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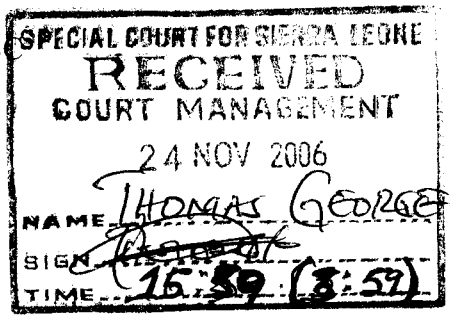
SPECIAL COURT FOR SIERRA LEONE

In Trial Chamber I

Before: Justice Bankole Thompson, Presiding
Justice Benjamin Mutanga Itoe
Justice Pierre Boutet

Registrar: Mr Lovemore Munlo, S

Date: 24 November 2006



THE PROSECUTOR

-against-

SAMUEL HINGA NORMAN, MOININA FOFANA, and ALLIEU KONDEWA

SCSL-2004-14-T

PUBLIC

FOFANA FINAL TRIAL BRIEF

For the Office of the Prosecutor:
Mr Christopher Staker
Mr James C. Johnson
Mr Kevin Tavener
Mr Joseph Kamara
Mr Mohammed Bangura
Ms Miatta Samba
Ms Nina Jørgensen
Ms Anne Althaus

For Samuel Hinga Norman:
Dr Bu-Buakei Jabbi
Mr John Wesley Hall
Mr Alusine Sani Sesay

For Moinina Fofana:
Mr Victor Koppe
Mr Michiel Pestman
Mr Arrow Bockarie
Mr Steven Powles

For Allieu Kondewa:
Mr Charles Margai
Mr Ansu Lansana
Mr Yada Williams
Ms Susan Wright

TABLE OF CONTENTS

I. Introduction

1. Counsel for Moinina Fofana (the "Defence") hereby submits its final trial brief (the "Brief") pursuant to Rule 86(B) of the Rules of Procedure and Evidence (the "Rules") and the order of this Trial Chamber (the "Chamber").[1]

2. The Office of the Prosecutor (the "Prosecution") filed its eight-count consolidated indictment (the "Indictment") on 5 February 2004,[2] charging Fofana with violations of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone (the "Statute").[3] Pursuant to orders of the Chamber, the Prosecution subsequently filed a pre-trial brief (the "Pre-Trial Brief") and supplemental pre-trial brief (the "Supplemental Pre-Trial Brief").[4] The Prosecution delivered its opening statement (the "Opening Statement") on 3 June 2004.[5] Throughout this Brief, the Indictment, Pre-Trial Brief, Supplemental Pre-Trial Brief, and Opening Statement are referred to collectively as the "Pleadings".

3. For the reasons outlined below, the Defence submits that the Prosecution has failed to substantiate a single charge contained in the Pleadings beyond a reasonable doubt. Accordingly, the Chamber should enter a verdict of 'Not Guilty' on Counts 1 through 8 as to all modes of liability. Simply put, Moinina Fofana does not bear any—let alone the greatest—responsibility for serious violations of international humanitarian law committed in Sierra Leone. Quite to the contrary, he supported the legitimate aims and objectives of the Civil Defence Forces (the "CDF"): the defence of the territory and civilian population of Sierra Leone and the restoration of its democratically elected government.

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[1] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-722, Trial Chamber I, 'Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments', 18 October 2006.
[2] *Norman*, SCSL-2004-14-PT-003, 'Indictment'.
[3] In particular, Fofana is charged under Article 2 with "murder" (Count 1) and "inhumane acts" (Count 3) as crimes against humanity; under Article 3 with "murder" (Count 2), "cruel treatment" (Count 4), "pillage" (Count 5), "acts of terrorism" (Count 6), and "collective punishments" (Count 7) as violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II; and under Article 4 with "enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities" (Count 8) as a serious violation of international humanitarian law.
[4] *Norman*, SCSL-2004-14-PT-024, 'Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (Under Rules 54 and 73*bis*) of 13 February 2004', 2 March 2004; *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-024, 'Prosecution's Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004', 22 April 2004, including attached annexes outlining proposed testimonial evidence and documentary evidence.
[5] Trial Transcript, 3 June 2004.

II. Principles of Evidence

4. As a preliminary observation, it should be noted that, in cases where more than one accused stands trial, the evaluation of the guilt of each of the accused should be considered in light of all the evidence presented by the Prosecution and each of the defendants, "not just the evidence of the Prosecution and the Defendant under consideration."[6] Where one of the accused has put forth evidence discrediting a Prosecution witness, the other accused are permitted to take advantage of that evidence.

5. The Prosecution has the burden to establish beyond a reasonable doubt the guilt of each accused for each distinct element of the charges in the Indictment. This is so, regardless of whether the evidence has been challenged. Where the Chamber is aware that the Defence inadvertently failed to recall certain evidence in its final brief or closing argument that would show that the Prosecution failed to meet its burden, the Chamber must, on its own initiative, consider that evidence.

6. The Defence invites the Chamber to consider all submissions the Defence made during the trial, as well as the oral submissions due to be made on 28–29 November 2006, in addition to the arguments raised in the Brief.

A. Burden of Proof

7. Pursuant to Article 17(3) of the Statute an accused is presumed to be innocent of all the charges levied against him. This presumption places on the Prosecution the burden of establishing the guilt of the accused, i.e., the burden of proving beyond a reasonable doubt that all the facts and circumstances which are material and necessary to constitute the crimes charged and the criminal responsibility of the accused. The burden of proof remains with the Prosecution for each individual fact alleged; in no circumstances does it shift to the Defence.[7] This is also in accordance with Rule 87(A), which states that a "finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt."

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[6] Prosecutor v. *Simic*, IT-95-9, Trial Chamber, 'Judgment', 17 October 2003 (the "*Simic* Trial Judgement"), ¶ 18.
[7] *Prosecutor v. Brdjanin*, IT-99-36, Trial Chamber, 'Judgement', 1 September 2004 (the "*Brdjanin* Trial Judgement"), ¶ 22; *Prosecutor v. Kunarac*, IT-96-23, Appeals Chamber, 'Judgement', 12 June 2002 (the "*Kunarac* Appeal Judgement"), ¶¶ 63, 65.

8. In order to enter a verdict of 'Guilty', the Chamber must find beyond a reasonable doubt "first, that the crimes charged have been committed and, second, that the accused is responsible for those crimes".[8] This is of notable importance to the instant case where the Defence does not necessarily dispute that certain crimes may have been committed, but vigorously denies that any culpability for such crimes attaches to Fofana. The Chamber determines "whether the ultimate result of the whole evidence is weighty and convincing enough to establish beyond reasonable doubt the facts alleged and, ultimately, the guilt of the Accused, as charged in the Indictment".[9]

9. Any finding of the Chamber must be established beyond a reasonable doubt. "It is not sufficient that it is a reasonable conclusion available from that evidence. It must be the only reasonable conclusion available. If there is another conclusion which is also reasonably opened from that evidence, and which is consistent with the innocence of the accused, he must be acquitted."[10] Any ambiguity must be resolved to the benefit of the accused.[11] In relation to facts from which more than inference may be drawn, the Trial Chamber in *Limaj* held:

> Where ... more than one inference was reasonably open from these facts, the Chamber has been careful to consider whether an inference reasonably open on those facts was inconsistent with the guilt of the Accused. If so, the onus and the standard of proof requires that an acquittal be entered in respect of that count.[12]

10. Consistent with the presumption of innocence, an accused need not give evidence. It has been acknowledged without limitation that "silence by the Accused may not be used as evidence to prove guilt and may not be interpreted as an admission".[13] Fofana's choice to remain silent has no bearing on the Prosecution's burden of proof. In *Limaj*, the Trial Chamber explicitly stated that "no probative relevance" should be attached to an accused's decision not to give evidence.[14]

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[8] *Brdjanin* Trial Judgement, ¶ 21.
[9] *Brdjanin* Trial Judgement, ¶ 22.
[10] *Prosecutor v. Delalic et al.*, IT-96-21, Appeals Chamber 'Judgement', 20 February 2001 (the "*Delalic* Appeal Judgement"), ¶ 458 (emphasis in original).
[11] *Brdjanin* Trial Judgement, ¶ 20.
[12] *Prosecutor v Limaj et al.*, IT-03-66, Trial Chamber, 'Judgement', 30 November 2005 (the "*Limaj* Trial Judgement"), ¶ 10.
[13] *Brdjanin* Trial Judgement, ¶ 24.
[14] *Limaj* Trial Judgement, ¶ 22.

B. Evaluation of the Weight of the Evidence

11. The Chamber may admit evidence that is deemed to be relevant, probative, and reliable pursuant to Rule 89(C). The broad discretion under rule 89(C) is limited by the requirement of Rule 89(B) "that the rules of evidence applied by a Chamber must be those which best favour a fair determination of the matter before the Chamber and which are consonant with the of the Tribunal's Statute and the general principles of law; the exercise of discretion under Rule 89(C) ought therefore to be in harmony with the Statute and the other Rules to the greatest extent possible".[15] By virtue of Rule 89(B), the accused is entitled to be tried in accordance with the principle of *in dubio pro reo*, according to which, doubt must be resolved in favour of the accused.[16]

12. The threshold of admissibility is low, and the Chamber's approach is a flexible one. The assessment of the reliability, credibility, and ultimate weight of the evidence is another matter. The fact that the Chamber made a determination favouring admissibility does not suggest that it should necessarily, at this stage, attach any weight to the proposed evidence. The Chamber may decide to disregard admitted evidence.

13. At a minimum, the evidence must be relevant to the charges and credible in order to have any weight. The Appeals Chamber of the International Tribunals[17] pointed out that "it is neither possible nor proper to draw up an exhaustive list of criteria for the assessment of evidence, given the specific circumstances of each case and the duty of the judge to rule on each case in an impartial and independent manner."[18] In essence, evidence must be both "reasonable" and "reliable".[19]

14. Reliability must be assessed in the context of the facts of each particular case, and requires a consideration of the circumstances under which the evidence arose, the

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[15] *Prosecutor v. Milosevic*, Trial Chamber, 'Decision on Admissibility of Prosecution Investigator's Evidence', 30 September 2002, ¶ 18.
[16] *Brdjanin* Trial Judgement, ¶ 21; *see also* Rule 89(B).
[17] In this Brief, the ICTY and ICTR are referred to collectively as the "International Tribunals".
[18] *Prosecutor v. Kayishema & Ruzindana*, ICTR-95-1, Appeals Chamber, 'Judgement', 1 June 2001 (the "*Kayishema* Appeal Judgement", ¶ 319.
[19] *Kayishema* Appeal Judgement. ¶¶ 320, 322.

content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntariness, and trustworthiness of the evidence.[20]

C. Credibility of Witnesses and Corroborative Evidence

15. In order to determine the credibility of witnesses, the Chamber must consider "their demeanor, conduct and character", as well as "the probability, consistency and other features of their evidence, including the corroboration which may be forthcoming from other evidence and circumstances of the case", as well as "the knowledge of the facts upon which they give evidence, their disinterestedness, their integrity, their veracity."[21] The Appeals Chamber of the International Tribunals has endorsed the practice of considering "inconsistencies in the light of its evaluation of the overall credibility of each particular witness".[22]

16. Although the Chamber should excuse reasonable memory gaps regarding exact dates and sequences of events,[23] discrepancies in relation to matters peripheral to the charges may be said to undermine the credibility of the witnesses in question.[24] The fact that a witness gave evidence honestly is not in and of itself sufficient to establish the reliability of that evidence, since the ultimate basis for accepting the evidence rests on whether the evidence is objectively reliable.[25]

17. Where a witness is found by the Trial Chamber to have lied on one issue, the Chamber should be sceptical about the remainder of that witness' evidence. In *Limaj* the Trial Chamber was "left with the distinct impression that [a witness] did indeed give false testimony on [an] issue."[26] This led the Chamber to treat the evidence of that witness with caution:

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[20] *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, 'Decision on Defence Motion on Hearsay', 5 August 1996, ¶ 19; *Prosecutor v. Kajelijeli*, ICTR-98-44, Trial Chamber, 'Decision on Motion to Limit the Admissibility of Evidence', 2 June 2001.
[21] *Brdjanin* Trial Judgement, ¶ 25. *See also Prosecutor v. Akayesu*, ICTR-96-04, Appeals Chamber, 'Judgement', 1 June 2001 (the "*Akayesu* Appeal Judgement"), ¶ 128.
[22] *Akayesu* Appeal Judgement, ¶ 136.
[23] *Kunarac* Appeal Judgment, ¶ 267; see also *Delalic* Appeal Judgment, ¶ 497, *Kunarac* Appeal Judgment, ¶ 254.
[24] *Simic* Trial Judgment, ¶ 22.
[25] *Delalic* Appeal Judgment, ¶¶ 491, 506.
[26] *Limaj* Trial Judgment, ¶ 26.

> the individual components of his evidence [were] rigorously scrutinised and used with caution. The Chamber [was] not prepared to accept and act on the evidence of [that particular witness] alone regarding any material issue and ... only [gave] weight to those parts of his evidence what are confirmed in some material particular by other evidence which the Chamber [accepted].[27]

18. The Trial Chamber in *Limaj* considered how to treat the evidence of an "insider" who himself had "committed" crimes and was offered "inducements" in return for his testimony.[28] In *Limaj* the Trial Chamber formed a "negative view of the credibility" of one such witness. Accordingly, the Trial Chamber stated in relation to the witness that:

> The Chamber has not been prepared to act on the evidence of [the witness] alone regarding any material issue and has only given weight to those parts of his evidence which are confirmed in some material particular by other evidence which the Chamber accepts.[29]

19. Where evidence is not corroborated, the Chamber should scrutinise the evidence against the accused "with great care before accepting it as sufficient to make a finding of guilt".[30] The Chamber may in such situations, as it has done in some instances, decide not to rely on the evidence at all.[31] Just as a witness' evidence will be strengthened by corroboration, "the converse also holds true".[32] Corroboration, however, is not a guarantee of credibility.

D. Documentary Evidence

20. The threshold for admission of documents is low, but before any weight is attached to a document there must be some proof of authenticity, source, and/or author.[33] The absence of a signature or stamp does not necessarily deprive the document of authenticity.[34] In order to determine the authenticity of a document, the form, contents and purported use of the document, as well as the position of the parties on the matter,

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[27] *Limaj* Trial Judgment, ¶ 26.
[28] *Limaj* Trial Judgment, ¶ 28.
[29] *Limaj* Trial Judgment, ¶ 28.
[30] *Prosecutor v. Krnojelac*, IT-97-25, Trial Chamber, 'Judgement', 15 March 2002 (the "*Krnojelac* Trial Judgement", ¶ 8.
[31] *Krnojelac* Trial Judgement, ¶ 71; *Brdjanin* Trial Judgment, ¶ 27.
[32] *Prosecutor v. Tadic,* IT-94-1, Trial Chamber, 'Judgment on Allegation on Contempt Against Prior Counsel Milan Vujin', 31 January 2000, ¶ 92.
[33] *Prosecutor v. Brdjanin & Talic,* IT-99-36, Trial Chamber, 'Order on the Standards governing the admission of evidence', 15 February 2002, ¶¶ 18, 19.
[34] *Ibid.*, ¶ 20.

are important factors for consideration.[35] Before affording weight to any documents admitted in evidence, the Trial Chamber must consider the reliability of these documents and the probative value in the overall context of the evidence. The Trial Chamber should always rely on the best evidence available under the circumstances.

