in and around Tongo, it is impossible to assess whether these acts had any impact, let alone a substantial one, on the commission of any crimes there. A detailed review of the evidence with respect to the Tongo crime base[269] reveals that all alleged criminal activity was perpetrated by unidentified "Kamajors", with the exception of the following individuals mentioned by name: Keikula Kamabote, BJK Sei, and Chief Baimba Aruna.[270] As there is no evidence that any one of these individuals was present at the above-mentioned meeting, it cannot be said that Fofana provided them with practical assistance, encouragement, or support with regard to their activity at Tongo.

171. In fact, witness BJK Sei testified that the planning for the various Kamajor operations at and around Tongo was done in the bush by Kamajors from several chiefdoms without any reference to Base Zero, and that he never once coordinated or liaised with Fofana.[271] According to other Defence witnesses, there were at least three discrete Kamajor attacks on Tongo[272] for which some arms had been provided from locations other than Base Zero.[273] Furthermore, the evidence above with regard to the above-referenced situation report indicates that five to six thousand Kamajors from several chiefdoms participated in that particular attack on Tongo.

172. Because the evidence with regard to the above-mentioned meeting indicates that only certain commanders were present, it is reasonable to conclude that much if not all of the criminal activity said to have taken place at Tongo and surrounding areas was committed by individuals who did not hear Fofana speak or who received their weapons and/or encouragement from other sources. It is equally likely, on this evidence, that any Kamajors who did receive ammunition or encouragement from Fofana at Base Zero ultimately never made it to Tongo, or that they did but committed no crimes there.

173. A single witness does claim that his group encountered Musa Junisa's troops at a checkpoint near Panguma where a woman was "chopped" by an unidentified

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[269] The crime base evidence for Tongo and environs comprised the testimony of witnesses TF2-015, TF2-022, TF2-035, TF2-027, TF2-047, TF2-048, TF2-013, TF2-144, TF2-016, and TF2-053. See Crime Base Annex.
[270] *See* Crime Base Annex.
[271] Trial Transcript, BJK Sei, 16 May 2006 (11–13, 29–33).
[272] Trial Transcript, Siaka Lahai, 17 May 2006 (7).
[273] Trial Transcript, Arthur Koroma, 4 May 2006 (73); BJK Sei, 16 May 2006 (27–28); Siaka Lahai, 17 May 2006 (19).

Kamajor.[274] However, in its Rule 98 Decision, the Chamber struck the location of Panguma from the Indictment with respect to Counts 1 and 2. In any event, it is not clear that Junisa—who is said to have been present at the above-mentioned meeting where Fofana "dished out" ammunition—had anything to do with the alleged chopping. Assuming, *ex arguendo*, that he did, it is equally unclear whether anything Fofana had done or said at Base Zero had an impact, substantial or otherwise, on Junisa's decision to engage in criminal activity at Panguma. To the extent that any link has been established between Fofana and Junisa, it is far too remote both physically and temporally to establish liability beyond reasonable doubt.[275]

174. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–4 at Tongo Field.

*12. Fofana did not aid and abet unlawful killings or detentions at SS Camp*

175. The Prosecution has claimed that Fofana frequently visited "SS Camp, a location in Kenema used by the CDF for the killing of captured rebels, collaborators and as a detention facility".[276] Although this statement fails to articulate any coherent allegations with respect to Fofana's alleged visits to SS Camp, the Defence presumes the Prosecution intended to allege that Fofana somehow aided and abetted Counts 1–4[277] at that location.

176. The Evidence with regard to this allegation comes exclusively from witness TF2-223 who stated that he received orders from one CO Ngaoujia to capture Special Security ("SS")[278] Camp and await further orders. According to the witness, Ngaoujia received his orders from Norman through Fofana.[279] SS Camp—located along the Gendema-Kenema axis approximately five miles south of Kenema near the Moa River Bridge—

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[274] Trial Transcript, TF2-144, 24 February 2004 (67:9–68:12).
[275] *See* Kunarac Trial Judgement, ¶ 741 (where the Chamber held that the nexus created by the Prosecution's evidence with regard to the acts of the accused and the alleged crimes was "so loose" that it would stretch the concept of aiding and abetting beyond its limits).
[276] Supplemental Pre-Trial Brief, ¶ 25(h), under "Counts 1–2: Unlawful Killings" for "Kenema District" and ¶ 72(g), under "Counts 3–4: Physical Violence and Mental Suffering" for "Kenema District".
[277] The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 5 or 8 for SS Camp. Because Counts 6 and 7 are pleaded as "umbrella" offences, they are dealt with separately in this Brief.
[278] The name "SS Camp" pre-dates the Kamajor occupation. As was mentioned several times during the trial, the location was initially established by the SLA, no doubt due to its strategic location on the Moa River.
[279] Trial Transcript, TF2-223, 28 September 2004 (57:1-27).

was considered a strategic position from which to launch attacks on Kenema.[280] Sometime in early January 1998, SS Camp was captured and occupied by the Kamajors. Some civilians died in the operation, but it is not clear whether they were killed in cross-fire or specifically targeted by junta or Kamajor fighting forces.[281]

177. Approximately one month after the Kamajors had taken control of Kenema (in April or May 1998, according to the witness), Ngaoujia's unit was assigned to mount a checkpoint at SS Camp by Fofana and Kondewa in order to secure the Moa River Bridge. Fofana personally escorted the witness to SS Camp to explain his responsibility there, which was to secure the river.[282]

178. At this point the evidence becomes rather confusing, and the witness was subsequently led a great deal by counsel for the Prosecution. The witness states that, at some point, a team known as Yamorto headed by Murrie Vaughn (alias Steve Biko) took over operations at SS Camp.[283] He then states that, approximately two weeks into his posting at SS Camp and after the Yamorto group had left, Norman arrived with the head of intelligence Mr Magona. Norman told the witness that the "mandate" of SS Camp had changed and that it would subsequently be used as a place for executions under the command of Magona. At some point, Vaughn returned, indicating that he had been sent by Kondewa to remain at SS Camp as part of a "special mission". Norman announced that all killings should be coordinated with Magona and gave the witness a "daily occurrence book" in which to record the killings. According to the witness, Vaughn's Yamorto Group was tasked with extracting human body parts at SS Camp for initiation purposes on orders from Kondewa. When asked how often Norman visited SS Camp, the witness's answer seemed indicated that Fofana may have been present on certain occasions and that he may have seen the daily occurrence book. However, this evidence is far from clear.[284]

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[280] Trial Transcript, TF2-223, 28 September 2004 (59:6–60:15).
[281] Trial Transcript, TF2-223, 28 September 2004 (61:1–62:18).
[282] Trial Transcript, TF2-223, 28 September 2004 (104:11–106:8).
[283] Trial Transcript, TF2-223, 28 September 2004 (106:19-26).
[284] Trial Transcript, TF2-223, 28 September 2004 (108:15–110:12), (111:11-25), (112:23–113:10), (114:16–115:9), (117:7-12), (118:13–119:26), (119:29–120:9), (120:24–122:3), (123:4-19), (125:11-17), (125:20–126:5) and 30 September 2004 (72:5-15).

179. On the above-cited evidence, Fofana's acts of assistance with regard to alleged activity at SS Camp are limited to (i) transmitting orders from Norman to Ngaujia with regard to the initial operation to take the camp sometime in January 1998; (ii) escorting witness TF2-223 to the camp to explain his duties there sometime in April or May 1998; and (iii) being present for unspecified periods of time on unspecified dates at unspecified locations within the camp when certain ritualistic killings may have been taking place there.

180. Because the first two acts deal strictly with the provision of assistance to legitimate objectives—the taking and later manning of a strategic position—and there is no further evidence that either one may have had a substantial effect on the commission of any crimes, Fofana's activity in this regard cannot be said to be culpable.

181. With regard to the third incident, the Defence re-emphasizes the fact that "acts of cannibalism and human sacrifices are not included in the indictment against the three Accused".[285] Taking the Prosecution at its word, the Defence draws particular attention to the fact that there is simply no evidence of any criminal activity other than that which unequivocally qualifies as "human sacrifice" alleged to have occurred at SS Camp.[286] In any event, the evidence of witness TF2-223—confusing in the extreme—is the product of a series of leading questions by counsel for the Prosecution[287] and is uncorroborated by any other witness. Further, it fails to establish that Fofana was present at the time that any of the alleged human sacrifices were being committed. Even assuming, *ex arguendo*, Fofana's presence during such acts, the Prosecution has failed to show what effect, if any, such presence alone would have had on the commission of the crimes. As noted above, mere presence at the scene of a crime is insufficient to incur criminal liability as an aider and abettor.

182. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–4 at SS Camp.

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[285] *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.
[286] Trial Transcript, TF2-223, 28 September 2004 (112:23–113:10), (117:7-12), (118:13–119:26), (124:19–125:10), (125:11-17). This was the only Prosecution witness who testified to the commission of any specific crimes at SS Camp.
[287] *Ibid.*

*13. Fofana did not aid and abet any crimes which might have resulted from any attack on Koribondo*

183. The Prosecution has alleged that Fofana was present at a meeting at Base Zero, along with Kondewa, with respect to an attack on Koribondo where certain "commands and orders" were given by Norman, including that no "living thing" should be spared in the attack;[288] "soldiers, rebels and collaborators in Koribondo [should] be killed";[289] Koribondo should be taken "at all costs";[290] and that "all the houses except four were to be destroyed because every house had given shelter to rebels and soldiers".[291] It is further alleged that Fofana "was responsible for sending ammunition to the CDF in the field".[292] Arguably, the Prosecution has alleged that Fofana aided and abetted Counts 1–5[293] in Koribondo through his distribution of ammunition following the alleged meeting. The evidence with regard to this allegation is as follows:

184. According to witness TF2-008, the war council recommended the taking of Koribondo to Norman in advance of moving on Bo and Freetown at a meeting attended by Fofana and Kondewa. Norman accepted the recommendation and told to the commanders to execute the attack and not to "leave any house or any living thing there, except mosque, church, the barrie and the school".[294]

185. According to witness TF2-201, Norman called a meeting at Base Zero at which he announced that he had given his "last words" to Joe Tamidey to take Koribondo "under all cost". Fofana added that it was a disgrace that the Kamajors had failed to dislodge the junta and that they should finally take Koribondo. Kondewa gave his blessing to the attack. Tamidey then requested a certain amount of ammunition, food, and money, and Norman wrote out an order. The following morning, Norman himself distributed the materiel.[295]

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[288] Supplemental Pre-Trial Brief, ¶ 31(a), under "Counts 1–2: Unlawful Killings" for "Bo District" and ¶ 77(a), under "Counts 3–4: Physical Violence and Mental Suffering" for "Bo District".
[289] Supplemental Pre-Trial Brief, ¶ 79(f), under "Counts 3–4: Physical Violence and Mental Suffering" for "Bo District".
[290] Supplemental Pre-Trial Brief, ¶ 108(a), under "Count 5: Looting and Burning" for "Bo District".
[291] Supplemental Pre-Trial Brief, ¶ 108(b), under "Count 5: Looting and Burning" for "Bo District".
[292] Supplemental Pre-Trial Brief, ¶ 33(d), under "Counts 1–2: Unlawful Killings" for "Bo District"; ¶ 79(d), under "Counts 3–4: Physical Violence and Mental Suffering" for "Bo District"; and ¶ 108(g), under "Count 5: Looting and Burning" for "Bo District".
[293] The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Count 8 for Koribondo. Because Counts 6 and 7 are pleaded as "umbrella" offences, they are dealt with separately in this Brief.
[294] Trial Transcript, TF2-008, 16 November 2004 (78:12–79:24).
[295] Trial Transcript, TF2-201, 4 November 2004 (113:1–114:20).

