

exercising administrative functions, and signing orders were not sufficient evidence of authority pertaining to a superior status.<sup>240</sup>

198. It follows that the essential element is not whether a superior had authority over a certain geographical area, but whether he or she had *effective control* over the individuals who committed the crimes, and whether he or she knew or had reason to know that the subordinates were committing or had committed a crime under the Statutes. Although an individual's command position may be a significant indicator that he or she knew about the crimes, such knowledge may not be presumed on the basis of his or her position alone.<sup>241</sup> Thus, control has to be *effective*. According to Fenwick, this word 'is intended to encompass both *de jure* and *de facto* command and to ensure that, when multiple chains of command appear to exist, responsibility is assigned to the chain of command wherein resides the power to give orders...'<sup>242</sup>

199. Article 6(3) of the Statute of SCSL states that a superior is expected to take "necessary and reasonable measures" to prevent or punish crimes under the Statute. In *Bagilishema*, the Trial Chamber held "necessary" to be those measures required to discharge the obligation to prevent or punish in the circumstances prevailing at the time; and "reasonable" to be those measures which the commander was in a position to take in the circumstances.<sup>243</sup> In *Celebici*<sup>244</sup>, the Trial Chamber held that a superior may be held responsible for failing to take only such measures that were within his or her powers to take. In *Bagilishema*, the Chamber held that it is the commander's degree of effective control which will guide the Chamber in determining whether he or she took reasonable measures to prevent, stop, or punish the subordinate's crime. Such a material ability must not be considered abstractly, but must be considered on a case-by-case basis, considering all the circumstances.<sup>245</sup>

200. There seems to be general agreement amongst the Trial Chambers that '*knew*' can be proved through direct and circumstantial evidence.<sup>246</sup> The Prosecutor's

<sup>240</sup> *Celebici Judgement*, para. 668.

<sup>241</sup> *Ibid*, para. 45.

<sup>242</sup> Cassese et al: *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1, p.858

<sup>243</sup> *Blaskic Judgment*, para. 333.

<sup>244</sup> *Celebici Judgement*, para. 395.

<sup>245</sup> *Bagilishema Judgment*, para 48.

<sup>246</sup> van Sliedregt *supra* note 226, page 158.

contention in *Celebici* that knowledge may be presumed when the crimes are a matter of public notoriety, are numerous, and occurred over a prolonged period, or over a wide geographical area was not accepted. The Trial Chamber was of the view that no such general presumption could be made. The Trial Chamber adopted from the Commission of Experts the list of indicia that serves to establish by way of circumstantial evidence if a superior knew offences were committed by his subordinates.<sup>247</sup>

201. In *Aleksovski*, the Trial Chamber expressed the view that a superior's position may be an indication of knowledge. It needs, however, to be coupled with other indicia such as the geographical and temporal circumstances:

“This means that the more physically distant the commission of the acts was, the more difficult it will be, in the absence of other indicia, to establish that the superior had knowledge of them.”<sup>248</sup>

202. The second part of the knowledge element of Article 6(3) of the Statute of SCSL contains the clause ‘had reason to know’. In *Celebici*, the Trial Chamber interpreted ‘*had reason to know*’, as follows:

“[t]hat a superior can 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. This information need not be such that it by itself was sufficient to compel the conclusion of the existence of such crimes. It is sufficient that the superior was put on further inquiry by the information, or, in other words, that it indicated the need for additional

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<sup>247</sup> *Celebici*, Judgement, para 386: Commission of Experts in its Final Report:

- I. The number of illegal acts;
- II. The type of illegal acts;
- III. The scope of illegal acts;
- IV. The time during which the illegal acts occurred
- V. The number and type of troops involved, if any;
- VI. The logistics involved, if any;
- VII. The geographical location of the acts;
- VIII. The widespread occurrence of the acts
- IX. The tactical tempo of operations;
- X. The modus operandi of similar illegal acts;
- XI. The officers and staff involved;
- XII. The location of the commander at the time.

<sup>248</sup> *Aleksovski* Judgment, para. 80.

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investigation in order to ascertain whether offences were being committed or about to be committed by his subordinates.<sup>249</sup>

203. Therefore a superior can only be required to take such measures as are within his powers. International law cannot oblige a superior to perform the impossible.<sup>250</sup>

#### **Prosecution's Theory on Command Responsibility of the First Accused**

204. The Prosecution alleges that the co-accused were seen and known as the top leaders of the CDF and that Moinina Fofana and Allieu Kondewa took directions from and were directly answerable to Hinga Norman. They took part in planning and operational decisions of the CDF.<sup>251</sup> Individually or in concert the three accused are alleged to have exercised authority, command and control over all subordinate members of the CDF.<sup>252</sup>

205. In its Pre-Trial brief the Prosecution states that criminal liability of the First Accused under Article 6(3) can be inferred from:

- His position of authority within the CDF and his leadership role within the Kamajor structure;
- The fact that during the relevant times in the indictment, Samuel Hinga Norman was in regular communication with other commanders at the various battle fronts where the CDF and Kamajor combatants were deployed;
- The fact that during the relevant times in the indictment he provided logistical support to the CDF in the field;
- The fact he received regular status reports of war operations and frequently visited Kamajor bases in and around Tongo [and other

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<sup>249</sup> *Celebici* Judgment, para. 393.

<sup>250</sup> *Ibid.*, para. 395.

<sup>251</sup> Indictment para 14.

<sup>252</sup> Indictment para 18.

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geographic locations] as well as the other areas in Sierra Leone where the war was being prosecuted.<sup>253</sup>

206. The Defence submits that the Prosecution has failed to prove that the Accused bears criminal responsibility for any of the crimes charged in the indictment under Article 6(3).

**The Position of the Accused and Establishment of the CDF:**

207. The Accused was appointed Deputy Minister of Defence by President Kabbah in 1996. As stated above, this government was ousted by a coup of the AFRC on the 25th of May 1997. Following near universal condemnation of the coup, ECOWAS took steps to assist in reinstalling the democratically elected government of Kabbah. In his evidence, Hinga Norman said the Chairman of ECOWAS was prepared to ask ECOWAS members to assist Sierra Leone if he was convinced it was the wishes of the people not to accept a military government. Hinga Norman stated that President Kabbah said “Chief, that is where we need the support of the hunters of Sierra Leone to support their people in rejecting the military government.”<sup>254</sup>

208. That is the purport of Exhibit 158, a letter from President Kabbah to CSO Mustapha of Nigeria about his discussion with General Abacha whereby he stressed the need to enhance the capacity of the Kamajors and the necessity of ECOMOG commanders to work with the Deputy Minister of Defence. Exhibit 158 shows that the government had a strategy in place to remove the junta through a carefully planned and executed action in collaboration with ECOMOG. This shows that at all times material to this conflict, the government and ECOMOG were in command and control of the Kamajors and the CDF. The first accused was not in a position of control and therefore never had a duty to act.

209. The Accused further testified that the President told him that there was an arrangement that he should “move from Guinea to join the officers of the Nigerian

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<sup>253</sup> PTB para 279 para (a) – (d), para 288 (a) – (d), para 296 (a) – (d), para 304 (a) – (d), para 312 (a) – (d), para 328 (a) – (d), para 335 (a) – (d), para 342 (a) – (d), para 349 (a) – (d), 356 (a), (g), (h), (i), para 362 (a) – (d), para 371 (a) – (d), 378 (a) – (d), para 386 (a) – (d), para (a)– (b).

<sup>254</sup> Transcript, Hinga Norman, p. 25, Jan. 25, 2006.

army in Liberia.” The Accused also testified that the President said he was going to announce to the people of Sierra Leone (over BBC) that he had been appointed National Coordinator. This was the first time the words “Civil Defence Force” were used by the President, to embrace all defences by civilians to support the military effort.<sup>255</sup>

210. As stated by Defence witness Peter Penfold, there were various civil militias actively working for the restoration of democracy and there was need to coordinate these activities both within these various groups and with ECOMOG. There was also a need for President Kabbah in Conakry to have control over efforts to re-establish his government.<sup>256</sup> There is unchallenged evidence that President Kabbah while in Conakry told Peter Penfold that the CDF will be the organisation to coordinate and the Chairman of the CDF Committee would be Vice President Demby answerable directly to the President with various other patronage to be appointed.<sup>257</sup>

211. The Accused testified that while in Monrovia he was picked up by General One Mohammed of ECOMOG who briefed him that it was for a mission that was of military importance to the situation in Sierra Leone and flew him to Monrovia. He was taken to his boss General Victor Malu who arranged for a meeting the following day and gave him a place to lodge and a vehicle.<sup>258</sup> Hinga Norman was told that some Kamajors were already at Bo Waterside, on the Liberian side of the border across from Sierra Leone. Hinga Norman said he requested a group of Kamajors to be conveyed to attend the meeting amongst including Eddie Massalay who had earlier denounced the military takeover over BBC.<sup>259</sup>

212. The Accused testified that in the meeting held on 17th June 1997 senior Nigerian officers with ECOMOG Liberia stated that they had been instructed by the Head of State of Nigeria to assist all civilian efforts to reinstate the democratic government of Sierra Leone. They further stated that the hunters who knew their terrain and their communities were being told by ECOMOG to assist in anyway they

<sup>255</sup> Transcript, Hinga Norman, pp.27,31, Jan. 25, 2006.

<sup>256</sup> Transcript, Peter Penfold, pp. 26-27, Feb. 8 2006.

<sup>257</sup> Ibid, pg. 27.

<sup>258</sup> Transcript, Hinga Norman, pp. 31-33, 25 Jan 2006

<sup>259</sup> Ibid, pp.33-34

could to make the work of ECOMOG less burdensome.<sup>260</sup> The Accused also said their discussion at the meeting covered logistical supplies including arms and ammunition, food, medicine, transportation by land and air by ECOMOG Liberia and for hunters to facilitate civilian support to ECOMOG Liberia while they were operating inside Sierra Leone.<sup>261</sup>

213. The Accused testified that the official designation of the CDF came about in May 1998 and that a request was made through the Chief of Defence Staff to the government-in-exile to provide financial resources so that the hunters could adequately be taken care of in the 149 chiefdoms.<sup>262</sup> Although Chief Norman was designated the coordinator, there was no one head, each unit, each chiefdom had their own respective civil defence which was headed by the chiefs and sub-chiefs.<sup>263</sup> In answer to a question about there being no centre from which pronouncements came from the CDF, defence expert witness Dr Hoffman said logistically, there was nobody who could occupy that position and there was nothing logistically that could facilitate it.<sup>264</sup>

214. The Accused testified that the information provided by Exhibit 112 (CDF Calendar) under his picture stating that he is the founder of the Kamajors is not true, but there was no way to correct it and that the information on every individual was provided by the Director of Personnel.<sup>265</sup> The Director of Logistics Mustapha Lumeh testified that the information on Exhibit 112 is misleading and that is why the calendars were not distributed.<sup>266</sup>

215. An assessment of the effectiveness or otherwise of Chief Norman's role by Lt. Gen David Richards was that 'he was very determined, kept talking about this was for everybody, not just ECOMOG. And did have a view of some of the detail'. But General Richards supposed he had 'already formed the opinion on his first visit that he was a very effective Minister. He was dynamic. He took decisions and had the

<sup>260</sup> Ibid, p. 36.

<sup>261</sup> Ibid, p.37.

<sup>262</sup> Transcript, Hinga Norman, p. 76, Jan.26, 2006.

<sup>263</sup> Transcript, Dr. Demby, p. 6. Feb. 16 2006.

<sup>264</sup> Transcript, Dr Hoffman, p.100, Oct. 9 2006.

<sup>265</sup> Transcript, Hinga Norman, p.57, Feb. 6 2006.

<sup>266</sup> Transcript, Mustapha Lumeh, pp 90-91 May 5, 2006.

courage of his convictions. He was a Minister who understood not to get into the tactical issues, but to keep at the right level for him, let the military get on and run their own affairs in line with the policy that had been agreed by the government.”<sup>267</sup>

### **The Prosecution’s Allegations of Effective Control over the CDF**

216. The Prosecution alleges that the Accused, in his position as the National Coordinator of the CDF, “was the principal force in establishing, organising, supporting, providing logistical support, and promoting the CDF. He was also the leader and Commander of the Kamajors and as such had de jure and de facto command and control over the activities and operations of the Kamajors.”<sup>268</sup>

217. The Defence submits that this is erroneous. In suggesting that Hinga Norman was the principal force, the Prosecution is alleging that the First Accused was the primary or the main force in establishing, organising, supporting, providing logistical support and promoting the CDF. The evidence suggests otherwise. In fact there were a number of other individuals and organisations who played an active role in supporting the CDF and specifically in supplying key logistical support to the CDF.

218. The Prosecution itself conceded that the CDF received logistical support from ECOMOG<sup>269</sup> and a number of other sources. It is ludicrous to suggest the Hinga Norman was the principal force in providing logistical support when it is clear from the evidence that in fact ECOMOG, a body formed out of a regional organisation with the support of sixteen West African countries, played a significant role in supporting the CDF in its objective of reinstalling the democratically elected government of President Kabbah<sup>270</sup>. It is also clear that the CDF was receiving support from the American and the British Governments, through ECOMOG<sup>271</sup>. President Kabbah was

<sup>267</sup> Transcript Lt. Gen. David Richards, pp.24-25, Feb. 21 2006.

<sup>268</sup> PTB para. 269, paragraph 13 Indictment.

<sup>269</sup> Transcript, May 8 2005 pg 2 – line 19 – pg 4 line 8: Q. Thirdly, there is no dispute, nor is there any challenge, that the Kamajor fighters received aid from ECOMOG. Again that is something you were telling us about. A. Exactly. Q. What may be in dispute is the period, but in general terms there is no dispute about the fact that indeed the Kamajors in the CDF received aid from a number of sources.

<sup>270</sup> Transcript, Kenneth Koker 20 February 2006, page 57 lines 1-3: “[Daramy Rogers] was mainly with the ECOMOG. Food that was coming through the ECOMOG, it was he and the ECOMOG who had been distributing this food to us, rice.”

<sup>271</sup> “The bulk of arms came from ECOMOG” Transcript, Arthur Koroma May 3 2006 pg 43, lines 6-7.

also playing a significant role on diplomatic fronts to ensure that there were logistical supplies coming through to the CDF.<sup>272</sup> It can hardly be suggested that Hinga Norman was the principle supporter of logistics to the CDF.

219. There is also significant evidence which demonstrates that the Accused was not the principal force in establishing, organising, or supporting the CDF in the relevant time frame. In this regard, there is evidence which demonstrates that in fact it was ECOMOG who was playing this principle role.

220. Arthur Koroma, a former CDF administrator, testified that from December 1997 to February 1998 while he was based at Lungi, he had significant interaction with ECOMOG and with General Khobe.<sup>273</sup> In 1998 he received a letter from ECOMOG informing him that the Kenema District CDF was under the 15<sup>th</sup> ECOMOG brigade and that all operational matters were to be dealt with through them.<sup>274</sup> This witness further testified to requests for ammunition being processed through ECOMOG.<sup>275</sup>

221. The role of the CDF in the attack on Kenema in February 1998 was that the CDF was an auxillary force to ECOMOG. While the CDF went in front, ECOMOG was clearly in command.<sup>276</sup> Prosecution witnesses confirmed that ECOMOG came into Kenema just after the CDF.<sup>277</sup> The central role of ECOMOG became much stronger after the 10<sup>th</sup> March 1998 when the government was restored.<sup>278</sup>

222. Another Prosecution witness testified that Hinga Norman seen in Bonthe with ECOMOG officers, but that ECOMOG was continually in Bonthe at that time.<sup>279</sup>

<sup>272</sup> There is evidence that the Kamajors in the northeastern corner of Kenema district and the northern part of Kailahun district had direct contact with the government in exile and received supplies directly from there. There is further evidence that the weapons used in the attack on Tongo in January 1998 came directly from the President in Conakry at the time (Transcript, Arthur Koroma, May 3<sup>rd</sup>, pg 43, lines 6-7).

<sup>273</sup> Transcript, Arthur Koroma, May 3 2006, pg 26, lines 20-28.

<sup>274</sup> Transcript, Arthur Koroma, May 3 2006 pg 46, lines 13-16. See also Exhibits 135 and 136

<sup>275</sup> See Exhibits 137, 138, 140.

<sup>276</sup> Transcript, Arthur Koroma, May 3 2006 pg 32 lines 21-29.

<sup>277</sup> Transcript, TF2-042, 17 September 2004 pg 97 lines 22-27, Transcript TF2-033, 20 September 2004 pg 27 lines 24-28, Transcript TF2-040, 21 September 2004 pg 33 lines 23-25, Transcript TF2-223, 28 September 2004 pg 102 lines 25-29.

<sup>278</sup> Transcript, Arthur Koroma, May 3 2006 pg 43 lines 1-8.

<sup>279</sup> Transcript, TF2-116, 9 November 2004 pg 31 lines 19-29: A. I saw once Chief Hinga Norman. That was in fact at the Bonthe airfield. He was accompanied by, I think, two ECOMOG officers at that time. I cannot tell

Former British High Commissioner, Peter Penfold, testified to being in Bo and going to the CDF office where he was introduced to Mr Daramy Rogers who briefed him on how the Kamajors, in conjunction with ECOMOG, had mounted a resistance against the junta in Bo.<sup>280</sup> Defence Witness Ishmael Koroma stated that after the takeover of Kenema the entire Kenema District, including SS Camp, was under the control of ECOMOG under a Lieutenant Uma.<sup>281</sup>

223. This evidence and others demonstrates that clearly Hinga Norman was not a principal force in establishing, organising, or supporting the CDF. Further details as to the logistical support and promotion of CDF are set out below.