E. Circumstantial Evidence

21. Circumstantial evidence is evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. While circumstantial evidence may be of no less substance than direct evidence, the Chamber should be cautious not to draw inferences based on assumptions. While "a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused depends because they would usually exist in combination only because a particular fact did exist," such a conclusion must be the only reasonable conclusion available on the evidence.[36]

F. Hearsay Evidence

22. Though hearsay evidence is admissible, the Defence cautions the Chamber to rely on such evidence only where its reliability is not in question, i.e., where there is sufficient independent evidence to support it. "Where hearsay is sought to be admitted to prove the truth of its content, a Chamber must be satisfied that the evidence is reliable for that purpose, and in doing so, may consider both the content of the evidence and the circumstances under which it arose".[37] Notwithstanding the variable circumstances of the case, "the weight or probative value to be afforded to hearsay evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined."[38] Double or triple hearsay will, on this basis, should be given even less weight.[39] In assessing the weight of hearsay evidence the

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[35] *Prosecutor v. Musema*, ICTR-96-13, Trial Chamber, 'Judgment', 27 January 2000 (the "*Musema* Trial Judgement"), ¶ 66.
[36] *Krnojelac* Trial Judgement, ¶ 67.
[37] *Prosecutor v. Aleksovski*, IT-95-14/1, Appeals Chamber, 'Decision on the Prosecutor's Appeal on Admissibility of Evidence', 16 February 1999, ¶ 15.
[38] *Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 'Judgement on Allegations of Contempt against Prior Counsel, Milan Vujin', 31 January 2000, ¶ 93.
[39] *Ibid.*

Trial Chamber considers that "the source has not been the subject of a solemn declaration and that its reliability may be affected by a potential compounding of errors of perception and memory".[40] The probative value of hearsay evidence depends on context and character of the evidence concerned.[41]

[40] *Simic* Trial Judgment, ¶ 23 and *Krnojelac* Trial Judgment, ¶ 70.
[41] *Prosecutor v. Tadic*, IT-94-1, 'Separate of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses', 10 August 1995, at 3.

III. Principles of Pleading

A. Introduction

23. The Defence submits that the Indictment, standing alone, suffers from a number of material defects. With regard to Fofana's alleged criminal conduct, the Indictment is vague in the extreme, and fails to set forth with the necessary degree of particularity the material facts describing his personal role in the alleged crimes. The Defence concedes that certain of these material defects have been cured by further Pleadings.[42] Nevertheless, the Defence submits that by the time the Prosecution called its first witness on 15 June 2004, the overly ambitious and highly ambiguous case articulated in the Indictment had been substantially limited to only a discrete number of specific charges supported by material facts contained in the Pleadings. The aim of the Defence in this section is not so much to expose a fatally defective charging instrument, but rather to define, to the extent possible, the actual scope of the charges levied against Fofana so that the Chamber may come to a fair and proper decision in the case.

B. Relevant Law

24. According to a recent decision of this Chamber, challenges to the form of an indictment are properly raised by an accused in his final submissions.[43] This decision accords with the jurisprudence of the International Tribunals, which requires, where possible, issues of this nature to be raised at the trial stage and not deferred until the appeals process.[44]

25. Article 17(4)(a) of the Statute explicitly affords each accused person the right "to be informed promptly and in detail in a language which he [...] understands of the nature and cause of the charge against him". In the jurisprudence of the International

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[42] As noted previously, the Pleadings include the Indictment, the Pre-Trial Brief, the Supplemental Pre-Trial Brief (and its annexes), and the Opening Statement.
[43] *See Prosecutor v. Sesay et al.*, SCSL-2004-15, Trial Chamber I, 'Oral Decision on Motions for Judgment of Acquittal', Trial Transcript of 25 October 2006, at 8:5-11 ("In the Chamber's considered opinion, this submission clearly goes to the root of the form of the indictment. It cannot, therefore, be examined at this stage as to its merits by reason of the provisions of Rule 72(B)(ii) [...] This is, of course, without prejudice to the right of the Defence to raise such issues in their final closing arguments".)
[44] *See, e.g., Prosecutor v. Naletilic and Martinovic*, IT-98-34, Appeals Chamber, 'Judgement', 3 May 2006 (the "*Naletilic* Appeal Judgement"), ¶ 21.

Tribunals, this right "translates into an obligation on the part of the Prosecution to state the material facts underpinning the charges in the indictment".[45]

26. As noted by this Chamber:

> It is trite law that an indictment as the fundamental accusatory instrument which sets in motion the criminal adjudicatory process, must be framed in such a manner as not to offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that where specific factual allegations are intended to be relied upon or proven in support of specific counts in the indictment they ought to be pleaded with reasonable particularity.[46]

27. It is equally trite that "a failure to plead in the Indictment, material facts and elements of the offences which the Prosecution intends to rely on to prove it, renders it vague, unspecific, and defective".[47]

28. By the time of proceeding to trial, the Prosecution is expected to know its case such that the accused is able to prepare his defence[48] and the Chamber is in a position to properly evaluate the charges.[49] The Prosecution's failure to proceed on anything less than "well-pleaded" allegations "would gravely undermine the procedural due process rights of accused persons and thereby bring the administration of justice into disrepute".[50] It would be manifestly unfair to confront an accused person "at every stage during the conduct of their trial [...] with new pieces of evidence designed to prove factual allegations not specifically pleaded in the Indictment, under the guise of a prosecutorial

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[45] *Prosecutor v. Kupreskic et al.*, IT-95-16, Appeals Chamber, 'Judgement', 23 October 2001 (the "*Kupreskic* Appeals Judgement"), ¶ 88.
[46] *Norman*, SCSL-2004-14-T-434, Trial Chamber I, 'Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence', 24 May 2005 (the "Admissibility Decision"), ¶ 18 (citing *Lansana and Eleven Others v. Reginam*, ALR SL 186 (1970–71) where the Sierra Leone Court of Appeal condemned the idea of an indictment framed in such a way as to create uncertainty in a count or counts both as to the offences and supporting factual allegations).
[47] *Norman*, SCSL-2004-14-T-434, 'Separate Concurring Opinion of Hon. Justice Benjamin Mutanga Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence', 24 May 2005, ¶ 18.
[48] *Prosecutor v. Blaskic*, IT-95-14, Appeals Chamber, 'Judgement', 29 July 2004 (the "*Blaskic* Appeal Judgement"), ¶ 212 (Precision is "required to avoid ambiguity with respect to the exact nature and cause of the charges against the accused".)
[49] *See Naletilic* Appeal Judgement, ¶ 26 (In reaching its judgement, "a Trial Chamber can only convict the accused of crimes which are charged in the indictment".)
[50] Admissibility Decision, ¶ 19(iv).

latitude to broaden the definitional scope of the statutory categories of offences chargeable".[51]

29. Whether particular facts are "material" depends on the nature and scope of the Prosecution case.[52] However, regardless of such variables, it is patently unacceptable for the Prosecution to omit relevant facts known to it at the time of confirmation with a view to shaping its charges over the course of the trial to match the evidence as it unfolds.[53]

30. In addition to providing the obvious material facts—such as the time, place, and identity of the victim of the alleged crime—pleading the manner and extent of the accused's alleged participation is equally important.[54] This requirement is borne of the fact that liability for international crimes may be incurred in a variety of ways. Therefore, the mere reference to Articles 6(1) or 6(3) of the Statute—which together provide for seven discrete modes of liability—or the simple verbatim quotation of their provisions is insufficient.[55] Because, in addition to the numerous crimes which form the *ratione materiae* of international criminal law, each mode of liability has its own unique *actus reus* and *mens rea* requirements, a well-pleaded allegation should include references to the physical deeds of the accused, his temporal and physical proximity to the crime scene, and the identity of any co-perpetrators and/or subordinates involved in the alleged crime. Such factors are clearly material and, to the extent possible, should be set forth unambiguously in an indictment.[56]

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[51] Admissibility Decision, ¶ 19(iv).
[52] *See Naletilic* Appeal Judgement, ¶ 24; *see also Blaskic* Appeal Judgement, ¶ 210 ("A decisive factor in determining the degree of specificity with which the Prosecution is required to particularize the facts of its case in an indictment is the nature of the alleged criminal conduct charged".)
[53] *See Blaskic* Appeal Judgement, ¶ 220 (The Prosecution "may not rely on the weakness of its own investigation in order to mould the case against the accused as the trial progresses".)
[54] *Prosecutor v. Ntagerura et al.*, ICTR-99-46, Trial Chamber, 'Judgement', 25 February 2004 (the "*Ntagerura* Trial Judgement"), ¶ 36 (emphasis added).
[55] *Ntagerura* Trial Judgement, ¶ 37; *Blaskic* Appeal Judgement, ¶ 226.
[56] *See Prosecutor v. Krnojelac*, IT-97-25, Appeals Chamber, 'Judgement', 17 September 2003 (the "*Krnojelac* Appeal Judgement"), ¶ 138 ("Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial."). *See also Prosecutor v Kordic and Cerkez*, IT-95-14/2, Appeals Chamber, 'Judgement', 17 December 2004 (the "*Kordic* Appeals Judgement"), ¶ 129; *Ntagerura* Trial Judgement, ¶¶ 31, 37; *Prosecutor v. Semanza*, ICTR-97-20, Trial Chamber, 'Judgement', 15 May 2003 (the "*Semanza* Trial Judgement"), ¶ 59; *Delalic* Appeal Judgement, ¶ 350; *Blaskic* Appeal Judgement, ¶ 210.

31. More specifically, where it is alleged that an accused personally committed the criminal acts in question, the identity of the victim, the place and approximate date of the alleged criminal acts, and the means by which they were committed must be pleaded "with the greatest precision".[57] Only somewhat less precision is required for allegations of planning, instigating, ordering, and aiding and abetting, and the Prosecution is still required to identify the "particular acts" or the "particular course of conduct" allegedly attributable to the accused.[58] For example, the Appeals Chamber of the International Tribunals has held that, in pleading instigation as a distinct form of participation, the Prosecution must precisely describe "the instigating acts and the instigated persons or groups of persons".[59] By analogy, planning, ordering, and aiding and abetting must be pleaded with similar precision.[60]

32. In its 'Response to Fofana Motion for Judgement of Acquittal'[61] with regard to planning, instigating, and ordering, the Prosecution submitted that Fofana planned, instigated, and ordered "all of the crimes alleged in the Indictment"[62] and that it was unnecessary—as to these modes of liability—"to show that the accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment".[63] Not surprisingly, there are no citations of support for the latter proposition. This is because the assertion is in direct contravention to the principles of pleading articulated by the relevant jurisprudence highlighted in the previous paragraph.

33. Where an accused is said to have incurred liability as a co-perpetrator through his participation in a joint criminal enterprise ("JCE"), the jurisprudence is clear: the pleadings must unambiguously specify (i) the form or forms of JCE upon which the Prosecution intends to rely; (ii) the alleged criminal purpose of the enterprise; (iii) the identity of the co-participants; and (iv) the nature of the accused's participation in the enterprise.[64]

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[57] *Naletilic* Appeal Judgement, ¶ 24 (emphasis added).
[58] *Ibid.*
[59] *Blaskic* Appeal Judgement, ¶ 226.
[60] *See, e.g., Ntagerura* Trial Judgement, ¶ 33 ("Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime".)
[61] *Norman*, SCSL-2004-14-T-469, 27 September 2005 (the "Rule 98 Response").
[62] *Ibid.*, ¶ 80.
[63] *Ibid.*, ¶ 79.
[64] *See, e.g., Ntagerura* Trial Judgement, ¶ 34.

34. With regard to allegations of command responsibility, the accused must be apprised not only of his own putative conduct giving rise to liability as a superior, but also of the conduct of his supposed subordinates for whom he is said to bear responsibility.[65] This Chamber has cited with approval the reasoning of the *Brdjanin* Trial Chamber, which held that, when pleading a case of superior responsibility,

> what is most material is the relationship between the accused and the others who did the acts for which he is alleged to be responsible, and the conduct of the accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.[66]

35. Recognizing the need to balance the difficulty of prosecuting international crimes with the paramount concern of affording the accused a fair trial, the jurisprudence acknowledges that certain deficiencies contained in an indictment may, in some instances, be cured through further pleading.[67] Essentially, a simple two-pronged approach to issues of defective charging has emerged from the relevant caselaw: (i) Is there a material defect in the indictment? (ii) If so, has it been otherwise cured?[68] While the evaluation of both questions obviously turns on the specific facts of the particular case, it is submitted that certain rules have crystallized in the jurisprudence.

36. Chambers have consistently found that the failure to plead the following categories of information renders an indictment materially defective with regard to the particular allegation: the location, date, and/or victim of the alleged crime;[69] the location, date,

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[65] *See, e.g., Blaskic* Appeal Judgement, ¶¶ 216–219.
[66] *Norman*, SCSL-2004-14-T-434, 'Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence', 24 May 2005, ¶ 18 (emphasis added).
[67] *See, e.g., Naletilic* Appeal Judgement, ¶ 26 (A defective indictment or portion thereof may be cured in some instances where the accused nevertheless "has received timely, clear and consistent information from the Prosecution detailing the factual basis underpinning the charges against him".)
[68] *Ibid. See also Prosecutor v. Kvocka et al.*, IT-98-30/1, Appeals Chamber, 'Judgement', 28 February 2005 (the "*Kvocka* Appeal Judgement"), ¶ 33.
[69] *See Naletilic* Appeal Judgement, ¶¶ 30–34, 40–43 (material defects not cured by further pleading); *Prosecutor v. Ntakirutimana*, ICTR-96-10, Appeals Chamber, 'Judgement', 13 December 2004 (the "*Ntakirutimana* Appeal Judgement"), ¶¶ 33, 41 (material defect not cured by further pleading); *Limaj Trial Judgement*, ¶ 242 (material defect not cured by further pleading); *Prosecutor v. Muhimana*, ICTR-95-01, Trial Chamber, "Judgement", 28 April 2005 (the "*Muhimana* Trial Judgement"), ¶ 196 (material defect cured by further pleading), ¶ 404 (material defect cured by further pleading), and ¶ 422 (material defect not cured by further pleading); *Prosecutor v. Muvunyi*, ICTR-00-55, Trial Chamber, 'Judgement', 12 September 2006 (the "*Muvunyi* Trial Judgement"), ¶ 25 (material defect cured by further pleading).

and specific nature of the accused's participation in the alleged crime;[70] the identity and activity of individuals and/or units allegedly subordinate to the accused;[71] the accused's particular acts of encouragement;[72] the details regarding the nature of the accused's alleged orders;[73] the names of principle perpetrators;[74] and the existence of an international armed conflict.[75]

37. As a general rule, the Prosecution is required to plead the material facts in its possession at the time of confirmation,[76] and material defects are not likely to be cured by information outside of an indictment.[77] However, it is possible "in a few cases that the Prosecution might cure the defect by giving timely, clear, and consistent information concerning the factual basis of the charge in relatively uncomplicated cases".[78] Such curative information can be provided through the Prosecution's pre-trial brief, opening statement, timely disclosed witness statements, or a combination thereof.[79] But, further pleadings which simply amount to "verbatim incorporation" of an indictment or provide no additional clarity will not cure a material defect,[80] nor will the exercise of the accused's right to cross-examine witnesses as to the unpleaded facts.[81]

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[70] *See Prosecutor v. Kamuhanda*, ICTR-99-54, Appeals Chamber, 'Judgement', 19 September 2005 (the "*Kamuhanda* Appeal Judgement"), ¶¶ 18–20, 28 (material defect cured by further pleading); *Ntakirutimana* Appeal Judgement, ¶¶ 45, 47 (material defect cured by further pleading) and ¶¶ 51, 59 (material defect not cured by further pleading).