186. According to witness TF2-190, Norman chaired a meeting at Base Zero in 1998 to "arrange strategies to launch an all-out offensive on the juntas". He said it was time to capture junta positions "once and for all, and at the same time". Fofana addressed the meeting and told the Kamajors it was time to implement the training they had received and that any commander who failed in his mission should not return to Base Zero. However, Fofana did not tell the fighters to loot property, burn houses, or kill civilians or captured soldiers. Kondewa ensured the fighters that his powers would be with them. Norman ordered Joe Tamidey to lead the attack on Koribondo. The witness and Tamidey moved together with their men to Kpetewoma where, along with commander Lahai George, they organized their men and distributed ammunition to the fighters. The witness had his own ammunition, and Tamidey had been given his at Base Zero by Lumeh on orders from Norman.[296]

187. According to witness TF2-190, the attack on Koribondo took place on Friday, 13 February 1998. Kamajors including the witness looted certain items, and the witness saw unidentified Kamajors burning houses during the attack.[297]

188. According to witness TF2-201, the commanders who participated in the attack were Joe Tamidey, Bob Tucker, and Lamin Ngobeh. Many Kamajors from the chiefdom joined the attack which was finally successful.[298]

189. According to witness TF2-014, commanders from Pujehun, Bonthe, and Bo Districts were involved in the successful attack on Koribondo in February/March 1998. After taking the town, the witness "burnt the place". He then received orders from Norman to move to Bo.[299]

190. On the above-cited evidence, Fofana may have provided assistance with regard to the Koribondo attack by way of his rather forceful words of encouragement to the fighters in support of certain illegal orders allegedly given by Norman.

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[296] Trial Transcript, TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).
[297] Trial Transcript, TF2-190, 10 February 2005 (49:7-11), (50:9-14), (51:12-15).
[298] Trial Transcript, TF2-201, 4 November 2004 (115:20-28).
[299] Trial Transcript, TF2-014, 10 March 2005 (74:21–76:7).

191. 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 in Koribondo, it is impossible to assess whether his words of encouragement had any impact, let alone a substantial one, on any of the individuals who allegedly committed crimes there. A detailed review of the evidence with respect to the Koribondo crime base reveals that all alleged criminal activity was perpetrated by unidentified "Kamajors".[300] As there is no evidence that these individual were present at the above-mentioned meeting, it cannot be said that Fofana provided them with practical assistance, encouragement, or support with regard to their activity.

192. Moreover, the evidence of Albert Nallo indicates that various commanders from Pujehun, Bonthe, and Bo Districts were involved in the attack; and witness TF2-201 noted that "many Kamajors" from the chiefdom joined the attack. Yet it is impossible to discern, on the Prosecution's evidence, whether all of these commanders and Kamajors were present at the above-mentioned meeting, let alone whether they heard the comments attributed to Fofana. Further, Mustapha Lumeh and Dauda Sheriff both testified that the final planning for the attack on Koribondo was done at Kpetewoma.[301] But it is not clear from the evidence whether those Kamajors in attendance at Kpetewoma had also been at the previous meeting at Base Zero.

193. Accordingly, it is reasonable to conclude that much if not all of the criminal activity said to have taken place at Koribondo was committed by commanders and fighters who had little or no awareness of what had transpired at the meeting at Base Zero. It is equally likely, on this evidence, that any of the Kamajors who were in fact substantially emboldened by Fofana's putative utterances at Base Zero ultimately never made it to Koribondo, or if they did, that they committed no crimes there. Furthermore, witness Joe Nunie testified that houses were burnt and civilians were killed by junta forces as they pulled out of Koribondo.[302]

194. A single individual, Bob Tucker, who claims to have been present at the above-mentioned meeting, also admits to having looted a quantity of zinc from various

[300] The crime base evidence for Koribondo comprised the testimony of witnesses TF2-198, TF2-157, TF2-176, TF2-012, TF2-162, TF2-159, and TF2-032. *See* Crime Base Annex.
[301] Trial Transcript, Mustapha Lumeh, 8 May 2006 (52–58) and Dauda Sheriff, 8 May 2006 (95–96).
[302] Trial Transcript, Joe Nunie, 11 May 2006 (34:13-25).

locations during the attack on Koribondo.[303] Yet it is not at all clear from Tucker's evidence—or from any other evidence—whether anything Fofana said at Base Zero had an impact, substantial or otherwise, on Tucker's decision to engage in criminal activity at Koribondo. The evidence is that Fofana urged the fighters to implement the training they had received in order to finally dislodge the junta. There is no further evidence that the Kamajors had been trained how to loot. Indeed, in his evidence, Tucker clearly indicated that Fofana had not told the fighters at the meeting to loot property.[304] Tucker's decision to do so, it seems, was entirely his own. Additionally, the Defence notes that Tucker admitted to having lied to prosecution investigators[305] and accordingly urges the Chamber to bear such fact in mind when evaluating his testimony.

195. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 1–5 at Koribondo.

*14. Fofana did not aid and abet any crimes which may have resulted from any attack on Bo*

196. The Prosecution has alleged that Fofana was present at a meeting at Base Zero "when orders were given that all shops and pharmacies in Bo Town were to be looted and that all property in Bo Town 'belonged' to the CDF";[306] "that the CDF should feed themselves"; and that such statements were "understood as giving a free hand to the CDF to loot property and that as a consequent effect widespread looting following the attacks on Bo".[307] It is further alleged that Fofana "was responsible for sending ammunition to the CDF in the field".[308] Arguably, the Prosecution has alleged that Fofana aided and abetted Count 5[309] in Bo through his presence at the above-mentioned meeting and his further distribution of ammunition. The evidence with regard to this allegation is as follows:

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[303] Trial Transcript, TF2-190, 10 February 2005 (50:11–27).
[304] Trial Transcript, TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).
[305] Trial Transcript, TF2-190, 10 February 2005 (79:18-21).
[306] Supplemental Pre-Trial Brief, ¶ 106(b), under "Count 5: Looting and Burning" for "Bo District".
[307] Supplemental Pre-Trial Brief, ¶ 114(a), under "Count 5: Looting and Burning" for "Bonthe District" but referring specifically to the attack on Bo.
[308] Supplemental Pre-Trial Brief, ¶ 108(g), under "Count 5: Looting and Burning" for "Bo District".
[309] The Supplemental Pre-Trial Brief contains no specific factual allegations against Fofana under Counts 1–4 or Count 8 for Bo Town. Because Counts 6 and 7 are pleaded as "umbrella" offences, they are dealt with separately in this Brief.

197. According to witness TF2-201, Norman convened a meeting at Base Zero sometime in Feburary 1998. Fofana and Kondewa were present as well as members of the war council and unnamed commanders. Norman instructed the "operation commanders" that there would be an "all-round attack" on Bo and Kenema and that the Kamajors should join ECOMOG forces moving into those areas from Liberia. According to Norman, ECOMOG would "lead the attack".[310]

198. According to witness TF2-008, at a meeting behind Norman's house at Base Zero sometime in 1998 after the fall of Koribondo, the war council recommended to Norman that Bo should be the next target and that the attack should be executed in consultation with Maxwell Khobe. Fofana and Kondewa as well as some commanders were present at this meeting, after which the three accused sat down "together with their commanders to plan" the attack.[311]

199. According to witness TF2-068, at a meeting at the school field at Base Zero, Norman told the fighters to "go and clear Bo from the enemies".[312]

200. According to witness TF2-017, a meeting was convened by Norman at the training field at Base Zero on an afternoon in January 1998. Present were Fofana and Kondewa, members of the war council, and various Kamajors. Children were also present at the meeting, and Norman announced that they were doing better than the adult fighters. In response to a question, Norman told those present that they should "hope to meet everything there when we attack and we succeeded. Whatever we find there belongs to us". He added that, in addition to attacking the "enemy combatant who are the RUF or the AFRC", the Kamajors should also attack collaborators who were "in support of the enemy combatants against us and [...] worse than the enemy combatant."[313]

201. According to witness TF2-017, a second meeting was held on the evening of the same day at the back of the field. Present were Fofana and Kondewa, members of the war

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[310] Trial Transcript, TF2-201, 5 November 2004 (41:12-19), (42:4-12), (42:15), (43:7-11), (43:13-25), (44:15-18), (44:23-24).
[311] Trial Transcript, TF2-008, 16 November 2004 (80:8-28), (81:1-6), (81:20-27), (82:1-11), (84:2-10), (94:23-28).
[312] Trial Transcript, TF2-068, 17 November 2004 (93:15–94:1).
[313] Trial Transcript, TF2-017, 19 November 2004 (87:3–88:16), (89:21–90:29), (91:13–92:2).

council, and commanders including James Kaillie and Joseph Lappia. Norman announced that the commanders should attack the Kebi Town section of Bo, kill enemy combatants and collaborators, burn houses, and loot big shops especially pharmacies. Fofana distributed the arms and ammunition later that night. Witness and his group of Kapras along with Kamajors from the other commanders carried out the attack and killed combatants in the process.[314]

202. According to witness TF2-017, sometime around the second week of February, the final order to attack Bo came from Norman, and "they" distributed arms and ammunition to all the commanders, who attacked Bo in four flanks under the command of Albert Nallo.[315]

203. On the above-cited evidence, Fofana's single act of assistance with regard to the alleged attack on Bo amounts to his distribution of an unknown quantity of ammunition to an unidentified number of individuals sometime before the attack.

