidence is truthful without embellishment. The Defence would submit that in the process of reinvention, this witness has painted a false picture designed to blame others and exonerate himself. The idea seems to have been to show the link between the AFRC and the RUF. The problems associated with that concept are stated above. This witness added nothing to the theory of the Prosecution and the Defence submits that this failed.

TF1-169[200]

203. This witness is the Government Architect and the Professional Head of the Ministry of Works. His evidence was to give evidence of all the buildings burnt as a result of the invasion of Freetown in January 6th, 1999. Exhibit P 28 contained a list of government quarters and buildings said to have been burnt by those who invaded Freetown, an event which forms Count 14 of the indictment. Under cross examination by Counsel for the third Accused, the witness was asked about an address which was included in the list. That address was in Murray Town and happened to be the residence of the witness. The witness had to accept that this was not done by 'rebels' but by the Alpha jet belonging to ECOMOG. This it is

[198] Evidence given on the 29th September 2005
[199] Evidence given on the 7th October 2005
[200] Evidence given on 6th July 2005

submitted was an attempt by this witness to attribute blame for his own personal residence to the Accused persons. Also it appears to be an attempt to have his residence included in list of priority repairs when perhaps it would otherwise not have been. It was also put to him that the Judge's residence he stated was burnt by the 'rebels' was in fact bombed by the ECOMOG jets. He denied this, but it is worth noting that this residence was at Bellair Park in Freetown and there is no evidence of any attack on this locality on or around January 6th. The PWD building in Pademba Road was also included in his list and he had to accept that this had been burnt before these events.

204. The Defence would ask that the demeanour of this witness be taken into consideration.

205. For those reasons, the Defence would submit that the evidence is unreliable as are the Exhibits attached to it.

II. Alibi Evidence

206. The Defence will not go into each and every witness who gave evidence on behalf of the First Accused and in support of his alibi. This is all within the court's records. It is worth noting though that the First Accused had an alibi for Kailahun, Yayah, Col Eddie Town and Freetown. In short he was not a Commander in Kono, Camp Rosos, Freetown or the Westside jungle and was not on the match from Kono District as a Commander. The Defence will highlight some of the evidence here.

207. The First Accused denied being in locations as described by the Prosecution. The Defence will deal with the Accused presence at Yayah first, although this does not indicate any special importance being attached to it. DAB111 stated in evidence that he saw the First Accused in Yayah during the raining season.[201] The witness testified

[201] See transcript of 27th September 2006 at page 20 line 7.

that Tamba Brima the first accused came to Yarya during the raining season after his brother Komba Brima had been shot. The witness told the first accused that Komba Brima had been taken to his father's plantation by his nephew.[202] Although this witness does not give a duration, this confirms the presence of the First Accused. The fact that a false duration was not given is proof itself that this is not a story that was made up. Further DAB-156[203] testified that she was among the troop SLA led by 05 and Keforkeh that passed through Yaryah and arrested Brima in a farm and took him to Eddie Town and that on arrival at Eddie town her husband 05 told her that the First Accused was under arrest. She testified that she had infact seen him under arrest.[204]

208. Another defence witness DBK-012 testified that he was among the troops led by 05 that arrested the First accused at Yaryah and brought him to Eddie Town and from Eddie town to Benguema. That the first Accused never formed part of the troops that invaded Freetown in January 1999.[205]

209. The First Accused stated that he was under arrest in Kailahun, a fact that was supported by the evidence of TF1 045. The defence witness DAB 059[206] also supported the fact that the First Accused was in Kailahun and was there for longer than the Prosecution alleges. This witness stated inter alia that he left the First Accused in custody at Buedu in Kailahun District in around April to May 1998.[207] DAB 142 also gave evidence of the arrest of the First Accused in the Kailahun District.

210. Whatever the circumstances of the arrest of the First Accused were at Kailahun, there is no doubt that he was arrested. There is however doubt as to the Prosecution's version that he was in Kailahun for a shorter period than the Defence claims. There is no evidence to support the Prosecution's new version, which was put to the First

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[202] Id at page 27
[203] Transcript,29th September,2006 Cross-examination.
[204] Id page 52-54
[205] Id page 57-63
[206] Evidence given on 27th September 2006
[207] Page 82-83 of the transcript of 27th September 2006

Accused that he was sent by Mosquito to Kono quite early as a way to earn his freedom. This latest version offers more confusion than explanation.

211. The First Accused also denied coming to Freetown during the January 6th 1999 invasion or being part of any attack on the city. This alibi was supported again by the evidence given in his favour by DAB-059[208] who denied under cross-examination that Tamba Brima was present in Freetown and never led the invasion to Freetown in January 1999.[209] DAB- 156[210] also testified that FAT and Junior Lion led the troops to Freetown and that she did not see the first accused in Freetown .When the troops were withdrawing to Freetown witness saw several prisoners among the troops including the wife of late SAJ Musa. This witness also testified that she got information that Junior Lion led troops that opened Pademba Road prisons and released all the prisoners.

212. Also DAB-O33[211], gave evidence that Tamba Brima the First accused was under arrest from Eddie Town up to Benguema and that he did not lead troops to Freetown in January 1999. This witness also testified that there were not many SLA soldiers in the Kenema District as it was predominantly RUF controlled. Tamba Brima he said did not go to Tongo and was not based in Kenema District.

213. In short the First Accused was not present at the places he is alleged by the Prosecution to be. The Defence submits that these pieces of evidence in support of his alibi are no less credible because they came from the Defence. Those Prosecution witnesses who had claimed to have seen him at various places were vigorously challenged on their evidence in any event.

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[208] Transcript,27th September & 2nd October 2006.
[209] Transcript, 2nd October 2006 Cross-examination.
[210] See Transcript of 29th September Page 61 line 23 onwards
[211] See Transcript of 25th September 2006

Forced Mining

214. The Prosecution's case is that there was forced mining in Kono. Yet other than putting their case to defence witnesses, there is no other evidence that that was so. TF1 -153 does not say that there was forced mining in Kono.[212] Further TF1-334 said mining was supervised by soldiers and commanders bit he makes no mention of people being forced to mine by members of the AFRC. It is also worth noting that whilst 334 mentions who the supervisors were of the mining, he does not claim to have been present at any mining site. Whereas 153, who was present and claims to have been a mines monitor, makes no mention of soldiers and commanders as supervisors. The defence will submit that of the two, 153 was the more reliable witness. Indeed he sought not to paint a picture of himself as a self righteous person, who despite being around the perpetrators was with clean hands. He accepted that at one point he accepted bribes in return for mining concessions.

215. It also appears that the Prosecution was introducing new evidence while cross-examining the 1st Accused. It was never put before this court that Johnny Paul Koroma ordered Sam Bockarie to arrest the 1st Accused. Indeed the prosecution witness who testified to the arrest of the 1st Accused on the orders of Sam Bockarie did not mention this. Yet this was put to the 1st Accused[213] and the Defence can only say that the Prosecution appeared to be shifting the goal post and the case to be met by the Defence at every opportunity.

Evidence of the 1st Accused

216. In his evidence on the 4th July, 2006, the 1st Accused mentioned the name of a person called Singateh with whom and whose help he moved from Koidu to Yayah. He said that Singateh was acquainted with the RUF, having been arrested by them[214].

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[212] See transcript of 22nd September 2005 at pages 20-22
[213] See Transcript of 4th July 2006 at page 73 lines 14-23
[214] See Transcript of 4th July 2006 at page 96 lines 8-25

This account of Singateh's acquaintance with the RUF is not unlike that of witness TF1-046, his role in the RUF having started from his arrest.