[71] *See Blaskic* Appeal Judgment, ¶¶ 228, 245 (material defect not cured by further pleading).

[72] *See Ntagerura* Trial Judgement, ¶¶ 40–64, 69.

[73] *Ibid.*, ¶¶ 40–64, 69.

[74] *Ibid.*, ¶¶ 40–64, 69.

[75] *See Simic* Trial Judgment, ¶¶ 115, 117 (material defect not cured by further pleading).

[76] *See Muhimana* Trial Judgement, ¶ 454 ("In this case, the material facts not pleaded relate to allegations that the Accused personally committed a series of individual acts and, with the exception of one allegation that arose after the filing of the Indictment in its final form, pleading the material facts in the Indictment was entirely practical, and the Prosecution's failure to do so remains largely unexplained. In its Pre-Trial Brief, the Prosecution had attempted to excuse itself from providing precise details of some attacks because of the lapse of time, the trauma of witnesses, and the scale of the alleged crimes. However, in respect of all but the one exception referred to above, the Prosecution had the requisite information and was aware of the material facts at the time that the Revised Amended Indictment was filed".)

[77] *Ibid.* ("The Trial Chamber is of the view that, where the material defect is the absence of a pleading of material facts underpinning a charge, it is less likely to be curable by information provided outside the Indictment.")

[78] *Ibid.*, ¶ 452 (emphasis added).

[79] *See Naletilic* Appeal Judgement, ¶ 27 ("In assessing whether a defective indictment was cured ... the Appeals Chamber has in some cases looked at information provided through the Prosecution's pre-trial brief or its opening statement" as well as "the list of witnesses the Prosecution intends to call at trial, containing a summary of the facts and the charges in the indictment as to which each witness will testify and including specific references to counts and relevant paragraphs in the indictment".); *Prosecutor v. Ndindabahizi*, ICTR-01-71, Trial Chamber, 'Judgement', 15 July 2004 (the "*Ndindabahizi* Trial Judgement"), ¶ 29.

[80] *See Naletilic* Appeal Judgment, ¶ 34 (A pre-trial brief or opening statement which suffer from the "same insufficiencies as did the Indictment itself" by failing to specify the place, time, and military purpose of a particular allegation do not cure a defective indictment.) and ¶¶ 42–43 (A chart of witnesses which fails to

38. Notably, the Prosecution can never discharge its pleading obligations by simply referring the Defence to material facts alleged only in witness statements and/or potential documentary evidence.[82] Where an indictment is materially defective, a timely disclosed witness statement may, in conjunction with a sufficiently informative pre-trial brief or opening statement, assist in the curative process.[83] However, the Defence knows of no case in which material facts have been pleaded through disclosure alone.

39. The rationale behind this rule of pleading is simple: In cases of such size and complexity as those typically before International Tribunals, it is unfair to require the Defence "to sift through voluminous" disclosure material searching for allegations which should have been clearly set out in the indictment or included in a pre-trial brief

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sufficiently identify the victim of an alleged beating and an opening statement which makes no reference to the beating do not cure a defective indictment.); *Simic* Trial Judgment, ¶¶ 117, 119 (A pre-trial brief which fails to identify the "particular time and place" of the alleged international conflict does not cure a defective indictment despite the fact that the Trial Chamber heard evidence from both parties on the issue and where the Prosecution's case had clearly shifted. In such instance, the Prosecution should have sought to amend its indictment.)

[81] *See Muhimana* Trial Judgment, ¶ 457, n. 420 ("The Trial Chamber notes that the exercise by the Accused of his right to cross-examine witnesses on the unpleaded facts does not cure the material defects in the Indictment".)

[82] *See Naletilic* Appeal Judgement, ¶ 27; *Muhimana* Trial Judgement ¶ 452 ("Disclosure of witness statements by the Prosecution does not, by itself, suffice to inform the Defence of material facts that the Prosecution intends to prove at trial.")

[83] *See Kamuhanda* Appeal Judgment, ¶¶ 25, 28 (A pre-trial brief containing a witness summary including the necessary details—the dates and locations of a defendant's alleged distribution of weapons—and a timely disclosed witness statement also including the necessary details were sufficient to "provided the Appellant with timely, clear, and consistent information about this distribution of weapons" and thus to cure the defective indictment.); *Muhimana* Trial Judgement, ¶ 196 (A pre-trial brief containing "accurate details" with regard to the time, place, and identity of victims of an alleged rape, where such information had been omitted from the indictment, was sufficient to cure the defect.); *Muhimana* Trial Judgement, ¶ 404 (A pre-trial brief and a timely disclosed witness statement, which "provided the identity of the victim and general area of the crime", were sufficient to cure a defective indictment.); *Muvunyi* Trial Judgement, ¶ 25 (A timely disclosed unredacted witness statement as well as a summary of that witness's testimony in the pre-trial brief containing information about a particular killing cured a defective indictment.); *Ntakirutimana* Appeal Judgement, ¶ 41 (A timely disclosed witness statement containing the necessary information in addition to a pre-trial brief which "made it unequivocal" that the Prosecution intended to prove that the accused personally killed the named victim as well as an annex to the brief which "further indicated" the particular witnesses the Prosectuion would rely on in that regard were sufficient to cure the defective indictment); *Ntakirutimana* Appeal Judgement, ¶¶ 46–47 (A pre-trial brief containing the specific allegations and an annex thereto specifying the particular witness upon whom the Prosecution intended to rely as well as a timely disclosed witness statement including the necessary information cured the defect—"based on these three documents" (indictment, pre-trial brief, and witness statement) that the accused were clearly informed of the charges.) *Cf. Muhimana* Trial Judgement, ¶¶ 468–470 (A timely disclosed witness statement referring to an alleged rape, clearly not pleaded in the indictment, did not "constitute sufficient, clear, and timely notice of the intention to prove the allegation of rape against the Accused" where the references in the appendix to the pre-trial brief were "insufficient and confusing". Accordingly, the Chamber made no finding in respect of this allegation.)

or opening statement.[84] As one Chamber succinctly put it: "Clear notice must be given and, until that time, the Defence is entitled to assume that the material facts enumerated in the Indictment are exhaustive and represent the case it has to meet".[85]

40. Therefore, to the extent that the evolving jurisprudence of the International Tribunals articulates a rule on the issue, it is this: Material facts which appear only in witness statements do not form part of the allegations.[86] In order to protect the rights of the accused and the integrity of the proceedings, the only fair and proper course of action in such cases is for the Trial Chamber to consider any evidence aimed at substantiating such unpleaded facts as falling outside the scope of the allegations and to disregard it.[87]

C. Analysis

41. Turning to the facts of Fofana's case, it is submitted that the Indictment suffers from several material defects only some of which have been cured through the further Pleadings.

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[84] *See Ntagerura* Trial Judgement, ¶ 66 ("The Trial Chamber and the accused should not be required to sift through voluminous disclosures, witness statements, and written or oral submissions in order to determine what facts may form the basis of the accused's alleged crimes, in particular, because some of this material is not made available until the eve of trial".)

[85] *Muhimana* Trial Judgement, ¶ 452. *See also Ntakirutimana* Appeal Judgement, ¶¶ 53, 54, 57, 59 (A pre-trial brief from which the material fact that the accused personally conveyed attackers to the attack was "conspicuously absent" and which contained "only one sentence" to that effect in its annex, when "viewed together", failed to state the allegation and cure the defective indictment. The Appeals Chamber concluded that the accused were "entitled to conclude that the allegations [contained in Annex B to the Pre-Trial Brief] were the allegations it would have to meet at trial".)

[86] The *Niyitegeka* case is particularly exemplary in this regard. There, the ICTR Appeals Chamber held that, as a general matter, mere service of witness statements by the Prosecution pursuant to the disclosure requirements of the Rules does not suffice to inform the Defence of material facts that the Prosecution intends to prove at trial, and that "regardless of whether the witness statement referred to the [particular] attack or not, the Appellant could well have concluded from the failure to mention [such attack] in the Pre-Trial Brief that the Prosecution did not intend to present evidence at trial regarding an attack at that location or in that timeframe". Accordingly, the Chamber held that the defect was not cured through disclosure only, and the Trial Chamber had committed an error of law by convicting the appellant in reliance on such evidence. *Prosecutor v. Niyitegeka*, ICTR-96-14, Appeals Chamber, 'Judgement', 9 July 2004 (the "*Niyitegeka* Appeal Judgement"), ¶¶ 221, 223.

[87] *See Ntagerura* Trial Judgement, ¶ 67 ("When the Chamber is confronted with defective paragraphs in an indictment at the post-trial phase, it may address an accused's lack of notice by disregarding the defective paragraphs in making its factual and legal findings. [...] The Chamber further notes that disregarding a portion of the indictment is most appropriate where an allegation is grossly deficient ...".); Krnojelac Appeal Judgement, ¶ 144 ("the Appeals Chamber holds that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good grounds for refusing, in all fairness, to consider an extended form of liability with respect to Krnojelac."); *Kupreskic* Appeal Judgement, ¶ 92 ("It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds. There are, of course, instances in criminal trials where the evidence turns out differently than expected. Such a situation may require the indictment to be amended, an adjournment to be granted, or certain evidence to be excluded as not being within the scope of the indictment.")(emphasis added); *Semanza* Trial Judgement, ¶ 61; *Krnojelac* Trial Judgement, ¶ 86; *Kupreskic* Appeal Judgement, ¶ 114.

42. The Indictment claims that Fofana should be held responsible pursuant to Articles 6(1) and 6(3) of the Statute for those crimes listed at Counts 1–8 and described as having taken place at several geographic locations over a stated period of time throughout southern and eastern Sierra Leone. He is said to have incurred liability for all of these acts—described in the Indictment as having been committed only by unidentified "Kamajors"—by either committing them himself, planning them, instigating them, ordering them, aiding and abetting their commission, participating in an enterprise whose common aim it was to commit them, or, finally, by virtue of his position of authority over the actual perpetrators. However, nowhere in the Indictment is it explained how, where, when or with whom Fofana is said to have accomplished the alleged acts.

43. Because his name is not once mentioned in the factual descriptions preceding each count,[88] the Indictment creates the impression that Fofana has only been charged as a superior. This, of course, is belied by the repeated references to the verbatim language of Article 6(1). However, as noted above, all forms of Article 6(1) liability (including each category of JCE[89]) require the Prosecution to move beyond the mere quotation of the Statute and specifically plead the nature of the accused's alleged participation.

44. Yet the Indictment does not describe any particular course of conduct on the part of Fofana which could be understood as either committing, planning, instigating, ordering, aiding and abetting, or participating in—through a common plan—any criminal activity. Oddly, the Indictment does not contain the name of a single victim. Nor does it list any principle or co-perpetrators apart from Norman and Kondewa. As clearly articulated by the relevant jurisprudence, these are the kinds of "particular acts" which are required to be pleaded with some degree of specificity in any well-pleaded indictment and the absence of which will render the charging instrument materially defective.

45. Further, the Defence submits that—despite the references to Fofana's alleged leadership position within the CDF—the Article 6(3) charges were not fully pleaded with the requisite degree of specificity. By failing to precisely alleged the conduct of Fofana "by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by [his alleged subordinates], and to have failed to take the

[88] See Indictment, ¶¶ 25–29.
[89] The particular pleading requirements for JCE are taken up again in greater detail below.

necessary and reasonable measures to prevent such acts or to punish the persons who did them",[90] the Prosecution has run afoul of the rule of *Brdjanin* endorsed by this Chamber.

46. Simply put, consistent with the above-stated principles, the Defence is unable to discern a single charge in the Indictment against Fofana which is supported by appreciable material facts. The Pre-Trial Brief is equally defective, simply restating, as it does, the vague allegations contained in the Indictment.[91] Accordingly, the Defence submits that the material defects which existed as of 5 February 2004[92] were in no way cured by 2 March 2004.[93]

47. It was only with the filing of the Supplemental Pre-Trial Brief and its accompanying evidentiary annexes, as ordered by the Chamber, that certain material facts regarding the allegations were finally provided to the Defence. That document purported to lay bare "The Specific Case Against Each Individual Accused", and the Defence concedes that some of the factual information contained therein reached the level of "particular acts" as described in the relevant jurisprudence. Additionally, the Opening Statement contained some allegations of sufficient particularity. Nevertheless, despite these minor curative effects, the Defence submits that a great deal of the evidence adduced at trial is irrelevant to the charges as they stood on 15 June 2004.[94]

D. Conclusion

48. It is not for the accused to strain to appreciate the charges laid out against him, but rather for the Prosecution to articulate them clearly and with specificity. Consistent with the Admissibility Decision, there is a surplus of evidence on the record in this case which goes to no particular allegation. If, as the Chamber has clearly held, the Prosecution's case against the three accused contains no allegations of sexual offences then, by parity of reasoning, any other "charge" unsupported by material facts in the Pleadings is similarly invalid.[95] Accordingly, for purposes of this Brief, the Defence

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[90] Admissibility Decision, 'Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence', ¶ 18 (citing *Brdjanin*).
[91] The Pre-Trial Brief is essentially a legal submission with no relevant factual allegations.
[92] The date of filing of the Indictment.
[93] The date of filing of the Pre-Trial Brief.
[94] The date the Prosecution called its first witness.
[95] E.g., acts of cannibalism or human sacrifice. *N.B.* The Prosecution has conceded this point. *See Norman*, SCSL-2004-14-T-728, 'Confidential Prosecution Response to Confidential Defence Request for Full Review of Prosecution Evidence to Identify Rule 68 Material for Disclosure', 30 October 2006, ¶ 16.

shall consider only those allegations supported by material facts in the Pleadings. Pursuant to the above-cited jurisprudence, the Defence does not deem it necessary to address allegations raised solely in witness statements, regardless of the testimony of certain witnesses or the exercise of Fofana's right to cross-examine them. Such matters simply do not form part of the Prosecution's case.

IV. Crimes Against Humanity

A. Introduction

49. The Prosecution has charged the three accused with crimes against humanity in Counts 1 and 3 of the Indictment.

50. The Indictment asserts that: "All acts and omissions charged herein as crimes against humanity were committed as part of a widespread and systematic attack directed against the civilian population of Sierra Leone."[96] The Indictment further alleges that "The words civilian or civilian population used in this indictment refer to persons who took no active part in hostilities, or were no longer taking an active part in the hostilities."[97] The Prosecution allege in the Indictment that "civilians, including women and children, who were suspected to have supported, sympathized with, or simply failed to actively resist the combined RUF/AFRC forces were termed 'collaborators' and specifically targeted by the CDF."[98]

51. The Pre-Trial Brief acknowledges the systematic and prolonged repression and human rights abuse meted out by the combined RUF and AFRC forces against the innocent people of Sierra Leone.[99] It is instructive to note that the vast majority of the 'General Factual Background' presented in the Prosecution CDF Pre-Trial Brief highlights the atrocities and misconduct of the RUF and AFRC.