204. However, because the Prosecution has failed to establish any nexus between Fofana's alleged distribution of ammunition at Base Zero and any of the underlying crimes said to have been committed in Bo, it is impossible to assess whether his act had any impact, let alone a substantial one, on the commission of any crimes committed there. A detailed review of the evidence with respect to the Bo crime base[316] reveals that all alleged criminal activity was perpetrated by unidentified "Kamajors", with the exception of the following individuals mentioned by name: James Bundu, Alhaji Hassan Sheriff, Sundifu Samuka, Joseph Kulagbanda, Gibril Mansarray, Ernest Blango, Phillip Mboma, Borbor Aruna, Chief Mulai, David Joseph, Munda Goima, Abu Gina, Gbessay Abu, Alieu Gina, Munda Gina, Moses Sandy, Abu Tawa, Agba Murray, and one Harowan. However, there is no evidence that any one of these individuals—or any one of their commanders for that matter—was present at the above-mentioned meetings. Therefore, it cannot be said that Fofana provided them with any practical assistance, encouragement, or support with regard to their alleged criminal activity in Bo.

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[314] Trial Transcript, TF2-017, 19 November 2004 (92:26–94:29), (95:5-9), (95:23-29), (96:19-27), (97:5-10), (97:15-18).
[315] Trial Transcript, TF2-017, 19 November 2004 (100:11–101:14) and 22 November 2004 (2:4–3:10).
[316] The crime base evidence for Bo comprised the testimony of witnesses TF2-119, TF2-030, TF2-156, TF2-088, TF2-057, TF2-067, TF2-007, TF2-058, TF2-056, TF2-006, and TF2-001. *See* Crime Base Annex.

205. Additionally, the evidence of witness TF2-017 indicates that Bo was attacked "in four flanks". Because it is not clear from the Prosecution's evidence whether Fofana distributed ammunition to the commanders in each flank, it is possible that all of the alleged crimes committed during the attack on Bo were carried out by commanders and fighters who did not receive ammunition from Fofana. It is equally possible, on this evidence, that those unnamed commanders and/or fighters who did receive ammunition from Fofana at Base Zero never in fact made it to Bo; or if they did, that they committed no crimes there.

206. Witness TF2-017 himself admits to having engaged in certain acts of looting during the Bo operation. Specifically, he claims that he and his men looted two pharmacies, one on Tikonko Road and one on Bojon Street,[317] and that they looted and burnt a hotel on Sewa Road belonging to Dr MB Sesay.[318]

207. The Defence does not dispute that one could, in theory, lend substantial assistance to the crime of looting by providing the physical perpetrators with the means by which to accomplish their illegal task. However, it is not at all clear from the Prosecution's evidence whether the arms and ammunition allegedly distributed by Fofana at the second meeting in January 1998[319] were the same arms and ammunition used by witness TF2-017 and his men during the Bo operation, which took place sometime during the second week of February and for which additional arms and ammunition were provided by unidentified individuals at Bumpe.[320] Further, it is equally unclear which particular arms and ammunition, if any, witness TF2-017 and his men used to facilitate the above-mentioned acts. The crime of looting, obviously, does not necessarily require the use of arms.

208. In cases where Chambers of the International Tribunals have found liability for aiding and abetting the commission of crimes through the distribution of weapons, the accused was physically present at the crime scene where both the distribution and use of the

[317] Trial Transcript, TF2-017, 19 November 2004 (11:17-19, 12:6-24).
[318] Trial Transcript, TF2-017, 19 November 2004 (6:2–8:10).
[319] Trial Transcript, TF2-017, 19 November 2004 (87–89).
[320] Trial Transcript, TF2-017, 19 November 2004 (100–101).

weapons clearly took place.[321] In other words, the nexus between the accused's act of assistance, encouragement, or support and the crime was clear. In the instant case, the Prosecution has clearly failed to make such a showing. Accordingly, it is open on this evidence that Fofana's alleged distribution of unspecified arms and ammunition in January 1998 had no effect, let alone a substantial one, on the alleged looting said to have taken place in Bo in February of the same year. Furthermore, Morries Ngobeh testified that the Southern Motel, owned by MB Sesay, was looted and burnt by the youths of Bo on a Friday or Saturday in February 1998 before the Kamajors entered town.[322]

209. Finally, the Defence submits that the entire testimony of witness TF2-017 should be viewed with extreme circumspection. The witness openly admitted to lying to the Prosecution and, when asked, agreed that it was acceptable to "make up facts if you are hesitant" about them.[323] Additionally, the witness and his family spent at least twenty-two months in the care and custody of the Special Court's Witness and Victim Support unit (the "WVS"), during which time his children's school fees were paid and $1000 was given to the witness, ostensibly for the care of his father.[324] While the Defence does not suggest that the receipt of financial support from the WVS in improper as a general matter, the fact that the witness openly admitted to lying reasonably calls into question his motives for participating in the CDF proceedings.

210. For these reasons, the Defence submits that the Prosecution has failed to substantiate its allegations that Fofana aided and abetted Counts 5 at Bo.

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

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[321] *See Ndindabahizi* Trial Judgement, ¶¶ 462, 464, 472–473, 485 (Liability for genocide and extermination where, in conjunction with his words of encouragement, the accused distributed weapons and money to the attackers and facilitated their transportation to the crime scene.); *Rutaganda* Trial Judgement, ¶¶ 385, 386, 439 (Liability for unlawful killings and infliction of serious bodily/mental harm where the accused, carrying a rifle and machete, arrived at the crime scene with a truck full of firearms and machetes, personally distributed the weapons to the Interahamwe (over whom he was in a position of authority), and urged them to "go to work".); *Semanza* Trial Judgement, ¶¶ 426, 430, 432 (Liability for genocide where the accused provided substantial assistance to the principal perpetrators of the genocide by gathering Interahamwe and their weapons for the attack on a church and by directing the attackers to kill the Tutsi refugees at the church.)

[322] According to Ngobeh, the Eastern Motel—also owned by Dr Sesay—was looted by youths around the same time but not burnt. Trial Transcript, Morries Ngobeh, 27 September 2006 (6–13).

[323] Trial Transcript, TF2-017, 22 November 2004 (38:25-27, 44:9-12).

[324] Trial Transcript, TF2-017, 22 November 2004 (53–55).

## F. Fofana did not commit any crimes through his participation in a joint criminal enterprise

### *1. The Prosecution has failed to plead a coherent theory of JCE liability*

212. As noted above, a properly pleaded allegation of an accused's commission of crimes through his participation in a joint criminal enterprise must unambiguously specify (i) the form or forms of JCE upon which the Prosecution intends to rely;[325] (ii) the alleged criminal purpose of the enterprise;[326] (iii) the identity of the co-participants, particularly the "person who physically carried out the crime";[327] and (iv) the nature of the accused's participation in the enterprise.[328] Such precision in pleading is required for he simple reason that it "would contravene the rights of the defence" if the Trial Chamber "chose a theory not expressly pleaded".[329]

213. For example, a the *Gacumbitsi* Trial Chamber held that, where the Prosecutor charged the accused with "participating in the planning, preparation or implementation of a common plan, strategy or scheme aimed at exterminating the Tutsi, through his own acts, or through people whom he helped, or through his subordinates, whose acts he knew and approved of", the Chamber could not make any finding as to the putative JCE because it had not been "pleaded clearly enough to allow the Accused to defend himself adequately".[330]

214. With respect to the alleged JCE in the CDF case, the Indictment states that:

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[325] *Stakic* Appeal Judgement, ¶¶ 66, 68, 71, and 74 (With regard to the form of the JCE, while it is preferable for the Prosecution to specifically identify its theory by one or more of the now well-known categories—basic, systemic, extended—an indictment that otherwise makes it clear on which category the Prosecution intends to rely is sufficient.)

[326] *Brdjanin* Decision on Form of the Indictment, ¶¶ 42, 43 (The scope of the common purpose must be to carry out a particular crime or crimes, and it is not sufficient for the Prosecution merely to allege that the enterprise did not have a lawful purpose; it must identify a specific crime.)

[327] *Krnojelac* Appeal Judgement, ¶ 116; *Brdjanin* Decision on Form of the Indictment, ¶ 45 ("Without such proof, it cannot be held that the accused was a member of a joint criminal enterprise together with the person who committed that further crime charged".)

[328] *Ntagerura* Trial Judgement, ¶ 34.

[329] *Krnojelac* Appeal Judgement, ¶ 117. No surprisingly, the second through fourth pleading requirements mirror the general *actus reus* elements of the offence of JCE.

[330] *Gacumbitsi* Trial Judgement, ¶ 289 (Where the Prosecutor had merely charged the accused "with conspiring with others, participating in the planning, preparation or implementation of a common plan, strategy or scheme aimed at exterminating the Tutsi, through his own acts, or through people whom he helped, or through his subordinates, whose acts he knew and approved of".).

> Samuel Hinga Norman, Moinina Fofana, and Allieu Kondewa, by their acts or omissions are individually criminally responsible pursuant to Article 6.1 of the Statute for the crimes referred to in [...] the Statute as alleged in this indictment, [...] which crimes were within a common purpose, plan or design in which each Accused participated or were a reasonably foreseeable consequence of the common purpose, plan or design in which each Accused participated".[331]
>
> The plan, purpose or design of Samuel Hinga Norman, Moinina Fofana, Allieu Kondewa and subordinate members of the CDF was to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone. Each Accused acted individually and in concert with subordinates, to carry out the said plan, purpose or design[332].

215. The language of the first paragraph arguably put Fofana on notice that the Prosecution was charging his participation in both basic[333] and extended[334] categories of JCE. The second paragraph, purporting to describe the common plan, arguably states two distinct criminal purposes: (i) conducting warfare by illegal "means" and (ii) the "elimination" of a protected class of persons.[335]

216. The Defence concedes that, for purposes of pleading, the first two prongs of the above-referenced test—namely, the category of JCE and the criminal purpose of the enterprise—have arguably been met, despite the rather vast scope of the alleged enterprise itself and the general nature of its alleged criminal purpose.

217. However, with respect to the third prong of the pleading test, the Indictment is problematic. Rather than clearly stating the identities of the alleged co-perpetrators as required, it refers vaguely to the three accused "and subordinate members of the CDF".[336] This amounts to a material defect, as the accused is entitled to know the

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[331] Indictment, ¶ 20; *see also* Pre-Trial Brief, ¶ 86, Supplemental Pre-Trial Brief, ¶ 11, and Prosecution's Opening Statement, Trial Transcript, 3 June 2004 at 10:4-17.
[332] Indictment, ¶ 19; *see also* Pre-Trial Brief, ¶ 83; Supplemental Pre-Trial Brief, ¶ 6; and Opening Statement, Trial Transcript, 3 June 2004 at 10:4-17.
[333] For crimes which "were within a common purpose".
[334] For crimes which crimes "were a reasonably foreseeable consequence of the common purpose".
[335] The Defence concedes that both conducting warfare by illegal means and seeking to eliminate a category of protected persons, in theory, amount to criminal activity. However, it is the better practice in pleading to refer to specific crimes (as enumerated in the Statute) rather than to broad descriptive categories of illegal activity.
[336] Indictment, ¶ 19.

identities of those individuals with whom he is said to have agreed upon the alleged common plan. Further, and perhaps more problematic, is the Prosecution's failure to specifically outline the nature of Fofana's alleged participation in the alleged enterprise as required by the fourth prong of the pleading test. This too amounts to a material defect.