### **Provision of Logistical Support and Promotion of CDF**

224. The Accused said he was told by the ECOMOG Chief of Staff to Gen. Malu, that he was always disposed to requests being made if and when they were needed in the areas of arms, ammunition, food, medicine, transport and the sustaining requirements for transports.<sup>282</sup> As far back as August 1997<sup>283</sup>, ECOMOG started supplying the CDF with arms and ammunition and funds for rations, condiments and miscellaneous expenses. At various phases in the conflict ECOMOG supplied arms and ammunition to the CDF as shown in Exhibits 137, 139, 140 and 158. In his evidence, Arthur Koroma testified that from the 10<sup>th</sup> March 1998, all the arms they used came from two sources, the bulk of which came from ECOMOG in the form of rifles and ammunition while in Gendema they received their arms and ammunition

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precisely whether he travelled by plane or helicopter, but it was by air. At that time we are in a situation of receiving ECOMOG, so any time we hear the sound of a plane or helicopter, almost half of Bonthe would run to the airstrip to see whether ECOMOG had arrived, but this time when we went -- I went there personally, because we were all eager to receive ECOMOG -- we only saw Chief Hinga Norman and the two ECOMOG officers.; Transcript, TF2-071, 11 November 2004 pg 93 line 25-- pg 94 line 14): Q. Okay. Did you ever see any other of the Kamajor leaders at the highest level in Bonthe? A. Yes. Eight days after the incident occurred the soldiers fled and the Kamajors took over Bonthe, Chief Sam Hinga Norman came by helicopter with two ECOMOG officials on board.

<sup>280</sup> Transcript, Peter Penfold, 8 February 2006 pg 44 lines 14-20, See also Transcript Kenneth Koker, 20 February 2006, pg 50 lines 9-16 "Was anything done by ECOMOG in relation to the organisation of the Kamajors in Bo? A. Yes, sir. Q. What was done? A. Because during that time we were in chieftdom orders. So the ECOMOG, they decided to form us into battalions. Q. Who was the head of your own battalion? A. Augustine Sule Ngaoujia."

<sup>281</sup> Transcript, Ishmael Koroma, 23 February 2006 pg 26, lines 6-11.

<sup>282</sup> Transcript, Hinga Norman, p.37-38, Jan 25 2006.

<sup>283</sup> Exhibit 157 "Periodic Report, Civil Defence Force, Kamajors, dated August 1997".

from the other main source - the government in exile.<sup>284</sup> Mustapha Lumeh also testified that he got logistics from two places, from Lungi where he received arms and ammunition from Gen Khobe and from Monrovia.<sup>285</sup>

225. The Accused described his interaction with ECOMOG as coordination which primarily meant he was to receive the support, whether in the form of arms, ammunition, food, transport from ECOMOG and then have it delivered to the men on the ground through their commanders. This was done by himself and a MS Kallon as Administrator who received and delivered supplies to kamajors to assist ECOMOG commanders.<sup>286</sup> The Accused said his duty in addition to that of being a government minister, was to encourage the various chiefdom hunters and other civilian organisations in the effort of restoring the elected government of the people of Sierra Leone.<sup>287</sup>

226. As defence expert witness Dr Hoffman puts it, there were lots of different sources of weapons. In some cases, individuals are using single-barrel shotguns that were the historic firearms of the Kamajors. People are getting weapons from ECOMOG at various points and often they are capturing them.<sup>288</sup>

227. The Accused testified that General Khobe visited Base Zero to discuss the provision of conventional weapons and the Accused also made a corresponding visit in October 1997 to Lungi. At that time he was told that there had been an arrangement by the government to procure arms and ammunition to be used by hunters and that the request was made for the preparation of trainers.<sup>289</sup> The Accused further stated that around November 1997, he was shown a huge quantity of weapons, in a store at Lungi by Gen. Khobe, amongst which were explosives, rocket propelled mortars, general purpose guns and AKs and these were all to be used by the hunters.<sup>290</sup> This piece of evidence was corroborated by Dr. Albert Joe Demby.<sup>291</sup>

<sup>284</sup> Transcript, Arthur Koroma, pp. 43-44, May 3 2006, See also footnote 276.

<sup>285</sup> Transcript, Mustapha Lumeh, pp75-76, May 5 2006.

<sup>286</sup> Transcript, Hinga Norman, p. 41 & 45, Jan. 25 2006, p.75, Feb. 6 2006.

<sup>287</sup> Transcript, Hinga Norman, p.3, Jan. 26, 2006.

<sup>288</sup> Transcript, Dr Hoffman, p.120, Oct.9 2006.

<sup>289</sup> Transcript, Hinga Norman, p 38, Jan 26, 2006, see Transcript Mustapha Lumeh, p.76, May 5 2006.

<sup>290</sup> Ibid, p.96. Feb.6 2006.

<sup>291</sup> Transcript, Dr Demby, p.32, Feb.10.

228. In his evidence TF2-008 alleged that in a meeting at Talia Hinga Norman told them that he got arms and ammunition from his friend General Abdu One Mohammed, an ECOMOG General<sup>292</sup>. The Accused said the request for the supply of conventional weapons by the government came from the hunters and that is what he conveyed to Gen. Khobe and that he travelled to the ECOMOG Chief of Staff in Liberia to make him understand that hunters will be carrying such weapons under the command of ECOMOG.<sup>293</sup>

229. TF2-014 in his evidence alleged that the First Accused told them that President Kabbah had failed to give them arms and ammunition and that President Kabbah didn't believe in the Kamajor movement and that he believes only in the international community for them to fight the war. TF2-014 further alleged that the First Accused told them that all food, arms and ammunition that the national coordinator brought, came from one of his friends, General Abdu One Mohammed of ECOMOG. The Accused rebutted this evidence as false and misleading as he could not have told TF2-014 that those arms and ammunition came from a friend since the arrangement had been put in place by the President of Sierra Leone.<sup>294</sup>

230. The Accused testified that welfare logistics, specifically rice and money went to hunters after the formation of National Coordinating Committee (NCC) every month from July 1998 to 2002.<sup>295</sup> Exhibit 128 details how the government supplied rice to CDF in November 1999.

231. This is corroborated by the former Vice President Dr. Albert Joe Demby and the Director of Logistics Mustapha Lumeh who testified that the NCC saw to it that support in terms of rice was increased<sup>296</sup> and that supplies to the District Administrators in respect of arms and ammunition went straight to General Khobe.<sup>297</sup>

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<sup>292</sup> Transcript, TF2-008, p.41 & 48, Nov. 16, 2004.

<sup>293</sup> Transcript, Hinga Norman p.45 January 26 2006.

<sup>294</sup> Transcript, Hinga Norman pp 35-36, Jan. 31 2006.

<sup>295</sup> Transcript, Hinga Norman, pp 24, 26, 28, Jan. 27 2006 & p. 96, Feb. 6 2006.

<sup>296</sup> Transcript, Mustapha Lumeh, pp 82-83, May 5.2006.

<sup>297</sup> Ibid p.84.

232. The Accused testified that he was informed by Hon. Pujeh Momoh that the amount of \$10,000 (US Dollars) had been given to him by Lady Patricia Kabbah to be conveyed to him on behalf of the hunters. The Accused said he was helicopter-lifted from Base Zero to Monrovia where he received this amount which he used to purchase a few needs and return to Base Zero. There he informed the Chairman and Members of the War Council of the transaction and handed over the supplies and balance to the Chairman.<sup>298</sup> The Accused said he was told that the money had been sent by “Tegloma” a group in the United States, to President Kabbah as support for all those who were assisting in the restoration of democracy including hunters.<sup>299</sup>

233. Defence witness Peter Penfold testified that before he was about to go on leave in December 1997, he visited the President who showed him a copy of draft contract which had been sent to him by a mining firm. The contract, in essence, was saying in return for certain mining concessions, equipment and training would be provided by a firm called Sandline for use by President Kabbah’s forces.<sup>300</sup> Mr Penfold said the Sandline contract allowed for a small amount of arms and ammunition, and that those arms and ammunition arrived at Lungi at the end of February or March 1998 and they were held by ECOMOG.<sup>301</sup> Vice President Demby corroborated this, stating that Gen. Khobe showed him this cache of arms stored at a secret location in Lungi.<sup>302</sup>

234. There is unchallenged evidence from the Director of Logistics Mustapha Lumeh that while in Liberia ECOMOG donated to the CDF logistics.<sup>303</sup> He further testified that the CDF directly requisitioned for arms and ammunition from ECOMOG in pursuit of the war as an allied fighting force and General Khobe was the Chief of Defence Staff and in charge of military matters.<sup>304</sup> The Districts were under various ECOMOG operational commands as indicated in Exhibits 135 and 136 (detailing Kenema under 15 ECOMOG Brigade). Under cross examination, the Accused

<sup>298</sup> Transcript, Hinga Norman p. 12, Jan. 30, 2006.

<sup>299</sup> Ibid p.15 Jan. 30, 2006.

<sup>300</sup> Transcript, Peter Penfold, pp. 40-41, Feb. 8, 2006.

<sup>301</sup> Ibid p. 42.

<sup>302</sup> Transcript Dr. Demby, p.32. Feb. 10 2006.

<sup>303</sup> Transcript of Mustapha Lumeh, p.24, May 8 2006.

<sup>304</sup> Ibid p. 68.

confirmed that the kamajors got their weapons from ECOMOG (Exhibits 137, 138, 139, 140) or from General Khobe who was in charge of ECOMOG Freetown.<sup>305</sup>

### **The Prosecution's allegations regarding the Accused's Effective Control Over all Units**

235. The Prosecution alleges that the CDF was "an organised armed force comprising various tribally based traditional hunters"<sup>306</sup> and that the first accused was the National Coordinator of the CDF. The Prosecution is essentially charging that the CDF was a highly organised and structured military organisation with the first Accused as the apex.

236. To establish this, the Prosecution has to prove beyond a reasonable doubt that all the Kamajors, and less dominant groups including the Gbethis, the Kapras, the Tamaboros, and the Donsos were integrated into an organised military structure, over which the Accused was the commander. The Prosecution has failed to do this.

### **The Accused Was Not the Overall Commander – He Had No Control Over Self Organized Groups Of Kamajors**

237. The Prosecution alleges that the First Accused was "also the leader and commander of the Kamajors and as such had *de jure* and *de facto* command and control over the activities and operations of that group within the CDF. In the pursuit of accomplishing these tasks he both issued orders and received reports operation operations from subordinate commanders."<sup>307</sup>

238. The Prosecution's case is premised on the position that every single kamajor and traditional hunter in Sierra Leone was a subordinate of Mr Norman. This is an extreme premise which is false. The evidence has shown that the groupings of kamajors were under the control of the chiefs. And often there were kamajors who appeared to be under the control of no one.

### **The conditions for command and control did not exist**

<sup>305</sup> Transcript, Hinga Norman, p.96, Feb. 6 2006

<sup>306</sup> Indictment, paragraph 6

<sup>307</sup> PTB para 269 and para 13 of the Indictment.

239. The Prosecution alleges that the “CDF was an organised armed force comprising various tribally-based traditional hunters”.<sup>308</sup> Overwhelming evidence by both the Prosecution and the Defence is that the kamajors emerged from the chiefdoms in response to the violent attacks by the RUF and the AFRC. These were self organised groups that were essentially autonomous and poorly organized<sup>309</sup>. The following paragraphs provide further detail on the command and control of the kamajors.

### **Command and Control of the Kamajors and CDF up to May 1997**

240. In his evidence, the former vice President testified that the “kamajor movement” started at the village level then the entire chiefdom. At the village level a leader/commander was appointed, usually from among ex-service men in that area. At the chiefdom level, the paramount chiefs and their sub-chiefs brought all of kamajors together under one umbrella called ‘Chiefdom Kamajors’. They were then under the chiefdom’s command and control, and supplied food and logistics under chiefdom authorities led by their Paramount Chiefs. This was the case up to 1994.<sup>310</sup>

241. All the fighting by the Kamajors was improvised and on a voluntary basis. As Dr Demby stated:

“... The Kamajor movement was a voluntary mass mobilisation of men, women and children from all walks of life who took up defensive weapons: Shotguns, knife, axe, spear, stick, et cetera, to beat back their enemies -- Q. By “their enemies”, what do you refer to? A. Rebels, sobels, juntas, which I will, as time goes on, tell you that. But those that came to attack them in their localities. So to beat back their enemies in the defence of their lives, their families, their properties and their community. That is the group that we

<sup>308</sup> Indictment, paragraph 6.

<sup>309</sup> If there was any organization of the kamajors it was done through ECOMOG. See for example Transcript, Kenneth Koker, February 20 2006 pg 50 lines 9-16: “Was anything done by ECOMOG in relation to the organisation of the Kamajors in Bo? A. Yes, sir. Q. What was done? A. Because during that time we were in chiefdom orders. So the ECOMOG, they decided to form us into battalions. Q. Who was the head of your own battalion? A. Augustine Sule Ngaoujia.”

<sup>310</sup> Transcript, Dr Demby, p.7, Feb. 10 2006.

called Kamajor movement. And it became a pride of every man, woman and grown-up child to contribute in the defence of his community -- of the community.”<sup>311</sup>

242. The kamajors have always worked directly under and for the interest of their chiefs as illustrated in Exhibit 144. This conduct is best described in humanitarian law as a ‘*levee en masse*’, i.e. the rule that civilians spontaneously taking arms on the approach of the enemy and in the absence of regular forces have combat status and a right to participate directly in hostilities.<sup>312</sup> This provision makes it clear that a State is responsible for the conduct, for example violations of international humanitarian law, of such civilians.

243. Contrary to the evidence of some prosecution witnesses that Hinga Norman was the founder of the Kamajors, there is unchallenged evidence from Hinga Norman himself<sup>313</sup> and various witnesses like Peter Penfold who disagreed with Exhibit 112 that Hinga Norman was the founder of the Kamajors. Mr Penfold said his understanding of Kamajors was that they had been called together by their paramount chiefs within the chiefdoms and each chiefdom would have a group who were known as Kamajors.<sup>314</sup> Vice President Demby gave a very detailed analysis of the origins and role of the Kamajors, corroborating the evidence of the First Accused.<sup>315</sup> Likewise Defence Expert witness Dr Hoffman<sup>316</sup> testified that the people leading this effort were community elders, particularly men, who participated collectively in decision making and who came together to discuss ways to protect themselves. This is indicative of the fact that the Kamajors were under the local chiefs.

244. It is equally important to note that after initiation most Kamajors never had weapons. Ishmael Koroma testified that the section chiefs were called by paramount chiefs, that those who had single barrel guns would give them to the Kamajors so that they could prosecute the war and they also gave money to buy single barrel

<sup>311</sup> Transcript, Dr Demby, 10 February 2006 pg 6 lines 6-17.

<sup>312</sup> Art. 4(A)(6) of Convention and Art. 2. of the Hague Regulations, see also Article 9 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, adopted in 2001.

<sup>313</sup> Transcript, Hinga Norman, p. Jan. 25 2006.

<sup>314</sup> Transcript, Peter Penfold, p. 44, Feb. 9 2006

<sup>315</sup> Transcript, Dr. Demby, p.7, Feb. 10 2006

<sup>316</sup> Transcript, Dr Hoffman, p.65 Oct 10 2006.

cartridges.<sup>317</sup> It was a collective community effort making the best of what resources were available.

### **Command and control from May 1997 to February 1998**

245. From May 1997 to February 1998, command and control of the kamajors lay with the chieftdom authorities and ECOMOG.<sup>318</sup> The First Accused had no active role to play in the fighting. However he was kept informed because he was the coordinator and needed to know how the hunters were assisting ECOMOG in the field.<sup>319</sup> Various witnesses testified that at all material times, together with ECOMOG soldiers, they would go out to fight and they fought along side ECOMOG under its command.<sup>320</sup> Under cross examination, the Accused testified that as coordinator, his role was not to initiate attacks on towns or villages in Sierra Leone<sup>321</sup> and that while in Talia he gave no orders that Kamajors should attack towns or villages.<sup>322</sup> This piece of evidence was corroborated by Arthur Koroma who testified that he never saw Chief Norman in combat activities and he never came close to the frontlines.<sup>323</sup> Arthur Koroma testified that by November 1997, there was a significant amount of involvement with ECOMOG in the sense that all the food, the arms and ammunition they used were provided by ECOMOG and even the wounded in hospital were taken to Monrovia and treated in ECOMOG hospitals.<sup>324</sup> Mr Koroma further testified when the Kamajors were together with ECOMOG, they were always an auxiliary to ECOMOG, and ECOMOG was in command. But they, the kamajors, led the way because they knew the terrain, the people and the language.<sup>325</sup>

246. In his evidence, TF2-201 alleged that the War Council did not function properly. TF2-011 also testified that most of the decisions of the War Council were not implemented because whenever a decision was taken, Norman would confer with

<sup>317</sup> Transcript, Ishmael Senesie Koroma, p.38, Feb. 22 2006.

<sup>318</sup> Transcript, Hinga Norman, p.19, Feb. 6 2006: Under cross examination, witness said after training in Talia, the First Accused addressed the kamajors and told them 'go into the land. Operate under the advice and direction of ECOMOG troops. They are the ones that will give you the needs for your services'.