217. Further, it was the Prosecution's case that the AFRC evolved from a political outfit to a military one.[215] If as suggested that the AFRC hierarchy was intact, then the Accused cannot be asked to carry the weight of the offences of those more superior in rank and appointment to him.

218. The Defence tendered D14 – The Discharge Book. Page 9 deals with the medical examination. This is against the background of the non-existence of documents since 1998 when it was disbanded. He testified that for much of the period the AFRC was in government he was ill and was admitted on and off at the military hospital. This assertion was unchallenged by the Prosecution. Given the trouble the Prosecution went to extract the hospital records of the father of the first accused, the prison records of the Accused, had they thought this was a falsehood, they would have done the same. Moreover, this witness had not seen active duty as a soldier for sometime.

Col Eddie Town and Arrest of the First Accused

219. Indeed even the evidence of TF1-167 is confusing as regards the issue of the arrest of the Accused persons. In his evidence TF1-167 stated that he was ordered to collect SAJ Musa by the 1st Accused. It took him two days to do so and that when SAJ Musa came to Eddie Town the Accused persons were already under arrest[216]. Yet 167 was one of those who effected this arrest because of their failure to plan the operations properly. This account asks more questions than proffers answers. Were the Accused persons under arrest? The answer to that will have to be yes as this was also stated by witness TF1 - 167and TF1-334 accepted this under cross examination by Counsel of the 3rd Accused. It appears as if TF1 -167 was not present if his account of the time frame is to be accepted, then he is untruthful about his role in the

[215] See Transcript of 4th July pages 97 lines 19-28
[216] Transcript of proceedings of the 15th September 2005 at page

meeting of SAJ Musa or on the arrest of the Accused persons. He could not be present at both.

220. The Defence would also submit that TF1-033 and TF1-184 gave evidence of the presence of the First Accused at Col. Eddie Town at the same time, but did not testify about such arrests. However, whilst the events surrounding the arrest and the duration of the arrest may be different, there is nevertheless evidence of such an arrest and the Defence would submit that the Prosecution cannot pick those portions of the evidence which fits its theory and discard or ignore others. The Court cannot therefore be satisfied so that it is sure of the role or position of the First Accused whilst at Col Eddie Town and for that reason alone, any doubt must be exercised in favour of the Accused.

221. This cherry – picking continued thorough out the Prosecution's cross examination of defence witnesses particularly the 1st Accused. When putting the Prosecution's case as regards Karina, Gbendembu and Mandaha, reliance was made on the version of events contained in the evidence of Witness TF1-334. Yet in giving evidence in chief in relation to Karina, witness TF1 – 167 stated that he was part of the Headquarter team, whilst TF1-334 put him as Commander of D company. Much was made of the number of people said to have been killed in a mosque by 'Gullit' if you rely on TF1-334[217] and by Alhaji Kamanda a.k.a Gunboot if you rely on TF1-167[218].

The role of 05

222. There are disparities and huge gaps in the Prosecution evidence. The Prosecution's case is that the 1st Accused was the Commander of Eddie Town. That is as far as the convergence of evidence goes. Witness TF1-334 stated that the 1st Accused was the Commander and was responsible restructuring the fighting force. Also, that there was a communication from SAJ Musa that he was sending 05, the 1st

[217] See Transcript of 23rd Ma generally and in particular pages 64 to 69
[218] See transcript of 15th September 2005 pages 53-57

Accused sent a party to meet 05. Witness TF1-167 said that he was sent to collect 05. However, TF1 -167 is not mentioned by 334 at least as far as the collection of 05 is concerned. TF1-334 states that the 1st Accused called Operation Commander A and himself to put together a group of men to collect 05. When they did not succeed, another group was dispatched which included Deputy Operation Commander[219] who led the operation that included, Lt Col King, Gunboot, Major Arthur amongst others.[220] Moreover, TF1-167 did not say that he was sent by the 1st Accused to collect 05. He stated" I was given the task to go and collect them"[221] . Yet in cross examination of the 1st Accused, Counsel for the Prosecution specifically put to him that he had ordered TF1-167 to meet 05[222], thereby choosing one Prosecution witness' version over the other. This was also the version put to by Counsel in the cross examination of defence witness DAB 023.[223] We are left with the impression that we do not know which version of events the Prosecution is relying on.

The case against Tamba Brima

223. The Prosecution's case against Tamba Brima is that he was a senior member of the AFRC and therefore one of those who bears the greatest responsibility for the crimes that took place during the temporal period of the indictment. In support if this theory, the Prosecution called and relied upon the evidence of a number of so-called insider witnesses. The most important of these was the witness TF1-334. It was the evidence given by this witness that the Prosecution relied upon during its cross examination. This witness gave detailed evidence over a period of time on the command and organisational structure of the AFRC in government and beyond the intervention in February 1998. The Defence will submit that the evidence of this witness cannot be relied upon for the following reasons:

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[219] This person is identified as Capt Junior Sheriff
[220] See the evidence of TF1-334 given on the 24th May 2005 on the arrival of 05. In particular see pages 91, 98 lines 3 onwards, pages 100 and 102.
[221] See Transcript of proceedings of 15th September 2005, page 75 at lines 8-9
[222] See Transcript of proceedings of 5th July 2006 at page 75 lines 11-14
[223] See transcript of proceedings of the 3rd August 2006 at page 82 line 3

- This witness gave evidence of details of meetings at which he was not present. His justification was that his immediate boss[224] who was present was an illiterate and would give him minutes of meetings to read.[225]
- When challenged, this witness claimed to have been present on every occasion an order or command was given by the 1st Accused.
- This witness claimed that the 1st Accused made several appointments as Commander and that he would read from a piece of prepared paper starting with the words "I Gullit……"[226] The witness would then proceed to recall verbatim the words used by the 1st Accused in his presence. This is unsupported by any other witness. This extraordinary gift of recalling verbatim the words used by a person so many years ago, makes this account of this witness not only incredible, but also unreliable. The Defence's position is that this witness was not present during any such meetings nor was he privy to any of these meetings.
- This witness gave evidence under cross examination that the 1st Accused replaced Johnny Paul Koroma. This assertion is unsupported by any other witness
- This witness was one who was prepared to lie under oath when confronted with previous inconsistent statements on issues which were not in the least contentious[227].
- Several inconsistencies between his statement and the evidence he later gave in court. In his statement he had said that Gullit captured 10 ECOMOG soldiers and shot each and every one of them. Whilst in oral evidence he said that Gullit shot two and Tito shot 12.[228]

224. The Defence asks the Trial Chamber to consider the following from the case of *Blaskic*

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[224] This witness gave evidence that he was a Security to an AFRC honourable referred to as Commander A
[225] See Transcript of proceedings of 16th May 2005 , page 72 lines 1-3
[226] See Transcript of proceedings of 13th June 2005 at page 80 lines 23-25 and page 83 lines 25-27
[227] See transcript of proceedings of 20th June 2005 at pages 12 to 15
[228] Evidence of 20th June 2005 – see page 19 of transcript

"A Trial Chamber.....must at all times be alive to the realities of any given situation and .....[take] great care.....lest an injustice be committed in holding individuals responsible for the acts of others in situation where the link of control is absent or too remote" [229]

225. The Defence will now look at each count in relation to the indictment. Whilst the Defence makes extensive submissions in relation to Counts 3 to 5, in relation to each crime base, those submissions where appropriate are to be read for all counts as the evidence led and the comments thereto are the same. This is done is the interest of judicial economy and a desire not to be repetitive. Also, some of these were dealt with in the Defence's motion for Acquittal. Where these are reproduced, the Defence not has the benefit to having finished its own case and adduced evidence to counter the allegations. All offences relating to all crime bases are denied.