218. Accordingly, as of 5 February 2004, the Prosecution's JCE charges were very similar to those rejected by the Trial Chamber in the *Gacumbitsi* case cited above. The material defects were not cured by the Pre-Trial brief, which merely repeated, verbatim, the allegations at paragraphs 19 and 20 of the Indictment. The Supplemental Pre-Trial Brief, which also largely repeated the same allegations, did make one noticeable alteration: Where the Indictment and the Pre-Trial Brief had described the plurality of alleged perpetrators as including an indeterminate number of "subordinate members of the CDF", such language was conspicuously absent from the Supplemental Pre-Trial Brief.[337] As no additional co-perpetrators were named, it seemed that as of 22 April 2004 the plurality included only the three accused.

219. With regard to the fourth prong of the pleading test, the Supplemental Pre-Trial Brief finally provided the required factual information regarding the manner in which Fofana is said to have participated in the alleged JCE. Specifically, the nature of Fofana's participation in the alleged enterprise was said to encompass seven discrete activities, namely (i) the use of radio communications to coordinate troop and supply movements, and offer status reports; (ii) attendance and participation in CDF leadership and War Council meetings; (iii) the coordination or direction of various CDF troop movements; (iv) the coordination or direction of various weapons and supply distribution; (v) the organization of CDF recruitment, initiation and training; (vi) the organization of financial and resource support; and (vii) the organization and/or participation in the initiation processes employed.[338]

220. Further, the Supplemental Pre-Trial Brief indicated that "the prosecution theory of the case is that each accused is criminally responsible for the acts and omissions of each of

[337] Supplemental Pre-Trial Brief, ¶ 6.
[338] Supplemental Pre-Trial Brief, ¶ 7. An eighth residual category of activity was included: "any action of an accused which furthered the joint criminal enterprise". However, the Defence submits that such a patently vague assertion has no place in a properly formulated criminal pleading.

their participating counterparts".[339] Yet none of these so-called counterparts were named, again with the exception of the three accused. The JCE was subsequently mentioned in the Prosecution's opening statement, where Mr Crane repeated the alleged criminal purpose of the plan.[340] Surprisingly, the language that was dropped from the Supplemental Pre-Trial Brief had re-emerged, with unidentified "subordinates" once again appearing to form part of the alleged plurality. Accordingly, at the time of going to trial, the Prosecution's JCE theory suffered from a material defect which had not been cured by the further Pleadings.

221. Because the matter had not been sufficiently pleaded, was the Defence to have assumed that the enterprise included only the three accused? All "subordinate members of the CDF"? Or only some of them? Albert Nallo? Bob Tucker? All fighters? All initiators? SLPP administrators in Freetown? Presdient Kabbah and his cabinet in Conakry? Such confusion as to which particular individuals are alleged to have formed the plurality is not a trivial matter, but rather a crucial pleading requirement, and the Defence submits that the confusion in the Pleadings is indicative of the Prosecution's own uncertainty as to its putative theory of liability.

222. The Defence emphasises that JCE is not a residual form of culpability through which the Prosecution can seek to criminalize the activity of an entire organization if it fails to prove individual criminality by way of the more traditional modes of liability. Rather, it is simply a discrete mode of "commission" by which an accused person can be said to incur liability for a <u>particular</u> offence through his joint activity with a set of <u>particular</u> co-perpetrators, at least one of whom has physically committed <u>particular</u> acts constituting a <u>particular</u> crime. However, unmoored by such particulars, the Prosecution's theory has failed to descend from the realm of academic abstraction to the *terra firma* of legal allegation.

223. By failing to coherently articulate its theory, the Prosecution has left the Defence (and the Chamber) to guess at its allegations. Without knowing precisely who is included in

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[339] *Ibid.*, ¶ 8.

[340] Opening Statement, Trial Transcript, 3 June 2004 at 10:4–8 ("Their plan and purpose, and that of their subordinates, was to defeat by any means necessary the [RUF] to include the complete elimination of the RUF and members of the [AFRC], their supporters, sympathizers and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone")

the alleged enterprise, let alone which individuals within that group are said to have physically carried out any particular crime, the Defence cannot fairly answer the charges, nor can the Chamber properly evaluate them. Accordingly, the Chamber should dismiss the supposed allegations without further analysis. As noted above, for the Chamber to attempt to analyze a theory not expressly pleaded "would contravene the rights of the defence".[341]

*2. The Prosecution has failed to substantiate any theory of JCE liability*

224. Nevertheless, *ex abundante cautela*, the Defence will attempt to analyze the JCE "charges" as further particularized in the Supplemental Pre-Trial Brief.[342]

*a. The substantive law of JCE*

225. Like the Appeals Chamber of International Tribunals, this Chamber has acknowledged that individual criminal responsibility arises under the Article 6(1) of the Statute not only in respect of persons who perform a criminal act, but also, in certain circumstances, in respect of those who in some way make it possible for the perpetrator physically to carry out that act.[343] When a number of persons are involved in a common plan aimed at the commission of a crime, they can be convicted of participation in a JCE in relation to that crime. Where the accused knows that his assistance is supporting the crimes of a group of persons involved in a joint criminal enterprise and shares that intent, then he may be found criminally responsible for all the crimes committed in furtherance of that common purpose as a co-perpetrator.[344]

226. Three categories of joint criminal enterprise have been identified in the jurisprudence of the International Tribunals. They all require, as to the *actus reus*, (i) a plurality of

[341] *Krnojelac* Appeal Judgement, ¶ 117.
[342] *N.B.* In cases where the Defence is left with "some uncertainty as to the Prosecution's argument" even where it reasonably took all three forms into consideration in its final trial brief a Trial Chamber has "good grounds for refusing, in all fairness, to consider" the form of liability. *Krnojelac* Appeal Judgement, ¶ 144 (where the Appeals Chamber held that, in view of the persistent ambiguity surrounding the issue of what exactly the Prosecution argument was, the Trial Chamber had good cause not to consider the proposed JCE theory).
[343] Rule 98 Decision, ¶ 130; *Tadic* Appeals Judgement, ¶ 192.
[344] *Kvocka* Appeals Judgement, ¶ 90. N.B. Co-perpetration in the context of a joint criminal enterprise differs from aiding and abetting. Where the aider and abettor only knows that his assistance is helping a single person to commit a single crime, he is only liable for aiding and abetting that crime. This is so even if the principal perpetrator is part of a joint criminal enterprise involving the commission of further crimes.

persons, (ii) the existence of a common plan design or purpose, which amounts to or involves the commission of a crime provided for in the Statute, and (iii) participation of the accused in the common design. However, only two of the three categories are relevant to the instant case: the first and the third. In the first type of joint criminal enterprise, so-called basic JCE, the accused intends to perpetrate a crime and this intent is shared by all co-perpetrators. The third type, extended JCE, concerns cases in which one of the participants commits a crime outside the common design. The *mens rea* in such cases is twofold. First, the accused must have the intention to take part in and contribute to the common criminal purpose. Second, in order to be held responsible for crimes which were not part of the common criminal purpose, but which were nevertheless a natural and foreseeable consequence of it, the accused must also know that such a crime might be perpetrated by a member of the group, and willingly takes the risk that the crime might occur by joining or continuing to participate in the enterprise.[345]

227. The presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required.[346] However, in all cases it must be shown that the accused as well as the physical perpetrator of the criminal act were both parties to the agreement to commit criminal activity.[347]

*b. The "allegations"*

228. As explained in greater detail above, the Prosecution has failed to plead a coherent theory of JCE against Fofana. However, in abundance of caution, the Defence will briefly dispense with the partial allegations contained in the Supplemental Pre-Trial Brief where the nature of Fofana's participation in the alleged enterprise was said to encompass seven discrete activities.[348]

229. With respect to five of the seven alleged activities, absolutely no evidence was presented. No witness or document indicated that Fofana, in furtherance of any common plan or otherwise, (i) used radio communications to do anything, let alone

[345] *Tadic* Appeals Judgement, ¶¶ 204; 227-228; *Kvocka* Appeals Judgement, ¶ 83.
[346] *Krnojelac* Appeals Judgement, ¶ 81.
[347] *Brdjanin* Trial Judgement, ¶ 344.
[348] Supplemental Pre-Trial Brief, ¶ 7.

coordinate troop and supply movements or offer status reports; (ii) coordinated or directed any particular CDF troop movements; (iii) organized CDF recruitment, initiation, or training; (iv) organized financial and resource support; or (v) organized and/or participated in the initiation process.[349]

230. However, as to the remaining two alleged activities—"attendance and participation in CDF leadership and War Council meetings" and "coordination or direction of various weapons and supply distribution"—the Defence has identified only three distinct instances where it could perhaps be said that Fofana, through one of these two categories of activity, participated in something approximating a common plan. Yet, as the Prosecution did not plead the first *actus reus* element of the alleged JCE—a plurality of persons—with sufficient particularity, analyzing Fofana's alleged culpability is impossible. This is because the relevant jurisprudence requires a showing that the accused person as well as the physical perpetrator of the criminal act were both parties to the agreement to commit criminal activity.[350]

231. According to the evidence outlined above, Fofana appears to have participated in a "leadership meeting" sometime prior to the Tongo operation by giving strong words of encouragement to those in attendance at the meeting. At this meeting, he is said to have distributed an unknown quantity of ammunition to an unidentified number of individuals sometime before the operation and subsequently ordered by Norman to distribute certain "morale boosters" to an unknown number of individuals sometime after the operation.[351] Further, he appears to have participated in a similar meeting prior to the Kamajor operation at Koribondo, again through his forceful words of encouragement to the fighters in attendance.[352] Finally, it was said that he distributed an unknown quantity of ammunition to an unidentified number of individuals at a third meeting prior to the Bo operation.[353]

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[349] Supplemental Pre-Trial Brief, ¶ 7.
[350] *See Brdjanin* Trial Judgement.
[351] *See* ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-201, 4 November 2004 (106:4-29); TF2-005, 15 February 2005 (105:20-25) and (106:10–107:3); 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); TF2-201, 4 November 2004 (110:25–111:1), (112:8-17), (113:1-2) and TF2-079, 26 May 2005 (66:2-14); TF2-079, 26 May 2005 (66:2-14).
[352] *See* ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-008, 16 November 2004 (78:12–79:24); TF2-201, 4 November 2004 (113:1–114:20); TF2-190, 10 February 2005 (43:28–48:4), (83:3-15).
[353] *See* ¶¶ *supra*, on aiding and abetting. Trial Transcript, TF2-201, 5 November 2004 (41:12-19), (42:4-12), (42:15), (43:7-11), (43:13-25), (44:15-18), (44:23-24); TF2-008, 16 November 2004 (80:8-28), (81:1-6), (81:20-

232. Of course, this is not how the Prosecution pleaded its JCE case. Leaving this aside as well as the equally important question of whether any plans to commit crimes materialized at any one of the three alleged meetings, the fact that no specific co-perpetrators have been identified makes it impossible to determine whether Fofana's alleged contribution can be said to have furthered either the contemplated[354] or reasonably foreseeable[355] crimes resulting from the supposed enterprise. In other words, no nexus has been established between the activity attributed to Fofana at Base Zero and the commission of criminal activity at any of the crime bases.[356]

233. Equally problematic is the fact that this lacuna in the Pleadings (and in the evidence) renders the crucial shared-intent analysis an exercise in futility. A review of the evidence with respect to the Tongo, Koribondo, and Bo crime bases reveals that the physical perpetrators of alleged criminal activity at those locations were either unidentified Kamajors or individuals not present at the above-referenced meetings. It is simply not possible on such evidence to determine—as must be done—whether Fofana shared the intent to commit crimes with these hypothetical co-perpetrators.