<sup>319</sup> Ibid p. 44.

<sup>320</sup> Transcript, Osman Vandi, p. 88 Feb. 17 2006; Transcript Arthur Koroma, p. 16, May 3 2006.

<sup>321</sup> Transcript, Hinga Norman, p.83. Feb.6 2006.

<sup>322</sup> Ibid p.86-87.

<sup>323</sup> Transcript, Arthur Koroma, pp 41-42, May 3 2006.

<sup>324</sup> Ibid p. 16.

<sup>325</sup> Ibid p.31-33.

Mr Moinina and Mr Kondewa and whatever those three decided was implemented. This witness further alleged that the War Council could not force Norman to implement its decisions and that it did not have control over the Disciplinary Committee, headed by Dr. Jibao. TF2-201 also stated that the Kamajors in Base Zero were more loyal to Norman and the initiators than to the Chiefs.<sup>326</sup>

247. The Accused rebutted these allegations when he testified that as far as operational decisions were concerned, it was a matter of advice between the War Council and himself. In the areas before ECOMOG commanders became involved with the activities of the various hunters groups, and eventually the CDF, it was a matter for discussion either at Base Zero with all War Council members or in Guinea with the War Council members in Conakry. Whenever it was decided that a particular action was to be taken by commanders in the field against enemy forces, the directives were given at meetings of the War Council.<sup>327</sup>

248. Contrary to allegation by TF2-011 that Kamajors were more loyal to Norman and initiators, Mustapha Lumeh testified under cross-examination that there was no central command in Base Zero other than the War Council. The War Council were the policy makers for the execution of the war itself, the planning of the war or the implementation of policy was done by the commanders in the field.<sup>328</sup> Mr Lumeh further testified that at Base Zero the undisputed leader was the Chairman of the War Council and Hinga Norman was seen as the government representative and coordinator of the Civil Defence Forces.<sup>329</sup> He emphasised the control of the War Council, stating that it was such a powerful organisation at Base Zero and nobody could have interfered with their work.<sup>330</sup>

249. In his evidence TF2-014 alleged that the First Accused had absolute power at Base Zero, even over the War Council. He also said that when the War Council took decisions, the Accused reversed them. The Accused denied these allegations and

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<sup>326</sup> Transcript TF2-011.

<sup>327</sup> Transcript, Hinga Norman, p.18, Feb. 2 2006

<sup>328</sup> Transcript, Mustapha Lumeh, pp.7-8, May 8 2006

<sup>329</sup> Ibid p.13.

<sup>330</sup> Ibid p. 22.

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stated that the War Council was set up with powers and authority to advise him especially as he was far away from the Minister of Defence under whom he served<sup>331</sup>.

250. Under cross examination, Ishmael Senesie Koroma, testified that the attack on Kenema in January/February 1998 was ordered by ECOMOG under Lt. Uma<sup>332</sup>. Under cross examination, Dr. Joe Demby, testified that General Khobe was in charge of the CDF before ECOMOG arrived because he had been appointed Chief of Defence staff and that made him in charge of the CDF and all the allied forces.<sup>333</sup>

251. In his evidence the former Vice President, testified that when General Khobe was appointed Chief of Defence Staff, he had responsibility for all military matters in the country. He was responsible for all deployments, logistical support, arms, ammunition, and food.<sup>334</sup> He further testified that the main purpose of the document shown as Exhibit 134, was that after the return of the democratically elected government, the government wanted to have full control over the way in which the war was being fought. The forces available to government were ECOMOG and CDF, so a delegation was composed to assess the military situation in the East of the country and make recommendations as to how the Government should proceed.<sup>335</sup> In his evidence, the Accused testified that when Gen. Khobe was appointed Chief of Defence Staff, he was introduced to him on the 17th of March 1998 as Deputy Minister of Defence and he had direct interaction with him in that capacity. He further testified that the custody, control and distribution of weapons were the responsibility of General Khobe.<sup>336</sup> As Arthur Koroma put it, when the government returned on the 10<sup>th</sup> March 1998, all matters relating to combat, fighting, logistics and everything was actually done in conjunction with ECOMOG, and it was the ECOMOG Brigade commander or his subordinates who showed them targets, what to do and what not to do.<sup>337</sup>

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<sup>331</sup> Transcript, Hinga Norman, pp 44-45 Jan. 30 2006.

<sup>332</sup> Transcript, Ishmael Senesie Koroma, pp.23-24, Feb. 23 2006.

<sup>333</sup> Transcript, Dr. Demby, p.31, Feb. 15 2006.

<sup>334</sup> Transcript, Dr. Demby, p.52, Feb. 10 2006.

<sup>335</sup> Ibid, pg 55, Feb.13 2006.

<sup>336</sup> Transcript, Hinga Norman, p.27 January 27 2006.

<sup>337</sup> Transcript Arthur Koroma, p.42, May 3 2006.

252. Exhibits 135 & 136 also demonstrate that the CDF was under the command and control of ECOMOG and all communications and logistics due were delivered through the chain of command. Exhibit 105, a Report of UN Secretary General<sup>338</sup> corroborates the fact that CDF was under the command and control of ECOMOG. This document confirmed that there was already a functioning government in Sierra Leone and the powers to give orders resided with the government and ECOMOG, certainly not the First Accused.

253. Defence witness Kenneth Koker testified that when ECOMOG captured Bo Town, they called a general meeting, One General Buhari Musa of ECOMOG told the Kamajors that from that moment no kamajor should do anything by himself, that they had to take orders from ECOMOG.<sup>339</sup>

254. As stated in Exhibit 159<sup>340</sup> by Major-General Abdu One Mohammed who was the Chief of Staff ECOMOG and Commander of the Nigerian Contingent in both Liberia and Sierra Leone, ECOMOG collaborated with the CDF operationally especially in the Bo-Kenema axis, supplying arms and ammunition, fuel, food and cash.

255. Under cross examination, Hinga Norman testified that while in Liberia, ECOMOG exercised control over the Kamajors who were on Liberian side of the border. It was from there that arrangement for the coordinated operation was put in place.<sup>341</sup>

256. In his evidence, Mohammed Turay Collier testified that Hinga Norman did not have control of any Kamajors in Talia. Every Kamajor had his own master.<sup>342</sup>

257. At the Chiefdom level, defence witness Paramount Chief Joseph Ali-Kavura Kongomoh II testified that the functions of the command structure of the chiefs in Moyamba was to guide and then give command to the Kamajors or mobilise them

<sup>338</sup> Report of the UN Secretary General, dated 14th August 1998, p. 4.

<sup>339</sup> Transcript, Kenneth Koker, pp. 50-51, Feb 20 2006.

<sup>340</sup> Exhibit 159, statement of Major-Gen. Abdu One Mohammed, dated 2nd March, 2006.

<sup>341</sup> Transcript, Hinga Norman, p. 76 Feb. 6. 2006.

<sup>342</sup> Transcript, Muhammed Turay Collier, p. 91, Feb.16 2006.

whenever there was an attack elsewhere within the district.<sup>343</sup> Every Chiefdom where there were Kamajors had their leaders called chiefdom commanders and district commanders. Under cross examination Mustapha Lumeh described the CDF as a loose organisation of various command posts, that any attack on any particular area was planned and directed by that particular area.<sup>344</sup>

258. Under cross examination, Dr. Joe Demby testified that from May 1997 to March 1998, the CDF was under the command of their paramount chiefs and sub chiefs.<sup>345</sup> Kamajors remained loyal and respectful to the chiefs until the time the war ended<sup>346</sup> but that between 1998 to 1999, the bodies that ensured that laws were obeyed and law and order maintained were the police and ECOMOG.<sup>347</sup>

259. Various witnesses testified that ECOMOG had control wherever Kamajors operated and Kamajors would do nothing that ECOMOG did not approve of.<sup>348</sup>

260. In their evidence TF2-222 and TF2-005 alleged that there were specific instructions for the Tongo operation from Chief Norman who allegedly said that “whosoever takes Tongo and keeps it wins the war.”<sup>349</sup> This was rebutted by Chiefdom commander Brima Sei who testified that he didn’t know anything about the Tongo attack being planned in Base Zero and that the planning was done in his own chiefdom.<sup>350</sup> Brima Sei further testified that the kamajors had organised themselves to came together to protect and fight for their lives. Siaka Lahai testified that at the time of the attack on Tongo they were working with the War Council.<sup>351</sup>

<sup>343</sup> Transcript PC. Joseph Ali-Kavura Kongomoh II, p. 51, June 1 2006 and Transcript Kenei Torma, p. 88 & 98, June 2 2006.

<sup>344</sup> Transcript, Mustapha Lumeh, p.89, May 5 2006.

<sup>345</sup> Transcript, Dr. Demby, p.32, Feb. 15 2006

<sup>346</sup> Transcript, PC Joseph Ali-Kavura Kongomoh II, P.60, June 1 2006

<sup>347</sup> Ibid, p.73.

<sup>348</sup> Transcript, Mohammed Kineh Swaray, pp. 52-53, May 26 2006; Transcript Ishmael Senesie Koroma, pp.23-24, Feb. 23 2006.

<sup>349</sup> Transcript, TF2-222, p. 10, Feb17 2005 and Transcript TF2-005, p 105, Feb. 15 2005

<sup>350</sup> Transcript, BJK Sei, p.14, May 16 2006.

<sup>351</sup> Transcript, Siaka Lahai, pp.39-40, May 17 2006.

**Command and Control from March 1998 to December 1999**

261. The Accused said the kamajors were directly under the control of the Chief of Defence Staff of the Sierra Leone Army after the reinstatement of the government of President Kabbah - beginning from the 10th of March 1998 right up to when 'di war don don' statement was made. The Chief of Defence Staff was working in liaison with ECOMOG forces and the hunters operated directly under the military orders of whichever forces were in the area.<sup>352</sup> The Accused stated that he received a letter signed by President Kabbah establishing the formation of a body called National Coordinating Committee (NCC) chaired by the President's appointee, the then Vice President, Dr. Albert Joe Demby (see Exhibit 120) to handle all policy matters relating to the National Militia/CDF.

262. As a follow up, Exhibit 123<sup>353</sup> the organogram of the CDF was prepared in fulfilment of the terms of reference of Exhibit 120. Exhibit 129 explains how the War Council was abolished by the National Coordinating Committee by March 1999. Exhibit 130 explains how the NCC increased logistics supply of rice/cash to support CDF operations. In Exhibit 131, the NCC took a decision that the CDF War Front food would go to ECOMOG commanders for distribution to the CDF fighters and the CDF food allocation were being handled by District officers and chiefs in the Northern Province.<sup>354</sup>

263. The Accused testified that from that time the Chief of Defence Staff was the direct coordinator between the government of Sierra Leone and ECOMOG and all logistical support to CDF was channelled through the National Coordinating Committee.<sup>355</sup> This evidence was corroborated by Joe Demby and Lt. General David Richards.

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<sup>352</sup> Transcript, Hinga Norman, p. 83, Jan. 26, 2006.

<sup>353</sup> Exhibit 123 sets out the hierarchical structure of the CDF.

<sup>354</sup> Exhibit 131, p.2. para. B.

<sup>355</sup> Transcript, Hinga Norman, pp 24-25, Jan 27 2006.

264. Defence witness Peter Penfold testified that the British government did not directly supply logistics to CDF but provided assistance to ECOMOG in the form of vehicles, communication equipment, paid for helicopter, training and ammunition.<sup>356</sup>

265. Defence witness Lt. Gen David Richards stated that when he visited Sierra Leone in January 1999 he worked with ECOMOG Brigadier Gen. Khobe who had tactical control of the government forces (CDF and remnants of the loyal SLA), and also Chief Hinga Norman was the Deputy Minister of Defence.<sup>357</sup> He further said 'Chief Norman might establish policy, but how it was spent in detail, how the forces were organised, that was all Gen. Khobe's job.'<sup>358</sup>

266. As Gen. David Richards rightly said under cross examination, Chief Norman was an inspirational figure head and that had an effect on the people's morale but, the hour-to-hour control of the CDF was exercised by Gen. Khobe, under what the government had established as a coherent defence strategy.<sup>359</sup>

#### **Appointments to Positions within the CDF**

267. During the time the War Council was in operation, an Appointment Committee existed, that interviewed people and took decisions on promotions and appointments of individuals. The Chairman of the Appointment Committee was Alhaji Daramy Rogers. A recommendation was forwarded to First Accused and the War Council's advice would be sought and the appointment would be either approved or rejected. These appointments did not happen below the battalion level.<sup>360</sup>

268. This fact was corroborated by Dr. Albert Joe Demby who testified that on the 19 September 1997, while he was at Lungi, Eddie Massalay told Hinga Norman that he had not been appointed commander of the Kamajors Southern Region, but Daramy Rogers had been appointed. Dr Demby said Chief Norman responded in his presence that the appointments to positions at Base Zero are by the Appointment Committee of

<sup>356</sup> Transcript, Peter Penfold p. 13, Feb, 9, 2006.

<sup>357</sup> Transcript, Lt. Gen. David Richards, p. 14, Feb. 21 2006,

<sup>358</sup> Ibid p. 21.

<sup>359</sup> Ibid p. 67.

<sup>360</sup> Transcript, Hinga Norman, p.42, Feb. 6 2006. See also Exhibits 10 and 59.

the War Council and that incidentally Daramy Rogers was the Chairman of the Appointment Committee.<sup>361</sup>

269. Various witnesses testified how they were appointed by the chieftdom commanders or by the War Council.<sup>362</sup> Under cross examination, Hinga Norman testified that the Chairman of Promotions and Appointment designated or appointed the commander responsible for the attack on Koribundo.<sup>363</sup> This is contrary to the evidence of TF2-014 that he was appointed National Deputy Director of Operations by Hinga Norman, and that he took general and specific instructions from the First Accused and passed it on to the war front. This piece of evidence has been rebutted by various witnesses including the first accused.<sup>364</sup> Under cross examination, the Accused denied having control over who became a commander.<sup>365</sup>

270. In his evidence, Mohamed Kaineh testified that the War Council appointed him to the position of Director of War, Kailahun District and also appointed the Vandi Songo III, Director of Intelligence, Easter Region, Jambawai Regional Coordinator, Easter Region<sup>366</sup> In his evidence, Kenneth Koker testified that they initially operating under chieftdom orders, and ECOMOG subsequently organised them into battalions. Augustine Ngaoujia was appointed the head of his battalion and Mr Koker became the deputy.<sup>367</sup>

271. Arthur Koroma testified that in May 1998 Vice President Demby decided that the CDF should be administered on the basis of Districts whereupon he was elected as District Administrator for Kenema.<sup>368</sup>

### **Giving and Receiving Reports and Orders about Operations from Commanders**

<sup>361</sup> Transcript, Dr. Demby, p. 30, Feb. 10 2006.

<sup>362</sup> Transcript, Ishmael Senesie Koroma, p. 23, Feb. 21 2006, Transcript Hinga Norman, pp.106-107. Feb, 6 2006; Transcript Kenei Torma, p.55, June 2 2006.

<sup>363</sup> Transcript, Hinga Norman, p. 100, Feb. 6 2006.

<sup>364</sup> Transcript, Hinga Norman, pp 37-38, Jan 31 2006.

<sup>365</sup> Ibid, p. Feb. 6 2006.

<sup>366</sup> Transcript, Mohamed Kaineh, p. May 19 2006.

<sup>367</sup> Transcript, Kenneth Koker, pp.52-53, Feb. 20 2006

<sup>368</sup> Transcript, Arthur Koroma, pp. 40-41, May 3 2006.

272. The Prosecution alleges that Hinga Norman was in regular communication with other commanders at the various battle fronts where the CDF and kamajor combatants were deployed. The Defence submits that this is entirely not the case.

273. Exhibit 157 is indicative of the fact that Kamajors started sending their periodic reports to ECOMOG as far back as August 1997. Also, in his evidence, TF2-079 testified that he left Tongo with a group of Kamajors to Talia to hand over a situation report of Tongo and that upon arrival they met Fofana who told them that Norman had gone to Liberia. As a result the report was given to Siaka Lahai. Siaka Lahai testified that he never gave any report for onward transmission to Base Zero. This was corroborated by Keikula Amara who testified that he sent his reports to his superior BJK Sei and that he was aware that BJK Sei's superior was Chief Amara Gado.<sup>369</sup>

274. TF2-190's testimony was that he used to receive orders from Hinga Norman and that when they were ordered by Norman to reinforce the Kamajors in Moyamba, Norman asked the logistical officer to supply them with fuel, arms, and a vehicle and ammunition.<sup>370</sup> This testimony is not consistent with his statement where he said "we got orders from the War Council. Mr Lumeh would bring orders to us...whatever the War Council would say we would do it."<sup>371</sup> This inconsistency should be noted and less weight given to such unreliable evidence.

275. Various witnesses have testified that Hinga Norman never gave orders to commanders in the field but instead they received orders from the War Council.<sup>372</sup> Defence witness Haroun Collier testified that the Death Squad took orders from the War Council and that no reports were ever made specifically to Hinga Norman. He further said that Exhibit 153 was false because as he himself was Secretary he should have written it.<sup>373</sup> In his evidence TF2-011 alleged that the War Council did not receive reports at Base Zero from commanders but reports went to straight to the Coordinator. This evidence has been rebutted by Lansana Bockarie who said they

<sup>369</sup> Transcript, Keikula Amara, pp 63-64, May 18 2006.

<sup>370</sup> Transcript, TF2-190.