Count 1-2 Terrorizing the civilian population and collective punishment

226. The Defence of Tamba Brima denies that the Prosecution has adduced sufficient evidence so that the Trial Chamber can be satisfied so that it is sure that the Defendant is guilty of the offences contained in Counts 1 and 2.

227. Various witnesses for the Prosecution gave evidence that certain acts were done to them or to others, the intention of which was to send a message to others. The first of these witnesses was TF1-021[230] an Imam of a mosque in Freetown who gave evidence of a massacre in his mosque in January 1999. This witness did not name the Defendant as being either one of the group, or part of the group, or someone whose name he heard as a Leader of the group. The Defence submits that this evidence does not in itself prove beyond doubt that the Defendant was one of the perpetrators. Further this witness accepted under cross examination by Counsel for the First

[229] Blaskic supra
[230] See Transcript of evidence of 15th April 2005

Accused that RUF were the rebels as stated in his statement.[231] The Trial Chamber is referred to Exhibit D5A and B.

228. Furthermore the witness TF1 – 334 gave evidence of a series of acts which were supposed to have been committed by the Defendant or on the authority and direction of the Defendant. The Defence submits that the evidence is unreliable and cannot be relied upon. Further this witness is a self serving witness for the reasons enunciated above. The Defence also asks that the evidence of its own crime based witnesses be carefully considered. These are witnesses against whom heinous crimes were perpetuated, but who never saw the Defendant or heard about him as being one of the perpetrators. The Defence therefore submit that there are doubts about the veracity, truthfulness and reliability of the accounts given by Prosecution witnesses. That doubt should therefore be exercised in favour of the 1st Accused.

Counts 3-5 Unlawful Killings

229. Count 3 alleges extermination. The Trial Chamber in its Rule 98 Decision stated that Prosecution should lead evidence to substantiate the elements of the offence as follows:

a. *that the perpetrator intentionally caused the death or destruction of one or more persons by any means, including the infliction of conditions of life calculated to bring about the destruction of a numerically significant part of the population;*
b. *that the killing or destruction constituted part of a mass killing of members of a civilian population;*
c. *that the mass killing or destruction was part of a widespread or systematic attack directed against a civilian population and;*
d. *that the perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.*[232]

[231] Id page

230. In summary, *extermination* under international humanitarian law involves "the intentional mass killing or destruction of part of a population as part of a widespread or systematic attack upon a civilian population".[233]

231. Also the Accused must be aware that his act(s) or omissions are part of "a mass killing event", which has "close proximity in time and place".[234] The requisite *mens rea* in this regard is knowledge that an act or omission is directed against certain groups of individuals and causes mass destruction, or forms part of an event that causes mass destruction, or that the act or omission alleged is done with "recklessness or gross negligence" which causes mass destruction to a certain group of individuals under Article 2 (b) of the Statute.[235]

232. It is submitted that the Prosecution has failed to prove any or all of the four limbs stated above.

233. In relation to Count 4 murder", the Trial Chamber in its Rule 98 Decision, noted that in order to prove the crime of "murder" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows:

a. *that the perpetrator by his acts or omissions caused the death of a person or persons;*
b. *that the perpetrator had the intention to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death;*
c. *that the murder was committed as part of a widespread or systematic attack directed against a civilian population, and*

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[232] See para. 73 of the Rule 98 Decision.
[233] Id., in which the Court quoted the Trial Chamber Judgment in *Akeyesu*, supra note…, at paras. 590-92.
[234] See *Prosecutor v. Kayishema & Anor*, ICTR-95-1-T, Trial Chamber Judgment, 21 May 1999, para 147.
[235] Id., para. 146.

d. *that the perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population.*[236]

234. As will be seen from the analysis of the factual evidence below, the Prosecution has failed to satisfy any or all of the four limbs above.

235. In Count 5, the allegation is that the Accused person committed "violence to life, health and physical or mental well-being of persons, in particular murder", a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, and punishable under Article 3.a of the Statute. Again the Trial Chamber in its Rule 98 Decision, noted that in order to prove "violence to life, health and physical or mental well-being of persons, in particular murder" as alleged, the Prosecution should lead evidence to prove the elements of the offence as follows:

a. *that the perpetrator inflicted grievous bodily harm upon the victim in the reasonable knowledge that such bodily harm would likely result in death,*
b. *that the perpetrator's acts or omission resulted in the death of the victim,*
c. *that the victim was a person protected under one or more of the Geneva Conventions of 1949 or was not taking an active part in the hostilities at the time of the alleged violation,*
d. *that the violation took place in the context of and was associated with an armed conflict and*
e. *that the perpetrator was aware of the factual circumstances that established the protected status of the victim.*[237]

236. It is unnecessary here to prove that this was committed as part of a widespread and systematic attack, as this is not a crime against humanity.

237. The Trial Chamber held that "murder as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II" is the "wilful killing of a person

[236] See also para. 74 of the Rule 98 Decision as well as the Trial Chamber Judgment in *Akeyesu*, supra note..., at paras. 589-90.
[237] See para. 77 of the Court's Rule 98 Decision.

or persons protected under the Geneva Conventions of 1949 and of Additional Protocol II during an armed conflict"[238]. This category of persons include persons taking no active part in hostilities, including the wounded or sick and prisoners of war or persons who have fallen into enemy hands as well as those in hostile territory. The Trial Chamber further held that there was an internal armed conflict in Sierra Leone, by virtue of which the Indictment was preferred, forms part of armed conflicts covered by the Geneva Conventions and Additional Protocol II[239]. This is as opposed to the opening of the Prosecutor who claimed that this was an international armed conflict.

238. Once again the Defence will submit that the evidence led by the Prosecution fails to support this count

239. In summary the 1st Accused in his evidence denied being part of any group or leading any group to commit any of the allegations contained in Counts 3, 4 and 5.

240. The Defence now turns to the evidence led by the Prosecution in relation to each district and in support of Counts 3, 4 and 5

Bo District:

241. No evidence was led by the Prosecution of any attack by the AFRC in general or by Tamba Brima in particular in the Bo District or specifically in Tikonko, Telu, Sembehun, Gerihun, Mamboma as alleged in paragraph 42 of the indictment. Furthermore in Tikonko the evidence of TF1-004 under cross examination was that the soldiers who went to Tikonko on the two occasions in June were members of the RUF. Whilst in examination on chief he had referred to 'soldiers' he accepted that they were members of the RUF.

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[238] Id., para. 75.
[239] Id., para. 76.

242. In the attack at Gerihun of which evidence was given by Witness TF1-053 and which led to the death of Paramount Chief Demby[240] he say soldiers dressed in 'military cloths and carrying guns' go into the Chief's house[241]. Under cross examination on the 19th April, the witness accepted that he had seen Boisy Palmer a soldier amongst those who went in to the Chief's house and that Palmer was the Brigade Commander in the area.[242]

243. The evidence of TF1-053 is also littered with contradictions between what he said in court and what he said in his previous statements. It is doubtful whether the Prosecution can rely on the evidence of what transpired in Bo District.