52. As noted in the Prosecution Pre-Trial Brief the Kamajor and CDF movement gained momentum as a direct response to RUF/AFRC attacks in an attempt to defend the civilian population and "local communities"[100] from abuse and ultimately restore the legitimate and democratic government.[101]

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[96] Indictment, ¶ 10.
[97] Indictment, ¶ 11.
[98] Indictment, ¶ 23. Paragraph 24 further elaborates on how the CDF allegedly committed crimes against 'collaborators'.
[99] Pre-Trial Brief, ¶¶ 2-39.
[100] Pre-Trial Brief, ¶ 13.
[101] Pre-Trial Brief, ¶ 18.

53. In the Opening Statement, the Prosecution stressed that: "The joint indictment is not an indictment of what could have been an important force for good, the organization called the CDF, the organization that these indictees perverted. Nor did we indict the cultural traditions or the concept of the centuries old hunting societies such as the Kamajors."[102] In other words, the trial is not a trial of the Kamajors and/or CDF.

54. Nowhere in the Indictment, the Pre-Trial Brief, or the Supplemental Pre-Trial Brief did the Prosecution set out explicitly or exactly how they intended to prove or demonstrate the widespread or systematic nature of the attack.

55. It fell to Prosecution counsel in the Opening Statement, for the first time, to give notice and indicate how the Prosecution intended to prove the widespread and systematic nature of the attack. After setting out a series of alleged incidents and crimes, counsel stated:

> These scenarios, Your Honours, clearly show the systematic and widespread pattern of physical violence, murder and looting, perpetrated by the Kamajors on the civilian population of Sierra Leone, Your Honours, all on the instructions, direction and command of Hinga Norman, National Coordinator, Moinina Fofana, National Director of War, and Allieu Kondewa, High Priest.[103]

56. It is submitted on behalf of Moinina Fofana that the Prosecution has failed to prove that any attack upon the civilian population of Sierra Leone (other than those committed by RUF and AFRC forces upon civilians) was either "widespread" or "systematic" so as to amount to a crime against humanity.

B. Relevant Law

57. The Pre-Trial Brief sets out much of the relevant law in relation to crimes against humanity.[104] This section will set out the other relevant jurisprudence and law in relation to crimes against humanity not covered in sufficient detail in the Pre-Trial Brief.

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[102] Trial Transcript, 3 June 2004, at 13:7-9.
[103] Trial Transcript, 3 June 2004, at 27:21-24.
[104] Pre-Trial Brief, ¶¶ 89-105.

58. Crimes against humanity are crimes which: "Either by their magnitude and savagery or by their large number or by the fact that a similar pattern was applied … endangered the international community or shocked the conscience of mankind."[105]

59. In *Tadic* the Trial Chamber held that there were six conditions for crimes against humanity to apply:

(i) the existence of an armed conflict;
(ii) a nexus between the acts in question and the armed conflict;
(iii) the acts were part of a widespread or systematic occurrence of crimes directed against a civilian population;
(iv) there was a discriminatory intent behind the crimes;
(v) there was a policy behind the discrimination (although this may not always be strictly necessary);
(vi) the accused acted with the requisite intent.[106]

60. In *Akayesu* the Trial Chamber explained the terms "widespread" and "systematic" as follows:

> The concept of "widespread" may be defined as massive, frequent, large scale action, carried out collectively with considerable seriousness and directed against a multiplicity of victims. The concept of "systematic" may be defined as thoroughly organised and following a regular pattern on the basis of a common policy involving substantial public or private resources. There is no requirement that this policy must be adopted formally as the policy of a state. There must however be some kind of preconceived plan or policy.[107]

61. In *Blaskic* the Trial Chamber held that the term "systematic" referred to the following four elements:

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[105] *History of the United Nations War Crimes Commission and the Development of the Laws of War*, 1943 p. 179 (emphasis added).
[106] *Prosecutor v. Tadic*, IT-94-1, Trial Chamber, 'Judgement', 7 May 1997 (the "*Tadic* Trial Judgement"), ¶¶ 616-660.
[107] *Prosecutor v. Akayesu*, ICTR-96-04, Trial Chamber, 'Judgement', 2 September 1998 (the "*Akayesu* Trial Judgement"), ¶ 580.

(i) the existence of a political objective, a plan pursuant to which the attack is perpetrated or an ideology, in the broad sense of the word, that is, to destroy, persecute or weaken a community;

(ii) The perpetration of a criminal act on a very large scale against a group of civilians or the repeated and continuous commission of inhumane acts linked to one another;

(iii) The preparation and use of significant public or private resources, whether military or other;

(iv) The implication of high-level political and/or military authorities in the definition and establishment of the methodical plan.[108]

62. The Appeals Chamber, however, held that the existence of a plan or policy may be evidentially relevant, but that it is not a legal element of the crime.[109]

63. In *Tadic* the Trial Chamber held that the concept of crimes against humanity necessarily implies a policy element,[110] but did not strictly stipulate this aspect as a requirement for crimes against humanity. The Trial Chamber also held that such a policy need not be explicitly formulated or be a policy of a State:

> ... the reason that crimes against humanity so shock the conscience of mankind and warrant intervention by the international community is because they are not isolated, random acts of individuals but rather result from a deliberate attempt to target a civilian population. Traditionally this requirement was understood to mean that there must be some form of policy to commit these acts. As explained by the Netherlands Hoge Raad in Public Prosecutor v Menten:
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> The concept of 'crimes against humanity' also requires – although this is not expressed in so many words in the above definition [Article 6(c) of the Nurnberg Charter] – that the crimes in question form a part of a system based on terror or constitute a link in a consciously pursued policy directed against particular groups of people.
>
> Importantly, however, such a policy need not be formulised and can be deduced from the way in which the acts occur. Notably, if the acts occur on a widespread or systematic basis that demonstrates a policy to commit those

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[108] *Prosecutor v. Blaskic*, IT-95-14, Trial Chamber, 'Judgement', 3 March 2000 (the "*Blaskic* Trial Judgement"), ¶ 203.
[109] *Blaskic* Appeals Judgement, ¶¶ 100, 117–120.
[110] *Tadic* Trial Judgment, ¶¶ 653–655.

> acts, whether formalised or not. Although some doubt the necessity of such a policy the evidence in this case clearly establishes the existence of a policy.
>
> An additional issue concerns the nature of the entity behind the policy. The traditional conception was, in fact, not only that a policy must be present but that the policy must be that of a State, as was the case in Nazi Germany. The prevailing opinion was, as explained by one commentator, that crimes against humanity, as crimes of a collective nature, require a State policy "because their commission requires the use of the state's institutions, personnel and resources in order to commit, or refrain from preventing the commission of, the specified crimes described in Article 6(c) [of the Nurnberg Charter]." While this may have been the case during the Second World War, and thus the jurisprudence followed by the courts adjudicating charges of crimes against humanity based on events alleged to have occurred during this period, this is no longer the case ... . Therefore, although a policy must exist to commit these acts, it need not be the policy of a State.[111]

64. This was confirmed by the Trial Chamber in *Kayishema and Ruzindana* in which it was held that a policy formulated by an organisation or group was sufficient:

> For an act of mass victimisation to be a crime against humanity, it must include a policy element. Either of the requirements of widespread or systematic are enough to exclude acts not committed as part of a broader policy or plan. Additionally, the requirement that the attack must be committed against a "civilian population" inevitably demands some kind of plan and, the discriminatory element of attack is, by its very nature, only possible as a consequence of a policy.
>
> Who or what must instigate the policy? Arguably, customary international law requires a showing that crimes against humanity are committed pursuant to an action or policy of a State. However, it is clear that the ICTR Statute does not demand the involvement of a State [...]
>
> To have jurisdiction over either of the accused, the Chamber must be satisfied that their actions were instigated or directed by a Government or by any organisation or group.[112]

65. In *Kordic and Cerkez* the Trial Chamber held that "although the concept of crimes against humanity necessarily implies a policy element, there is some doubt as to whether it is strictly a requirement, as such, for crimes against humanity."[113] Instead it

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[111] *Tadic* Trial Judgment, ¶¶ 653, 654.
[112] *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-01, Trial Chamber, 'Judgement', 21 May 1999 (the "*Kayishema* Trial Judgement"), ¶¶ 124–126.
[113] *Prosecutor v. Kordic and Cerkez*, IT-95-14/2, Trial Chamber, 'Judgement', 26 February 2002 (the "*Kordic* Trial Judgement"), ¶ 182.

was held that "the existence of a plan or policy should better be regarded as indicative of the systematic character of the offences charged as crimes against humanity."[114]

66. In *Jelisic* the Trial Chamber held:

> The existence of an acknowledged policy targeting a particular community, the establishment of parallel institutions meant to implement this policy, the involvement of high-level political or military authorities, the employment of considerable financial, military or other resources and the scale of the repeated, unchanging an continuous nature of the violence committed against a particular civilian population are among the factors which may demonstrate the widespread or systematic nature of the attack.[115]

67. In essence, the policy requirement requires that the acts of individuals alone, which are isolated, un-coordinated, and haphazard be excluded. The International Law Commission has stated:

> This alternative is intended to exclude the situation in which an individual commits an inhumane act while acting on his own initiative pursuant to his own criminal plan [...] . This type of isolated criminal conduct on the part of a single individual would not constitute a crime against humanity.[116]

68. The policy need not be one of a State. It can also be an organizational policy. Non-state actors, or private individuals, who exercise *de facto* power can constitute the entity behind the policy.[117]

69. Article 7(1) of the Rome Statute of the International Criminal Court provides that "crimes against humanity" means any of the stipulated acts when committed as part of a "widespread or systematic attack directed against any civilian population". Article 7(2) of the Rome Statute provides that for the purpose of Article 7(1), "attack directed against any civilian population" means:

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[114] *Ibid.*

[115] *Prosecutor v. Jelisic*, IT-95-10, Trial Chamber, 'Judgement', 14 December 1999 (the "*Jelisic* Trial Judgement"), ¶ 53.

[116] *Report of the International Law Commission on the Work of its Forty-eighth Session* 6 May-26 July 1996, GAOR, 51st Sess., Supp. No. 10, 30, UN Doc. A/51/10, p. 94. *See also Prosecutor v Nikolic*, IT-02-60/1, 'Review of Indictment Pursuant to Rule 61 of the Rules of Procedure and Evidence', 20 October 1995, ¶ 26.

[117] *Report of the International Law Commission on the Work of its Forty-eighth Session* 6 May-26 July 1996, GAOR, 51st Sess., Supp. No. 10, 30, UN Doc. A/51/10, p. 266.

> A course of conduct involving the multiple commission of acts referred to in paragraph 1 against any civilian population, pursuant to or in furtherance of a State or organizational policy to commit such attack.

70. The elements of the crimes within the jurisdiction of the International Criminal Court are set out in the Elements of Crimes as drafted by the Preparatory Commission for the International Criminal Court. The introduction to the elements of the crimes under Article 7 of the Rome Statute (crimes against humanity) provides the following:

> Attack directed against a civilian population" in these context elements is understood to mean a course of conduct involving the multiple commission of acts referred to in article 7, paragraph 1, of the Statute against any civilian population, pursuant to or in furtherance of a State or organisational policy to commit such attack. The acts need not constitute a military attack. It is understood that "policy to commit such attack" requires the State of organisation actively promote or encourage such an attack against a civilian population.[118]

71. The footnote to the above provides that:

> A policy which has a civilian population as the object of the attack would be implemented by State or organizational action. Such a policy may, in exceptional circumstances, be implemented by a deliberate failure to take action, which is consciously aimed at encouraging such attack. The existence of such a policy cannot be inferred solely from the absence of governmental or organizational action.[119]

72. Thus, at the ICC, for an accused to be guilty of crimes against humanity pursuant to Article 7, it must be shown that the attack on the civilian population was widespread or systematic and that the attack was in furtherance of a State or organizational policy.

73. Although the *tu quoque* principle has no application in international law, the Trial Chamber in *Limaj* acknowledged and was "conscious" of the background and context in which the crimes of one side to a conflict are alleged to have taken place.[120] In Kosovo, as in Sierra Leone, it was common knowledge that one side, namely the Serb forces, were responsible for far greater human suffering and human rights abuse than the side of the accused on trial, i.e., the KLA.

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[118] ICC Elements of Crimes, Introduction to elements of crimes against humanity (article 7), ¶ 3 (emphasis added).
[119] ICC Elements of Crimes, Introduction to elements of crimes against humanity (article 7), ¶ 3, n. 6.
[120] *Limaj* Trial Judgement.

74. In *Limaj* the Trial Chamber held that:

> History confirms, regrettably, that wartime conduct will often adversely affect civilians. Nevertheless, the Chamber finds that, even if it be accepted that those civilians of whatever ethnicity believed to have been abducted by the KLA in and around the relevant period were in truth so abducted, then, nevertheless, in the context of the population of Kosovo as a whole the abductions were relatively few in number and could not be said to amount to a "widespread" occurrence for the purposes of Article 5 of the Statute.[121]

It is therefore appropriate, when considering the widespread or systematic nature of an attack to take account of the scale of the alleged abuse in the context of the population as a whole.

75. The Trial Chamber in *Limaj* found that "the KLA evinced no policy to target civilians per se."[122] The Trial Chamber did hold, however, that "there was evidence of a KLA policy to target perceived Kosovo Albanian collaborators who were believed to be or suspected of associating with Serbian authorities and interests."[123] The Chamber went on that "whether these perceived or suspected collaborators were correctly identified or not, they were targeted as individuals rather than as members of a larger targeted population."[124]

76. In finding that there had been no widespread or systematic attack on the civilian population, the Trial Chamber in *Limaj* concluded:

> Upon consideration of the evidence before it, the Chamber finds that at the time relevant to the Indictment there was no attack by the KLA directed against a "civilian population", whether Kosovo Albanian or Serbian in ethnicity, and no attack that could be said to indicate a "widespread" scale; however, as indicated earlier there is evidence of a level of systematic or coordinated organization to the abduction and detention of certain individuals. While the KLA evinced a policy to target those Kosovo Albanians suspected of collaboration with the Serbian authorities, the Chamber finds that there was no attack directed against a civilian population, whether of Serbian or Albanian ethnicity."[125]

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[121] *Ibid.*, ¶ 210 (emphasis added).
[122] *Ibid.*, ¶ 215.
[123] *Ibid.*, ¶ 216.
[124] *Ibid.*, ¶ 217.
[125] *Ibid.*, ¶ 228.

The Prosecution did not appeal against this finding or the acquittal of all three accused of all the Crimes against humanity counts in the Indictment.

C. Analysis

77. It would be an affront to history to suggest that the Kamajors/CDF had as their primary aim anything other than the protection of the civilian population from human rights abuse and the restoration of the legitimate and democratic government of Sierra Leone.

78. The position was succinctly and clearly stated by Prosecution witness Colonel Iron:

> All CDF operations as far as I can see appear to have been driven by the central strategic idea of the CDF, which was to defend their homelands … . I can't recall the exact words, but seemed to accord to the central idea of the CDF, which was to defend their homelands against the RUF and subsequently junta forces. But specifically in the south and west there were clear strategic ideas as the campaign developed, as the war developed. So we see the CDF starting from a defensive posture after the junta. Moving to an offensive posture to correspond – coincide with the ECOMOG intervention.[126]

The defence of their homelands, their people and democracy were the guiding principles of the CDF. It was not an organization dedicated to destruction and gratuitous violence.