<sup>371</sup> Ibid, p. Feb. 10, 2005

<sup>372</sup> Transcript, Haroun Collier, pp 5-6, May 15 2006.

<sup>373</sup> Transcript, Haroun Collier p.6 May 15 2006.

heard of the position of National Coordinator but and CDF Administrator but there was a War Council so they reported to it.<sup>374</sup>

276. The Accused testified that President Kabbah did not give him orders on how to conduct the war and that his appointment was solely to coordinate -- not to command and control the war.<sup>375</sup>

277. Under cross examination, Haroun Collier as deputy commander of the Death Squad<sup>376</sup>, refuted the evidence of TF2-008<sup>377</sup> and that of TF2-014, that the Death Squad was answerable to Hinga Norman and Allieu Kondewa. The witness equally disagreed with TF2-068<sup>378</sup> that the Death Squad was under the control of Hinga Norman, Fofana and Kondewa and finally refuted the evidence of TF2-190 that he was only finally answerable to Hinga Norman.

### **Investigation and Disciplining of the Kamajors and CDF**

278. The Kamajors and the CDF were investigated and disciplined by the government and ECOMOG for any violations as CDF members were under their command and control. Cases of investigation range from Exhibits 132A and 132B concerning an alleged attack on Marima village was subsequently investigated by the government.

279. Where harassment was alleged against the Kamajors as in the case of Exhibit 133 concerning Fogbo village, the allegation was investigated. Under cross examination, Dr. Albert Joe Demby, testified that he conducted investigations and he kept records of such investigations.<sup>379</sup>

280. In his evidence, Arthur Koroma agreed that some CDF members fell short of proper behaviour on several occasions. He cited, as an example one commander James Kallon in Joru who had problems with the chiefs in the township and a

<sup>374</sup> Transcript, Lansana Bockarie, p.15, June 1 2006.

<sup>375</sup> Transcript, Hinga Norman, pp. 25-26, Feb. 6 2006.

<sup>376</sup> Ibid, pp 16, 42.

<sup>377</sup> Transcript, TF2-008, pp. 60-61, 16 Nov. 04 2006.

<sup>378</sup> Transcript, TF2-068, pp.90-91, 17 Nov. 04 2006.

<sup>379</sup> Transcript, Dr. Demby, p 47, Feb. 16 2006

complaint was forwarded to the Senior District Officer in Kenema for disrupting a dance and misbehaving to the chiefs. Mr Kallon was investigated and sent to the state prison.<sup>380</sup>

281. According to Dr. Joe Demby, the government investigated the killing of civilians at the checkpoint, allegedly committed by Kamajors, but that their investigation came to a different conclusion.<sup>381</sup> Also investigated was information that the CDF killed their captives but the investigation showed that there were detention centres at Islamic College, Magburaka.<sup>382</sup> The witness further testified that reports were made to President Kabbah that Kamajors had seized houses belonging to other people. The President asked that the Minister of Local government and himself to go to Bo and Kenema to investigate and to see that the people got their houses. This was after the return of the government.<sup>383</sup> Also investigated was the allegation that the Kamajors locked up people and burnt them in their houses.<sup>384</sup>

282. Various witnesses also testified how the War Council at Talia investigated and Disciplined Osman Vandi for alleged misconduct.<sup>385</sup> TF2-011's testimony that the War Council took decisions to punish Kamajors but they were never followed or carried must be viewed in light of other testimony which suggested that there were instances where the War Council investigated and disciplined the Kamajors.<sup>386</sup>

283. ECOMOG also investigated and disciplined Kamajors who allegedly committed crimes. In the case of Exhibit 89<sup>387</sup>, the ECOMOG Commander for Kenema under whom the CDF operated investigated a CDF member.

284. There is equally the case of Exhibit 145 whereby a police officer was investigated by ECOMOG in September 1998, for alleged atrocities committed during

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<sup>380</sup> Transcript, Arthur Koroma

<sup>381</sup> Transcript, Dr Demby p.33, Feb. 13 2006

<sup>382</sup> Ibid.

<sup>383</sup> Ibid pp.33-34.

<sup>384</sup> Ibid p.31.

<sup>385</sup> Transcript, Hinga Norman, p.34, Jan 30 2006; Transcript Brima Tarawally, p.53, October 5.

<sup>386</sup> Transcript, Brima Tarawally, pp. 53-54, October 5 2006.

<sup>387</sup> 20/26 Dec. 1998, entitled 'Handing over of Mr KBK Magona National Task Force Commander Civil Defence Force and the Report of Investigation carried out on his Activities in Kenema'

the junta era. In the above cases the ECOMOG commander put the Vice President on notice by providing some specific information.

285. From the above analysis one can conclude that the Kamajors and the CDF were under the ‘*overall control*’ of the government of Sierra Leone and ECOMOG forces. In *Tadic*, the Appeal Chamber ruled that:

“In order to attribute the acts of a military or paramilitary group to a State, it must be proved that the State wields overall control over the group, not only by equipping and financing the group, but also by coordinating or helping in the general planning of its military activity. Only then can the State be held internationally accountable for any misconduct by the group. However, it is not necessary that, in addition, the State should also issue, either to the head or to the members of the group, instructions for the commission of specific acts contrary to international law”.<sup>388</sup>

#### **Communication with Commanders in the field:**

286. The Accused moved to Talia, Base Zero in October 1997 and stayed there till the end of 1998 with intermittent shuttle between Talia, Monrovia and Conakry. The Accused had no satellite communication facility between him and the Kamajor commanders in the field who were working with ECOMOG Commanders.<sup>389</sup> The Accused testified that it “took one to know what was going on as long as it took somebody to walk” -- anything between five to seven days.<sup>390</sup>

287. In his evidence defence expert witness Dr Hoffman, testified that communication capacity did not exist.<sup>391</sup> Dr. Hoffman further testified that as a general rule, communication was extremely difficult, and it was generally done by individual couriers as there was no functioning phone system in rural communities.<sup>392</sup> Communication was extremely difficult to the extent that while at Talia, the First Accused was only made aware that ECOMOG was in Sierra Leone beyond being

<sup>388</sup> Tadic Appeal Judgment, July 15, 1999, para 131.

<sup>389</sup> Transcript, Hinga Norman, p.2, Jan. 30 2006

<sup>390</sup> Transcript, Hinga Norman, p. 107, Feb. 6 2006

<sup>391</sup> Transcript, Daniel Hoffman, p. 99, October 9 2006

<sup>392</sup> Ibid, p.107

based at Lungi through the BBC. There was no radio link between ECOMOG and the First Accused. The First Accused also received information from runners who came from Kenema and Tongo and told him the extent to which ECOMOG had advanced.<sup>393</sup>

288. In his evidence, the Prosecution's Military Expert testified that there were very few, if any radios being used, so the communications had to be run by hand. This could either be by motor bike or moped in the areas controlled by the CDF, or on foot through the jungle in other areas.<sup>394</sup> However, the expert also testified that communications throughout this period and throughout this region were good and that the high command in Talia understood what was happening on the ground.<sup>395</sup> This is inconsistent and implausible. As defence expert witness Dr Hoffman puts it "logistically it wasn't possible. The only mode of communication that had any chance of reaching a broad audience was the BBC's Focus on Africa programme. It's the only outlet to a large number of the kamajors had simultaneous access".<sup>396</sup>

289. The Accused testified that a satellite phone was provided for him at Base Zero by President Kabbah to facilitate communication between the Accused and the President and the ECOMOG Chief of Staff in Liberia. Hinga Norman arrived in Talia in September 1997 and the phone arrived in around November 1997<sup>397</sup>. Hinga Norman said that communicated with President Kabbah regularly to communicate operations that were going on to reinstate his government and democracy in Sierra Leone. The President stated that his concern was whenever a need arose for logistical support he should be immediately informed.<sup>398</sup> There was no satellite communication facility between the Accused and the commanders in the field who were working with ECOMOG commanders and were out of his reach.

290. The Defence is calling upon the Trial Chamber to look at the logistics involved if any, the location of the accused in Talia, the officers and the staff, the tactical tempo of operations and the geographical location of the alleged acts which

<sup>393</sup> Transcript, Hinga Norman, p.98, Feb 6 2006.

<sup>394</sup> Transcript, Col Richard Iron, p. 33, June 14, 2005.

<sup>395</sup> Ibid. p.35.

<sup>396</sup> Transcript, Daniel Hoffman, p.99, Oct.9 2006.

<sup>397</sup> Transcript, Hinga Norman, pp. 25-26, Feb. 6 2006.

<sup>398</sup> Transcript, Hinga Norman, p.5, Jan.30 2006.

are all indicia pointing to one conclusion: the accused had no knowledge of the crimes allegedly committed by the Kamajors and the CDF. To decide otherwise will be obliging the accused to perform the impossible. When illegal acts are committed in a location “physically distant,” the presumption of knowledge becomes far weaker in the “absence of other indicia”.<sup>399</sup> Knowledge of the nature of the “general situation that prevailed,” however, does not amount to knowledge that one’s subordinates are likely to commit crimes.<sup>400</sup>

### **The Prosecution Military Expert Col. Richard Iron**

291. The first issue to be discussed is whether an expert may be permitted to give an opinion on the ‘*ultimate issue*’, in the case, i.e., to give an opinion on the very issue that the court has to determine.<sup>401</sup> As pointed out by *May & Wierda* it is not for the expert to give an opinion on the ultimate issue that the Court has to determine.<sup>402</sup> The ultimate issue in this case is the alleged command responsibility of the first accused. This question has arisen in the ICTY in relation to military experts who have sought to comment on the command responsibility of the accused. In *Kordic* the Trial Chamber excluded the evidence on the basis that the witness indeed was drawing conclusions on the very matters upon which the Trial Chamber was required to decide, thus invading its province.<sup>403</sup>

292. The Military Expert Col. Richard Iron testified that he was to determine the extent to which command was effective and whether there was a clear connection between strategic, operational and tactical levels<sup>404</sup> within the CDF.<sup>405</sup> Colonel Iron said the CDF was a territorial force dispersed in chiefdoms controlled by CDF.<sup>406</sup> He further testified that there was a large number of CDF units based in Talia on a hierarchical structure and that the commander was Hinga Norman.<sup>407</sup> This piece of evidence was challenged by Dr Hoffman who testified that there simply was nobody

<sup>399</sup> *Aleskovski, Judgment*, para. 80.

<sup>400</sup> *Bagilishema, Judgment*, para. 42.

<sup>401</sup> *May & Wierda, International Criminal Evidence* (2002), p. 200.

<sup>402</sup> *May & Wierda*, p. 200.

<sup>403</sup> *Ibid*, p. 200.

<sup>404</sup> Transcript, Col. Richard Iron, p.23, June 14 2005.

<sup>405</sup> *Ibid* p. 24.

<sup>406</sup> *Ibid* p. 29.

<sup>407</sup> *Ibid* p.30.

in a position to make declarations that would be considered the word for the movement as a whole and there was no communication capacity.<sup>408</sup>

293. According to the military expert, at the tactical level command tended to be less effective because of their inexperience and lack of training.<sup>409</sup>

294. Col Richard Iron also testified that the CDF had a recognisable military hierarchy and structure<sup>410</sup> and that the CDF had effective command and the person who welded the ultimate power in a military sense within the CDF was Hinga Norman.<sup>411</sup> Under cross examination, this witness testified that there was evidence to demonstrate difficulties over command and the relationship between ECOMOG and the CDF.<sup>412</sup> The witness agreed that ECOMOG and CDF operated together after ECOMOG intervention.<sup>413</sup> Defence Expert witness Dr Hoffman who testified as to whether the CDF constituted a military organisation and what kind of structure it had, described the CDF as a militarised social network, or militarised social movement.<sup>414</sup>

295. The Military expert merely interviewed seven people, and read witness statements and testimonies – all provided for him by the Prosecution. The witness said he interviewed two members of the War Council who were high ranking officials while writing his report (their names were written in Exhibits 98 and 99). The witness agreed that the names of those seven people interviewed were provided by the Prosecutor<sup>415</sup> and that he did not independently verify the source of his information.<sup>416</sup> This in itself is a problem and as defence expert witness Dr Hoffman said methodologically, he is concerned with the very limited number of people spoken to and their location and position within the CDF, and concerned about the very limited amount of time that was spent in preparation of the report. As Dr Hoffman stated “there are a lot of social nuances that are incredibly important for understanding the

<sup>408</sup> Transcript, Daniel Hoffman Ph.D, p.99, October 9 2006.

<sup>409</sup> Transcripts of Col. Richard Iron, p.30, June 14, 2005.

<sup>410</sup> Ibid p.39.

<sup>411</sup> Ibid p.40.

<sup>412</sup> Ibid p.47.

<sup>413</sup> Ibid p. 49.

<sup>414</sup> Transcript, Daniel Hoffman, p.112, October 9 2006.

<sup>415</sup> Ibid p.59.

<sup>416</sup> Ibid p.60.

dynamics of the CDF...nobody could possibly pick up talking to seven people within a period of 14 days".<sup>417</sup>

296. Col Richard Iron testified that he would classify the CDF as an unconventional army.<sup>418</sup> In his evidence, Lt. General David Richards testified that the CDF is at best a militia and that a militia is best characterized as a citizen army but it does not exhibit in his mind many of the traits of a conventional army, for the training is far less thorough, their chain of command is much looser, their discipline is less good.<sup>419</sup>

### **The Complete Absence of any features of an organised military**

297. Kamajors were often identified in the evidence by the "ronko" that they were wearing. These outfits were based on traditional hunting clothes and were variously described. The traditional attire could hardly qualify as a "uniform"<sup>420</sup>, did not have insignias identifying kamajors to any particular unit or rank, there was no standing kamajor force,<sup>421</sup> there were no barracks<sup>422</sup>, kamajors received no salaries – there were no features of an organised structure. For particular attacks, commanders would converge with their kamajors and there would be no one person who had overall command.<sup>423</sup>

298. People could come and go from groups of fighters as they pleased. Although military terminology was sometimes used to describe groupings of kamajors and there

<sup>417</sup> Ibid p.111.

<sup>418</sup> Ibid p. 79.

<sup>419</sup> Transcript, Lt. General David Richards, p.56, Feb. 21 2006.

<sup>420</sup> Transcript, TF2-162 8 September 2004 pg 22 lines 7-17: Q. Can you describe how they were dressed? 7 A. Yes. Q. What were they wearing? Were they wearing uniforms or any other kind of clothes? A. They had no uniform on. In fact, the clothes that they had on was torn and tattered. They didn't have any proper dress on - no uniform. They never had a uniform on; no, it was not a uniform that they had on.

<sup>421</sup> Transcript, Arthur Koroma, 4 May 2006 pg 18 line 28 – page 20 line 15.

<sup>422</sup> Transcript, Arthur Koroma, 4 May 2006, pg 20 lines 13-15: So it was very difficult to actually put a stop to Kamajor activities because of that decentralised nature of the organisation.

<sup>423</sup> For example, the attack on Korbibundo: Transcript, TF2-082 pg 34 lines 14-28: Q. So you met other Kamajors in Korbibundo? A. Yes. When we entered there we met Kamajors there. Q. Were there any other Kamajor commanders in Korbibundo that you met? A. Yes. Q. And who are these commanders that you met on the ground when you entered Korbibundo? A. I first saw Siro (phonetic) Lamina when I entered. Q. You saw Siro (phonetic) Lamina and who else? A. And Bobo Toka, and Lahai George. Q. So did you have command over these other commanders? A. At times they would listen to me, but you know in that Kamajor not everybody could listen to me, except those that I actually brought, because they were much more than us in number.

were an overwhelming number of people with the designation of “commander”, this usage was so arbitrary and widespread and did not correspond to any military reality.

**The role of the First Accused as the Deputy Minister of Defense did not enhance the capability or effectiveness of the CDF as a fighting force**

299. The Prosecution further alleges that the Accused, “as Deputy Minister of Defense...was able to enhance the capability and effectiveness of the CDF as a fighting force”.<sup>424</sup>

300. No witness confirmed the alleged enhanced capability and effectiveness of the CDF by virtue of Mr Norman’s position as the deputy minister of defence. In fact, the evidence shows that if the effectiveness and capability of the CDF was enhanced by anyone it was by the Minister of Defence, President Kabbah. While there was certainly a dimension of personal politics at play in the relationship between the President and Mr Norman it does not detract from the fact that it was the Minister of Defence who ultimately had the ability to ensure that the CDF played a legitimate and significant role in his government’s reinstatement.

**Ability to Implement International Humanitarian Law**

301. The Prosecution submits that the Accused and all members of the CDF were required to abide by International Humanitarian Law (IHL) and the laws and customs governing the conduct of armed conflicts, including the Geneva Conventions of 12 August 1949, and Additional Protocol II to the Geneva Conventions, to which the Republic of Sierra Leone acceded on 21 October 1986.<sup>425</sup> However the Prosecution has failed to demonstrate that the CDF had the ability to implement international humanitarian law as required for the application of Additional Protocol II.

302. There was a significant amount of evidence as to the rules of being a kamajor but these rules certainly never included rules pertaining to IHL. Certainly within the

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<sup>424</sup> PTB, para 269.

<sup>425</sup> Indictment, para 8

rules that did exist, there was no system of ensuring implementation of those rules, let alone any capacity for implementation of IHL.<sup>426</sup>

303. The evidence demonstrates that there was no dissemination of principles of IHL at during the period relevant in the indictment or thereafter.<sup>427</sup> One witness testified to having a ICRC booklets on “how to treat war victims”<sup>428</sup> but this evidence is hardly indicative of an ability of CDF to implement IHL.