244. Although the witness claimed not to have seen Kamajors in Gerihun on June 1997,[243] he had earlier told the investigators of the Office of the Prosecutor

(1) that he decided to leave Gerihun on the night of 25th June 1997
(2) that he saw Kamajors walk in Gerihun on the 26th of June 1997,
(3) that he did not see them fire shots
(4) that they passed Gerihun and walked to another place
(5) That at about 4:30 to 4:45 pm he heard again two gunshots. [244]

245. The witness though dissociated himself from his earlier statement, this however goes to demonstrate this witness' unreliability.

246. The Prosecution cannot rely on the evidence of TF1 054 either. This witness who gave evidence on the 19th April identified the Brigade Commander on Bo, as one Boisy Palmer and the Secretary of State as A. F. Kamara and Secretary to the Secretariat was one ABK.[245] There is nothing in this witness' evidence that would

[240] Evidence of 18th April 2005 at page 103 of the transcript
[241] Page 104 of the Transcript of 18th April 2005
[242] Page 20 and 21 of the Transcript of 19th April 2005
[243] Page 52 of the transcript of 19th April
[244] Page 7285 of statement of
[245] Page 78 of Transcript of 19th April 2005

indicate that these people took orders from or were directed by Tamba Brima in any way whatsoever.

247. In the Prosecution's supplemental Pre trial Brief[246], the Prosecution asserted that the evidence will demonstrate that:

a. Sam Bockarie [247] led the attack against Sembehun where at least 8 civilians were killed by soldiers who were described themselves as Peoples Army
b. Sam Bockarie participated in the attack on Tikonko where SLA soldiers dressed in combat uniform killed at least 19 civilians
c. S.L.A. soldiers killed at least 3 civilians during the attack on Mambona;
d. S.L.A. junta forces killed at least 5 civilians during the attack on Gedrihun;
e. Sam Bockarie was present in Telu and gave orders to his soldiers before the attack in which several civilians were killed by RUF/SLA soldiers.

248. The Prosecution has tried to draw a nexus between Tamba Brima and the activities of Sam Bockarie or any of the events in the Bo District. Evidence of Prosecution witnesses demonstrate that Sam Bockarie was law in to himself who took no orders from the AFRC of which Tamba Brima was said to be part. Sam Bockarie's activities were never said to be part of any plan of the AFRC government.[248] No matters arising out of the evidence of Prosecution witnesses can be said to indicate that Tamba Brima planned, instigated, ordered or committed unlawful killings in the Bo District or that he aided or abetted in such killings in Bo District. The Defence further contends that participation of Tamba Brima cannot be inferred from any evidence led.

249. The Prosecution failed to adduce any evidence that would indicated that between 1st June 1997 and 30th June 1997, Tamba Brima was in a position to prevent unlawful killings or to punish perpetrators of such killings. The Prosecutions own witness said that the head of the AFRC was Johnny Paul Koroma. Others more senior in the

[246] Dated 1st April 2004 and filed 22nd April 2004
[247] Page 7 of the said document at paragraph 20
[248] See Evidence of TF1-334, TF1-167, TF1-

government were S.A.J. Musa. No evidence was adduced to show that Tamba Brima was part of the decision making process or was part of pr present when any decision was taken to effect such policies. The Prosecution's own theory and evidence is that Sam Bockarie was a senior member of another organisation (RUF) and also took no orders from or in concert with the AFRC who he viewed with suspicion and failed to take orders from. It was the Prosecution's own witnesses who created a picture of Sam Bockarie as an uncontrollable outlaw of the RUF over whom the AFRC had no control or command.

250. The Defence also called the witness DAB 137[249] a resident of Bo District. This witness falls under those loosely referred to as crime based witnesses. He knows none of the Accused persons and is holds a position within his community. This witness' evidence was that Kamajors (civil defence militia) and ECOMOG were all operating in the Bo District at the material time. Whilst the Defence denies that the 1st Accused was anywhere in Bo District as alleged or that he had command of any troops on Bo District, the Defence further states that if there is any evidence, the Trial Chamber cannot be satisfied so that it is sure of the Accused's guilt. The only right verdict in this case is therefore one of not guilty.

Kenema District

251. The Defence submits that in respect of all allegations relating to Kenema District which includes Tongo, the First Accused was not present there, nor was he in control of any one or force in Kenema District. No prosecution witness gave evidence of this and it was confirmed by those witness called on behalf of the Defence. The Defence was somewhat perplexed that in putting the Prosecution case to the witness DAB 147 he was asked whether he had not seen the First Accused in Kenema and Tongo where he was monitoring mining operations.[250]

[249] Evidence given on the 2nd October 2006
[250] Cross Examination of DAB 147 on the 3rd October 2006.

252. Evidence led by the Prosecution has been that Sam Bockarie alias Mosquito of the RUF was the de facto ruler of Kenema. TF1- 122 said there was an AFRC presence in Kenema (see evidence of 22.6.05). He went on to say however (on the 24.6.05) under cross examination by Counsel for Kamara that Mosquito was in total control of Kenema and was responsible for the deaths of B.S. Massaquoi, Brima Kpaka and Andrew Quee as well as the unlawful killing of an alleged Kamajor who had been caught farming by RUF rebels. This witness also stated that he was present when Mosquito ordered the killing of a man called Bunny Wailer and two others. Mosquito according to Prosecution evidence led in Court was part of the RUF High Command. Bockarie also extended his rule to Tongo within the District. Moreover Witness TF1-045 who placed PLO II in Tongo (Evidence of 19.7.05) appears to have been talking about someone else. He recalls Tamba Brima being present at a meeting at Spur Road but does not equate him to the PLO II he say and was introduced to in Tongo. Furthermore he says 'Gullit' the person the prosecution say is Tamba Brima had gone to Kailahun by the time of another meeting at Gandarhun-Kpeneh. In his evidence of 21.7.05 the same witness says that his Commander 'B' told him that Gullit was PLO I. There is therefore no evidence of any individual criminal responsibility in the Kenema District. Also in the evidence of TF1-045, although he says that Captain Yamoa Kati commanded troops of AFRC and RUF, fighting such that there was or he was aware of was against the Kamajors another fighting faction in the war in Sierra Leone[251]. Civilians and W considered Bockarie a.k.a. Mosquito to be in command and control in Tongo. Also Witness TF1 – 062 under cross examination on the 27th June said that as far as he and the civilians were concerned, Sam Bockarie a.k.a. Mosquito was in command and control of Tongo[252].

253. Furthermore, Witness TF1-167[253] accepted that Mosquito was in control of the Eastern part of Sierra Leone which included Kenema, Kono, Kailahun, Tongo Field, Tongo.[254] Evidence has also been led that when Johnny Paul Koroma and Tamba

[251] Evidence of 19th July 2005 at pages 35-37 of transcript.
[252] Page 53 of the Transcript of 27th June 2005
[253] This witness was one of the Prosecution witnesses so- called Insider Witness.
[254] Page 55 of Transcript of 19th September 2005

Brima arrived at Kailahun after February 1998, Mosquito ordered their arrest and detention.[255]

254. The Defence would also pray in aid the evidence of DAB 147.[256] This witmess gave evidence of Kenema Town and Tongo field to match that of the Prosecution witnesses of these two places. This witness gave evidence of the power and command wielded by Sam Bockarie and the killing of B.S. Massaquoi and others, an incident about which prosecution witness TF1-12 testified about. This witness also gave evidence of the faction in control of Tongo field at the material time of the indictment. The witness denied witnessing killing and beating by soldiers and the orders given by Sam Bockarie for people to move after the ECOMOG intervention in February 1998.