79. Other Prosecution witnesses confirm that the primary goal of the CDF was the defence of their homelands and the protection of civilians: Witness TF2-008 said that the objective of the Kamajors was to protect civilians and that this was told to Kamajors during training.[127] Witness TF2-079 testified that he joined the Kamajors to "defend myself from RUF brutality and to prevent my community from being attacked by the RUF rebels."[128] He went on to confirm that the Kamajor movement was set up to protect the lives and properties of civilians.[129]

80. Moreover, Prosection witnesses confirm one of the primary aims of the CDF as being the restoration of the democratically elected government: Bob Tucker stated that the

[126] Trial Transcript, 14 June 2005, at 34:5-18.
[127] Trial Transcript, 17 November 2004, at 13.
[128] Trial Transcript, 26 May 2005, at 7.
[129] Trial Transcript, 27 May 2005, at 18.

Kamajors fought to restore the legitimate government and not to enrich themselves.[130] Witness TF2-005 confirmed that the CDF motto was "we fight for democracy".[131]

81. Other witnesses confirmed that the CDF fought alongside ECOMOG with the aim of restoring the legitimate government: Colonel Iron stated that the CDF and ECOMOG had similar operational aims and objectives—to recover the country from the junta forces.[132] Witness TF2-201 stated that to his knowledge ECOMOG was fighting on behalf of the government in exile and that ECOMOG had the same objectives as the Kamajors.[133]

82. Expert witness Dr Daniel Hoffman confirms this analysis. His testimony relevant to this issue is summarised below:

83. Traditionally and historically, the Kamajor was the protector of the community "from threatening forces of the forest."[134] In the early stages of the war, it was the Kamajors who were "mobilized to defend communities to assist the armed forces as scouts and as guides."[135]

84. As the war progressed, the numbers of people adopting or being labelled Kamajor increased.[136] The need to protect rural villages and IDP camps from the threat of the "Sobel" led "community elders, town chiefs, paramount chiefs, and the elderly" to come together and respond by putting men forward as Kamajors.[137] The number of people self-identifying themselves as Kamajors significantly increased during the Junta period.[138]

85. Notwithstanding the massive growth of the Kamajor/CDF movement between 1995 and 2000, its principle aims and objective of "defending the community from threat" did not significantly change. As stated by Dr Hoffman:

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[130] Trial Transcript, 10 February 2005, at 91.
[131] Trial Transcript, 16 February 2005, at 67. This motto also appears on Exhibit 26.
[132] Trial Transcript, 14 June 2005, at 50.
[133] Trial Transcript, 5 November 2004, at 117.
[134] Trial Transcript, 9 October 2006, at 60:1-2 and 61:29.
[135] Trial Transcript, 9 October 2006, at 62:13.
[136] Trial Transcript, 9 October 2006, at 62:16.
[137] Trial Transcript, 9 October 2006, at 64:22–65:7.
[138] Trail Transcript, 9 October 2006, at 62:26 and 67:6-16.

> It is obviously a very broad claim and at different moments in the trajectory of this organization, what was perceived to be the threat to the community changed. I would argue, though, and have argued that this is a fairly consistent sense throughout that the function, if you will, of a Kamajor, was to be this community defender. In the Junta period, the threat was of the AFRC, and this was—and the RUF had combined forces at that time. This is a fairly significant threat. I mean, the policy, if you will, of the Junta was fairly clear, that it was the Kamajors were not going to be allowed to continue, and this was perceived as being a threat, not only to the Kamajors themselves, but, really, to Mende areas, in general, and so I would suggest that at that level, the aims and objectives are fairly consistent throughout.[139]

86. In response to a question from the Presiding Judge, Dr Hoffman elaborated on the subtle change in emphasis of the CDF in response to the Junta threat:

> It fell on the Kamajors to maintain their position as those who were defenders of communities. Their specific objectives, their specific aims when the Junta takes control is to restore the SLPP government. So, in that sense, you have a new set of aims based on a new set of circumstances; the SLPP government has gone into exile. And so I guess what I'm arguing is it sort of depends on which level you're talking. If you are talking at a greater level of extraction, the sort of purpose of the Kamajor remains consistent. The specific aims have obviously changed, based on the fact that you now have the Junta in Freetown.[140]

87. Notwithstanding the Kamajor/CDF principle objective of defending the community, there can be little doubt that some civilians were killed by such forces. Such killings, however, did not form part of CDF policy. When cross-examined, Dr Hoffman stated:

> If you are asking me whether civilians were killed by members of the CDF and Kamajors, I have no doubt that it happened at various points. If you're asking me as a matter of policy, I would disagree with that statement.[141]

88. As Dr Hoffman earlier confirmed in his testimony:

> Q: Rape, extra-judicial killings, cannibalism, et cetera, how do such things relate to the aim of defending the community, which was an aim of the Kamajor society which you identified? How do those matters relate to the aim of the Kamajor/CDF?
>
> A: They would certainly be countered to those aims.[142]

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[139] Trial Transcript, 9 October 2006, at 81:20–82:4.
[140] Trial Transcript, 9 October 2006, at 83:13-23.
[141] Trial Transcript, 10 October 2006, at 65:17-20.

89. Part of the reason for this was the process of initiation into the Kamajor society. As part of many such initiations the initiated undertook to observe a certain set of responsibilities to the community. These included things like: "not committing rape, not attacking unarmed civilians, defending the community."[143]

90. Dr Hoffman exemplified this further by explaining a powerful phrase associated with initiation: "Kamajor *baa woteh*". This means:

> Kamajor do not turn, right. It has a number of meanings, one way is simple: Do not retreat. When you go into battle, don't run away. Even more importantly, it means don't turn on your community. The specific reference is to the Sobels, the figures of the AFRC, RUF, you know that ambiguous line between people meant to be protecting the community and people who in fact threaten the community. The Kamajor bawote is that this is what you are about now you have entered this society.[144]

Thus, fundamental to being a Kamajor is the notion of not committing crimes against the community. Accordingly, the commission of crimes runs counter to the very core of what Kamajors undertook to do.[145]

91. That the targeting of civilians was not an objective of the CDF was reinforced during the cross-examination of Dr Hoffman. Dr Hoffman agreed with the proposition that the CDF engaged in guerrilla-type warfare.[146] He did not agree with the proposition that "targeting innocent civilians is one of the main tools in guerrilla warfare".[147] He stated: "the ideal military models of guerrilla warfare specifically states that it's only successful when civilians are not attacked."[148]

92. The targeting of so-called "collaborators" cannot be described as an aim and objective of the CDF.[149] Dr Hoffman explained the reason for this in the following terms:

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[142] Trial Transcript, 9 October 2006, at 89:25–90:1.
[143] Trial Transcript, 9 October 2006, at 90:18.
[144] Trial Transcript, 9 October 2006, at 90:22-29.
[145] Trial Transcript, 9 October 2006, at 91:1-5.
[146] Trial Transcript, 10 October 2006, at 62:7-13.
[147] Trial Transcript, 10 October 2006, at 62:14-17.
[148] Trial Transcript, 10 October 2006, at 62:18-20.
[149] Trial Transcript, 9 October 2006, at 98:11-16.

> For one thing the—I would probably point to the ambiguity of the term "collaborator" for one thing, and what it meant for individuals on the ground. The fact that this is, as I pointed out, one of the things we need to take into account is the extent to which what was happening here was a conglomeration of local dynamics. The term "collaborator" was used fairly – well, to cover a lot of different kind of dynamics. We are talking about in some cases, this became a rubric under which individual scores would be settled. The easiest thing in the world was, in the wake of an attack on a village, or an intervention which a new territory was held, the easiest thing in the world to do was to use that particular term "collaborator" as a way to settle old scores, you know, promote oneself individually [...].[150]

Thus to the extent that individuals were targeted as "collaborators"—this was more as a way of settling personal scores than as part of CDF policy.

93. Moreover, due to the communication problems within the terrain over which the Kamajors/CDF operated and the different voices that purported to speak on behalf of the CDF—it was impossible for one person to articulate any kind of common CDF position. As Dr Hoffman stated: "There simply was nobody in a position to make declarations that would be considered the word for the movement as a whole. The communication capacity wasn't there."[151] In response to a question from Justice Itoe, Dr Hoffman stated:

> To make the kinds of declarations that would be considered to be CDF policy, in that sense. It simply wasn't—it wasn't practical, and it wasn't the way the organization was operating at the time. I mean, 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 which everybody—and I put "everybody" in quotes, clearly it wasn't everybody, but a large number of the Kamajors had simultaneous access to, and that's not where these kinds of declarations were necessarily being made.[152]

In response to a further question, Dr Hoffman confirmed:

> Presiding Judge: Does it amount to saying that there was no center from which pronouncements came?

[150] Trial Transcript, 9 October 2006, at 98:18–99:4.
[151] Trial Transcript, 9 October 2006, at 99:12-15.
[152] Trial Transcript, 9 October 2006, at 99:20-29.

> A: Yes, My Lord, that's what I would maintain. And logistically, there was nobody who could occupy that position and there was nothing logistically that could have facilitated it.[153]

94. For example, Dr Hoffman confirmed the very "tenuous" relationship between Base One and Base Zero with "tensions between the personalities at these various locations".[154] He concluded by saying:

> There is not a lot of—in fact, probably very, very little co-ordination of efforts, partly because of these personality tensions, but also because of the difficulty of moving from one to another. It is not possible to do it over land. It's dangerous, it takes a very long time. And it meant coordinating any kinds of activities between the two was certainly not easy.[155]

95. Although the Kamajors/CDF had a common aim to protect the civilian population and not commit crimes against them, this did not preclude individuals amongst them having less than noble aims and objectives of their own, such aims, however, cannot be said to give rise to CDF policy. Dr Hoffman confirmed that although everyone, on the whole, adhered to the common aims of the Kamajors:

> that does not preclude other people having individual agendas or individual aims as well. These are not mutually exclusive. My sense is that—and certainly in my experience, you talk to members of the organization, and they—they are pretty consistent, that this is what the organization is about. Now again, they may have individual aspirations as well, hopes for what their participation might bring them personally, but, in terms of a—a kind of collective sense of what they are about, I think that's fair to say.[156]

96. In terms of examples of individual aims, Dr Hoffman highlighted the following:

> I think there are a lot of individuals that—and, again, we're talking especially about young people who saw, at various points, that participation with the militia was a way to gain a certain amount of prestige. Some cases, it may even have been a route to material success, material acquisition. It may have been an opportunity to settle old scores with community members for whom they may not have been able to do that in the past, for reasons of economic imbalance or social norms. The war presented many people with an opportunity to enact alternate routes to achieving their individual objectives.

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[153] Trial Transcript, 9 October 2006, at 100:1-6.
[154] Trial Transcript, 9 October 2006, at 72:2-4.
[155] Trial Transcript, 9 October 2006, at 72:4-10.
[156] Trial Transcript, 9 October 2006, at 85:14-24.

> Again, they might be political, they might be economic, they might be social. And I think for various individuals they fell in all three of those categories.[157]

Dr Hoffman stated that the activities of such individuals were not a common aim of the Kamajor movement: "not in a sense of being a kind of policy or even a *raison d'etre*."[158] He went on: "what I'm suggesting is that there are local aims and local concerns shot through and everyone—and this is not uncommon".[159]

97. To conclude, it is clear that there was no Kamajor/CDF policy to attack civilians. The over-riding Kamajor/CDF policy was the defence of civilians from the very constant and ever-present RUF/AFRC attack. There was no one person or entity that could articulate and circulate any CDF policy to attack civilians. Exhortations to attack collaborators, if done at all, was done by individuals rather than on behalf of the CDF. In any event, encouragement to attack collaborators does not necessarily give rise to policy to commit crimes against humanity. As held in *Limaj* it must be shown that regardless of whether collaborators are correctly identified or not, it must be shown that they were targeted as "members of a larger targeted population" rather than as individuals.[160]

98. The Prosecution stated in their Opening Statement that the widespread or systematic nature of the attacks would be demonstrated by the various incidents alleged against the three accused. It is necessary therefore to look at such evidence as has been adduced by the Prosecution and consider, for each crime base, whether the facts alleged, if proved, cross the requisite threshold of seriousness to rise from violations of Common Article 3 (war crimes under Article 3 of the Statute) to crimes against humanity under Article 2.

99. The Prosecution case, taken at its highest, is set out at Annex A. It is submitted that close scrutiny of the alleged crimes, as outlined in Annex A, demonstrates that the requisite threshold has not been crossed.

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[157] Trial Transcript, 9 October 2006, at 85:27–86:10.
[158] Trial Transcript, 9 October 2006, at 86:23-25.
[159] Trial Transcript, 9 October 2006, at 87:6-8.
[160] *Limaj* Trial Judgment, ¶¶ 216-217.

100. Firstly, even if proved, the attacks cannot be said to have, for the reasons set out above, been carried out pursuant to any Kamajor/CDF policy. Secondly, the incidents themselves are not, in the context of the conflict in Sierra Leone, of a sufficient seriousness and gravity to amount to widespread or systematic attacks for the purposes of Article 2 of the Special Court Statute.

D. Conclusions

101. It is submitted that from the above the following conclusions can be made:

(i) The overwhelming majority of human rights abuses in Sierra Leone between 1996–1999 were committed by the combined forces of the RUF/AFRC against the Sierra Leone civilian population.

(ii) The Kamajor/CDF policy (such that there was one) was to protect the civilian population from such attacks and reinstated the SLPP government in exile.

(iii) The CDF did not have a policy to target and attack civilians. Indeed to attack civilian targets was contrary to CDF philosophy and training.

(iv) The targeting of collaborators was not a CDF aim. Some members of the CDF may have had concerns about collaborators and articulated them. However, they did not and could not speak for the CDF as a whole. Moreover, there is nothing to suggest their exhortation to deal with collaborators was aimed at anyone who was not actively engaged with the RUF/AFRC forces.

(v) It is common practice and certainly not a violation of international law for a State or armed group to take lawful measures against those suspected of spying or being engaged in treason.

(vi) To the extent that perceived collaborators were targeted, they were, as in *Limaj*, targeted as individuals rather than as members of a larger targeted population.

(vii) If innocent civilians were attacked by persons purporting to be members of the CDF, these attacks were not carried out as part of any CDF policy and were carried out by individual Kamajors/CDF members independent of any overall plan or policy.

(viii) Any such isolated attacks carried out do not demonstrate a widespread or systematic attack on the civilian population for the purpose of the current proceedings.

102. For the reasons set out above, all three accused should be found 'Not Guilty' of counts 1 and 3 of the Indictment.

V. War Crimes

103. In order for this Chamber to have jurisdiction over the crimes alleged pursuant to Article 3 of the Statute, it must be shown, conjunctively, that such crimes were committed in the context of an armed conflict and that a sufficient nexus existed between each crime and the conflict.[161]

104. The Prosecution has alleged that at all times relevant to its case, "a state of armed conflict existed in Sierra Leone"[162] and that a "nexus existed between the armed conflict and all acts or omissions charged"[163] as violations of Article 3 of the Statute.[164]

105. While the Appeals Chamber has already confirmed this Chamber's finding that an armed conflict existed in the territory of Sierra Leone from March 1991 until January 2002,[165] it remains for the Prosecution to prove beyond a reasonable doubt that Fofana's alleged acts were "closely related" to the hostilities occurring in the parts of the country controlled by the parties to the conflict.[166]

106. The Defence submits that the Prosecution has failed to discharge its burden in this regard and urges the Chamber to hold the Prosecution to strict proof of its case with respect to Counts 2, 4, 5, 6, and 7.