#### **Allegations under Article 6(3) have not been proven**

304. Having examined customary law on superior responsibility the Appeals Chamber in *Celebici* ruled that ‘*sufficient influence*’ is not an element of superior responsibility.<sup>429</sup> In *Semanza*, the Trial Chamber ruled that effective control means the material ability to prevent the commission of the offence or to punish the principal offenders.<sup>430</sup> This requirement is not satisfied by a showing of general influence on the part of the accused<sup>431</sup>. Should the first accused be held responsible because he was a well known personality as a Deputy Minister of Defence and National Coordinator? The Norman Defence submits that the Trial Chamber should answer this question in the negative.

305. From the legal evaluation of the facts, the accused cannot be held for superior responsibility under Article 6(3) of the Statute, for superior responsibility must not be seen as responsibility for the act of another person. Superior responsibility derives directly from the failure of the person against whom the complaint is directed to honour an obligation.<sup>432</sup> In *Aleksovski*, the Trial Chamber ruled that:

<sup>426</sup> For example, TF2-013 testified that kamajors were instructed not to kill innocent civilians or to loot property; but certain unmanageable kamajors ignored such rules. Transcript, TF2-013, 24 February 2005 page 30 line 28--page 31 line 1.

<sup>427</sup> Transcript, General David Richards, 21 February 2006 page 63 lines 11-23 “Now, General, in the British Army I take it that there are rules of engagement, no doubt? A. Yes. Q. And are these rules made known to every military personnel? A. Yes, very strictly. Q. Very strictly. And naturally you would expect strict adherence? A. It's a disciplinary offence not to adhere to them. Q. Thank you very much. In your strategising with General Khobe, General Shelpidi, were you at any time told about rules of engagement for the CDF? A. Not to my knowledge. I can't remember any discussion of them

<sup>428</sup> Transcript, TF2-223, 28 September 2004 page 35 lines 2-16.

<sup>429</sup> *Celebici Appeals Judgment*, paras 258-264.

<sup>430</sup> *Semanza, Judgment* (TC), para. 402, cited in *Ntagerura et al.*, (TC), para. 628.

<sup>431</sup> *Semanza, Judgment* (TC), para. 402, para. 402.

<sup>432</sup> *Aleksovski Judgment*, para. 72

“Within the meaning of Article 7(3), a person is obliged to act only if it has been established that he was a superior of the perpetrators of the offence and also knew or had reasons to know that a crime was about to be committed or had been committed. Should such be the case, the person against whom the claim is directed is obliged to take all the necessary and reasonable measures to prevent the crime or to punish the perpetrator or perpetrators thereof.”<sup>433</sup>

306. The Prosecutor has not established sufficient reliable or credible evidence to determine that Hinga Norman was in command and control of the Kamajors and the CDF. Therefore the accused cannot be held criminally responsible as a superior under Article 6(3) of the Statute for the alleged acts of the Kamajors and the CDF because the Prosecutor has not established the existence of a superior-subordinate relationship. There is also lack of sufficient reliable evidence to determine whether the accused knew or should have known that the Kamajors and the CDF were allegedly committing offences. In *Blaskic*, the Appeals Chamber concluded that:

“[Blaskic] “lacked effective control over the military units responsible for the commission of crimes in the Ahmici area on April 16, 1993, in the sense of a material ability to prevent or punish criminal conduct, and therefore the constituent elements of command responsibility [were] not satisfied”.<sup>434</sup> On the basis of the above the defence submits that the Prosecution has failed to demonstrate that the Accused is liable for any of the Counts in the indictment pursuant to Article 6(3) superior responsibility liability.

### **Responsibility of the First Accused pursuant to Article 6(1)**

#### **Elements of Individual Responsibility under Article 6(1)**

307. The Prosecution has stated that it imputes guilt to Mr Norman in relation to each count of the indictment pursuant to Article 6.1 of the Statute. The Prosecution alleges that Mr Norman bears individual responsibility for those crimes the Prosecution alleges that he planned, instigated, ordered, committed or in whose planning, preparation or execution he otherwise added and abetted. It is further

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<sup>433</sup> Ibid para 72.

<sup>434</sup> *Blaskic*, Appeals Chamber, para 421.

alleged that the Accused with his co-Accused participated in a joint criminal enterprise.

308. For criminal responsibility to attach by virtue of Article 6(1) the Prosecution must first prove each of the elements of the crimes for counts 1-8 as set out above beyond a reasonable doubt. If it succeeds in doing so for any crime, then the Prosecution must prove each of the following elements of individual responsibility in relation to that crime, again beyond a reasonable doubt. The Defence would also note here that while Article 6(1) covers various stages of the commission of a crime, with respect to making a finding of criminal participation pursuant to Article 6(1), the Accused can only incur criminal responsibility if the offence is completed<sup>435</sup>.

### Planning

309. Planning implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phase.<sup>436</sup> The *actus reus* of “planning” requires that one or more persons plan or design the criminal conduct constituting one or more crimes provided for in the Statute, which are later perpetrated.<sup>437</sup> The level of participation must be substantial, such as formulating a criminal plan or endorsing a plan proposed by another.<sup>438</sup> An accused will only be held responsible for planning, instigating or ordering a crime if he directly or indirectly intended that the crime be committed.”<sup>439</sup>

### Instigating

310. In the jurisprudence of the Tribunals, “instigating” is defined to mean “prompting another to commit an offence”.<sup>440</sup> It must be shown that there is a causal relationship between the instigation and the fulfilment of the *actus reus* of the

<sup>435</sup> *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.

<sup>436</sup> *Brdanin Trial Judgment*, para 268; *Krstic Trial Judgment* para 601; *Stakic Trial Judgment*, para 443, *Limaj, Trial Judgment*, para 513, *Blaskic Trial Judgment*, para 279; *Rutaganda, (Trial Chamber)*, December 6, 1999, para. 37; *Musema, (Trial Chamber)*, January 27, 2000, para. 119; *Akayesu, (Trial Chamber)*, September 2, 1998, para. 480;

<sup>437</sup> *Kordic Appeal Judgment*, para 26 citing *Kordic Trial Judgment* para 386.

<sup>438</sup> *Bagilishema, (Trial Chamber)*, June 7, 2001, para. 30; *Semanza, (Trial Chamber)*, May 15, 2003, para. 380.

<sup>439</sup> *Kordic and Cerkez, (Trial Chamber)*, February 26, 2001, para. 386.

<sup>440</sup> *Krstic, (Trial Chamber)*, August 2, 2001, para. 601; *Blaskic, (Trial Chamber)*, March 3, 2000, para. 280; *Akaseyu Trial Judgment* para 482; *Blaskic Trial Judgment* para 280.

crime.<sup>441</sup> Further, the *actus reus* requires a clear contribution to the act of the other person.<sup>442</sup> To establish the *mens rea* for instigating it must be proved that the accused directly intended to provoke the commission of the crime, or was aware of the substantial likelihood that the commission of a crime would be a probable consequence of his acts.<sup>443</sup>

## Ordering

311. Ordering' entails a person in a position of authority using that position to convince another to commit an offence.<sup>444</sup> No formal superior-subordinate relationship is required for a finding of 'ordering' so long as it is demonstrated that the accused possessed the authority to order.<sup>445</sup> With regard to the *mens rea*, the accused must have either intended to bring about the commission of the crime, or have been aware of the substantial likelihood that the crime would be committed as a consequence of the execution or implementation of the order.<sup>446</sup>

312. With respect to planning, instigating or ordering, the Prosecution has attempted to argue that to find guilt of the Accused, it is not necessary to prove that the Accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment.<sup>447</sup> In making this argument [with respect to the Second Accused], the Prosecution states that "it would be open to a reasonable trier of fact to conclude on the basis of all of the evidence that all of the crimes alleged in the Indictment were committed pursuant to a single campaign of which the Second Accused was one of the planners and instigators, and which the Second Accused gave orders to implement. On that basis, the Prosecution submits that it would be open to a reasonable trier to fact of conclude that the Second Accused is guilty of planning, instigating and ordering all of the crimes alleged in the Indictment."<sup>448</sup> The Defence submits that this proposition is legally incorrect, and that the Prosecution must

<sup>441</sup> *Blaskic*, (Trial Chamber), March 3, 2000, paras. 278, 280.

<sup>442</sup> *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60.

<sup>443</sup> *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 387; *Naletilic and Martinovic*, (Trial Chamber), March 31, 2003, para. 60; *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 252

<sup>444</sup> *Krstic*, (Trial Chamber), August 2, 2001, para. 601.

<sup>445</sup> *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 388:

<sup>446</sup> *Blaskic Appeals Judgment*, para 42, *Kordic Appeals Judgment* para 30, *Brdanin Trial Judgment* para. 270.

<sup>447</sup> *Prosecutor v Norman et al.*, SCSL-04-14-T-469, Public Version of the Prosecution Response to Fofana Motion for Judgment of Acquittal, 27 September 2005, SCSL-14-T-469, para. 79.

<sup>448</sup> *Ibid.*

demonstrate the elements for each specific alleged crime before there can be a finding of criminal responsibility pursuant to Article 6(1).

### Committing

313. Committing a crime “covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law.”<sup>449</sup> “‘Committing’ refers to the direct personal or physical participation of an accused in the actual acts which constitute the material elements of a crime under the Statute.”<sup>450</sup> Any finding of direct commission requires the direct personal or physical participation of the accused in the actual acts which constitute a crime under the International Tribunal’s Statute with the requisite knowledge.<sup>451</sup> The requisite *mens rea* for committing a crime is that, as in other forms of criminal participation under Article 6(1), the accused acted in the awareness of the substantial likelihood that a criminal act or omission would occur as a consequence of his conduct.<sup>452</sup>

### Aiding and Abetting

314. “Aiding and abetting” has been defined as the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.<sup>453</sup> Strictly, “aiding” and “abetting” are not synonymous. The term ‘aiding’ means assisting or helping another to commit a crime, and the term ‘abetting’ means encouraging, advising, or instigating the commission of a crime.<sup>454</sup> However, these forms of liability have consistently been considered together in the jurisprudence of the Tribunals.<sup>455</sup>

315. The *actus reus* of aiding and abetting is that the support, encouragement or assistance of the aider and abettor has a substantial effect upon the perpetration of the crime.<sup>456</sup> The acts of the accused must be direct and substantial.<sup>457</sup> Mere presence

<sup>449</sup> *Krstic Trial Judgment* para 601, *Tadic Appeals Judgment* para 188, *Kunarac Trial Judgment* para 390.

<sup>450</sup> *Semanza*, (Trial Chamber), May 15, 2003, para. 383.

<sup>451</sup> *Kordic and Cerkez*, (Trial Chamber), February 26, 2001, para. 376; *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 62.

<sup>452</sup> *Kvočka et al.*, (Trial Chamber), November 2, 2001, para. 251.

<sup>453</sup> *Kordic Appeals Chamber* para 28 citing *Kordic Trial Judgment* para 388.

<sup>454</sup> *Semanza*, (Trial Chamber), May 15, 2003, para. 384; *Akayesu*, (Trial Chamber), September 2, 1998, para. 484.

<sup>455</sup> *Limaj*, Trial Judgment, para 516.

<sup>456</sup> *Blaskic Appeals Judgement* para 48; *Furundzija Trial Judgment*, para 249,

constitutes sufficient participation under some circumstances so long as it was proved that the presence had a significant effect on the commission of the crime by promoting it and that the person present had the required *mens rea*.<sup>458</sup> However, an individual's position of authority is not sufficient to lead to the conclusion that his mere presence constitutes a sign of encouragement which had a significant effect on the perpetration of the crime.<sup>459</sup>

316. To establish the *mens rea*, an accomplice must *knowingly* provide assistance to the perpetrator of the crime, that is, he or she must know that it will contribute to the criminal act of the principal. Additionally, the accomplice must have intended to provide assistance, or as a minimum, accepted that such assistance would be a possible and foreseeable consequence of his conduct.<sup>460</sup>

### *Allegations of planning:*

317. The Indictment does not provide any information as to material facts that allege that the First Accused planned any of the alleged crimes in Counts 1-8. The Pre-Trial Briefs also do not provide the Defence with any more specific material facts relating to particular crimes the Accused is alleged to have planned. While it is not for the Defence nor the Trial Chamber to have to guess what the Prosecution's allegations are, given the nature of the pleading in the Indictment and the sparseness of detail in Pre-Trial briefs the Defence has no other option than to attempt to decipher the material facts as set out in the PTB.

318. With respect to "planning", the Prosecution states that criminal responsibility of the Accused for Counts 1-8 can be inferred on the basis that:

- The CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo; Bo; Moyamba, Kenema, Bonthe<sup>461</sup>;

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<sup>457</sup> *Tadic*, (Trial Chamber), May 7, 1997, para. 691, *Bagilishema*, (Trial Chamber), June 7, 2001, para. 33; *Vasiljevic*, (Trial Chamber), November 29, 2002, para. 70.

<sup>458</sup> *Aleksovski*, (Trial Chamber), June 25, 1999, para. 64.

<sup>459</sup> *Aleksovski*, (Trial Chamber), June 25, 1999, para. 65.

<sup>460</sup> *Bagilishema*, (Trial Chamber), June 7, 2001, para. 32; *Blaskic*, (Trial Chamber), March 3, 2000, para. 286; *Furundzija*, (Trial Chamber), December 10, 1998, para. 245, 249.

<sup>461</sup> PTB para 275 (a), para 292 (b), para 300 (b), para 331 (b), para 374 (b).

- Samuel Hinga Norman was physically present in war planning meetings at the issuing of directives and commands to the CDF for the capture of Tongo; Kenema; Bo, Bonthe, Moyamba<sup>462</sup>;
- It was at Base Zero that Samuel Hinga Norman, Moinana Fofana, and Allieu Kondewa, forming a tripartite CDF leadership, together with other persons, planned, coordinated, directed, trained and commanded the attacks on Bo, Kenema, Moyamba, Bonthe, Koribundo and Tongo as well as the other locations specified in the indictment;<sup>463</sup>

### The evidence

319. The Defence would firstly note that no dates are provided in the PTB as to when any meetings were held and the only indication of where these meetings were held is “Base Zero”. The Defence would also note that there are inconsistencies between the Counts with respect to planning for attacks in particular geographic areas. For example, the Prosecution alleges that for Counts 1 and 2, the Accused can be found criminally responsible for planning because “the CDF high command, repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo,<sup>464</sup> Bo,<sup>465</sup> Moyamba<sup>466</sup>.” However, for Counts 3 and 4, the Prosecution only alleges criminal responsibility for planning on the basis that “ the CDF high command, led by Samuel Hinga Norman repeatedly engaged in discussions together and with each other concerning the battle plans for Tongo Field,<sup>467</sup> for Kenema,<sup>468</sup> Moyamba,<sup>469</sup>”. While the Prosecution has failed to specifically cite their material facts towards proof of planning, it is also unclear whether the Prosecution is alleging planning only occurred for specific counts in specific geographic locations. The Defence submits that the Trial Chamber should bear in mind this pervading vagueness in examining the evidence.

320. The Defence would submit that these allegations as set out in the Pre-Trial Brief do not assist the Defence in knowing the case against the Accused. There is no information provided as to when these meetings were, and the fact that “discussions were held together and with each other” is illogical and unhelpful. There is also a

<sup>462</sup> PTB para 276 d, para 285 (c) para 293 (d), para 309 (d), para 382 (d) para 395 (d).

<sup>463</sup> PTB para 307 (b), para 351 (d), para 373 (c).

<sup>464</sup> PTB para 275 (a).

<sup>465</sup> PTB para 292 (b).

<sup>466</sup> PTB para 300 (b).

<sup>467</sup> PTB para 324 (b).

<sup>468</sup> PTB para 331 (b).

<sup>469</sup> PTB para 345 (b).

conspicuous lack of mention of the War Council anywhere in the Prosecution's material facts.

321. Regardless, with respect to the evidence that was presented, the Prosecution relies extensively on its allegations that it was at meetings predominately at Base Zero (Talia) where "battle plans" were discussed. As set out above, to be criminally responsible for planning, there must be evidence of planning to commit one of the crimes which is in the Indictment and the plan must have been carried out. Further it must be demonstrated that the Accused directly or indirectly intended that the crime be committed."

322. There is a paucity of evidence relating to specific planning for any of the crimes that the Accused has been charged. The evidence that does exist is very general, and provides no indication of specific plans, beyond generally discussing "attacks". Further within this general planning evidence, there are indications of planning by the War Council and Mr Norman being the one carrying the results of the planning through to the commanders.

323. With respect to planning for the attack on Tongo, TF2-201 stated that the meeting took place at Talia and that Mr Norman directed that the "hydro" at Dodo should be destroyed.<sup>470</sup> This same witness also testified that the planning for the planning for the Bo and Kenema attacks was done in February 1998 at Talia. He further testified that Norman stated that it would be an "all-round attack" on Bo and Kenema together and that the Kamajors would join ECOMOG who would "lead the attack."<sup>471</sup>

324. TF2-008 testified that the planning for the taking of Koribundo and Sembehun was done by the War Council and made the recommendation to Norman. Norman accepted this recommendation and passed on the instructions of the War Council to the commanders.<sup>472</sup> TF2-008 further testified that in 1998 the War Council met and

<sup>470</sup> Transcript, TF2-201, November 4 2004 pg 106 lines 4-29.