255. The Defence further will submit that 1st Accused denies ever being present at the Kenema District and/or ordering or being in command of any troops attacking or operating in Kenema District. The Defence submits that even relying on the Prosecution's own case they have failed to prove their case as far as Kenema District is concerned. The totality of the evidence, both prosecution and defence leaves more questions than answers and therefore doubts. It is the Defence's submission that such doubts should be exercised in favour of the Accused.

Kono District

256. It was established by the Prosecution witnesses that Tombodu in the Kono District was controlled by Savage an RUF fighter. In the evidence of TF1 -167[257], he accepted that Tombodu was controlled by Savage who was an outlaw and took orders from no one. Savage was an RUF whose immediate superior in Kono District was Denis Mingo alias Superman who was also an RUF Commander. The evidence given

[255] Evidence of TF1-122
[256] Evidence given rd October 2006
[257] Page 41 of the Transcript.

by Witness 033[258] is unsupported by any other independent testimony and is inconsistent with the other insider witnesses like TF1 – 167 and independent witnesses/victims present at Tombodu during the same period[259]. Whilst witness TF1-334 and TF1-167 gave evidence of Tamba Brima being present in Tombodu at a particular time, it appears that this was a transient stop on their withdrawal from Kono. TF1-167 did go on to say that they saw atrocities in Tombodu on their way out of the District to Mansofinia.[260] Furthermore TF1-167 did say that the battalion in Tombodu was commanded by Savage. On their withdrawal Savage stayed at Tombodu under the command of Denis Mingo another RUF.

257. Whilst witness TF1-334 and TF1-167 gave evidence of Tamba Brima being present in Tombodu at a particular time, it appears that this was a transient stop on their withdrawal from Kono. TF1-167 did go on to say that they saw atrocities in Tombodu on their way out of the District to Mansofinia.[261] Furthermore TF1-167 did say that the battalion in Tombodu was commanded by Savage.

258. On their withdrawal Savage stayed at Tombodu under the command of Denis Mingo another RUF.

259. The evidence given by TF1 – 072 also confirms the superiority of Savage in Tombodu area. This witness whose hand was amputated by Savage was captured along with a friend and taken to Savage who accused him of killing soldiers and of not being there when they came to save them.

260. The evidence of TF1 –217 does not in anyway support the Prosecution's case in support of Counts 3-5. This witness evidence mentions several commanders who perpetrated the events he either witnessed, heard of or perceived were all

[258] Page 12 of the transcript of 11th July 2005
[259] Evidence given on the 1st July 2005.
[260] Evidence given on the 15th September 2005
[261] Evidence given on the 15th September 2005

commanders belonging to the RUF[262] He named Captain Bai Bureh, Komba Gbundema, Sam Bockarie and Lieutenant Jalloh.

261. The Defence submits that there is no evidence was adduced to indicate that 'Operation No Living Thing' was a philosophy preached or practiced by the AFRC in general or Tamba Brima in particular. Evidence from prosecution witnesses was that this was a pronouncement by the RUF.

262. The Defence asks the Trial Chamber to consider the lack of evidence and/or reliable evidence led by the Prosecution as regards the following:

a. That Tamba Brima was the S.L.A in charge of Kono post the ECOMOG intervention within the AFRC/RUF collaboration, save for the unsubstantiated claims of TF1-334.
b. Instruction given by Bockarie to Issa Hasan Sesay
c. That Sesay passed this on to the other AFRC/RUF Commanders
d. That Tamba Brima arrived in Kono form Bombali District approximately one week after the start of the ECOMOG intervention
e. That Tamba Brima brought feeing civilian men and women to Johnny Paul Koroma and were killed by armed men of the AFRC/RUF
f. That Tamba Brima was present at meetings in February/ March 1998 of senior Commanders in Kono
g. That senior Commanders were in regular contact with Bockarie in Kailahun
h. That Tamba Brima led a force of AFRC/RUF from Kono to Koinadugu with instructions to revenge on civilian population for failing to support the AFRC/RUF.

224. No nexus has been adduced to link Tamba Brima to any of the atrocities in Kono District. The Prosecution's own witnesses have said that Tamba Brima came to Kono

[262] Evidence of 17th October 2004.

quite late and not from Bombali District. Also that Tamba Brima had been hitherto his arrival in Kono been arrested and detained by Bockarie in Kailahun.[263] Questions about the duration of the arrest have been dealt with elsewhere herein.

225.Furthermore whilst the Prosecution has adduced evidence of movement from Kono, they have failed to adduce evidence of any instruction being passed on to troops during this movement. This movement came by way of an order S.A.J. Musa, as told to the court by witness TF1-167 and TF1-334.

The Prosecution has also failed to establish that Tamba Brima was in charge of Kono District post the ECOMOG intervention.

226. To these specific allegations, the Defence denies that Tamba Brima was present in Kono District in the capacity that the Prosecution have attributed to him. The Defence relies on the alibi evidence mentioned above and adduced in court.

227. The Prosecution's own evidence was that this was an area controlled the entire period of the war by the RUF.[264] This evidence is supported by witness TF1 -045 who said that he was amongst those who effected the arrest of Gullit, the person whom the prosecution say is Tamba Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.[265] The evidence of Tamba Brima's arrest in Kailahun is further supported by witness TF1 -167 and TF1-334. Furthermore witness TF1 – 113 gave evidence that she was based in Kailahun and worked in the RUF hospital. Her evidence described the control exercised by the RUF over that district which included the need to obtain passes from the RUF when moving around and the fact that Sam Bockarie alias Mosquito shot ordered the killing of some people and personally shot two people in her presence for allegedly being Kamajors. The witness goes on to

[263] See evidence of TF1-334, TF1-167, TF1-045
[264] See the evidence of Zainab Bangura and TF1-113
[265] See evidence of TF1-045 of 19th July 2005 pages 96-100 of the Transcript.

say that another ten people were killed by a roundabout by Mosquito[266]. Indeed Witness TF1-045 gave evidence under cross examination of Mosquito's extensive controlled over the Eastern province which included Kono, Kailahun and half of the Kenema District including Tongo[267]

228. Witness TF1-334 also said that Tamba Briuma had mentioned being detained by Mosquito in Kailahun. This evidence is supported by witness TF1 -045 who said that he was amongst those who effected the arrest of Gullit, the person whom the prosecution say is Tamba Brima. This witness also said that Mosquito used force on Johnny Paul Koroma the leader of the AFRC and that Issa Sesay another senior RUF figure raped the wife of Johnny Paul Koroma.

229. There could be no nexus between Tamba Brima with any or all the events which took place in Kailahun District even relying on the Prosecution's own evidence.

230.In relation to witnesses who testified on behalf of the Defence, the defence submits that none if these witnesses saw or heard of the Accused committing any of the offences as alleged by the Prosecution. DAB 100 a witness with no relations with any of the Accused persons testified that the RUF were in control of Kono District

231. The Defence further relies on the alibi evidence. In relation to Kailahun the witness DAB 142[268] gave evidence o f the arrest of the First Accused and that she saw him she was told he was in jail[269]. Significantly also for the entirety of this case is that she said she saw no good relationship between the RUF and the soldiers from the AFRC.