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[161] *See, e.g., Kunarac* Appeal Judgement.
[162] Indictment, ¶ 4.
[163] Indictment, ¶ 5.
[164] These include Counts 2, 4, 5–7.
[165] See *Norman*, SCSL-2004-T-398, Appeals Chamber, 'Decision on Appeal Against Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence', 18 May 2005, ¶ 40.
[166] *See, e.g., Brdjanin* Trial Judgement , ¶ 128.

VI. Article 6(1) Liabilty

107. Consistent with the previous submissions, for each mode of liability contained in Article 6(1), the Defence will set out the relevant law and then apply it to the evidence which corresponds to the allegations contained in the Pleadings, discussing the elements of the relevant crimes only where necessary.

A. Fofana did not commit any crimes

108. "Committing" a crime "covers physically perpetrating a crime or engendering a culpable omission in violation of criminal law".[167] Article 6(1) "covers first and foremost the physical perpetration of a crime by the offender himself, or the culpable omission of an act that was mandated by a rule of criminal law".[168] The *actus reus* required for committing a crime is that the accused participated, physically or otherwise directly, in the material elements of a crime provided for in the Statute, through positive acts or omissions,[169] whether individually or jointly with others. The requisite *mens rea* is that the accused acted with an intent to commit the crime, or with an awareness of the probability, in the sense of the substantial likelihood, that the crime would occur as a consequence of his conduct.[170]

109. Nowhere in the Indictment, the Pre-Trial Brief, or the main body of the Supplemental Pre-Trial Brief is Fofana specifically alleged to have physically perpetrated any crime provided for in the Statute, either through positive acts or omissions. Annex A of the Supplemental Pre-Trial Brief, listing the Prosecution's proposed testimonial evidence, does refer to a single incident of Fofana's alleged commission, specifically that a group of Kamajors, including Fofana, broke into the proposed witness's house, fired shots, and beat the proposed witness's uncle.[171] However, the proposed witness was never

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[167] *Prosecutor v. Krstic*, IT-98-33, Trial Chamber, 'Judgement', 2 August 2001 (the "*Krstic* Trial Judgment"), ¶ 601. *See also Prosecutor v. Tadic*, IT-94-1, Appeals Chamber, 'Judgement' (the "*Tadic* Appeal Judgement"), ¶ 188; *Ntakirutimana* Appeals Judgement, ¶ 462.
[168] *Tadic* Appeals Judgement, ¶ 188.
[169] *Kordic* Trial Judgement, ¶ 376.
[170] *Ibid.*
[171] Supplemental Pre-Trial Brief, Annex A, p.9 (proposed testimony of TF2-063).

called[172], and no other evidence was presented by the Prosecution as to this alleged incident.

110. Accordingly, Fofana should be found 'Not Guilty' of committing any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

B. Fofana did not plan any crimes

111. "Planning" implies that one or several persons plan or design the commission of a crime at both the preparatory and execution phases.[173] 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.[174] It is sufficient to demonstrate that the planning was a factor substantially contributing to such criminal conduct.[175] A person who plans an act or omission with an intent that the crime be committed, or with an awareness of the substantial likelihood that a crime will be committed in the execution of that plan, has the requisite *mens rea* for establishing responsibility under Article 6(1) of the Statute for planning.[176]

112. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have planned or designed the commission of any particular crime which was later perpetrated. Although he is said to have been physically present at several so-called "planning meetings"[177], the Supplemental Pre-Trial Brief alleges only a single instance of Fofana's actual participation and/or involvement in the planning of crimes,[178] namely, that he was "physically present and participated in a meeting addressed by Samuel Hinga Norman at Dassamu village", wherein it was agreed that "all civilians living in Kebe were collaborators and should be killed and their houses burnt".[179] Arguably, the Prosecution has alleged that Fofana planned Counts 1 and 2 at Dassamu

[172] Proposed witness TF2-063 did not testify at trial.
[173] *Brdjanin* Trial Judgement, ¶ 268; *Krstic* Trial Judgement, ¶ 601; *Stakic* Trial Judgement, ¶ 443.
[174] *Kordic* Appeals Judgement, ¶ 26.
[175] *Kordic* Appeals Judgement, ¶ 26.
[176] *Kordic* Appeals Judgement, ¶ 31.
[177] Not one of these references, however, refers to any alleged criminal activity. *See* ¶¶ 16(e), 25(e), 33(e), 41(d), 47(b), 49(g), 65(e), 72(e), 79(e), 88(e), 91(d), 93(e), 101(e), 108(h), 113(c), 115(e), 122(e), and 135(e).
[178] *N.B.* Annex A of the Supplemental Pre-Trial Brief, listing the Prosecution's proposed testimonial evidence, does not provide any factual details that could reasonably and fairly be construed as Fofana's alleged planning of crimes.
[179] Supplemental Pre-Trial Brief, ¶¶ 33(h), 78(e), and 108(c).

village through his participation in the above-mentioned meeting. Yet, the Prosecution presented no evidence with respect to this alleged incident and the Chamber, in its Rule 98 Decision, held that all references to "Kebi Town" in Bo District were accordingly stricken from the Indictment.[180] If by "Kebe", the Prosecution had in mind a location other than Kebi Town, the Defence has been unable to discover that particular location on any map of Sierra Leone, let alone evidence that any crimes were committed there.

113. Accordingly, Fofana should be found 'Not Guilty' of planning any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

C. Fofana did not instigate any crimes

114. "Instigating" means "prompting another to commit an offence."[181] Both acts and omissions may constitute instigating, which covers express and implied conduct.[182] A nexus between the instigation and the perpetration must be demonstrated;[183] but it need not be shown that the crime would not have occurred without the accused's involvement.[184] The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator's conduct.[185] The requisite *mens rea* for "instigating" is that the accused intended to provoke or induce the commission of the crime, or was aware of the substantial likelihood that a crime would be committed in the execution of that instigation.[186]

115. Nowhere in the Pleadings is Fofana specifically alleged to have prompted any others to commit any particular offence provided for in the Statute which was later perpetrated. Accordingly, the Defence submits that the Prosecution's case against Fofana did not include charges of instigating any criminal activity. In any event, no evidence of such instigation was presented.

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[180] *Norman*, SCSL-2004-14-T-473, Trial Chabmer I, 'Decision on Motions for Judgement of Acquittal Pursuant to Rule 98', 21 Ocotber 2005.
[181] *Krstic* Trial Judgement, ¶ 601; *Akayesu* Trial Judgement, ¶ 482; *Blaskic* Trial Judgement, ¶ 280; *Kordic* Appeals Judgement, ¶ 27; *Kordic* Trial Judgement, ¶ 387.
[182] *Brdjanin* Trial Judgement, ¶ 269; *Blaskic* Trial Judgement, ¶ 280.
[183] *Brdjanin* Trial Judgement, ¶ 269; *Blaskic* Trial Judgement ¶ 280.
[184] *Kordic* Appeals Judgement, ¶ 27.
[185] *Kordic* Appeals Judgement, ¶ 27.
[186] *Kordic* Appeals Judgement, ¶ 32.

116. Accordingly, Fofana should be found 'Not Guilty' of instigating any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

D. Fofana did not order any crimes

117. The *actus reus* of "ordering" requires that a person in a position of authority instructs another person to commit an offence.[187] It is not necessary to demonstrate the existence of a formal superior-subordinate command structure or relationship between the orderer and the perpetrator; it is sufficient that the orderer possesses the authority, either *de jure* or *de facto*, to order the commission of an offence, or that his authority can be reasonably implied.[188] There is no requirement that the order be given in writing, or in any particular form, and the existence of the order may be proven through circumstantial evidence.[189] 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.[190]

118. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have instructed others to commit any particular offence provided for in the Statute, which was later perpetrated. However, the Supplemental Pre-Trial Brief does make certain specific factual claims which support the following allegations of ordering. These are dealt with in turn.

1. Fofana did not order "Born Naked" Kamajors to attack Kenema

119. The Prosecution has alleged that Fofana ordered a CDF group known as Born Naked "to attack Kenema Town, kill all captured rebels and collaborators and seize or burn their houses".[191] However, no evidence was presented that Fofana ordered the Born Naked group to do anything, let alone attack Kenema Town. The Prosecution's

[187] *Kordic* Appeals Judgement, ¶ 28.
[188] *Brdjanin* Trial Judgement, ¶ 270.
[189] *Kamuhanda* Appeal Judgement, ¶ 76.
[190] *Blaskic* Appeals Judgement, ¶ 42; *Kordic* Appeals Judgement, ¶ 30; *Brdjanin* Trial Judgement, ¶ 270.
[191] Supplemental Pre-Trial Brief, ¶ 25(g), 72(f), and 101(f); Annex A, p.20 (proposed testimony of TF2-148).

proposed witness on this issue never testified,[192] and no other evidence was presented that Fofana ordered any commander to attack Kenema, kill captured combatants or collaborators, burn their houses, or seize their property.

2. Fofana did not order the erection of a checkpoint at Jebma Town

120. The Prosecution has alleged that Fofana "gave instructions for a checkpoint to be erected at Jebma Town, where civilians were separated by tribes" and "the Temnes were taken to the forest" to be killed, maimed, and/or physically harmed".[193] However, no evidence was presented that Fofana ordered a checkpoint to be erected at any location, let alone at Jebma Town. The Prosecution's proposed witness on this issue never testified[194], and no other evidence was presented that Fofana ordered any commander to separate captured rebels and civilians by tribe and kill, maim, or otherwise physically harm Temnes.

3. Fofana did not order the Taiama Operation

121. The Prosecution has alleged that Fofana, along with Norman, "gave direct instructions to the Death Squad for the Taiama Operation in 1997" resulting in "a heavy toll of civilian casualties".[195] However, no evidence was presented that Fofana ordered the Death Squad to do anything, let alone engage in the so-called "Taiama Operation" in 1997. Indeed, no evidence was presented as to the existence of any such operation.

4. Fofana did not order the execution of death sentences at Base Zero

122. The Prosecution has alleged that Fofana, "at Base Zero and together with Allieu Kondewa, pronounced the death sentences on captured combatants or gave orders to inflict other forms of physical violence".[196] However, no evidence was presented that Fofana pronounced death sentences or gave orders to inflict other forms of physical violence on anyone, let alone captured combatants at Base Zero.

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[192] Proposed witness TF2-148 did not testify.
[193] Supplemental Pre-Trial Brief, ¶¶ 33(i) and 78(d); Annex A, p. 17 (proposed testimony of TF2-124).
[194] Proposed witness TF2-124 did not testify.
[195] Supplemental Pre-Trial Brief, ¶¶ 33(j) and 78(c).
[196] Supplemental Pre-Trial Brief, ¶ 93(i).

5. Fofana did not order the burning of civilian property

123. The Prosecution has alleged that Fofana ordered, "as a general measure of retribution", "the burning of civilian property performed as part of the attacks on many villages throughout the various Districts of Sierra Leone".[197] However, no evidence was presented that Fofana ordered the burning of civilian property as part of attacks on villages for any reason, let alone as a general measure of retribution.

6. Fofana did not order any other attack on Kenema

124. The Prosecution has alleged that "the CDF launched an attack on Kenema Town on or about February 15, 1998, which occasioned severe physical violence, and the intentional infliction of mental harm or suffering on the civilian population, upon the directives and instructions of the CDF high command, of which Moinina Fofana was the National Director of War".[198] It is further alleged that Fofana "was responsible for sending ammunition to the CDF in the field".[199]

125. Although witness TF2-201 claims that Fofana was present at a meeting at Base Zero sometime in February 1998 where Norman is said to have instructed commanders with regard to potential attacks on Kenema and Bo,[200] there is no evidence that Fofana ever issued a single directive or instruction with regard to the alleged 15 February 1998 attack, or any other attack, on Kenema.

7. Fofana did not order the illegal detention of witness TF2-057 and his brother

126. In Annex A of its Supplemental Pre-Trial Brief, the Prosecution has alleged that Fofana ordered witness and his brother to be imprisoned and kept on a water-only diet for twenty-five days, and that witness's brother and two other detainees were taken away and never seen again.[201] In its Opening Statement, the Prosecution further alleged that

[197] Supplemental Pre-Trial Brief, ¶ 131(c).
[198] Supplemental Pre-Trial Brief, ¶ 70(a).
[199] Supplemental Pre-Trial Brief, ¶¶ 25(d) and 72(d).
[200] Trial Transcript, TF2-201, 5 November 2004 (41–54).
[201] Annex A, p. 8 (proposed testimony of TF2-057).

it would substantiate the killings, by machete, of four civilians along Mahei Boima Road in Bo, "right at the same street where Moinina Fofana had his headquarters".[202] Arguably, on these material facts, the Prosecution has alleged that Fofana ordered Counts 1–4.

127. The Prosecution did present evidence regarding this alleged incident by way of a single witness, TF2-057.[203] According to his testimony, sometime in March 1998[204] shortly after the arrival of ECOMOG forces in Bo, a group of unidentified Kamajors came to his house and informed him that he was wanted at Kamajor headquarters at 88 Mahei Boima Road, and that he and his brother were then taken there by force. Once there, Fofana allegedly entered the room from the veranda and stood near the witness and his brother.

128. The witness claims to have recognized Fofana from previous meetings held at Coronation Field in Bo in 1993 and 1994 where Fofana was introduced as the Director of War. According to the witness, Fofana then asked: "What type of people are this?" When told that the witness and his brother were Temnes, Fofana allegedly responded that he "did not have any business with the Temne people, because ... they're [sic] brother, Foday Sankoh, brought a war in this country".[205] The witness claims that he understood this comment to mean that he and his brother would be killed.[206]

129. Fofana then went into his office, and an unidentified Kamajor locked the witness and his brother in a cell with four others, where the witness remained for twenty-five days. Approximately fifteen days into his detention, the witness claims to have heard Fofana's voice calling for "one person among the two people in the cell". Unidentified Kamajors then opened the door and asked witness's brother to come out. The witness never saw his brother again.

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[202] Opening Statement, 3 June 2004, 26:21–24. *N.B.* The forensic evidence presented by the Prosecution had to do with an incident described by witness TF2-156, who testified that four of his companions were pursued and chopped to death by unidentified Kamajors outside his aunt's house in Bo. *See* Exhibit 101, Haglund Report, § IV(A)(4) at p. 22 (7654). The Prosecution presented no forensic evidence with respect to the incident described by TF2-057.
[203] Trial Transcript, TF2-057, 29 November 2004 (117–123); Trial Transcript, 30 November 2004 (1–12). The evidence of TF2-057 is uncorroborated.
[204] Trial Transcript, TF2-057, 30 November 2004 (70:26–71:9).
[205] Trial Transcript, TF2-057, 29 November 2004 (122).
[206] Trial Transcript, TF2-057, 30 November 2004 (20:24–21:12).

130. Sometime later, the witness again claims to have heard the voice of Fofana calling for two others from the cell to be removed. The witness then "peeped" through a hole in the door and saw a group of unidentified Kamajors armed with cutlasses and sticks surround the two detainees and hack them to death. The witness further claims that he saw another fellow detainee, Aruna Massaquoi, killed in a similar manner by unidentified Kamajors. The witness claims he was eventually released by ECOMOG officers.