234. For these reasons the Defence submits that the Chamber would have to accept far to many assumptions and unreasonable inferences to arrive at the conclusion that the Prosecution has substantiated any JCE charges against Fofana.

**G. Fofana did not commit any of the crimes referenced in the testimony of Albert Nallo**

235. Consistent with the principles outlined above, the Prosecution has failed to plead the bulk of the offences referenced in the testimony of Albert Nallo. This Chamber has held "that it is a legal misconception that once a determination is made that evidence sought to be adduced is relevant and of probative value, such a finding automatically triggers off its reception in evidence, even though the Indictment may not contain any

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27), (82:1-11), (84:2-10), (94:23-28); TF2-017, 19 November 2004 (87:3–88:16), (89:21–90:29), (91:13–92:2); TF2-017, 19 November 2004 (92:26–94:29), (95:5-9), (95:23-29), (96:19-27), (97:5-10), (97:15-18).

[354] In relation to a Category I JCE.

[355] In relation to a Category III JCE.

[356] As noted above, the Prosecutions allegations of aiding and abetting suffer from similar evidentiary problems.

specific factual allegations underlying that evidence".[357] By the same reasoning, simply because a witness was permitted to testify as to certain incidents during trial does not mean that such testimony is necessarily relevant to any of the charges against the accused. For example, the Chamber has indicated that any testimony related to crimes of a sexual nature—some of it technically "on the record" in the sense that it has been recorded in the transcripts—will be considered to have no evidentiary value because it does not go to any of the charges in the case. By force of logic, the Defence submits that the testimony of Albert Nallo (or any other witness for that matter), which does support any factual allegations in the Pleadings, is legally null and void and must be disregarded by the Chamber.

236. The Defence submits that the following portions of Albert Nallo's testimony relating to Fofana's alleged involvement in criminal activity do not go to any charges contained in the Prosecution's case: (i) the operations at Dodo, Sorgia, Pipor, and Baoma; (ii) the human sacrifices of one Kamajor and one Kapra in the bush near Base Zero; and (iii) the orders to execute a number of specifically-named collaborators and destroy their property in Bo and Koribondo.

237. The Pleadings do not contain a single specific factual allegation with respect to the first and second incidents. And although the summary of Nallo's testimony set forth at Annex A of the Supplemental Pre-Trial Brief provides certain general information with respect to the third incident—"Witness was instructed at Base Zero to kill all captured rebels and collaborators as a result of which there were many such killings. Witness saw looting at several locations and heard HINGA NORMAN give direct orders that certain targets were to be looted".[358]—Fofana is nowhere alleged to have been involved. As explained above in greater detail, in order to successfully plead allegations of any mode of Article 6(1) liability, at a minimum, the accused's "particular acts" must be clearly set forth somewhere in the Pleadings.

238. In its Rule 98 Response, the Prosecution emphasized Fofana's "direct involvement" in the human sacrifices said to have taken place in the bush near Base Zero.[359] As noted

[357] Admissibility Decision, ¶ 19(vii).
[358] Supplemental Pre-Trial Brief, Annex A, at p 2.
[359] Rule 98 Response, ¶¶ 87–88.

above, under the jurisprudence of the International Tribunals, such allegations of direct involvement (i.e. commission) must be pleaded with "the greatest precision".[360] Yet the Prosecution did not mention the time, location, participants, victims or any other material fact concerning these alleged killings anywhere in its Pleadings when all of this information was presumably in its possession at the time of going to trial. In any event, the Prosecution has already conceded that "acts of cannibalism and human sacrifice" do not form part of the charges against the three accused.

239. Accordingly, the Defence submits that the Prosecution has not charged Fofana with any of the alleged crimes discussed by Nallo. However, *ex abundante cautela*, the Defence nevertheless briefly addresses each incident in the event the Chamber departs from its Admissibility Decision.

*1. Fofana is not liable for any crimes committed during the alleged operations around Talia*

240. According to Nallo, "one morning" Norman ordered him to engage in certain killings of people around Base Zero in the presence of Fofana.[361] Specifically, Nallo discussed four incidents, not one of which was mentioned anywhere in the Pleadings.

*a. The alleged killing of fifteen people at Dodo*

241. According to Nallo, Norman gave him "command that I should go on an operation to get rid of all the collaborators, rebels and sympathisers around our base," and that on these orders Nallo went to Dodo village "with two other people given to me by Moinina Fofana to give me an idea what the terrain is in the area." These men were called Momoh Pemba and Billo Conteh. Upon reaching Dodo, Nallo and the others summoned the villagers to the court barrie, announced their mission to "weed out" rebels, and "opened fire on them". Fifteen people were killed and an unspecified number of houses were burnt down.[362]

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[360] *See* ¶¶, *supra*, on pleading requirements.
[361] Trial Transcript, TF2-014, 10 March 2005 (42:12), (42:15-16), (44:22-23), (44:28).
[362] Trial Transcript, TF2-014, 10 March 2005 (45:1–46:23).

242. Assuming the material facts of Fofana's involvement in this incident had been pleaded, the Prosecution has arguably alleged that he aided and abetted murder (Counts 1 and 2) in Dodo by providing Nallo with the men for his unlawful mission. However, Billoh Conteh himself disabused Nallo's testimony in this regard[363] and testified that he never went on any mission with Nallo and Pemba, nor was he ever involved in any fighting in Dodo.[364] Further assuming that the Chamber finds Conteh less credible than Nallo, the evidence does not satisfy the *mens rea* requirement for aiding and abetting, namely that Fofana knew that he was assisting a criminal offence. The evidence is that Norman ordered Nallo to "get rid of all the collaborators, rebels and sympathisers around our base". On its face, such an order does not suggest the commission of criminal activity, and it is open on this evidence that Fofana may have reasonably believed he was assisting a legitimate Kamajor operation.

*b. The alleged torture of Joseph Lansana and killing of his mother at Sorgia*

243. According to Nallo, following the original instructions from Norman, he went to Sorgia with Kamoh Lahai Bangura and identified Joseph Lansana as someone who had been working as a secretary for the rebels and was therefore a "dangerous man around our base". Nallo and his companion then tied Lansana, cut off his ear, dripped melted plastic onto his body, and beat him "well, well, well". After this, Bangura informed Nallo that Lansana's mother had been "cooking for the juntas" and "the old woman was chopped" by an unidentified member of Nallo's group. After chopping the woman, the group "set ablaze their compound" and threw her into the fire. "That's where she died".[365]

244. Assuming the fact of Fofana's alleged presence at the meeting between Nallo and Norman had been pleaded, there is no evidence that Fofana lent his assistance—substantial or otherwise—to the alleged incident. As noted throughout this Brief, the mere presence of an accused person is insufficient to incur criminal liability. In any event, the Defence took up Nallo's suggestion[366] and invited Lansana to give his version of events. He testified that Sorgia was attacked by Kamajors only once, in 1995 during the presidency of Maada Bio, and that during the attack his mother was burnt to

[363] Trial Transcript, Billoh Conteh, 28 September 2006 (41:27–42:17), (45:6-10).
[364] Trial Transcript, Billoh Conteh, 28 September 2006 (38:2–39:25).
[365] Trial Transcript, TF2-014, 10 March 2005 (46:24-28) and (47:7–49:29).
[366] Trial Transcript, TF2-014, 10 March 2005 (48:11-12).

death by a Kamajor called Conteh but that he was unharmed in the attack.[367] Further, the Chamber was able to confirm that Lansana, the only person by that name living in Sorgia, was in possession of both of his ears.[368]

*c. The alleged looting at Pipor*

245. On further instructions from Norman, Nallo claimed he went to Pipor village and "unroofed" the house of Mamuna Cleveland and carried away the zinc because Norman had received information that it had been supplied to certain villagers by the RUF.[369] Again, there is no indication in the evidence that Fofana lent any assistance to this incident. For the same reasons as outlined above, he therefore does not incur liability.

*d. The alleged killing at Baoma*

246. According to Nallo, he went to Baoma Kpenge village on "the order of Chief Norman and Moinina Fofana" because the two had been informed by a Kamajor from that area, "Junisa Korneh [phon]",[370] that rebels and collaborators had been infiltrating the trade fair in Baoma "which was very dangerous for our base". Nallo took five Kamajors and joined Conneh at Baoma on the day of the trade fair. Conneh identified a Fullah man on a bicycle as a rebel. Nallo and the others "apprehended him" and "took him behind a school building" where he was shot to death by an unidentified member of the group".[371]

247. Assuming the material facts of Fofana's involvement in this incident had been pleaded, the Prosecution has arguably alleged that he, in conjunction with Norman, ordered unlawful killing in Baoma. However, the evidence indicates only that Fofana and Norman instructed Nallo to go to Baoma. Such evidence, which attributes a single act to two individuals without further explication as to what each individual actually did, is difficult to analyze and typical of Nallo. It is simply not clear on this evidence that Fofana actually instructed Nallo to commit a criminal offence as per the *actus reus* for

[367] Trial Transcript, Joseph Lansana, 28 September 2006 (61:16–63:29), (79:16-22).
[368] Trial Transcript, Joseph Lansana, 28 September 2006 (64:18-20).
[369] Trial Transcript, TF2-014, 10 March 2005 (51:26–53:17).
[370] The correct spelling of the surname is "Conneh".
[371] Trial Transcript, TF2-014, 10 March 2005 (53:18–54:17).

the crime of ordering. Further, it is equally unclear whether Fofana intended to bring about the killing of the Fullah man or whether he was aware of a substantial likelihood of Nallo engaging in killing at Baoma.