232. In summary the Prosecution has failed to prove its case in relation to Kailahun District.

Koinadugu District:

[266] See evidence of witness TF1-113 18th July, 2005 – pages 84 to 90 of the Transcript
[267] See evidence of 21st July 2005 at pages 53 to 54 of the Transcript.
[268] See evidence given on the 19th September 2006
[269] Page 29 lines 20 -29 of the transcript of 19th September 2006

233.The evidence of the Prosecution witnesses is that Koinadugu was the base of S.A.J. Musa a commander senior in position and rank to Tamba Brima and Denis Mingo alias Superman of the RUF. Events in Koinadugu cannot therefore be put on the door step Tamba Brima.

234. The Prosecution also led evidence from witness TF1-310, who had witnessed indiscriminate killing and had been shot herself. The witness was unable to tell the court which armed faction the armed men belonged to[270]. It would therefore be unfair to the Accused person if an assumption is made or an inference is drawn from this piece of evidence that the perpetrators belonged to a group or faction over which he exercised control.

235. There was no evidence adduced of any operations carried out in Koinadugu District by the group which Prosecution witnesses have said was being led by Tamba Brima.

236.The Defence called witnesses form Koinadugu on its behalf. DAB 077, DAB 080, DAB 083, DAB 082, DAB 089, DAB 088, DAB 091[271]. All of these witnesses were crimes based witnesses. None of them had heard the name of the 1st Accused or that he committed by himself or by directing others any of the crimes stated by the Accused persons. Whilst each witness testified about atrocities having been committed, none attributed them either to the AFRC or to the 1st Accused.

237. Much must be said about the quality of these defence witnesses. All ordinary crime based witnesses some like DAB 077 serving their community and holding positions of responsibility within those small communities. The Defence would submit that the evidence of DAB 077 a Pastor and Teacher is given close attention.

238. The Defence would also submit that DAB 089 stated in cross examination that he did not know the distinction between rebel and SLA. Rather than see this as support for the Prosecution's case that the RUF and the SLA were one outfit, the defence would say

[270] See evidence of the 5th July 2005
[271] See evidence o f 21st July 2006

that it reinforces the point that in a fluid war situation it was difficult to distinguish who belonged to which faction. It follows therefore that acts committed by the RUF could have been wrongly attributed to the Accused persons in this trial. That could not now be proved, but quite a few witnesses for the Prosecution did describe their perpetrators as rebels and then went on to describe the way they were dressed. This, the Defence submits has created some confusion as to who was responsible for what. The defence submits that this is not evidence of joint criminal enterprise. This adds doubts to the Prosecution's case which should be exercised in the Defence's favour.

239. DAB 080 who gave evidence of a bomb severing the arm of her child, opened up the possibility and doubts that bombs were being used and the possibility and creating[272] the doubt that bombs not the Accused persons were responsible. There is evidence that bombs were used by the ECOMOG and there was no evidence that the faction referred to as AFRC ever possessed or used bombs.

240. It should also be stated that Defence witnesses stated that the two leaders whose names they heard were SAJ Musa and Superman.[273] This is as stated by the witnesses for the Prosecution.[274]

Bombali District

241. Prosecution witnesses appeared to be contradictory as regards events which are said to have taken place in Bombali District. The identification of Tamba Brima is open to question. Witness TF1-157 referred to a person called Gullit, the name the Prosecution says the Accused was known by. However this is only because he heard others say so. He provides no positive identification of this person.[275] Moreover, his evidence is punctuated by references to atrocities committed by persons who he referred to as 'they'. The names Gullit was what he heard others say and assumed he was one of the bosses

[272] See transcript of 20th July 2006 page 72
[273] Example DAB 091 evidence of 24th July 2006 page 10 and DAB 089
[274] Example TF1-184
[275] Page 90-92 of Transcript of 22nd July 2005

'the way they spoke to people that's how I knew they were bosses.'[276] That is insufficient evidence on which to base a finding that Tanba Brima has a case to answer as regards unlawful killings in Bombali District.

242. Evidence of Tamba Brima ordering atrocities in Bombali are self serving and contradictory and perhaps explains why the Prosecution shifted its position in relation to parts of its own evidence. This was evidence given by TF1 – 167 and TF1-334, TF1-033 and what was allegedly told to TF1 -084. This was especially evident in the case of the evidence led about Karina and the Defence has chosen to deal with it separately.

243. The Defence would also rely on the crime based witnesses called in support of its case. For example, DBK 086 gave evidence that through out the events in his area of Bombali District he did not hear the name of the First Accused.[277] Further under cross examination he stated that he did not hear the name 'Gullit'[278]

244. DBK 090 also a Bombali resident gave evidence about the Bombali District during the period the Prosecution say the First Accused led an attack there.[279] He also did not hear the name of the Fist Accused.

245. The Defence also called DAB 100 who referred to a group led by Adama Cuthand as the perpetrators of the crimes in their area.[280] This person has been referred to before by Prosecution witness TF1 -157.[281] This opens up the possibility of another group separate and distinct that the group the Prosecution allege was led by the First Accused, whose viciousness is being passed on to the First Accused. Bearing in mind more than one Prosecution witness mentioned her, the Prosecution has never explored or explained who Adama Cuthand was and the role she played. This therefore creates doubt as to who

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[276] See page 90 line 22 of the transcript of the 22nd July 2005
[277] See Page 86 of the Transcript of 18th July 2006
[278] Id page 90
[279] See Transcript of 17th July 2005 in particular page 40 and page 58
[280] See Transcript of 17th July page 19
[281] See Transcript of 22nd July 2005

was responsible for the crimes in Bombali District. Any such doubt, it is submitted must be exercised in favour of the Accused.

246. Defence witness DBK 104 also stated that he had never heard the names of the three accused persons as those responsible for crimes in Mandaha, Bombali District.[282] Under cross examination, he also stated that he had not heard the name Gullit.[283]

Karina

247. It is quite clear that the Prosecution shifted its evidence in relation to the killings in the mosque at Karina. The evidence of TF1-334 was that Gullit (referring to the 1st Accused) killed the Imam and several other persons in the mosque.[284] Witness TF1 -033 said that about 3-00 civilians were killed and 200 amputated[285]. This witness did not specifically mention atrocities in a mosque and gave his figures for "both town" – that is to say Bonoya and Karina. Witness TF1- 167, gave an account of seeing dead bodies in the mosque and of orders coming from the 1st Accused that the town should be burnt down. The account of witness TF1 -157 also differs in that he states that the rebels burnt two houses and that he saw two people mutilated[286] Witness TF1-055 also states that he saw two people killed at the mosque.[287] His version differs from all the others and is perhaps the most important as he is a native of Karina. What is important here is that we five completely different versions of what transpired in on that day and that is all from the Prosecution's case. The Defence produced three witnesses from Karina – the Imam (DBK 095) who was supposedly killed according to Witness TF1-334, a local boy (DBK094) and the Assistant Section Speaker (DBK 089). Almost as soon as it was established that there was only one mosque in Karina, the Prosecution introduced the