131. The Defence submits that the evidence of TF2-057 is neither reliable nor consistent with the other evidence in the case. Furthermore, that Fofana ordered the alleged detention and killings is not the only reasonable inference to be drawn from the evidence.

a. The witness's identification of Fofana is unreliable

132. Although the witness indicated that he personally recognized Fofana based on having seen him at certain meetings in 1993 and 1994,[207] the evidence suggests that the witness spent very little time in the presence of Fofana on the day he was detained—only long enough for Fofana to emerge from the veranda, ask a single short question, receive an even shorter answer, briefly reply, and immediately leave the scene.[208] No doubt this is a sufficient amount of time in which to recognize a familiar face. But the witness—by his own admission—hadn't seen Fofana in at least four years and only then at public meetings at Bo's Coronation Field, a large meeting ground the size of a standard football pitch. Following this initial brief encounter, the witness does not claim that he saw Fofana again. However, after an interval of not less than fifteen days, according to the evidence,[209] the witness claims to have recognized Fofana's voice through the closed door of his cell.[210] Ten days later, he claims to have heard the same voice a second time.[211] This evidence is all that links Fofana to the disappearance of the witness's brother and the killings of the three others. For a number of reasons, the Defence submits the Chamber should treat it with extreme circumspection.

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[207] Trial Transcript, TF2-057, 29 November 2004 (120:20–121:9).
[208] Trial Transcript, TF2-057, 29 November 2004 (121:14), (121:28), (122:10-11), (122:29).
[209] Trial Transcript, TF2-057, 30 November 2004 (2:8–9, 3:2).
[210] Trial Transcript, TF2-057, 30 November 2004 (2:16-17).
[211] Trial Transcript, TF2-057, 30 November 2004 (3:29).

133. As to the physical identification of Fofana, the witness's assertion that he would have been introduced by the title Director of War in 1993 or 1994 is dubious. According to the Prosecution's own evidence, the earliest mention of Fofana's title is mid- to late-1997.

134. Further, with regard to the alleged voice identification, there is no evidence that the witness had ever heard Fofana's voice prior to the alleged incident at the office.[212] Additionally, as stated above, the amount of time the witness was allegedly exposed to Fofana's voice was rather short, and it is highly unlikely that the witness—no doubt under a great deal of stress, having been forcibly detained for reasons unexplained to him—was making a deliberate effort to commit Fofana's voice to memory. The witness indicated in his examination-in-chief that he only spoke three languages: Temne, Krio, and Susu.[213] Assuming, *ex arguendo*, that Fofana in fact engaged in the above-mentioned dialog with the "junior Kamajor",[214] it is almost certain that such a discussion would have taken place in Mende, a foreign language to the witness. Moreover, as the witness describes the original exchange between Fofana and the junior Kamajor, there is no reason to suppose that it was conducted in anything but normal conversational tones. However, if the witness was indeed able to comprehend an unfamiliar voice speaking a foreign language through the door of his cell, it most certainly must have been projected quite forcefully, if not shouted. One needn't be an expert in forensic voice recognition to know that the sound of someone's voice can change dramatically depending on the speaker's tone and emotional state as well as the acoustic conditions of the environment.

135. Finally, the Defence emphasizes that the witness did not identify Fofana or his voice in court. Accordingly, it is equally likely that the voice the witness claims to have heard calling for the removal of the men from the cell belonged to a person other than Fofana.

b. There is confusion as to the timing, location, and perpetrator of the alleged incident

136. With regard to the creation and staffing of CDF offices in Bo, the evidence is as follows: (i) At some point, Kosseh Hindowa occupied an office at 88 Mahei Boima

[212] *N.B.* It was the witness's testimony only that he *saw* Fofana in 1993 or 1994, not that he *heard* him speak at that time. TF2-057, 29 November 2004 (120:20–121:9).
[213] Trial Transcript, TF2-057, 29 November 2004 (110:3-6).
[214] Trial Transcript, TF2-057, 29 November 2004 (121:13).

Road.[215] (ii) Sometime in 1999/2000, an office of the "war directorate" (which was later referred to as the "Peace Office") was opened at an unspecified number on Mahei Boima Road and that Fofana headed this office.[216] (iii) There were two CDF offices in Bo, both along Mahei Boima Road: one at number 88 and the other at number 42.[217] (iv) Hindowa and Fofana had offices at different locations.[218] Apart from the testimony of witness TF2-057, there is no evidence that Fofana was present in Bo in March 1998.

137. According to the evidence, it appears fairly clear that Fofana's "office" was at 42 Mahei Boima Road and was not opened until March 1999 at the earliest. Therefore, the witness's testimony—that he saw Fofana at 88 Mahei Boima Road in March 1998—is suspect. While it is possible that Fofana was present on that particular occasion at number 88 or that the witness was simply mistaken in his testimony as to both the address and the time of the incident, it is equally possible that the witness mistook Kosseh Hindowa or another Kamajor for Fofana.

c. Fofana's ordering is not the only reasonable inference under the circumstances

138. While the existence of an order may be proved through circumstantial evidence, it must be the only reasonable inference under the circumstances. The witness did not testify that Fofana ordered him to be brought to the office or placed in the cell or that he heard Fofana order the alleged killings. Assuming, *ex arguendo*, that it was indeed Fofana who the witness saw, the evidence is simply that he emerged from the veranda *after* the witness had been detained, made an equivocal remark about Temne people, and left the room. Indeed, Fofana's question ("What type of people are this?") indicates that he may have been surprised to see the witness and his brother in the office. That Fofana is said to have spent so little time with the two men reasonably indicates that, as he is alleged to have said, he literally "did not have any business with the Temne people" and not, as the witness understood it, that he thought they should be killed. At its highest, the evidence suggests that Fofana may be a racist, not a murderer.

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[215] Exhibit 168, Statement of Foday Seisay, 29 August 2006, at p. 2 ("Mr Hindowa occupied a large, staffed office at 88 Mahei Boima Road".)
[216] Trial Transcript, TF2-014, 14 March 2005 (57:7-12), (57:24-26) and 15 March 2005 (40:17–41:25), (42:16-22); *see also* Exhibit 168, Statement of Foday Seisay, 29 August 2006, at p. 2.
[217] Trial Transcript, 20 February 2006 (90:17-20).
[218] Trial Transcript, Kenneth Koker, 20 February 2006 (84:17–19).

139. Of course, it is the burden of the Prosecution to prove Fofana's alleged acts and state of mind beyond a reasonable doubt. For the above-stated reasons, the Defence submits that it has not done so. The evidence of witness TF2-057 cannot and should not be relied upon by the Chamber to impute any liability to Fofana for ordering Counts 1–4.

140. Accordingly, Fofana should be found 'Not Guilty' of ordering any of the crimes alleged in Counts 1–5 and Count 8 of the Indictment.

E. Fofana did not aid and abet any crimes

141. "Aiding and abetting" is the act of rendering practical assistance, encouragement or moral support, which has a substantial effect on the perpetration of a certain crime.[219] Strictly speaking, "aiding" and "abetting" are not synonymous.[220] "Aiding" involves the provision of assistance, while "abetting" need involve no more than encouraging, or being sympathetic to, the commission of a particular act.[221] However, the two concepts have been consistently considered together as a single mode of liability.

142. The *actus reus* of aiding and abetting is the practical assistance, encouragement, or support of the aider and abettor which has a substantial effect upon the perpetration of the crime.[222] The test is two-pronged: (i) Initially, it must be shown that the accused in fact provided assistance, encouragement, or support to the principle offender. (ii) Such assistance, encouragement, or support must then be shown to have had a substantial impact on the commission of the alleged crime.

143. While there is no requirement of a strict causal relationship between the conduct of the aider or abettor and the crime in the sense that such conduct was the *sine qua non* of the commission of the crime,[223] liability will not arise where the activities of the accused are merely "indicative of some degree of involvement" in alleged criminal activity.[224]

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[219] *Krstic* Trial Judgement, ¶ 601; *Aleksovski* Appeal Judgement, ¶ 162.
[220] *Kvocka* Trial Judgement, ¶ 254, *citing* Akayesu Trial Judgement, ¶ 484.
[221] *Kvocka* Trial Judgement, ¶ 254, *citing* Akayesu Trial Judgement, ¶ 484.
[222] *Blaskic* Appeals Judgement, ¶ 48; *Furundzija* Trial Judgement, ¶ 249; *Kunarac* Trial Judgement, ¶ 391.
[223] *Blaskic* Appeals Judgement, ¶ 48.
[224] *See, e.g., Delalic* Appeal Judgement, ¶¶ 356–359 (No liability for unlawful confinement where the accused publicly justified and defended the purpose and legality of the camp and participated in the classification and release of prisoners (despite having no "independent authority" to do so); while such activities were "indicative of some degree of involvement in the continuing detention or release of detainees", both were insufficient to

Regardless of the type of support, encouragement, or assistance, it must always be shown to have a substantial effect on the commission of the underlying crime. In practice, Chambers of the International Tribunals have refused to impose liability where the nexus between the accused's alleged acts and the underlying crime has been considered too remote, particularly where the accused's own involvement is both temporally and physically distant from the crime base.[225]

144. Mere presence at the scene of a crime will rarely, if ever, constitute aiding or abetting.[226] However, in those few cases where it can be shown that the presence bestows legitimacy on, or provides encouragement to, the actual perpetrator, such presence may be culpable.[227] The presence of a superior may operate as an encouragement or support, in the relevant sense,[228] but only where he is physically present at the crime base along with his subordinate.[229] An omission may, in the particular circumstances of a case, constitute the *actus reus* of aiding and abetting, but only where there is a legal duty to act.[230]

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establish the "degree of participation that would be sufficient to constitute a substantial effect on the continuing detention".)

[225] *See, e.g.*, *Brdjanin* Trial Judgment, ¶ 527 (No liability for torture where the accused's public utterances were not deemed "specific enough to constitute instructions [...] to the physical perpetrators to commit any of the underlying" crimes; the Prosecution had failed to establish a nexus between the statements and the commissions of the killings in question.); *Kunarac* Trial Judgment, ¶ 741 (No liability where it was not established that the accused was present while the principle perpetrator committed the rapes, despite the fact that the accused continued to visit the house where the rapes were being committed; the connection between the events at the house and the accused's sporadic presence there, was "so loose" that it would stretch the concept of aiding and abetting beyond its limits.); *Oric* Trial Judgment, ¶¶ 682–688 (No liability where, despite his preparation and execution of attacks wherein crimes were clearly committed but where there was evidence that the accused could have done nothing to prevent it as he did not have the means to control the perpetrators and where there was no evidence that his group—one of several involved in the attack—had any involvement in the crimes, the accused could not be said to be the kind of "approving spectator" who could be held responsible.)

[226] *Kupreskic* Appeal Judgement, ¶¶ 256, 304.

[227] *Simic* Trial Judgment, ¶ 165; *Delalic* Appeal Judgment, ¶¶ 357-359; *Naletilic* Trial Judgment, ¶ 63; *Kvocka* Trial Judgment, ¶ 257; *Krnojelac* Trial Judgement, ¶ 89; *Kunarac* Trial Judgment, ¶ 393; *Aleksovski* Trial Judgement, ¶¶ 64, 65, 87; *Delalic* Trial Judgment, ¶ 327; *Limaj* Trial Judgment, ¶ 517; *Brdjanin* Trial Judgment, ¶ 271; *Tadic* Trial Judgement ¶ 689.

[228] *Brdjanin* Trial Judgement, ¶ 271.

[229] *See, e.g.*, *Akayesu* Appeal Judgement, ¶ 684; *Akayesu* Trial Judgement, ¶¶ 452, 693–694, 704–705 and AC ¶ 694; *Bisengimana* Trial Judgment, ¶ 39; *Furundzija* Trial Judgement, ¶¶ 270–275; *Niyitegeka* Trial Judgment, ¶ 462; *Ntagerura* Trial Judgement, ¶ 762.

[230] *See Blaskic* Appeal Judgement, ¶ 47; *Krnojelac* Trial Judgement, ¶ 88; *Kunarac* Trial Judgement, ¶ 391. *N.B.* Omissions have been found to constitute the *actus reus* of aiding and abetting the crimes of subordinate principles only where the accused's position of authority imposed a duty to act and his proximity to the crime scene and awareness of what was happening there established his knowledge. *See, e.g.*, *Aleksoviski* Trial Judgement, ¶ 87; *Krnojelac* Trial Judgement, ¶¶ 171, 316; *Rutaganira* Trial Judgement, ¶¶ 29–35.

145. The *mens rea* required is the knowledge that, by his or her conduct, the aider and abettor is assisting or facilitating the commission of the offence.[231] This awareness need not have been explicitly expressed; it may be inferred from all relevant circumstances.[232] The aider and abettor need not share the *mens rea* of the perpetrator, but he or she must be aware of the essential elements of the crime ultimately committed by the perpetrator,[233] and must be aware of the perpetrator's state of mind.[234]

146. Of particular relevance when attempting to determine an accused's state of mind, is the physical and temporal proximity of the accused to the underlying criminal act in question. In making the determination, the Chambers of the International Tribunals have invariably found that the accused became cognizant of the state of mind of the principle perpetrator either (i) due to his physical presence at the crime base along with the principle or (ii) through effectively functioning military or institutional lines of communication.[235] No liability will attach where it has not been shown that the accused knew that his acts of support, encouragement, or assistance would lead to the commission of crimes.[236] Of course, in order for a Chamber to make the determination, the identity of the principle perpetrator must be pleaded and proven.

147. Nowhere in the Indictment or the Pre-Trial Brief is Fofana specifically alleged to have aided and abetted the commission of any particular offence provided for in the Statute which was later perpetrated. However, the Supplemental Pre-Trial Brief does make

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[231] *Furundzija* Trial Judgement, ¶ 249; *Tadic* Appeals Judgement, ¶ 229; *Blaskic* Appeals Judgement, ¶ 49; *Vasiljevic* Appeals Judgement, ¶ 102.

[232] *Delalic* Trial Judgement, ¶ 328; *Tadic* Trial Judgement, ¶ 676.

[233] *Aleksovski* Appeals Judgement, ¶ 162; *Krnojelac* Trial Judgement, ¶ 90 ("The aider and abettor must be aware of the essential elements of the crime committed by the principal offender, including the principal offender's *mens rea*. However, the aider and abettor need not share the mens rea of the principal offender.")

[234] *Brdjanin* Trial Judgement, ¶ 273; *Aleksovski* Appeals Judgement, ¶ 162.

[235] *Blagojevic* Trial Judgment; *Brdjanin* Trial Judgment; *Gacumbitsi* Trial Judgment; *Kajelijeli* Trial Judgment; *Krstic* Appeal Judgement; *Kunarac* Trial Judgement; *Kvocka* Appeal Judgement; *Limaj* Trial Judgement; *Naletilic* Trial Judgement; *Ndindabahizi* Trial Judgement; *Ntakirutimana* Trial Judgement; *Rutaganda* Trial Judgement; *Semanza* Trial Judgement; *Vasiljevic* Appeals Judgement..