<sup>471</sup> TF2-201, 5 November 2004 page 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines 15-18, page 44 lines 23-24, page 46 lines 22-24, page 51 lines 2-8, page 53 lines 24-28; page 54 lines 1-8, page 83 lines 3-7.

<sup>472</sup> TF2-008, 16 November 2004 page 78 line 12- page 79 line 24.

recommended to Norman that Bo should be the next target and that the attack should be done in consultation with Maxwell Khobe.<sup>473</sup>

325. TF2-190 said that he attended a meeting at Talia in 1998 to “arrange strategies to launch an all-out offensive on the juntas.”<sup>474</sup> TF2-005 merely stated that the responsibility for planning how the war was to be fought was with Norman, Fofana and his deputy, Director of Operations and his deputy, and Kondewa<sup>475</sup> though he also states that it was the War Council who chose where to attack.<sup>476</sup> TF2-014 stated that he was the one who did all the planning for the Koribundo attack.<sup>477</sup> Finally, there is absolutely no evidence that demonstrates that there was ever any “planning” with respect to the use of child soldiers.

326. Therefore the Defence submits that on the basis of the lack of evidence with respect to planning of any specific crimes, the Accused cannot be held criminal liability under Article 6(1) for planning any alleged crimes under Counts 1-8.

### **Allegations of Instigating**

327. Again the Defence submits that it is impossible to know what the allegations relating to “instigating” specifically are as the PTB and the Indictment never make this clear. Regardless, from what the Defence can piece together from the PTB, the Prosecution appears to allege that criminal responsibility through instigating for Counts 1-8 can be inferred on the basis that:

- In December 1997 at a Base Zero meeting attended by all Commanders in the Tongo axis, Samuel Hinga Norman said that all people in Tongo should be regarded as the enemy and should be treated as such; that civilians living in Tongo were Kamajor enemies because they were mining diamonds which were used by the rebels to buy weapons and that therefore all Tongo residents remaining in the town after its capture by the CDF should be regarded as enemies and should be killed;<sup>478</sup>
- Addressed a meeting of the CDF at Base Zero and supported directives for the attack on Bonthe Town during which collaborators were to be killed;<sup>479</sup>

<sup>473</sup> F2-008, 16 November 2004 page 80 line 8-28, page 81 lines 1-6, page 81 lines 20-27, page 82 lines 1-11.

<sup>474</sup> TF2-190, 10 February 2005 page 43 line 28– page 48 line 4.

<sup>475</sup> TF2-005, 15 February 2005 page 93 line 29– page 94 line 5.

<sup>476</sup> TF2-005, 16 February 2005 page 10 lines 3-7.

<sup>477</sup> Transcript, TF2-014, 10 March 2005 page 64 lines 16-18.

<sup>478</sup> PTB para 276 (e).

<sup>479</sup> PTB para 309 (e).

- in February of 1998 addressed a meeting of the CDF at Base Zero where he supported directives for the attack on Bonthe Town; that those orders included instructions that collaborators should be killed; that many civilians were seriously injured in the attack;<sup>480</sup>
- at a meeting in Base Zero, while addressing the CDF before the attack on Bo, said that the CDF should feed themselves; that this statement was understood as giving a free hand to CDF to loot property and that in effect, widespread looting followed the attack on Bo and was pervasive in Bonthe District as well.<sup>481</sup>

### **The Evidence**

328. The Defence submits firstly that it is unable to find any testimony relating to a meeting at Base Zero in February 1998 where Bonthe District was discussed. Further the defence submits that the Prosecution has failed to demonstrate a casual relationship in any of the evidence between any alleged instigation and the fulfilment of the *actus reus* of the crime. For example there is no evidence which shows a nexus between alleged looting that occurred in Bo by kamajors and any meeting with the Accused is alleged to have “instigated” such activity. Further one witness gave testimony about a meeting where Tongo was discussed<sup>482</sup> but when this meeting is alleged to have occurred is never made clear. On this basis liability pertaining to instigating under Article 6(1) fails.

### **Allegations of Ordering**

329. The Prosecution has not specifically made clear what exactly the Accused is said to have “ordered”, alleging all actions pertaining to the First Accused fall within the rubric of Article 6(1) responsibility. However, and again, through a process of attempting to decipher the Prosecution’s case, it appears that the Prosecution makes a number of allegations in its Pre-Trial Brief as the evidence of the Accused’s alleged ordering. No evidence was presented for the bulk of these allegations or the allegations pertain to geographic areas that were no longer a part of the Indictment.<sup>483</sup>

<sup>480</sup> PTB para 353 (g).

<sup>481</sup> PTB para 375 (d).

<sup>482</sup> Transcript, TF2-005 15 February 2005 pg 105 lines 20-25, page 106 line 10– page 107 line 3.

<sup>483</sup> This includes allegations at PTB 293 (e), PTB para 339 (b), PTB para 339 (c), PTB para 339 (d), PTB para 346 (f), PTB para 368 (g), PTB para 368 (h), PTB para 373 (d), PTB para 382 (f), PTB para 293 (g), PTB para 309 (h), PTB para 325 (f).

## Tongo PTB Allegations

- In January 1998 after the CDF had taken Tongo, Samuel Hinga Norman gave instructions that all those found remaining in Tongo following the capture of the area were to be killed, that no one was to be spared<sup>484</sup>;
- In January 1998 CDF combatants fighting in Tongo spoke of a CDF order that all houses were to be searched and that anyone who had a gun or ammunition in their house were to be killed; that anyone in a uniform or who was an occupant in a house where a gun or uniform was found, was to die;<sup>485</sup>
- [Hinga Norman was] the commander who, in December 1997, said in a meeting at Base Zero, attended by all Commanders in the Tongo axis, that all people in Tongo should be regarded as the enemy, that he further said that civilians living in Tongo were Kamajor enemies because they were mining for diamonds which were used by the rebels to buy weapons and that therefore they should be killed;<sup>486</sup>

## Evidence

330. TF2-005 is that only witness who gave testimony that Norman had said that Tongo should be taken “at all costs” and anybody found “walking with the juntas or mining for them should not be spared”.<sup>487</sup> This is the only witness who gave testimony relating to the allegations as set out in the PTB related to Tongo. This testimony was not corroborated by any other witness.

331. Also as stated above, the ICTR has stated that the Accused can only incur criminal responsibility if the offence is completed.<sup>488</sup> The Defence submits that there is no evidence which shows a nexus between what TF2-005 alleges that Hinga Norman ordered and what unidentified kamajor perpetrators are alleged to have done in Tongo.

## Kenema PTB Allegations

- The CDF launched an attack on Kenema town on February 1998 upon the directives and instructions of the CDF high command, of which Samuel Hinga Norman was the National Coordinator and that during this attack an unknown number of civilians were killed;<sup>489</sup>

<sup>484</sup> There was no evidence presented to support this allegation.

<sup>485</sup> There was no evidence presented to support this allegation.

<sup>486</sup> PTB para 325(e), There was no evidence presented of such a meeting at Base Zero in December 1997 to support this allegation.

<sup>487</sup> TF2-005, 15 February 2005 pg 105 lines 20-25, pg 106 line 10 - page 107 line 3.

<sup>488</sup> *Prosecutor v Akayesu*, ICTR-96-4-T, Judgment and Sentence, 2 September 1998, para 473.

<sup>489</sup> PTB 283 (a).

- Ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;<sup>490</sup>
- Following reports received at Base Zero that police were involved in the fighting on the side of the Junta, ordered CDF to treat the police as their enemies and thereafter police officers were specifically targeted and killed at the Police Barracks in Kenema in February 1998.<sup>491</sup>
- The commander who ordered the CDF to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses;<sup>492</sup>

### Evidence

332. TF2-201 testified to a meeting at Talia where he alleged that the planning for the capture of Bo and Kenema took place. According to the witness, Norman announced that it would be an “all-round attack” on Bo and Kenema together and that the Kamajors would join ECOMOG who would be moving from Liberia and would “lead the attack”.<sup>493</sup> There was no evidence that Hinga Norman ordered the CDF to “kill all captured rebels and collaborators and seize or burn their houses”.

333. TF2-041 testified that an unidentified kamajor said to him “He said -- Hinga Norman said, “When you come, that we should kill the police, their wives and their children, so we're taking you straight to the ground commander in Blama.”<sup>494</sup> However there is no evidence of Hinga Norman actually ever giving such an order to specifically target police and such an order cannot be implied based on this testimony alone.

### Koribundo PTB Allegations

- At a meeting in which Samuel Hinga Norman participated, commands and orders were given for the attack on Koribundo in the Bo District; that those commands included orders not to “spare any living thing” during the attack;<sup>495</sup>
- In January/February 1998 after various failed attempts to capture Koribundo, while addressing the CDF before an attack on the town, ordered them to capture Koribundo “at all costs”; that he specifically ordered the CDF to destroy Koribundo;<sup>496</sup>

<sup>490</sup> PTB 285 (d).

<sup>491</sup> PTB 285 (f).

<sup>492</sup> PTB para 323 (b), para 361 (e).

<sup>493</sup> Transcript TF2-201, 5 November 2004 pg 41 lines 12-19, page 42 lines 4-12, page 42 line 15, page 43 lines 7-11, page 43 lines 13-25, page 44 lines 15-18, page 44 lines 23-24, page 46 lines 22-24, lines 51 lines 2-8, page 53 lines 24-28.

<sup>494</sup> Transcript, TF2-041 24 September 2004 page 20 line 10– page 31 line 2.

<sup>495</sup> PTB 291 (a)

<sup>496</sup> PTB para 293 (j), para 337 (a), para 339 (e), para 368 (e)

- Ordered that all the houses – except 4 were to be destroyed because every house had given sheltered (sic) rebels and soldiers;<sup>497</sup>

### **Evidence**

334. Tf2-014 was the only “commander” who gave evidence of having received any orders prior to the attack on Koribundo from Hinga Norman. The remainder of the evidence relates to witness testimony of attending either one or both meetings held at the court barri in Koribundo where Hinga Norman allegedly said that he had ordered that all the houses in Koribundo were to be burnt.<sup>498</sup> There cannot be liability under Article 6(1) for ordering when it is the Accused who self-incriminates himself in stating that he did the ordering. Further these statements were made after the fact, without any further evidence to demonstrate that he gave the order and that the order subsequently was carried out. Further the Defence would submit that the credibility of the testimony of TF2-014 must be closely examined. This is explained in greater detail in the paragraph below.

335. Further TF2-008 testified that it was the War Council who gave the orders for Koribundo and that Hinga Norman accepted the recommendation and passed on the instructions to the commanders.<sup>499</sup> Hinga Norman was merely a conduit for passing on information from the War Council to the commanders and cannot be held liable for “ordering”.

### **Bo PTB Allegations**

- In early February 1998 at Base Zero before the attack on Bo, ordered that prominent people, including the former District Officer, Provisional Secretary, and those who stayed in Bo Town during the rebel occupation were to be executed;<sup>500</sup>
- Gave specific instructions to commanders during the Bo attack to kill police officers because they did not support the Kamajor cause;<sup>501</sup>

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<sup>497</sup> PTB para 368 (f)

<sup>498</sup> Transcript. TF2-198, 15 June 2004 pages 37-39, TF2-157, 16 June 2004 pages 19-22, TF2-012, 21 June 2004 pages 27-28, TF2-162, 8 September 2004 page 30, TF2-032, 10 September 2004 pages 55, 62, TF2-082, 15 September 2004 page 49.

<sup>499</sup> TF2-008, 16 November 2004 page 78 line 12– page 79 line 24

<sup>500</sup> PTB para 293 (f)

<sup>501</sup> PTB para 293 (h)

- In January 1998 at Base Zero where he instructed the CDF to kill captured rebels and rebel collaborators or anyone who worked for the rebels or who lived in an area occupied by rebels;<sup>502</sup>
- In a meeting at Base Zero, Samuel Hinga Norman ordered that all shops and pharmacies in Bo Town were to be looted and that all property in Bo Town “belonged” to the CDF;<sup>503</sup>

336. TT2-014 gave the bulk of the evidence that supports these allegations. The Defence would submit that the credibility of TF2-014 should be carefully inspected by the Trial Chamber. Though TF2-014 was adamant in wanting to speak the truth, after having been reassured that he himself would not be prosecuted for his participation in a number of atrocities<sup>504</sup>, he quite deliberately misled the Trial Chamber with his evidence. TF2-014 provided the court with great detail of the targeting of a Joseph Lansana, stating that he participated in his torture and that he cut off his ear.<sup>505</sup> This was blatantly untrue as Joseph Lansana himself appeared as a Defence witness with both of his ears intact.<sup>506</sup> While the Trial Chamber felt it necessary to thank the witness for his role in “ensuring lasting peace” in Sierra Leone,<sup>507</sup> it is clear that the credibility of the witness was significantly impeached when it is clear on a significant allegation he clearly chose not to tell the truth.

### *Allegations of Committing*

337. As stated above, given the requirement of increased specificity in the Indictment where the Prosecution alleges that the Accused “committed” a crime, the Defence has proceeded on the basis that no such allegations are made in this case as the Indictment contains no such allegations. Further through examination of the PTB the Defence can find no specific allegations of committing there either. With respect

<sup>502</sup> PTB para 309 (f)

<sup>503</sup> PTB para 366 (b)

<sup>504</sup> TF2-014, Transcript, March 11 2005, line 6-17, page 45: “Yes, Mr Witness, you said you had a clear understanding that those who received commands would not be apprehended, if I am correct. From whom did you get this understanding? A. It was from Radio Sierra Leone, then the people – the prosecutors -- that went around me. They said they wanted the truth. If you do not bear any of the greatest responsibility, you say the truth, nothing but the truth, nothing will be done to you. I thought for some time; I pondered over it, and I thought within myself that until we say the truth -- until we say the truth -- we get everlasting peace in this country. That is why I am here today, to say the truth so that we get everlasting peace in this country.”

<sup>505</sup> TF2-014, Transcript, March 11 2005, page 48, lines 22-23

<sup>506</sup> Transcript, Joseph Lansana,

<sup>507</sup> TF2-014, Transcript, March 15 2005 pg 70 line 24 – page 71 line 1 page 45 PRESIDING JUDGE: It has been long, but it has revealed many things which will assist the Chamber to determine the truth in this matter. THE WITNESS: Yes, My Lord. PRESIDING JUDGE: I think the Chamber would like to commend one thing, and that is that you came to testify in order to ensure that there is, you know, lasting peace in this country.

to Count 8 the Defence submits that there is no evidence which demonstrates that the Accused himself recruited or used child soldiers.

### *Allegations of Aiding and Abetting*

338. The Prosecution appears to allege that the liability of the Accused with respect to aiding and abetting can be inferred predominately from evidence that:

- Samuel Hinga Norman was responsible for sending ammunition to the CDF in the field as well as providing other logistics to CDF commanders and combatants;<sup>508</sup>
- Samuel Hinga Norman was physically present in war planning meetings and at the issuing of directives and commands to the CDF;<sup>509</sup>
- Samuel Hinga Norman provided the commanders with arms and ammunition;<sup>510</sup>

### **Evidence**

339. TF2-201 testified that Hinga Norman would write orders for distribution of ammunition on paper and pass them to the Second Accused.<sup>511</sup> TF2-201 also testified that at a meeting at Talia concerning the attack on Tongo, Norman announced that he would supply the commanders with ammunition and food.<sup>512</sup> This witness also stated that at a meeting at Talia regarding Koribundo TF2-082 asked for a certain amount of ammunition, food, and money, and Norman wrote out an order for supplies.<sup>513</sup> TF2-017 testified that it was the Second Accused who distributed arms and ammunition to attack Kebi Town.<sup>514</sup> This same witness testified that it was the Second Accused who also distributed the weapons for the Black December operation.<sup>515</sup> He further stated that around the second week of February 1998 the final order to attack Bo came from Norman and “they” gave arms and ammunition to all the commanders.<sup>516</sup>

<sup>508</sup> PTB para 276 (c).

<sup>509</sup> PTB Tongo, para 276 (d), Kenema para 285 (c), Bo para 293 (d), Moyamba para 301 (d), Bonthe para 309 (d).

<sup>510</sup> PTB Tongo para 276 (f), Bo para 293 (c), Moyamba para 301 (c), Bonthe para 309 (c).

<sup>511</sup> Transcript, TF2-201, 4 November 2004 page 97 lines 14-26.

<sup>512</sup> Transcript, TF2-201, 4 November 2004 page 106 lines 4-29.

<sup>513</sup> Transcript, TF2-201, 4 November 2004 page 113 line 1– page 114 line 20

<sup>514</sup> Transcript, TF2-017, 19 November 2004 page 92 line 26– page 94 line 29, page 95 – 97 line 18.

<sup>515</sup> Transcript, TF2-017, 19 November 2004 page 82 lines 17-22

<sup>516</sup> TF2-017, 19 November 2004 page 98 line 4– page 101 line 14

340. The Defence submits that the testimony of TF2-017 must not be given any weight as this witness himself stated that “it is acceptable to invent facts about which one is unsure” and also admitting to not telling the truth to OTP investigators.<sup>517</sup>

341. TF2-190 stated that he participated in the attack on Koribundo and that he organised his own men and supplied their ammunition as he had his own. He also stated that TF2-082 had been given ammunition by orders from Norman at Talia.<sup>518</sup> TF2-005 gave general evidence stating that Norman was in control of giving out ammunition and that the Second Accused also was responsible for distributing ammunition.<sup>519</sup> TF2-014 testified that part of his role was to distribute arms and ammunition.<sup>520</sup>

342. The *mens rea* for aiding and abetting is not the criminal intent of the perpetrator; rather it involves the accessory having the knowledge that his actions assist the perpetrator in the commission of the crime. However, the accessory must also be aware of the essential elements of the crime, including the *mens rea* of the principle.<sup>521</sup> The evidence fails to establish this.