248. In any event, Conneh himself—a lifetime resident of Baoma Kpengeh and its only resident with that name—testified that he had never seen a trade fair in his village nor had he ever gone on any mission with Nallo.[372] Conneh additionally disabused Nallo's testimony regarding the alleged killing of the Fullah man at Baoma.[373]

*2. Fofana is not liable for the alleged human sacrifices in the bush near Talia*

249. Additionally, Nallo gave evidence regarding two human sacrifices which allegedly took place in the vicinity of Base Zero in the presence of the three accused and others.

*a. The alleged killing of Mustapha Fallon*

250. According to Nallo, a Kamajor from Kati called Mustapha Fallon[374] was killed at some point in time in "the Poro bush when we were at Talia".[375] When specifically asked who committed the actual killing, Nallo responded, somewhat equivocally: "Dr Allieu Kondewa and Chief Hinga Norman and Moinina Fofana; all were there".[376] When asked how Fallon was killed, Nallo was equally unclear: "*They* laid him and *they* cut off his throat. There was one guard whose mouth was cut. [...] *We* laid him and *we* cut off his throat. [...] I was there; I was standing there".[377] However, when asked why Fallon was killed, Nallo was explicit: "Allieu Kondewa said that we needed human sacrifice".[378] Nallo further added that Fallon's corpse was "burnt to ash. The liver was cooked with some medicine, some herbs, which Chief Allieu Kondewa brought out and mixed with it. All of us ate that and we took an oath".[379]

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[372] Trial Transcript, Junisa Conneh, 28 September 2006 (8–15).
[373] Trial Transcript, Junisa Conneh, 28 September 2006 (17:2-3).
[374] Trial Transcript, TF2-014, 10 March 2005 (56:15).
[375] Trial Transcript, TF2-014, 10 March 2005 (55:16).
[376] Trial Transcript, TF2-014, 10 March 2005 (55:5-6).
[377] Trial Transcript, TF2-014, 10 March 2005 (55:8–56:2) (emphasis added).
[378] Trial Transcript, TF2-014, 10 March 2005 (56:6).
[379] Trial Transcript, TF2-014, 10 March 2005 (57:19-24).

251. As the Defence has already mentioned several times, the Prosecution has formally announced that its charges against the three accused do not include acts of cannibalism or human sacrifice. Nevertheless, Fallon's brother Mohammed gave a completely different account of the death of his brother, specifically that he was killed by junta forces in Koribondo sometime in October of 1997. Fallon the witness, who stood to gain nothing by coming to court, claims to have been present during the killing and to have clearly recognized his brother.[380]

252. Should the Chamber find Fallon less credible than Nallo, the Defence submits that the little evidence regarding Fofana's alleged involvement in the killing—simply that he was "there"—is legally insignificant. In order for an accused to incur liability under international criminal law, it must be shown that he either participated in some way, either by committing, planning, instigating, ordering, aiding and abetting, or contributing to a JCE, or that he is liable for the criminal act of his subordinate. Not a single one of these discrete and nuanced modes of liability is substantiated by simply being "there" when a crime is committed.

253. Finally, the Defence notes that Fallon was said to have been a Kamajor. As it is legally impossible to commit a war crime against a member of one's own faction,[381] Fofana could not be held liable for the alleged death of Fallon pursuant to Count 2 even if the Prosecution had pleaded and proved the killing.

*b. The alleged killing of Alpha Dauda Kanu*

254. Further, Nallo testified that Alpha Dauda Kanu, a Kapra, was killed in an oil palm plantation near Mokusi.[382] Again, when asked who killed him, Nallo ambiguously answered: "Dr Allieu Kondewa, Hinga Norman, Moinina Fofana".[383] However, as with the alleged incident relating to Fallon, the alleged killing of Kanu was clearly described

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[380] Trial Transcript, Mohammed Fallon, 27 September 2006 (25:9–32:24), (36:17-28), (37:4-8), (43:10-18).
[381] *See* Antonio Casesse, INTERNATIONAL CRIMINAL LAW, (Oxford 2003), §3.1 at 48. ("[C]rimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.") (*citing* the decisions in *Pilz*, Dutch Special Court of Cassation and *Motosuke*, Temporary Court Martial of the Netherlands East Indies at Amboina).
[382] Trial Transcript, TF2-014, 10 March 2005 (59:19-25).
[383] Trial Transcript, TF2-014, 10 March 2005 (59:26-27).

as some kind of human sacrifice.[384] Furthermore, it contradicts the evidence of another prosecution witness who testified in much greater detail about the alleged sacrifice and who clearly suggested that Kanu had been killed by "two herbalists".[385]

255. According to witness TF2-017, Fofana was only made aware of the incident sometime after the fact, and there is no evidence on the record that the unidentified herbalists were his subordinates.[386] Witness TF2-017 also testified that he brought Nallo to the scene of the alleged crime the following morning and that Kondewa alone was still there.[387] Again this contradicts the testimony of Nallo who claimed to have been present while Kanu was allegedly killed.[388]

256. Finally, the Defence notes that Kanu was allegedly a Kapra which would have made him a member of the CDF along with Fofana. For the same reason given above,[389] Fofana could not then be held liable for Kanu's alleged killing pursuant to Count 2 even if the Prosecution had produced credible evidence that it had taken place.

*3. Fofana is not liable for the alleged killing and burning in Bo and Koribondo*

257. Additionally, Nallo testified that, before the Kamajor operations in Bo and Koribondo, he was given "specific orders" by Norman at Base Zero in the presence of Fofana to kill several collaborators at both locations and to further burn and loot their property.[390] However, as noted several times in this brief, mere presence at the issuance of illegal orders does not amount to culpable behavior under any of the modes of liability recognized by international criminal law. Assuming, *ex arugendo*, the relevance and veracity of Nallo's testimony, it has not been shown that Fofana was under any legal obligation, vis-à-vis Nallo, to prevent the alleged activity from occurring.

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[384] Trial Transcript, TF2-014, 10 March 2005 (59:28–60:14).
[385] Trial Transcript, TF2-017, 19 November 2004 (65:28–66:18).
[386] Trial Transcript, TF2-017, 19 November 2004 (67:26–68:7).
[387] Trial Transcript, TF2-017, 19 November 2004 (80:24–81:8).
[388] Trial Transcript, TF2-014, 10 March 2005 (60:2).
[389] *See* Antonio Casesse, INTERNATIONAL CRIMINAL LAW, (Oxford 2003), §3.1 at 48. ("[C]rimes committed by servicemen against their own military (whatever their nationality) do not constitute war crimes.") (*citing* the decisions in *Pilz*, Dutch Special Court of Cassation and *Motosuke*, Temporary Court Martial of the Netherlands East Indies at Amboina).
[390] Trial Transcript, TF2-014, 10 March 2005 (70:14–79:19).

### H. Acts of Terrorism and Collective Punishments

258. As charged in the Indictment, Fofana is said to have incurred liability under both Counts 6 and 7, by his "acts or omissions in relation to" the allegations contained in Counts 1 through 5.[391] Further, the Supplemental Pre-Trial Brief explains that "[t]he matters set out above in relation to counts 1 to 5 inclusive are relied upon as establishing the nexus between Moinina Fofana and" Counts 6 and 7.[392]

259. With regard to Count 6, the Defence submits that the Prosecution has failed to demonstrate that Fofana himself directly engaged in any "acts or threats of violence directed against protected persons or their property" for any purpose, let alone "with the primary purpose of spreading terror among protected persons."[393] Additionally, with regard to Count 7, the Defence submits that the Prosecution has equally failed to prove that Fofana himself directly imposed any "punishment" on anyone, let alone "protected persons for acts that they have not committed".[394]

260. Further, it has not been established that Fofana ordered, planned, instigated, or aided and abetted such "acts or threats of violence" or "punishment" or that he entered into a common plan with others with a view to accomplishing such illegal aims. Nor has it been shown that any identifiable subordinate of Fofana committed such offences.

261. Simply put, because the Prosecution has failed to substantiate the charges contained in Counts 1–5, the critical nexus between Fofana and Counts 6 and 7 does not exist.

262. The Defence reserves its right to make further legal and factual submissions with respect to Counts 6 and 7 during its closing arguments.

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[391] Indictment, ¶ 28.
[392] Supplemental Pre-Trial Brief, ¶¶ 129, 131 (emphasis added).
[393] Rule 98 Decision, ¶ 112, where the Chamber outlined the elements of Count 6.
[394] Rule 98 Decision, ¶ 118, where the Chamber outlined the elements of Count 7.

## VII. Article 6(3) Liability

### A. Relevant Law

263. The law in relation to Command Responsibility under international law is well settled. Most of the relevant principles are fully set out in the Prosecution's Pre-Trial Brief[395] and are accordingly not repeated here.

264. In essence, to establish guilt pursuant to Article 6(3) of the SCSL Statute the Prosecution must prove to the requisite standard, i.e., beyond reasonable doubt:

(i) A superior subordinate relationship between the perpetrator and the Moinina Fofana;

(ii) Fofana's knowledge that his subordinate was about to commit or had committed a crime;

(iii) Fofana's failure to prevent or punish the commission of the crime.

265. In addition to the jurisprudence highlighted in the Prosecution's Pre-Trial Brief, the following important principles should also be set out and borne in mind when considering an accused's liability pursuant to Article 6(3):

(i) The ICTY Appeals Chamber in *Blaskic* held that in determining whether a legally significant superior-subordinate relationship actually exists, a Trial Chamber "must at all times be alive to the realities of any given situation and ... [take] great care ... lest an injustice be committed in holding individuals responsible for the acts of others in situations where the link of control is absent or too remote.[396]

(ii) The accused's subordinates must be clearly identified and the link between them obvious. In *Blaskic* it was further stated: [T]he law does not know a universal superior without a corresponding subordinate."[397] An accused

[395] Pre-Trial Brief, ¶¶ 156–174.
[396] *Blaskic* Appeal Judgment, ¶ 197.
[397] *Blaskic* Appeal Judgment, ¶ 197.

cannot have command responsibility over an "unspecified assortment of attackers". The Prosecution must establish a "link of control".[398]

(iii) In *Hadzihasanovic et al* the ICTY Appeals Chamber held that:

> 'an accused cannot be charged under Article 7(3) of the Statute for crimes committed by a subordinate before the said accused assumed command over that subordinate.'[399]

(iv) It is submitted therefore that a Trial Chamber may only ascribe criminal responsibility to an accused pursuant to Article 6(3) of the Statute for crimes committed by the accused's subordinates at the time that he was either their *de jure* or *de facto* commander.