[282] See Transcript of 18th July 2006 page 64
[283] Id page 68
[284] See Transcript of proceedings of 23rd May 2005 at pages 68,69,and 70
[285] See Transcript of 11th July 2005 at pages 14 onwards
[286] See Transcript of 22nd July 2005 at page 101 lines 8-17
[287] See Transcript of 12th July 2005 at pages 125 to 128

possibility that the atrocities could have taken place at a Wassi.[288]. The witness went on to describe what a wassi is[289] and to state that he did not hear of anything happening at a Wassi. The Imam who had been left in charge in the absence of DBK 095 had himself survived and to been killed by the 1st Accused as witness TF1-334 had stated. It was also established through this witness that Karina town is different to Karina Section and that there was only one mosque in Karina Town. The Prosecution evidence had been only about Karina town. This is important to the Defence because, the evidence that was led by all the Prosecution witnesses was about Karina town only. When the Prosecution realised that, that indeed their own witnesses had given elaborate and exaggerated accounts of atrocities in Karina, Counsel tried to shift focus on the possibility that the atrocities might have happened at a Wassi. When that failed, they then turned to the existence of other mosques, forgetting that there is a Karina Section and a Karina Town and that they had led evidence on Karina town. This is further evidence of the Prosecution cherry – picking there own evidence. The Defence also puts before this court that none of the Defence witnesses who are independent people of the Accused and merely stated what they knew, had ever heard of any of the Accused persons committing atrocities in Karina. In so far as the Imam who was supposedly questioned and killed by the First Accused is concerned, the Defence submits that if any witness, Prosecution or Defence, should know about that then, it is the witness DBK 089 – the Imam of Karima. In so far as the charges include unlawful killing and atrocities in Karina, the Defence says that these have not been proved.

Freetown and Western Area

248. The Trial Chamber will recall that there was an objection to the calling of this witness on the grounds of relevance`. This was based on the fact that this witness'

[288] See Cross-examination of DBK 089 in the transcript of the proceedings of 14th July 2006. A wassi was described as a place where people pray - a praying spot
[289] See Transcript of 14th July 2006 at page 49 lines 6-29. Amongst other things the witness said a wassi is a praying spot, some people create it in their house. See also page 51 lines 9-10 "Wassi just apiece of pebbles and mud. Wassi is not a house"

evidence did not show a nexus between the Accused persons and the events that took place that Friday in January 1999 in the mosque.

249. As far as that 'soldiers' who attacked the mosque in Freetown TF1-021 affirms the statement 'They were rebels of the RUF. I know this because when they were addressing us, they told us that they were RUF rebels and that they were Peoples Army.' (this in contradiction to what he said before). Page 6378 of his statement was that it was RUF that were the rebels. The Defence asks that the contradictions are noted in Exhibit 5A and B, the statement of the witness.

250. The Defence contends that the evidence adduced is insufficient to support any assertion or theory that Tamba Brima by has acts or omissions is guilty of offences described in the indictment.

Port Loko District

251. The Prosecution called the witness TF1 -256[290] from Port Loko District. This witness was unable to state which faction the people who had come to his village in April 1999. His evidence is full of generalities and hearsay rather that specific facts of events and incidents witnesses by him. There are various references to 'they'. The question is, Who is they? His evidence was that right from the start they were of the opinion that they were soldiers. 'They wore soldiers' uniforms'[291] He goes on to state that he was told by someone that they were SLA. The Defence submits that this is all hearsay upon which the Trial Chamber should attach no weight. In a fluid war situation when evidence has been adduced that there were various fighting factions and that some wore uniforms, mixed uniforms and civilian clothing, how is the Trial Chamber expected to come to a conclusion beyond reasonable doubt that those who the witness said they were of the opinion that they were soldiers were in fact the Accused persons or persons under their control. This witness went further to state that 47 people left the garden with one Abu

[290] Evidence given on the 14th April 2005
[291] Id page 102 line 1

Kanu and he has not been able to see them up till now[292]. These people were taken away by Abu Kanu.[293] The witness has therefore assumed that they were killed. However, this is an assumption and there is no evidence before this court that this was what happened. Moreover, those 7 corpses found by the witness in the bush cannot be attributed to the Accused for lack of a nexus between them and the discovery. It is important to note the demeanour and state of this witness. This is a witness who was clearly grief stricken. He stated that he had lost some of those that disappeared with Abu Kanu were family members of his and he discovered his son was amongst the corpses he discovered in the bush. The witness also talked about 'this confusion that's why I did not accept to come and talk to these people'.[294] Clearly this is a witness looking for answers and has been distressed by the events. It will therefore be entirely dangerous to rely on his evidence which is bound to lack coherence, be punctuated by village rumours and hearsay grabbed in the haste and desperation to find the answers and the people to blame for the tragic events. It is the defence submission therefore that for quite understandable reasons the testimony of this witness is unreliable. This is the same for all the counts for which the testimony of this witness could be said to support. Further, there is no nexus between the events described by the witness and the First Accused.

252. If on the other hand the Trial Chamber were to find that this testimony was reliable, then the Defence would say that this group were not under the control of the First Accused. Firstly the First Accused relies on the alibi evidence invoked in support of his defence. Secondly, this witness was specific about the names of those people in charge. He mentioned a Captain Richie, a Mr Lamin and that they were taken to a place they called the Headquarter in Nonkoba and found a RSM Momoh in charge at the MP Office. We are no clear as to who these people were or what faction they belonged to. The generic term soldier may in fact be used for any group of armed men.

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[292] Id page 72, line 11
[293] Id page 70-84.
[294] Id page 78 lines 1-6

253. The Prosecution also called TF1-253 a witness for Manarrma.[295] The Defence will submit that the evidence of this witness is unreliable for several reasons. Firstly there were vast inconsistencies between the evidence given by the witness and his statement and indeed his cross examination. It appeared that this witness shifted his own evidence depending on who was asking the question.[296] Whether by design or genuine confusion, these inconsistencies left his evidence unreliable. The witness could not even be clear as to how much money was taken from him by these soldiers. In evidence he claimed it was Le130,000.00 whilst in his evidence before Trial Chamber 1 he had said it was Le 140,000.00 - Le150,000.00.[297] Whilst a precise figure given could have been misheard or inaccurately translated or transcribed, this was a range of figures, giving the impression that he was unsure as to the exact amount that was taken from him. In giving evidence before Trial Chamber II, the witness was very precise.

254. There are other examples of this witness' evidence being at variance with the account in his statement including that relating to his sister.

255. This is a witness who also explained in cross examination that he hoped to receive some money from the Special Court as he had explained his problems to them. He had also explained the problems of his siblings and that it could be solved by either food or money although he preferred money. It is the Defence submission that this sort of expectation is built on the promise either implied, explicit or inaccurately formed of giving a good story. For if a good story is not told, then the witness may either get less than expected or nothing at all. It is a practice, rightly or wrongly which will lead to fanciful accounts built on a promise. Witnesses were given some money as transport, in excess of normal transport fares, and put in accommodation far beyond that which they had been used to[298]. It is therefore a recipe for unreliable information. This not only

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[295] Evidence of 15th April 2005

[296] See evidence of 18th April 2005 in particular cross examination of the witness by Counsel for the Forst Accused.

[297] See cross examination of 18th April 2005. Also Transcript of Trial Chamber 1 of 28th July 2004 lines 28-30 put to him in cross examination

[298] See cross examination of witness TF1-282 BY Counsel for the First Accused., in relation to the accommodation he was living courtesy of the Special Court and that which he had been living which included 9 people in 2 rooms and a parlour, no flush toilet and a wash yard behind the house.

goes for this witness, but for all the witnesses, crime based as well as insiders called by the Prosecution. It is also an important point for all counts in the indictment faced by the First Accused.