343. The defence submits that Mr Norman was not aware of the essential elements of any of the crimes that were committed, especially the *mens rea* of the alleged perpetrators. While it may be unclear whether certain unidentified members of the CDF were conducting military operations with the intent to commit any of the crimes charged in the Indictment, Mr Norman, as a potential aider and abetter was certainly unaware of such hypothetical intentions. Accordingly he cannot be held indirectly responsible for any of the acts alleged in the Indictment.

### **Joint Criminal Enterprise**

344. The Prosecution alleges a theory of criminal liability that inculpates Norman for those criminal acts which were perpetrated as a part of a joint criminal enterprise

<sup>517</sup> TF2-017, 22 November 2004 page 38 lines 25-27, page 44 lines 9-12

<sup>518</sup> TF2-190, 10 February 2005 page 47 lines 21 - 29

<sup>519</sup> TF2-005, 15 February 2005 page 91 lines 12-19, page 101 lines 15-16

<sup>520</sup> TF2-014 10 March 2005 page 33 lines 15-18

<sup>521</sup> Prosecutor v Tadic, (AC), para 229, Prosecutor v Blaskic (AC), para 50.

in which he participated.<sup>522</sup> The Prosecution alleges that this joint criminal enterprise was “to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone.” At the outset the Defence submits that this simply does not amount to criminal behaviour. It is a legitimate goal of any party to an armed conflict and certainly in this instance, where the objective was the reinstatement of the democratically elected government of President Kabbah.

345. Joint criminal enterprise liability is a form of criminal responsibility. It entails individual responsibility for participation in a joint criminal enterprise to commit a crime.<sup>523</sup> It can exist whenever two or more people participate in a common criminal endeavour.<sup>524</sup> This form of criminal liability does not exist in the Statute of the Special Court but rather it is a concept that exists as customary international law.<sup>525</sup>

### **Categories of Common Purpose Doctrine**

346. The notion of common purpose encompasses three distinct categories of collective criminality. The first such category is represented by cases where all co-defendants, acting pursuant to common design, possess the same criminal intention, for instance the formulation of a plan among the co-perpetrators to kill, where, in effecting this common design.<sup>526</sup>

347. The second distinct category of cases embraces the so-called “concentration camps” cases. The notion of common purpose was applied to instances where the offences charged were alleged to have been committed by members of military or administrative units such as those running concentration camps i.e. by groups of persons acting pursuant to a concerted plan.<sup>527</sup>

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<sup>522</sup> Indictment para 20.

<sup>523</sup> Tadic (AC) 1999 para. 190.

<sup>524</sup> Kvočka et al (Trial Chamber) ICTY November 2 2001 para. 307.

<sup>525</sup> Tadic (AC): “the notion of common design as a form of ... liability is firmly established in customary international law.”

<sup>526</sup> Tadic (Appeals Chamber) para. 195-196

<sup>527</sup> Tadic (Appeals Chamber) para. 202-204

348. The third category concerns cases involving a common design to pursue one course of conduct where one of the perpetrators commits an act which, while outside the common design, was nevertheless a natural and foreseeable consequence of the effecting of that common purpose.

### **Elements required for a Joint Criminal Enterprise**

349. The following elements must be demonstrated beyond a reasonable doubt for criminal liability to arise:

- a) Plurality of persons;
- b) The existence of a common plan design or purpose which amounts to or involves the commission of a crime;
- c) Participation of the accused in the common design involving the perpetration of one of the crimes as alleged in the indictment.

350. The participation need not involve the commission of a specific crime but may take the form of assistance in, or contribution to, the execution of the common plan or purpose. A person participates in a joint criminal enterprise by: personally committing the agreed crime as principal offender; by assisting the principal offender in committing the agreed crime as a co-perpetrator (by undertaking acts that facilitate the commission of the offence by the principal offender); or by acting in furtherance of a particular system in which the crime is committed.<sup>528</sup>

351. For joint criminal liability an accused must have carried out acts that substantially assisted or significantly affected the furtherance of the goals of the enterprise with knowledge that his acts or omissions facilitated the crimes committed through the enterprise in order to be criminally liable as a participant in a joint criminal enterprise.<sup>529</sup>

352. The Prosecution must establish the existence of an arrangement or understanding amounting to an agreement between two or more persons that a

<sup>528</sup> Vasiljevic (Trial Chamber) November 29 2002 para 67.

<sup>529</sup> Kvočka et al (Trial Chamber) November 2001 para 312.

particular crime is committed. The arrangement or understanding need not be express and it may be inferred from all the circumstances.<sup>530</sup>

353. The level of participation in joint criminal enterprise must be significant. The Trial Chamber in *Kvočka*<sup>531</sup> defined “significant” as an act or omission that makes an enterprise efficient or effective, e.g. participation that enables the system to run more smoothly or without disruption. Physical or direct perpetration of a serious crime that advances the goal of the criminal enterprise would constitute a significant contribution. The level of participation attributed to the accused and whether the participation is deemed significant will depend on variety of factors including the size of the criminal enterprise, the functions performed, the position of the accused, the amount of time spent participating after acquiring knowledge of the criminality of the system, the seriousness and scope of the crimes committed and the efficiency, zealousness gratuitous cruelty exhibited in performing the actors function.

354. The responsibility for crimes outside the common purpose occurs if it was foreseeable that such a crime might be perpetrated and the accused willingly took the risk.<sup>532</sup>

355. The *mens rea* required for joint criminal enterprise is dependent upon which of the three forms is alleged. The basic form requires that the accused had the intent to perpetrate a specific crime that was within the common purpose, an intent that was only shared by the co-perpetrators. The accused must have voluntarily participated and intended the criminal result. The extended form requires that the accused intended to participate in and further the common purpose of the joint criminal enterprise, and that the crime that was beyond the common purpose was a natural and foreseeable consequence and the accused willingly took the risk that it would occur.<sup>533</sup>

<sup>530</sup> Vasiljevic (Trial Chamber) ICTY November 29 2002 para. 66

<sup>531</sup> Kvočka et al (Trial Chamber) ICTY November 2 2001 para 309

<sup>532</sup> Tadic (AC), para. 77.

<sup>533</sup> Kvočka et al (Trial Chamber) ICTY November 2 2001 para 86

356. It is however important to consider the joint criminal enterprise as alleged in this Indictment. While the Prosecution has not explicitly stated it, it appears that the prosecution is alleging criminal liability pursuant to the third category of joint criminal enterprise -- covering a situation where a group of persons act according to a common purpose, and in the course of this, someone in the group commits a crime that was not part of the common purpose.

357. The common plan alleged by the Prosecution “was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included giving complete control over the population of Sierra Leone and the complete elimination of the RUF/ AFRC its supporters, sympathizers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone”. Each Accused is alleged to have acted individually and in concert with subordinates to carry out the said plan, purpose or design.<sup>534</sup>

358. The common plan “to gain and exercise control over the territory of Sierra Leone” is not criminal itself. Nor does this enterprise amount to a crime provided for in the Statute.<sup>535</sup> As the Prosecution alleges, the CDF was a criminal organisation and the three Accused and their subordinates were all part of this joint criminal enterprise – effectively making every action of the CDF criminal. This flies in the face of the accepted evidence that the purpose of the CDF was to defend communities and to liberate the country from the RUF and AFRC.

359. The Defence would also submit that it is important to note that the Prosecution has broadened the scope of an already exceedingly broad form of criminal liability. In citing the three forms of joint criminal enterprise, the ICTY stated that for the third form (where a crime occurs that was not a part of the common purpose), the standard of proof is that crime was a “*natural and foreseeable consequence*” of the common purpose.<sup>536</sup> The Prosecution in this instance attempts to broaden this even further by stating that the crime was “*reasonably foreseeable*”<sup>537</sup>. The Defence submits that

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<sup>534</sup> Paragraph 19 Indictment

<sup>535</sup> A joint criminal enterprise requires the existence of a common plan, design or purpose which amounts to or involves the *commission of a crime provided for in the Statute*.

<sup>536</sup> Tadic 15 July 1999 Appeals Chamber, Kvočka et al 2 November 2001 (Trial Chamber)

<sup>537</sup> Indictment, para. 20.

there is no basis for the Prosecution reformulating the law and further that it is an unacceptable further broadening of the potential culpability of criminal defendants – very little would appear to fall outside the scope of a joint criminal enterprise.<sup>538</sup>

360. The Defence submits that Hinga Norman did not act individually and in concert with subordinates within a common purpose, plan or design. In addition to the CDF lacking the requisite criminal purpose, the violations as alleged in the Indictment to the extent that they did occur are attributable to individual kamajors and commanders who did not follow stated rules. These were isolated events and not the result of a general policy or plan on the part of the Accused and “subordinates”.

## **The Counts**

### **Counts 1 and 2**

#### **The majority of the alleged perpetrators are unknown**

370. The Defence would first submit that respect to Counts 1 and 2, the bulk of the evidence does not establish the identity of any of the alleged perpetrators of murder.

371. The PTB only states that the “CDF attacks and unlawfully killed an unknown number of captured enemy combatants as well as civilians”<sup>539</sup> for each of the geographic locations set out in the Indictment. At the start of its case, it appears that the Prosecution was unable to provide the Defence with the name of one single alleged perpetrator of murder. The PTB is also unable to provide the name of a single “commander.”

372. The evidence shows that the prosecution does not in fact know who committed the majority alleged murders nor does the evidence demonstrate that any of these persons were the subordinates of Mr Norman. In the case of criminal liability under Article 6(3), an essential element to be pleaded and proved is that there was a superior-subordinate relationship. Mr Norman can only be found guilty of those

<sup>538</sup> “What is the limit to intended or foreseeable wrongdoing in a country wracked by ethnic cleansing and armed conflict?” Allison Marston Danner and Jenny S. Martinez, ‘Guilty Associations: Joint Criminal Enterprise, Command Responsibility, and the Development of International Criminal Law’, 93 Calif. L. Rev. 75. at 135.

<sup>539</sup> PTB Paragraphs 273, 281, 290, 298, 306.

crimes if the perpetrators are under his effective control. As the Prosecution has failed to identify who the perpetrators are, the counts of murder should be dismissed. Also the evidence wholly fails to establish any link between the Accused to any alleged command he gave to any commander to any discreet piece of evidence that this command was implemented. On that basis no liability under Article 6(3) has been established.

373. There is no evidence of any link between these unidentified kamajors and the Accused. Where this is possibly a link it is too remote. As the ICTY has stated “great care must be taken lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.”<sup>540</sup>

### Tongo

374. The Prosecution alleges in Paragraph 25 a) of the Indictment that “Between about 1 November 1997 and about 30 April 1998 at or near Tongo Field, and at or near the towns of Lalehun, Kamboma, Konia, Talama, Paguma and Sembehun,<sup>541</sup> the CDF attacked and unlawfully killed an unknown number of captured enemy combatants as well as civilians,<sup>542</sup> Further details provided in the Prosecution Pre-Trial Brief allege that these unlawful killing including Chief Aruna Konuwa, Chief Brima Conteh, and one Mohammed Mansarray alias “Joskie”.<sup>543</sup>

375. The Prosecution further alleges that within this same time frame and geographic regions, Kamajors screened the civilians and those identified as “Collaborators”, along with any captured enemy combatants and unlawfully killed them.<sup>544</sup>

376. The Defence would first submit that this is no evidence presented for the geographic location of Konia.

<sup>540</sup> Celebici Trial judgment, 16 November 1998 para 377-378.

<sup>541</sup> Note that two geographic locations, Panguma and Sembehun, were dropped from the indictment in the Decision on the Motions for Acquittal pursuant to Rule 98”, 21 October 2005 Doc 473

<sup>542</sup> Indictment 25a

<sup>543</sup> PTB para 273.

<sup>544</sup> Paragraph 24a Indictment.

377. The Prosecution states that the attacks on Tongo took place between 1 November 1997 and about 30 April 1998. With respect to the Prosecution's witnesses ability to put their testimony with this relevant timeframe, TF2-015 could not remember when the attack was<sup>545</sup>, TF2-048 only being able to recall that it was on a Wednesday<sup>546</sup>, TF2-035 stated it was in the dry season of 1997<sup>547</sup>, TF2-144<sup>548</sup> and TF2-053<sup>549</sup> recalling that it was the "fasting month". Even though the Prosecution's PTB alleges that it was on or about 14 January 1998 that the CDF attacked Tongo Field, five of the Prosecution witnesses testified that it was sometime either in November or December 1997.<sup>550</sup>

378. A number of witnesses testified that civilians gathered at the NDMC Headquarters and it here where the Prosecution alleged that a number of unlawful killings took place.

379. TF2-015 testified to a number of alleged killings, all perpetrated by unidentified Kamajors.<sup>551</sup> TF2-022 also testified to a number of killings, again by unidentified kamajors.<sup>552</sup> TF2-022 testified to one instance of an unidentified commander ordering a kamajor to open fire on a group of civilians and another unidentified commander ordering them to stop.<sup>553</sup> In nearly every instance the witness testified that the civilians allegedly killed were targeted for a particular reason<sup>554</sup>. As previously stated identification and killing of specific individuals does not amount to a crime against humanity and therefore none of the alleged killings can be considered as such under Count 1.

<sup>545</sup> Transcript, TF2-015, 11 February 2005 5:1-6 Do you remember when the Kamajors came to Tongo? A. Yes. Q. Do you know what month or year the Kamajors came to Tongo? A. I cannot remember. I cannot remember the day they came to Tongo.

<sup>546</sup> 23 February 2005 pg 6 lines 15-17.

<sup>547</sup> 14 February 2005 pg 8 lines 10-20.

<sup>548</sup> Transcript, TF2-144, 24 February 2004 pg 56 lines 26-28, page 59 lines 6-12, page 60 line 23– page 61 line 4.

<sup>549</sup> Transcript, TF2-053, 1 March 2004 pg 74 lines 4-13.

<sup>550</sup> Transcript, TF2-022, 11 February 2005 pg 44 line 27– page 45 line 4, TF2-035, 14 February 2005 page 8 lines 10-20, page 10 lines 24-28, TF2-027, 18 February 2005 page 79 lines 14-25, page 85 lines 4-15, page 85 lines 27-29, TF2-047, 22 February 2005 page 44 lines 4-11, TF2-016, 1 March 2004 page 32 lines 20-26.

<sup>551</sup> Transcript, TF2-015, 11 February 2005 page 7 lines 23– page 8 line 17, page 8 line 25– page 9 line 28, Transcript, TF2-015, 11 February 2005 page 11 line 23 – page 13 line 15.

<sup>552</sup> Transcript, 11 February 2005 page 46 lines 14-29, 11 February 2005 page 50 line 19– page 53 line 3, 11 February 2005 page 59 lines 15-29, 11 February 2005 page 61 lines 8-20.

<sup>553</sup> Transcript, TF2-022, 11 February 2005 page 56 lines 19-28, page 57 lines 1-10, page 57 lines 13-26.

<sup>554</sup> This also hold true for the evidence of TF2-048 who stated that another unidentified Kamajor, after consulting a list containing names of Limbas, killed the witness's elder brother.

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380. TF2-035 testified to Kamajor commander called Keikula Kamagboty (“Kamabote”) ordered that the belongings and persons of a group of civilians be searched; also upon his orders, a group of 150 Limba, Temne, and Loko civilians were taken a short distance away and systematically hacked to death by a group of 30 unidentified Kamajors.<sup>555</sup> This testimony is not corroborated anywhere else. Also, as defence counsel noted in its cross examination, this evidence is suspicious in that an alleged massacre of this scale should have been noted somewhere, in newspapers, through memorial / remembrance services in Tongo, or through third party documented sources such as NGOs or UN monitors. There is no evidence that these alleged killings were reported by any other source than this witness. Further, the Prosecution chose to engage the services of a forensic expert who gave evidence pertaining to two graves containing a relatively small number of bodies<sup>556</sup>. If, as according to this witness, the victims of the alleged killings were still buried behind the NMDC building, then why did the Prosecution not provide a forensic report for this site?

381. The evidence demonstrates that “Kamabote” is alleged to have been responsible for the majority of the alleged deaths in Tongo. In addition to the evidence of TF2-035, this “Kamabote” is also alleged to have chopped a “Fatmata Kamara” to death.<sup>557</sup> TF2-053 also testified that Kamabote ordered two women to denounce rebels among the group assembled there; two women did so and, Kamabote shot dead the two men the women had identified.<sup>558</sup> She also said that Kamabote had killed her son at a checkpoint.<sup>559</sup> There is no evidence that Kamabote belonged to any particular group of kamajors, or that he was taking instructions from any commander let alone that such a commander was acting pursuant to any directives of the Accused.

382. TF2-027 and TF2-047 each testified that BJK Sei was the commander in charge in Tongo and that Saika Laihi was his deputy.<sup>560</sup> However to say that there was

<sup>555</sup> Transcript, TF2-035, 14 February 2005 page12 lines 21-25, page 13 lines 11-16, page 15 lines 3-17, page 16 lines 10-11, page 17 lines 11-15, page 18 lines 23-24, page 20 lines 1-20.

<sup>556</sup> Exhibit 101.