[236] *Blagojevic* Trial Judgement, ¶¶ 733–745 (No liability for mass executions where the accused and his brigade provided practical assistance to the operation that resulted in the death of thousands of Muslim men and boys by separating the men from the rest of the population and transporting, detaining, and guarding them at the detention sites (necessary steps in the overall murder operation). However, there was insufficient evidence of mens rea, and therefore no liability.); *Brdjanin* Trial Judgement, ¶¶ 477–479 (No liability for extermination where it was not demonstrated that the accused was aware that the crimes would necessarily reach the level of extermination.); *Kordic* Appeal Judgement, ¶ 765 (No liability for persecution where the accused had no knowledge that crimes were about to be committed.); *Krnojelac* Trial Judgement, ¶ 347 (No liability for unlawful killings where the accused, a prison warden, failed to use his authority to prevent the perpetrators from entering the prison which had a substantial effect on the commission of the killings, because the Prosecution had failed to establish that the accused was "aware of the crimes which were being committed as a result of his failure".)

certain specific factual claims which, the Defence concedes, arguably allege the following charges of aiding and abetting. These are dealt with in turn.

1. Fofana did not aid and abet the commission of any crimes which might have resulted from any attack on Bonthe Town

148. The Prosecution has alleged that Fofana "addressed a meeting of the CDF at Base Zero" in February 1998 where he "supported directives for the attack on Bonthe Town" which included the killing of collaborators and the destruction of their property.[237] However, absolutely no evidence was led with regard to this alleged meeting, or with regard to any other meeting concerning any attacks on Bonthe Town at which Fofana was alleged to have been present.

2. Fofana did not aid and abet the execution of a captured soldier at Dassamu

149. The Prosecution has alleged that Fofana was "responsible for turning over to Allieu Kondewa a soldier captured at Dassamu for the purpose of having that soldier executed".[238] However, absolutely no evidence was led with regard to this alleged incident.

3. Fofana did not aid and abet the looting of a World Vision vehicle in Bo

150. The Prosecution has alleged that Fofana "took possession of a vehicle looted from World Vision by the CDF and put it into private use".[239] However, no evidence was presented that Fofana took possession of any vehicle belonging to World Vision or to any other party or organization.

4. Fofana did not aid and abet the looting of generators and stereos in Bo

151. The Prosecution has alleged that "during the attack on Bo Town, the CDF looted generators and stereos from the house of one civilian accused of being a collaborator

[237] Supplemental Pre-Trial Brief, ¶¶ 49(h), 93(h), 115(f).
[238] Supplemental Pre-Trial Brief, ¶ 64(b).
[239] Supplemental Pre-Trial Brief, ¶ 106(c).

and handed the looted items to Moinina Fofana".[240] However, no evidence was presented that any looted items, let alone generators and stereos, were handed over to Fofana.

5. Fofana did not aid and abet the looting of a Mercedes vehicle at Base Zero

152. The Prosecution has alleged that "a looted Mercedes vehicle was delivered to Samuel Hinga Norman at Base Zero but was in the custody and use of Moinina Fofana".[241] However, no evidence was presented as to this alleged incident.

6. Fofana did not aid and abet the beating of a civilian by the CDF of the 19th Battalion

153. The Prosecution has alleged that Fofana was "physically present at a scene when one civilian was severely beaten by the CDF of the 19th Battalion".[242] While no evidence was led that Fofana was involved in any such incident, a single prosecution witness gave evidence regarding a seemingly similar episode involving Kosseh Hindowa. According to witness TF2-057, sometime after the arrival of ECOMOG in Bo, a Limba man was arrested by unidentified Kamajors and taken to 88 Mahei Boima Road—the Kamajor "head office". The man was placed in the custody of Kosseh Hindowa and beaten by unidentified Kamajors in Hindowa's presence. Hindowa then demanded 100,000 Leones for the man's release, and the witness paid the money. The man died one month later.[243] However, the witness never mentioned Fofana as being present or in any way involved in the alleged incident, nor did any other witness. Accordingly, he cannot be said to bear responsibility for the alleged beating.

7. Fofana did not aid and abet the infliction of physical violence and mental harm in Bo

154. The Prosecution has alleged that Fofana "maintained his offices and spent a significant amount of time in Bo and was thus in proximity to the events which resulted in the

[240] Supplemental Pre-Trial Brief, ¶ 106(d).
[241] Supplemental Pre-Trial Brief, ¶ 114(e).
[242] Supplemental Pre-Trial Brief, ¶ 33(g).
[243] Trial Transcript, TF2-056, 6 December 2004 (74:14–76:14), (76:18–77:7), (77:17-19).

infliction of physical violence and mental harm or suffering".[244] It is unclear to the Defence what the Prosecution intended to allege by this statement.

155. However, whether and when Fofana maintained offices in Bo, let alone whether he spent any time there, has been left unclear on the record.[245] At its highest, the Prosecution's evidence suggests that Fofana was in some way associated with offices somewhere on Mahei Boima Road as early as March 1999. With the exception of the evidence of witness TF2-057 (dealt with above under "ordering"), there is no evidence, specific or otherwise, suggesting that Fofana was in proximity to the events which resulted in the infliction of physical violence and mental harm or suffering in Bo. In any event, merely being "in proximity" to unspecified criminal events does not incur criminal liability for aiding and abetting (or any other mode of liability) under the relevant jurisprudence. Accordingly, the Prosecution has failed to substantiate its charges in this regard.

8. Fofana did not aid and abet the looting of coffee and cocoa at Base Zero

156. The Prosecution has alleged that "a looted truck loaded with coffee and cocoa was taken to Base Zero and handed over to Moinina Fofana".[246] Yet this vague allegation—arguably an attempt to charge Fofana with aiding and abetting the looting of the goods—is not made any clearer by the Prosecution's evidence.

157. According to the only witness who testified as to this alleged event, when asked whether he had ever seen any evidence of looting at Base Zero, he replied that a truckload of "looted cocoa and coffee" was brought there from the highway by unidentified individuals. He then stated that the cocoa and coffee were unloaded and given to the "Director of War and the Chief Priest".[247] No further evidence regarding the incident was presented, and there is nothing in the witness's testimony to suggest that Fofana knew the items had been looted, or if he did, that he had anything to do with their improper procurement. The witness did not identify the individuals who arrived

[244] Supplemental Pre-Trial Brief, ¶ 77(d).
[245] Trial Transcript, TF2-014, 14 March 2005 (57:7-12), (57:24-26) and 15 March 2005 (40:17–41:25), (42:16-22); Trial Transcript, TF2-140, 14 September 2004 (91:3-20); Trial Transcript, TF2-008, 16 November 2004 (18:1-5), (19:23–20:3); Trial Transcript, Kenneth Koker, 20 February 2006 (90:17-20); and Exhibit 168, at 2.
[246] Supplemental Pre-Trial Brief, ¶ 114(d).
[247] Trial Transcript, TF2-068, 17 November 2004 (92:1-12).

with the goods, nor did he indicate what, if anything, Fofana did with the items once they were given to him.

158. The Prosecution has clearly failed to demonstrate how, by simply taking possession of items without the knowledge that they had been illegally obtained, Fofana lent substantial assistance to the crime of looting.

9. Fofana did not aid and abet the order to kill Sheku Gbao

159. The Prosecution has alleged that Fofana, "in the presence of Samuel Hinga Norman and Allieu Kondewa, accosted a CDF commander of inferior rank, and rebuked him for failing to kill, as ordered, one Sheku Gbao, a captured enemy combatant".[248] Again—as per its pleading style—the Prosecution has failed to coherently articulate its allegation, and no evidence was presented that Fofana himself did anything that could be said to have had a substantial effect on the order to kill Gbao.

160. The little evidence presented on this issue suggests that Norman gave the order to Albert Nallo without any assistance, encouragement, or support from Fofana.[249] As to whether Fofana had any appreciable effect on the actual commission of the crime itself is impossible to determine for Nallo admitted that he was unable to carry out the killing.[250] The testimony of witness TF2-082—indicating that sometime after the successful attack on Koribondo Fofana asked him why he hadn't killed Sheku Gbao[251]—is irrelevant. As already stated, Gbao was not killed, and there are no inchoate offences in international criminal law (apart from genocide). Accordingly, Fofana cannot be said to have incurred liability in this case.

10. Fofana did not aid and abet the use of children in attacks

161. The Prosecution has alleged that Fofana was "present where children were being used in attacks";[252] that he "was directly responsible for the Death Squad, which allowed

[248] Supplemental Pre-Trial Brief, ¶ 32(c).
[249] Trial Transcript, TF2-014, 10 March 2005 (71:7–72:25).
[250] Trial Transcript, TF2-014, 10 March 2005 (71:7–72:25).
[251] Trial Transcript, TF2-082, 15 September 2004 (41:3–42:27).
[252] Supplemental Pre-Trial Brief, ¶ 135(c), under "Count 8: Use of Child Soldiers".

young boys to fight alongside them on the battlefield";[253] and that he "visited the village of Gambia twice where he expressed support and endorsed the use of child soldiers".[254] Although quite vague,[255] these claims arguably articulate *prima facie* charges of aiding and abetting Count 8.

162. However, no evidence was presented that Fofana himself was ever present during any attack, let alone one in which children were "being used". Although a few Prosecution witnesses mentioned that the Death Squad was answerable to the three accused collectively, the leader of that unit, Bob Tucker, testified that he received his orders from "Pa Norman and not any other person else".[256] Furthermore, there is no evidence in this case that the Death Squad ever engaged in any particular operation "on the battlefield", with or without young boys. Finally, there is no evidence that Fofana ever "expressed support and endorsed the use of child soldiers" in the village of Gambia or anywhere else in Sierra Leone.

163. According to one Prosecution witness, Fofana was present along with "children" at a meeting at Base Zero sometime in January 1998 where Norman is alleged to have said that the children were performing better than the adult fighters.[257] Yet no evidence was presented as to the age of the alleged individuals, and no other witness testified to the same incident. Even assuming, *ex arguendo*, that the unidentified individuals were under the age of fifteen years, there is no evidence that Fofana was or should have been aware of that information, that he had anything to do with their conscription or enlistment, or that he used them in any way.[258] Accordingly, the Prosecution has failed to substantiate its allegation that Fofana aided and abetted Count 8.

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[253] Supplemental Pre-Trial Brief, ¶ 135(f), under "Count 8: Use of Child Soldiers".
[254] Supplemental Pre-Trial Brief, ¶ 135(g), under "Count 8: Use of Child Soldiers".
[255] Unlike its approach with respect to Counts 1–5, the Prosecution did not articulate its Count 8 allegations according to the specific crime bases.
[256] Trial Transcript, TF2-190, 10 February 2005 (34:15-26).
[257] Trial Transcript, TF2-017, 19 November 2004 (87:3–88:16), (89:21–90:29), (91:13–92:2).
[258] According to this Chamber, the elements of Count 8 are as follows: (i) The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities; (ii) such person or persons were under the age of 15 years; (iii) the perpetrator knew or had reason to know that such person or persons were under the age of 15 years; (iv) the conduct took place in the context of and was associated with an armed conflict; and (v) the perpetrator was aware of factual circumstances that established the existence of an armed conflict. Rule 98 Decision, ¶ 124.

11. Fofana did not aid and abet any crimes which might have resulted from any attack on Tongo

164. The Prosecution has alleged that Fofana was present at a meeting at Base Zero "in December 1997", along with "members of the CDF command structure"[259] including "all Commanders in the Tongo axis", where Norman announced "that the civilians found in Tongo at the time of the battle were to be regarded as the enemy and should be treated as such",[260] and "the civilians living in Tongo were enemies of the CDF because they were mining diamonds which were used by the rebels to buy weapons and therefore these individuals should be killed".[261] It is further alleged that Fofana "was responsible for sending ammunition to the CDF in the field".[262] Arguably, the Prosecution has alleged that Fofana aided and abetted Counts 1–4[263] in Tongo through his presence at the above-mentioned meeting and his further distribution of ammunition. The evidence with regard to this allegation is as follows:

165. According to witness TF2-201, the meeting took place at Base Zero and was convened by Norman. Present were Fofana and Kondewa, along with members of the war council and certain commanders including Musa Junisa and Lamin Ngobeh. Norman announced that the hydroelectric facility at Dodo should be destroyed and that the Kamajors should capture Tongo from the rebels and junta. He further announced that he would supply the commanders with ammunition and food, and the commanders gave their assurances that they would mobilize Kamajors from their individual chiefdoms for the attack.[264]

166. According to witness TF2-005, Tongo was discussed at a planning meeting for the Black December Operation. Present were Norman, Fofana, Kondewa, war council members, and commanders from Tongo including Musa Junisa. Norman announced that Tongo should be taken "at all costs" and anybody found "walking with the juntas

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[259] Supplemental Pre-Trial Brief, ¶ 15(c), under "Counts 1–2: Unlawful Killing" for "Tongo Field".
[260] *Ibid.*
[261] Supplemental Pre-Trial Brief, ¶ 64(b), under "Counts 3–4: Physical Violence and Mental Suffering" for "Tongo Field".
[262] Supplemental Pre-Trial Brief, ¶ 16(d), under "Counts 1–2: Unlawful Killing" for "Tongo Field" and ¶ 65(d), under "Counts 3–4: Physical Violence and Mental Suffering" for "Tongo Field".
[263] The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 5 or 8 for Tongo. Because Counts 6 and 7 are pleaded as "umbrella" offences, they are dealt with separately in this Brief.
[264] Trial Transcript, TF2-201, 4 November 2004 (106:4-29).

there or mining for them should not be spared". Norman ordered Fofana to "dish out the ammunitions". Fofana did so, and "they went with it".[265]

167. According to witness TF2-222, Norman gave specific instructions for the Tongo operation. He told the fighters present that Tongo would determine the outcome of the war and that they should bear in mind that there was no place to keep any prisoners of war, junta forces or collaborators. At the same meeting, Norman instructed the fighters present to "take care of the human left", that is to chop off the left hand of captured junta forces as "an indelible mark". Fofana then addressed the fighters and told them—"Now you've heard the National Coordinator"—any commander failing in his mission should kill himself and not return. Kondewa said that the time for the rebels to surrender had passed and gave his blessing to the operation.[266]

168. According to witnesses TF2-201 and TF2-079, a situation report was delivered to Norman, in the presence of Fofana and Kondewa and members of the war council indicating that Tongo had fallen to the Kamajors after four days of fighting and that approximately five to six thousand Kamajors had come from several chiefdoms. This was sometime in December 1997.[267] According to witness TF2-079, Norman then ordered Fofana to make arrangements for witness and his men to receive money and other morale boosters.[268]

169. On the above-cited evidence, Fofana's potential acts of practical assistance, encouragement, or support with regard to the attack on Tongo amount to his (i) strong words of encouragement to those in attendance at the meeting; (ii) distribution of an unknown quantity of ammunition to an unidentified number of individuals before the attack; and (iii) provision of certain morale boosters to an unknown number of individuals after the attack.

170. However, because the Prosecution has failed to establish a nexus between Fofana's alleged acts at Base Zero and any of the underlying crimes said to have been committed

[265] Trial Transcript, TF2-005, 15 February 2005 (105:20-25) and (106:10–107:3).
[266] Trial Transcript, TF2-222, 17 February 2005 (110:5-28), (111:8-19), (111:23–112:2), (112:25–113:7), (113:19–114:4), and (119:1–120:11).
[267] Trial Transcript, TF2-201, 4 November 2004 (110:25–111:1), (112:8-17), (113:1-2) and TF2-079, 26 May 2005 (66:2-14).
[268] Trial Transcript, TF2-079, 26 May 2005 (66:2-14).