(v) Effective control of an alleged superior must be operative at the time the alleged subordinates committed the criminal acts.[400] Temporarily delegated authority is an insufficient bases from which to extrapolate command responsibility unless crimes occurred during the period of delegation.[401] This point is illustrated in *Kunarac,* where because the Prosecution failed to "show that soldiers who committed the offences charged in the Indictment were under the effective control of the accused at the time they committed the offences" the accused was not found liable pursuant to the concept of command responsibility.[402]

(vi) The mere giving of instructions by an accused to somebody else (even where those instructions are complied with by that person) does not necessarily denote a position of command for the accused over that person.[403]

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[398] *Blaskic* Appeal Judgment, ¶ 197.
[399] *Hadzihasanovic et al* 'Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility' 16 July 2003. ¶ 51 (emphasis added).
[400] *Delalic* Appeal Judgment, ¶ 254.
[401] *Delalic* Trial Judgment, ¶¶ 695-696 and 700.
[402] *Kunarac* Trial Judgment, ¶¶ 628-629.
[403] *Kupreskic* Appeal Judgment, ¶¶ 354–357 (where the Appeals Chamber held that it had been "unreasonable for the Trial Chamber to conclude [that the accused] played a command role in the attack" by virtue of his instructions to a soldier to "leave [a woman] alone").

(vii) Even where it is established that persons subordinate to an accused operated in a given area where crimes were committed, if there is a possibility that other units or persons operated in the same area it is inappropriate to hold the accused responsible pursuant to Article 6(3) unless the Prosecution can demonstrate that those persons were also subordinates of the accused.[404]

(viii) Even where an accused possess a degree of influence as a high-ranking member of an organisation, no responsibility will entail pursuant to Article 6(3) unless the Prosecution can prove that such influence was capable of establishing effective control. In *Halilovic* the Trial Chamber held:

> 'The Trial Chamber recalls its finding that Sefer Halilovic possessed a degree of influence as a high ranking member of the AbiH and as one of its founders. However, the Trial Chamber considers that Sefer Halilovic's influence falls short of the standard required to establish effective control. It is a principle of international criminal law that a commander cannot be held responsible for the crimes of persons who were not under his command at the time the crimes were committed.'[405]

(ix) In establishing whether an accused has the power to prevent or punish crimes, it is important to distinguish between the exercise of "true powers of discipline" by an individual from "mere personal influence" in a given situation.[406]

(x) In determining whether an accused exercised command, either *de facto* or *de jure*, or effective control, the Trial Chamber must be satisfied to the required degree, namely beyond reasonable doubt. Even where "there is a strong possibility apparent on the evidence that [an accused] was active as a commander ... at the times relevant to the Indictment", this is not enough to sustain a conviction pursuant to Article 6(3).[407]

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[404] *Limaj* Trial Judgement, ¶¶ 697–702.
[405] *Halilovic* Trial Judgement, ¶ 752 (emphasis added).
[406] *Limaj* Trial Judgement, ¶ 590.
[407] *Limaj* Trial Judgement, ¶ 601.

**B. Prosecution's Allegations of Command Responsibility**

266. In the Indictment the Prosecution allege that:

(i) At all times relevant to the Indicment, Moinina Fofana was the National Director of War of the CDF. As such, together with Samuel Hinga Norman, Moinina Fofana was seen and known as one of the top leaders of the CDF. Moinina Fofana took directions from and was directly answerable to Samuel Hinga Norman. He took part in policy, planning and operational decisions of the CDF.[408]

(ii) Moinina Fofana acted as leader of the CDF in the absence of Samuel Hinga Norman and was regarded as the second in command. As National Director of War, he had direct responsibility for implementing policy and strategy for prosecuting the war. He liaised with field commanders, supervised and monitored operations. He gave orders to and received reports about operations from subordinate commanders, and he provided them with logistics including supply of arms and ammunition. In addition to the duties listed above at the national CDF level, Moinina Fofana commanded one battalion of Kamajors.[409]

(iii) As such, Moinina Fofana, individually or in concert, exercised authority, command and control over subordinate members of the CDF.[410]

(iv) Pursuant to Article 6(3) of the Statute, Moinina Fofana, while holding a position of superior responsibility and exercising command and control over subordinates, is individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute. He is responsible for the criminal acts of his subordinates that he knew or had reason to know that the subordinate was about to commit such acts or had done so and he

[408] Indictment, ¶ 14.
[409] Indictment, ¶ 15.
[410] Indictment, ¶ 18.

failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[411]

(v) Moinina Fofana is charged pursuant to Article 6(3) for counts 1-8 of the Indictment.

267. The Pre-Trial Brief adds no more, in terms of substance, with regards to command responsibility and alleged liability pursuant to Article 6(3) than the Indictment.[412]

268. The Prosecution expand and set out in more detail Fofana's alleged Article 6(3) liability in the Supplemental Pre-Trial Brief, where the specific allegations for Fofana's alleged liability pursuant to Article 6(3) are set out for each of the crime bases: (i) Tongo; (ii) Kenema; (iii) Bo; (iv) Moyamba; and (v) Bonthe. This is set out and considered below for each crime base.

269. Before considering Fofana's Article 6(3) liability for each crime base area, it is first instructive to consider, on a general level, Fofana's superior position against the backdrop of the Article 6(3) requirements.

**C. Fofana's Superior Position**

270. There is evidence that Fofana was a superior, of sorts, within the Kamajor/CDF movement. The issue is firstly what role and responsibilities he had as a superior and secondly whether he was the superior of the specific perpetrators of any crime (this second question is considered in more detail below in relation to each crime base and Fofana's relationship to the alleged perpetrators of the crimes therein).

*1. Command in the Kamajor/CDF Movement*

271. When considering any position of command within the CDF, it is important to see it against the backdrop of how the Kamajor/CDF movement functioned, or rather did not function, as a unit.

[411] Indictment, ¶ 21.
[412] Pre-Trial Brief.

*a. The number of Kamajors and the issue of recruitment*

272. There are varying estimates as to how many people were actually in the Kamajor/CDF movement. The most conservative estimates put the figure at 5,000, while the most generous at 99,000 plus.[413] One of the reasons it is so hard to accurately estimate how many people were in the movement was because some people took the name "Kamajor" for "no purpose other than to defend their own community and may not have done anything more than patrol the perimeter of the village on a handful of occasions."[414] Obviously, it is very difficult to ascertain the numbers of such individuals and simultaneously very difficult for any one to direct or control what they were doing at any given time.

273. In terms of who was mobilising people to join the Kamajor society, it is apparent that "the people leading this effort are community elders, town chiefs, paramount chiefs, and then the elderly, particularly men, in these given communities who participate collectively in decision-making and are coming together to talk about this obviously pressing need."[415] This was confirmed by Albert Joe Edward Demby who stated that the Kamajor movement was a "voluntary mass mobilisation" organised at the Chiefdom level.[416]

274. That the driving force behind many men joining the Kamajors was the Chiefdom authorities inevitably meant that many still held some allegiance and responsibility towards those authorities. This similarly no doubt diluted the command and control that any individual or entity could exert over the Kamajors as a whole.

275. Indeed, as confirmed by Arthur Koroma, Kamajor combat activities and discussions regarding tactics and strategy were sorted out "locally".[417] This chiefdom-based command system had tactical advantages in that a decentralised system made it difficult to "put a stop to Kamajor activities".[418] Thus, Kamajors often fought without the knowledge and consent of the likes of Fofana. Decisions as to which and how many

[413] Trial Transcript, 9 October 2006, at 63:3.
[414] Trial Transcript, 9 October 2006, at 63:7.
[415] Trial Transcript, 9 October 2006, at 65:3.
[416] Trial Transcript, 10 February 2006, at 6:6-17 and 7:8-19.
[417] Trial Transcript, 3 May 2005, at 42:7-12.
[418] Trial Transcript, 4 May 2005, at 20:3-15.

Kamajors went to the front were made locally by local commanders.[419] Accordingly, in any given attack, Kamajors could have come from a number of different sources. To ascribe Article 6(3) responsibility to Fofana it must be proved beyond reasonable doubt that the perpetrators of any alleged crimes were under his command and control.

*b. Base Zero vs Base One*

276. It is also important to consider the relationship between Base Zero and Base One. To the extent that individuals were directing Kamajor/CDF activity, it is clear that Base Zero, and the individuals there, did not have any sort of monopoly on the organisation of the Kamajors. Indeed, in the initial mass mobilisation of the Kamajors it was Eddie Massallay at Gendema (to become Base One) who made the public announcement over the BBC for Kamajors to congregate at Gendema after the coup.[420] In terms of who gave Massallay the authority to make such a call, Dr Hoffman stated:

> To some degree, what gives him that authority is the fact that he has access to somebody who will broadcast this call over the BBC. He took the initiative to do this, and he is obviously an important person in the region and so it is not surprising that a person of importance is going to end up playing this kind of role, but it's really he becomes the name associated with this summoning. That, in a sense, conveys on him the authority to do so, if that makes any sense.[421]

Thus, it was open to many people, at any given time, to exert and claim authority over the Kamajors/CDF and certainly various factions within it.

277. Mohammed Bonnie Koroma states that he was appointed a Battalion Commander at Base One by Eddie Massallay.[422] Accordingly, not all commanders and people involved in operations were directed by individuals at Base Zero and certainly not by Fofana.

278. That said, in terms of what was "going on at Gendema" (Base One), Dr Hoffman concluded that it was "a more fluid and chaotic situation [...]. There may have been efforts on the parts of various people to establish some kind of authority. But it's not clear that that was ever – in fact, it's quite certain that it didn't quite pan out that

[419] Trial Transcript, 5 May 2005, at 48–50.
[420] Trial Transcript, 9 October 2006, at 67:26.
[421] Trial Transcript, 9 October 2006, at 68:5.
[422] Trial Transcript, 22 May 2006, at 24, 32 and 33.

way."[423] Thus, it was difficult to say that either Eddie Massallay or Chief Norman was directing things at Base One.[424]

279. It is also apparent that there were tensions between Base Zero and Base One. Individuals in one location could not necessarily exert influence and control over what happened in their own base, let alone the other. In terms of the relationship between Base Zero and Base One, Dr Hoffman stated:

> When Base Zero becomes what we think of as being Base Zero, there are Kamajors that go from Gendema to Base Zero. The relationship is not – it's not a fixed one and it's, to some degree, tenuous. There are tensions between personalities at these various locations. 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 co-ordinating any kinds of activities between the two was certainly not easy.[425]

280. Thus, it is very difficult to assert that anyone in Base Zero could exert any kind of control and influence over persons in Base One. There was no hierarchy between the two bases with Base Zero coming out on top, as Dr Hoffman stated: "in terms of a kind of relationship of one having precedence over the other, I wouldn't characterise it in that way".[426] In all likelihood this could also be true of Kamajors based in other areas other than the two bases where there were local figures directing Kamajor/CDF matters. Ultimately, it is impossible to determine whether any of the alleged perpetrators of alleged crimes were committed by persons from Base Zero or where ever Fofana may have been.