<sup>557</sup> Transcript, TF2-047, 22 February 2005 page59 lines 11-27.

<sup>558</sup> Transcript, TF2-053 t, 1 March 2004 page 82 line 8– page 84 line 27.

<sup>559</sup> Transcript, TF2-053, 1 March 2004 page 88 line 22– page 89 line 10.

<sup>560</sup> Transcript, TF2-027, 18 February 2005 page 92 lines 22-23, page 92 line 26.

one commander in charge of Tongo is false as other witnesses testified that there were groups of kamajors following various often contradictory orders from commanders, none of whom are identified.<sup>561</sup>

383. Witnesses also testified to seeing corpses of people that they recognised. But there is no evidence that they saw who killed them or how they were killed. TF2-027 testified to recognizing two corpses, Joski Mbona and one Fullah bread seller.<sup>562</sup> TF2-144 testified to seeing two corpses, one a man she knew called Joski and an unnamed woman.<sup>563</sup> This evidence cannot constitute evidence towards unlawful killings should be disregarded.

384. TF2-013 testified to the alleged killing of Chief Brima Conteh in Lalehun, the only one of three people specifically identified in the pre-trial brief as having been unlawfully killed. However, no time is given for when this death is alleged to have taken place.

385. According to TF2-016, a commander named Bimba Aruna ordered the killing of a “Aruna Konowa” who was arrested, brought to Lalehun, and killed.<sup>564</sup>

386. The bulk of these alleged killings were by unidentified kamajors. The perpetrators are unknown. No evidence has been brought about the *mens rea* of these unidentified perpetrators. Accordingly there is no evidence regarding this requisite element for the crime of murder.

387. Where a kamajor is named (i.e. Kamabote) the evidence is that he was not acting in accordance with any instructions or under any command. Again, however, there is no evidence about the *mens rea* of this alleged perpetrator and again then the requisite element for murder is missing. Further there is no evidence that reports on Kamabote were ever taken to the Accused.

<sup>561</sup> Transcript, TF2-022, 11 February 2005 page 71 lines 20-28, page 72 lines 17-20, page 73 lines 5-15.

<sup>562</sup> Transcript, TF2-027, 18 February 2005 page 108 lines 8-20, page 109 lines 2-7.

<sup>563</sup> Transcript, TF2-144, 24 February 2004 page 62 line 20– page 63 line 24.

<sup>564</sup> Transcript, TF2-016 1 March 2004 page 36 line 13– page 37 line 18, page 38 line 7-13, page 38 line 22– page 39 line 10.

## KENEMA

388. The Indictment alleges that “on or about 15 February 1998, at or near the District Headquarters town of Kenema and at nearby locations of SS Camp, and Blama, Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants.”<sup>565</sup> The Prosecution Pre-Trial Brief further alleges that one “Kosia of Sumalia Street” was unlawfully killed by the CDF.<sup>566</sup>

389. It is further alleged that “on or about 15 February 1998, at or near Kenema Kamajors unlawfully killed an unknown number of Sierra Leone Police Officers”<sup>567</sup>. Included in these alleged deaths, the Prosecution alleges that the CDF unlawfully killed Sgt Fosonah, Momoh Samura and Cpl. Fandai.<sup>568</sup>

390. 9 prosecution witnesses testified to events alleged to have occurred in Kenema.

391. Again the majority of the evidence relates to unidentified kamajors as the perpetrators with no evidence as to the *mens rea* of these perpetrators, hence a critical element for murder has not being demonstrated. TF2-033 testified that unidentified kamajors killed an unarmed soldier.<sup>569</sup> TF2-151 testified to unidentified Kamajors killing an unnamed boy accusing him of being a junta.<sup>570</sup> TF2-154 states that unidentified Kamajors decapitated a Temne boy and killed a Mende man accused of being a former soldier.<sup>571</sup> TF2-152 testified to unidentified kamajors killing 5 people.<sup>572</sup> TF2-040 testified that unidentified kamajors killed unnamed police officers.<sup>573</sup> 4 witnesses testified that unidentified Kamajors killed seven named police

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<sup>565</sup> Indictment para 25 b.

<sup>566</sup> PTB para 281.

<sup>567</sup> Indictment para 25c.

<sup>568</sup> PTB para 282.

<sup>569</sup> Transcript, TF2-033, 20 September 2004 page 10 lines 2-23.

<sup>570</sup> Transcript, TF2-151, 22 September 2004 page 12 line 16– page 16 line 23.

<sup>571</sup> Transcript, TF2-154, 27 September 2004 page 48 line 4– page 50 line 3.

<sup>572</sup> Transcript, TF2-152, 27 September 2004 page 121 line 10– page 123 line 3.

<sup>573</sup> Transcript, TF2-040, 21 September 2004 page 26 line 23 – page 27 line 2

officers.<sup>574</sup> One kamajor is identified by name by TF2-041<sup>575</sup> however, there is no evidence to demonstrate the *mens rea* of this perpetrator.

392. There is no evidence which connects any of the unidentified kamajors to a commander. There is also no evidence which then connects a commander to the Accused or any of the unidentified kamajors directly to the Accused.

## BO

393. The Prosecution alleges that “in or about January and February 1998 in locations in Bo District including the District Headquarters Town of Bo, Koribundo, Fengehun Kamajors unlawfully killed an unknown number of civilians and captured enemy combatants.”<sup>576</sup> The Prosecution also alleges in its Pre-Trial Brief that the CDF unlawfully killed both captured enemy combatants and an unknown number of civilians including one Kafala<sup>577</sup>, Ambrose Kortu<sup>578</sup> and, one Abema<sup>579</sup>, a CDF combatant, who was killed for refusing to operate as ordered by CDF superior commanders.<sup>580</sup>

394. 10 Prosecution witnesses gave evidence relating to Bo.

395. The evidence of TF2-088 relates to Gumahun, Mandu, and Kpetewoma - all geographic locations not mentioned in the Indictment and therefore this evidence should be excluded. TF2-030 testified that unidentified kamajors killed her husband because he was a Temne.<sup>581</sup> TF2-156 also testified to unidentified kamajors capturing his brother, some others and himself and “chopping them”.<sup>582</sup> TF2-57 gave evidence to seeing kamajors arrest a woman and then later seeing her severed head wrapped in

<sup>574</sup> Transcript TF2-042, 17 September 2004 page 102 lines 18-23; Transcript TF2-033, 20 September 2004 page 11 line 18–page 12 line 12; Transcript TF2-040, 21 September 2004 page 28 line 6– page 29 line 2; Transcript, TF2-039, 23 September 2004 page 107 line 6–page 112 line 21.

<sup>575</sup> Transcript, TF2-041, 24 September 2004 page 52 lines 15-23.

<sup>576</sup> The geographic locations of Kebi Town, Kpayama, Mongere were dropped from the Indictment in the Rule 98 Decision.

<sup>577</sup> No evidence was presented with respect to this allegation.

<sup>578</sup> No evidence was presented with respect to this allegation.

<sup>579</sup> No evidence was presented in support of this allegation.

<sup>580</sup> PTB para 290.

<sup>581</sup> Transcript, TF2-030, 25 November 2004 page 11 lines 6-19.

<sup>582</sup> Transcript, TF2-156, 25 November 2004 page 41 lines 8-15, page 41 lines 21-27, page 42 line 1– page 43 line 26, page 45 lines 19-21, page 46 line 14– page 47 line 5, page 48 line 13– page 49 line 21.

a scarf. This evidence should not be considered as it is too circumstantial to prove a murder allegation. TF2-067 said that an unidentified kamajor shot to death an unnamed Temne man in a park<sup>583</sup> as well as an unidentified kamajor killing a soldier at a checkpoint.<sup>584</sup> TF2-058 said unidentified kamajors killed her husband.<sup>585</sup> Through hearsay and uncorroborated evidence TF2-056 said he saw the corpses of police officers.<sup>586</sup> This evidence should be completely disregarded as there is no indication as to who is alleged to have killed these police officers. This same witness also gave evidence that four Limbas from Tongo Field were killed by unidentified kamajors.<sup>587</sup> TF2-001 also gave evidence of unidentified kamajors shooting a man named "Freeman".<sup>588</sup> This same witness stated that on 6 February 1998, a group of unidentified kamajors hacked to death "James Vandy".<sup>589</sup>

396. The Defence submits that with respect to Count 1 the evidence does not show that there was an "attack" of any kind. Further the evidence on its face demonstrates that the alleged killings were of particular individuals who were identified by profession or ethnic group. Again this is insufficient to demonstrate an attack. Therefore there is no crime against humanity and Count 1 should be dismissed.

397. Further, the only kamajors who are identified are with respect to the testimony of TF2-007 who stated that certain kamajors participated in the death of his father.<sup>590</sup> All other evidence alleges that it is unidentified kamajors who were the perpetrators. Again there is no evidence of the *mens rea* of these perpetrators and therefore an essential element of the crime of murder has not been demonstrated.

<sup>583</sup> Transcript, TF2-067, 1 December 2004 page 4 line 19– page 5 line 15.

<sup>584</sup> Transcript, TF2-067, 1 December 2004 page 18 lines 12-27.

<sup>585</sup> Transcript, TF2-058, 3 December 2004 page 50 lines 10-22, page 51 lines 14-25, page 51 line 26– page 52 line 6, page 52 lines 7-9, page 53 line 23– page 54 line 11, page 54 line 16– page 55 line 13, page 55 line 14 – page 57 line 12, page 60 lines 2-1.

<sup>586</sup> Transcript, TF2 -056, 6 December 2004 page 68 lines 15-24, page 68 line 29– page 70 line 8.

<sup>587</sup> Transcript, TF2-056, 7 December 2004 page 75 line 16– page 76 line 8.

<sup>588</sup> Transcript, TF2-001, 14 February 2005 page 82 line 16– page 83 line 5.

<sup>589</sup> Transcript, TF2-001, 14 February 2005 page 85 line 17– page 87 line 4.

<sup>590</sup> Transcript, TF2-007, 2 December 2004 page 48 lines 6-8, page 49 lines 6-20, page 50 line 10– page 51 line 4.

## MOYAMBA

398. The Prosecution alleges that “between about October 1997 and December 1999 in locations in Moyamba district including Taiama, Ribbi, Kamajors killed an unknown number of civilians.”<sup>591</sup> The PTB also alleged that the CDF unlawfully killed an unknown number of civilians, including one Mr Thomas, former Treasury Clerk and Abubakkar “Waka” Bangura,<sup>592</sup> a businessman as well as captured enemy combatants.<sup>593</sup>

399. 7 Prosecution witnesses gave evidence relating to the Moyamba crime base.

400. TF2-168 testified that unidentified Kamajors entered his farm in the bush and that a Kamajor named “Kakpata” ordered an unidentified Kamajor to shoot his wife.<sup>594</sup> TF2-165 testified that a group of unidentified Kamajors, under the command of one Mr Ngobeh, arrested and killed a suspected collaborator called Mr Thomas.<sup>595</sup> He also testified that unidentified kamajors brought three men to Shenge Park and burnt one of them to death.<sup>596</sup> TF2-167 testified that on 23 March 1998, a group of four unidentified armed Kamajors came to witness’s house and shot his grandson.<sup>597</sup> TF2-170 testified that a Kamajor named Kakpata shot a Alusine Kabbah dead.<sup>598</sup>

401. The Prosecution led evidence on 5 alleged unlawful killings in Moyamba. Against this evidence hardly reaches the scale of an attack to be a crime against humanity. Further again the evidence is that unidentified kamajors were the perpetrators and only one instance is a kamajor named (“Kakpata”). In all cases no evidence as to the *mens rea* of these perpetrators has been led. With respect to Kakpata there is no evidence to establish his *mens rea*, and no evidence that he was in any particular grouping of Kamajors or that he had a command, or that there was any

<sup>591</sup> The geographic locations of Sembehun, Bylago, and Gbangbatoke were dropped from the indictment in the Rule 98 Decision.

<sup>592</sup> No evidence was presented in support of this allegation.

<sup>593</sup> PTB para 298.

<sup>594</sup> Transcript, TF2-168, 3 March 2005 page 59 line 28– page 65 line 29, page 67 line 8– page 68 line 6.

<sup>595</sup> Transcript, TF2-165, 7 March 2005 page 9 lines 13-25, page 10 line 22– page 12 line 17.

<sup>596</sup> Transcript, TF2-165, 7 March 2005 page 14 line 13– page 15 line 15, page 16 lines 9-24.

<sup>597</sup> Transcript, TF2-167, 8 March 2005 page 28 line 9– page 30 line 24, page 31 lines 2-17, page 32 lines 22-27.

<sup>598</sup> Transcript TF2-170, 7 March 2005 page 51 line 16– page 52 line 16, page 53 lines 1-12, page 54 line 14– page 57 line 6, page 57 line 24– page 58 line 25, page 59 lines 1-27

nexus at all to the Accused. The same hold true with respect to Mr Ngobeh, identified as a commander by TF2-165. There is no evidence that this commander received any orders or directions or logistics etc from the Accused or that he was in attendance at any meetings alleged to have occurred at Base Zero.

## BONTHE

402. The Prosecution allegations that “between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, and Bonthe Town Kamajors unlawfully killed an unknown number of civilians.”<sup>599</sup> The Prosecution further alleges in its PTB, that the CDF unlawfully killed a number of civilians including Jusu Sally, Lahai Lebbie, and Pa Bargie<sup>600</sup> as well as captured enemy combatants.<sup>601</sup>

403. 12 Prosecution witnesses testified to events in Bonthe.

404. 3 Prosecution witnesses gave evidence of a fisherman being shot by a kamajor commander named “Baigeh”.<sup>602</sup> TF2-147 testified that a fisherman called Kondor Bantiamor was killed by unidentified Kamajors.<sup>603</sup> This same witness also testified that “Samuka Kamara” was killed by unidentified Kamajors.<sup>604</sup> TF2-071 testified to the allegedly killing of a “Musu Fai” by unidentified kamajors.<sup>605</sup> TF2-071 testified that unidentified Kamajors stabbed to death a pregnant woman called Jebbeh<sup>606</sup>. TF2-071 testified to a killing in Bolloh village<sup>607</sup>, but the Defence submits that this evidence should be disregarded as this location is not cited in the Indictment.

405. TF2-096 said a captured soldier was killed by unidentified Kamajors but the witness didn’t know when it was (the “rainy season”)<sup>608</sup>. Three individuals identified as Jusu Shalley, Baggie Vaiey, and Lahai Lebbie were killed, according to TF2-108

<sup>599</sup> Indictment para 25 f.

<sup>600</sup> No evidence was presented in support of this allegation.

<sup>601</sup> PTB para 306.

<sup>602</sup> Transcript TF2-116, 9 November 2004 page 12 lines 10-24, Transcript TF2-147, 10 November 2004 page 36 line 12 – page 37 line 2; Transcript TF2-071, 11 November 2004 page 77 lines 13-17

<sup>603</sup> Transcript, TF2-147, 10 November 2004 page 43 lines 10-28

<sup>604</sup> Transcript, TF2-147, 10 November 2004 page 40 line 2– page 41 line 10

<sup>605</sup> TF2-071, 11 November 2004 page 71 lines 1-12

<sup>606</sup> Transcript, TF2-071, 11 November 2004 page 71 lines 13-21

<sup>607</sup> Transcript, TF2-071, 11 November 2004 page 73 lines 10-18

<sup>608</sup> Transcript, TF2-096 8 November 2004 page 21 line 2– page 22 line 3

by unidentified Kamajors in Talia.<sup>609</sup> TF2-187 testified that three pregnant women were killed by “Kondewa’s boys.”<sup>610</sup> TF2-189 testified that a kamajor named Nulele killed her husband.<sup>611</sup>

406. When witness’s husband attempted to retrieve her from Talia, he was captured by Nulele, taken to Kondewa, then led by a group of singing Kamajors to a tree where Nulele asked him to say goodbye and to choose death by the gun or the knife; the husband did not choose, and Nulele cut his throat and removed his head; his corpse was taken to the bush:

407. Against the Defence submits that the level of alleged killings is clearly not an “attack” within the meaning of crimes against humanity and therefore Count 1 should be dismissed. Also, again the majority of crimes are perpetrated by unidentified kamajors with no evidence as to their *mens rea*, nor any connection to the Accused, or any of his actions. Where the alleged perpetrator is identified there is still no evidence of the perpetrator’s *mens rea*.

### **Counts 3 and 4**

408. Paragraph 26 of the Indictment charges the Accused with “Acts of Physical violence and infliction of mental harm and suffering”. Counts 3 charges inhumane acts as a crime against humanity, and Count 4 charges “Violence to life, health and physical or mental well-being of persons, in particular cruel treatment,” a Violation Of Article 3 Common to the Geneva Conventions and of Additional Protocol II punishable under Article 3 (a) of the Statute.

### **Physical violence and mental suffering**

409. A number of Prosecution witnesses gave testimony alleging physical violence and mental suffering with respect to the various crime pages: Tongo (TF2-015), Kenema (TF2-151, TF2-152, TF2-079), Blama (TF2-041), Koribundo (TF2-157, TF2-014), Bo (TF2-198, TF2-056, TF2-001, TF2-067, TF2-110), Bonthe District

<sup>609</sup> Transcript, TF2-108, 30 May 2005 page 5 line 6– page 6 line 14

<sup>610</sup> Transcript, TF2-187, 1 June 2005 page 17 lines 1– page 19 line 12.

<sup>611</sup> TF2-189, 3 June 2005 page 7 line 15– page 8 line 24