Counts 6-9 Sexual Violence

256. Count 6 alleges "rape" as a form of "sexual violence" and once again this is a crime against humanity punishable under Article 2.g of the Statute. In its Rule 98 Decision, the Court adopted the definition of "rape" given by the ICTY Appeal Chamber in the *Prosecution v. Kunarac et al*[299] and noted the elements of the offence as follows:

a. that *the actus reus of the crime of rape in international law is constituted by: the sexual perpetration, however slight: a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or b) of the mouth of the victim by the penis of the perpetrator; where such sexual penetration occurs without the consent of the victim.* For this purposes, the Appeals Chambebr stated that *consent [must be] given voluntarily, as a result of the victim's free will, assessed in the context of the surrounding circumstances.*
b. And secondly the Court defined the *mens rea* of the crime of "rape" as the *intention to effect [the above mentioned] sexual penetration, and the knowledge that it occurs without the consent of the victim* The Trial Chamber also noted "[f]orce or threat of force provides clear evidence of non-consent, but force is not an element per se of rape".[300]

257. As a crime against humanity, the rape must be committed as part of a "widespread or systematic attack against any civilian population"[301].

[299] ICTY IT-96-23-A Judgment, Appeals Chamber, 15 June 2002, [*Kunarac* Appeals Chamber Judgment], para. 127; see also paras. 106-8 of the Court's Rule 98 Decision.
[300] Id., para. 107 of the Court's Rule 98 Decision, quoting *Kunarac's* Appeals Chamber Judgment, supra.
[301] Id., para. 108.

258. Count 7 alleges: i) "sexual slavery" (a form of "sexual violence") and ii) "any other form of sexual violence" as crimes against humanity punishable under Article 2.g of the Statute. In its Rule 98 Decision, the Court indicated that in order to, firstly, prove the crime of "sexual slavery" as alleged, the Prosecution should lead evidence to prove the elements of the offence within the meaning of Article 2.g of the Statute as follows:

a. that "the perpetrator exercised any or all of the powers attaching to *the right of ownership over one or more persons, such as by purchasing, selling, lending, or bartering such a person or persons, or by imposing on them a similar deprivation of liberty*";
b. that "*the perpetrator caused such person or persons to engage in one or more acts of a sexual nature*";
c. that "the conduct was committed as *part of a widespread or systematic attack directed against a civilian population*"; and
d. that "*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against a civilian population.*[302]

'Any Other Form of Sexual Violence':

259. Additionally, the Trial Chamber stated the elements of "any other form of sexual violence" as a crime against humanity punishable under Article 2.g of the Statute as follows:

a. that "*the perpetrator committed an act of a sexual nature against one or more persons or caused such persons to engage in an act of a sexual nature by force, or by threat of force or coercion*, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or persons or another person, or by taking advantage of a coercive environment or such person or persons' incapacity to give genuine consent";

[302] See para. 109 of the Court's Rule 98 Decision.

b. that "such conduct was of a gravity comparable to the acts referred to in Article 2.g of the Statute";
c. that "the perpetrator *was aware of the factual circumstances that established the gravity of the conduct*";
d. that "the conduct was committed as *part of a widespread or systematic attack directed against any civilian population*"; and
e. that "*the perpetrator knew that the conduct was part of or intended the conduct to be part of a widespread or systematic attack directed against any civilian population*".[303]

260. The Trial Chamber also noted the conclusion reached by the ICTY Trial Chamber in *Prosecutor v. Kvocka*[304] that: "sexual violence is broader than rape and includes such crimes as sexual slavery or molestation (...) sexual mutilation, forced marriage, and forced abortion...".[305]

261. As far as Count 8 is concerned the Trial Chamber in its Rule 98 Decision, dealt with the legal definition or requirements of this Count by making reference to Count 11[306]. The Defence for the First Accused submits that this lend support top the argument against this count dealt with elsewhere in this closing brief. The Defence therefore sees no reason to rehearse those points here. In so far what the Prosecution has to prove the Defence will refer to the Trial Chamber's Rule 98 decision. That is

a. that "*the perpetrator inflicted great suffering, or serious injury* to body or to mental or physical health, *by means of an inhumane act*;
b. that "the act was of a gravity similar to the acts referred to in Article 2.a to h. of the Statute";
c. that "the perpetrator *was aware of the factual circumstances that established the character or gravity of the act*";

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[303] Id., para. 110.
[304] ICTY IT-98-30/I-T, Trial Chamber Judgment, para. 180.
[305] Id., para. 111.
[306] See para. 112 of the Court's Rule 98 Decision, supra.

d. that "the act was committed as *part of a widespread or systematic attack directed against a civilian population*"; and

e. that "*the perpetrator knew or had reason to know that his acts or omissions constituted part of a widespread or systematic attack directed against a civilian population*".[307]

262. The Chamber noted that the phrase "other inhumane acts" operates at international humanitarian law as "a residual category of crimes against humanity"[308].

263. In terms of facts to support this count, the Defence submits that no evidence was adduced before the court which showed beyond doubt that the 1st Accused either by his words or actions was individually responsible for the crimes charged under counts 6-9 nor did he act in joint enterprise with any person or person or bears the greatest responsibility for the crimes alleged.

264. The Prosecution called Witness 081 (an independent witness) who gave evidence of girls treated for medical conditions which derived from sexual abuse during the war by the organisation FAWE.[309] The witness could not however tell the court of the identity of the perpetrators of the crimes against the girls they were treating.[310]

Kono District

265. The Defence will deal firstly with Tombodu. Witness TF1 – 076 gave evidence on the 27th June 2004 of her capture and rape in Tombodu. Witness' evidence was that they were dressed in TUPAC T- Shirts and spoke in Liberian dialect. Witness does not identify her attackers as either AFRC or RUF and it is submitted that any attempt to label

[307] Id., para. 174 of the Court's Rule 98 Decision, supra.
[308] Id. para. 173.
[309] Evidence given on the 4th July 2005
[310] Page 10 of Transcript lines 23 to the end.

her attackers as being members of the AFRC is uncorroborated by any evidence led by the Prosecution. There has been no evidence of Liberians being members of the fighting faction AFRC although there has been evidence of them being either part of or along side the RUF.

266. Witness TF1 -206 was also abducted in Kono and had his hand amputated by rebels. He gave evidence on the 28th June 2005 and talked about sexual assaults on girls in which he was forced to participate.[311] However the witness could not say which rebel faction these men belonged to even though he had heard of the AFRC and of the RUF. This cannot therefore form a basis for attesting individual criminal responsibility to Tamba Brima. This inability to be able identify the faction responsible can also be seen from the evidence given by witness TF1-272 who stated that patients who came from the East tended to tale about junta or rebels. This as has been stated in ....above merely goes to cloud the issue as to who people referred to by which name and in turn leads to doubts as to the guilt of the Accused.

267. The evidence has failed to demonstrate that such sexual abuse was widespread in Kono District. Whereas there has been oral evidence of some sexual violence in the Kono there was no evidence adduce of it being widespread. The Prosecution failed to establish the evidence about the Cyborg Mining Pit[312]. The evidence of TF1-062 was that the Cyborg Pit was in Tongo but whilst he gave evidence of deaths and work conditions he gave no evidence of sexual violence.[313]

268. The evidence given by TF1-206 does not identify which faction these perpetrators belonged to.[314] That evidence does not lend its support to the Prosecution's theory.

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[311] Page 95-97 of the Transcript.
[312] Page 32, paragraph 85 of the Prosecution Supplemental Pre-Trial Brief of 1st April 2004
[313] TF1-062 evidence of 27th June 2005.
[314] Evidence of 28th June 2005.