*c. Communication with Kamajors in the field*

281. Moreover, it is important to consider the difficulty the Kamajors/CDF had with to communicating with each other during the conflict.

> Communication was very difficult and it was generally done by individual couriers. It was—there was not a—at that point there wasn't a functioning

[423] Trial Transcript, 9 October 2006, at 71:1.
[424] Trial Transcript, 9 October 2006, at 70:23.
[425] Trial Transcript, 9 October 2006, at 71–72.
[426] Trial Transcript, 9 October 2006, at 73:10.

phone system to the rural communities. We're talking about messages that are passed orally. In some cases written down. There were modes of tape recording, in some cases, voices, and sending those. So, as anybody who has travelled up country in Sierra Leone knows, especially during the rainy season, this can be a time-consuming process.[427]

As witness TF2-079 put it in evidence:

Q: Mr Witness, would I also be correct to suggest that because of this absence of communication system between Base Zero and the various points some of the incidents do not come to the knowledge of the Kamajor commanders at Base Zero?

A: Which of the commanders?

Q: To the War Council members, the national co-ordinator, those who were at Base Zero?

A: Yes I agree some of the incident did not come to the notice of the War Council and the national co-ordinator –

Justice Thompson: Because of the lack of communication?

A: Yes.[428]

Thus, it would be difficult to exert control and influence over those in remote areas.

*d. Inexperience of the Kamajors and general lack of discipline*

282. Coupled with the logistical difficulties go the relative inexperience of the Kamajors/CDF. It is important to recall that the vast majority had no formal military experience or training. Accordingly, Colonel Iron described how, at the "tactical level" "command tended to be less effective because of the inexperience and lack of training of many of the junior commanders."[429] The CDF had no fall back: when things started to go wrong the CDF units tended to disintegrate. If one of the people was killed the rest of the unit would run away and they were less robust that the other two organisation involved in the conflict (especially in 1997 and 1998).[430] On the battlefront there was a real "lack of discipline".[431]

[427] Trial Transcript, 9 October 2006, at 107:13
[428] Trial Transcript, 27 May 2005, at 35:5.
[429] Trial Transcript, 14 June 2005, at 30:23.
[430] Trial Transcript, 14 June 2005, at 36:12.
[431] Trial Transcript, 14 June 2005, at 37:23.

283. This was confirmed by CDF members: Witness TF2-222 stated "from the outset ... the Kamajors were not disciplined"; there was a "chain" but lack of discipline was responsible for the "uncontrollable nature of the activities".[432] Indeed some fighters acted on their own without the knowledge of central command.[433]

284. Crucially "no on individual" was in control of deployment, the individual commanders told their men where to go, any one who could command up to ten or fifteen men could mobilise them to a particular area.[434] Even at Base Zero itself, it was said that there was a "lack of an effective command and control" – "everyone was commander".[435]

285. Indeed, witness TF2-005 confirms that many people considered themselves to be commanders at Base Zero. He said: "But there were so many commanders in the place there, everybody – many people called themselves CO, CO. That name was all around the place."[436] Thus, it is not right for the Prosecution to assert that Fofana was in charge of all commanders as it was not his role or within his power to control them.

*e. The War Council at Base Zero*

286. At Base Zero, it is also important to factor in and consider the role of the War Council. The War Council, based in Base Zero, "was a collection of important people who either lived in Talia, that was considered their home, or they had been displaced or visited from, came in from other parts of the country."[437] Dr Hoffman describes the War Council as a "socio-political institution" whereby elders in the community "come together and they are—they deliberate in local parlance stuff and refer to as hanging heads. People—people of consequence in a community coming together to inform one another about their understandings of what matters of importance to a community. Seeking counsel together, offering advice to the collective."[438]

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[432] Trial Transcript, 23 November 2004, at 32:23.
[433] Trial Transcript, 16 February 2005, at 70:23.
[434] Trial Transcript, 17 February 2005, at 92:16.
[435] Trial Transcript, 17 February 2005, at 87–90.
[436] Trial Transcript, 16 February 2005, at 16:24.
[437] Trial Transcript, 9 October 2006, at 77:9.
[438] Trial Transcript, 9 October 2006, at 77:24.

287. Dr Hoffman agreed with the analysis of the Presiding Judge that the War Council acted as "a kind of continuum of some indigenous institution within the community. That would be your own independent finding, as distinct from an ad hoc body, set up to address a particular phenomenon at a particular junction of time."[439] Thus, the War Council was an important and respected institution within Base Zero and exerted influence on the way things functioned. Persons at Base Zero of "sufficient status" would sit in on War Council meetings.[440] Their level of participation and influence would of course be a matter for them.

288. The important role of the War Council can be seen as a result of the purported appointment of Fofana as Director of War.[441] There is also evidence that the War Council was involved in tactical decision making with regards to the conflict. For example, it was said that it was the War Council that recommended the taking of Koribondo[442] and Bo.[443]

289. It is not clear, from the evidence, whether Fofana was actually on the War Council or definitively what the role of the War Council was and its place in the hierarchy, such that there was one, at Base Zero especially with regards the direction and control of commanders. It is open on this evidence that much of what the Prosecution allege against Fofana was actually within the province of the War Council.

*2. The Importance of Patronage to issues of Command*

290. The concept of patronage was central to the Kamajor/CDF structures. Patronage is central to everyday life in Mende communities and was therefore foundational to the Kamajors/CDF.[444] Patrons are generally thought of as being people who are going to be on the lookout for their clients.[445] As a result the client has a certain sense of obligation to the patron in relation to matters such as security and labour.[446]

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[439] Trial Transcript, 9 October 2006, at 78:8.
[440] Trial Transcript, 9 October 2006, at 79:14.
[441] *See* Exhibit 59 and *infra*.
[442] Trial Transcript, 16 November 2004, at 78:12–79:24.
[443] Trial Transcript, 16 November 2004, at 80–84.
[444] Trial Transcript, 9 October 2006, at 102:19.
[445] Trial Transcript, 9 October 2006, at 102:24.
[446] Trial Transcript, 9 October 2006, at 103:1.

291. It is important to stress, however, that such relationships are not stable. As Dr Hoffman stated:

> In practice, these client/patron relationships can be quite fluid. And what we find is that in periods, particularly of economic or social stress, they in fact become quite fluid. For the only reason, this is how you get by, this is how you survive, is your positioning within the patron/client frameworks, and a lot of the anthropological literature, especially on West Africa, not just within Sierra Leone and the war, but generally in the wake of the kind of post-structural adjustment economic crises is that these relationships can be highly mobile and highly fluid.[447]

292. In times of conflict, such relationships are put under greater strain and pressure: "clients who are constantly have to seek out new patrons and constantly having to find people who can help them make the basic necessities when they're not themselves in a position to do so."[448]

293. Dr Hoffman makes the point that in times of conflict, "the term 'commander' essentially became a synonym, if you will, of the term 'patron'. That was—the implication in the term 'commander' was that this was the kind of relationship that was being pointed to".[449] It is apparent that it was relatively easy to become a "commander" in that all one needed to do was assert oneself with a degree of conviction and authority. As Dr Hoffman stated: "what you were doing was you were saying, okay, I am a commander and all you had to do was say it. You know, if you said it with enough conviction, the hope was that people would then sort of be willing to treat you as such."[450]

294. It is important to stress that during times of conflict the patronage system may be modified. As Dr Hoffman stated in cross-examination:

> Militarisation offered, for some young people, an alternative way to work around what they considered to be the injustices of the way patronage operated. It doesn't suggest that it offered them a way to opt out of patronage. It suggests it offered them a way to opt out of the way the patronage system had worked prior to the war, which many of them felt excluded them, because, as I mentioned, this gerontocratic, what they perceived as being the

[447] Trial Transcript, 9 October 2006, at 103:19.
[448] Trial Transcript, 9 October 2006, at 104:6.
[449] Trial Transcript, 9 October 2006, at 104:14.
[450] Trial Transcript, 9 October 2006, at 105:7.

> greed of elders, in not passing down to their clients material wealth. Many of them perceived that as an injustice. This offered them a way to erect their own alternative patronage networks.[451]

Due to the fluid and loose nature of patronage relationships, especially during time of conflict, it is obviously hard for an individual, big man or not, to exert significant command and control.

*3. Moinina Fofana's Title – Director of War*

295. At some point during the conflict Moinina Fofana acquired the title "Director of War". In terms of the *de jure* responsibilities attaching to this position, there was no evidence called during the trial to explain exactly what the responsibilities and duties of someone with such a title were. The title is objectively meaningless with no corresponding or analogous position in any other military organisation. The title is apparently a CDF invention. This certainly concurs with Colonel Iron's observation that there was no established rank system with the CDF.[452] He went on to confirm that in the absence of a formal rank system there was no written job description associated with the different offices within the CDF.[453]

296. It is accordingly important to consider Fofana's *de facto* responsibility.

*a. Receipt of the title*

297. The Trial Chamber was presented with different accounts of how Fofana received the title "Director of War".

(i) On one account Fofana was appointed Director of War by "all the Kamajors" at Talia sometime in September or October 1997.[454]

(ii) Similarly it was stated that Fofana was appointed at a meeting of elders at Talia shortly after Chief Normans arrival there.[455]

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[451] Trial Transcript, 10 October 2006, at 7:7.
[452] Trial Transcript, 14 June 2005, at 69:19-22.
[453] Trial Transcript, 14 June 2005, at 69:23.
[454] Trial Transcript, 4 November 2004, at 88:25–89:5.

(iii) Two other witnesses stated that it was Norman who appointed Fofana "Director of War", one said in November 1997[456] and the other stated before the Kamajors moved to Talia.[457]

298. Fofana's "Letter of Appointment – Director of War and Operations"[458] is dated 18 January 1999. It appears that Chief Norman accepted and approved the recommendation of the War Council to appoint Fofana 'Director of War'.

299. Crucially, the Letter of Appointment does not set out or specify Fofana's duties and responsibilities as Director of War. It is interesting to note that it appears that it was actually the War Council that had the power to appoint Fofana to the position as opposed to Chief Norman. The letter does, however, highlight the lofty aims of the CDF and the primary motivation of the organisation. The letter tells Fofana:

> You have earned this position as a result of your hardwork and dedication to the course of our people and the restoration of DEMOCRACY in Sierra Leone.

Fofana is further told:

> I wish to urge you to take this appointment as a challenge for you to strive further and redouble your efforts for the restoration of constitutional order and the reinstatement of Alhaji Dr Ahmed Tejan Kabba as president of Sierra Leone.

The aims of the CDF were noble and Fofana's appointment and instruction part of those noble aims.

*b. Actual role behind title*

300. Notwithstanding Fofana's title, it appears that, in many ways it was nothing more than just that – a title. In the words of Justice Thompson, summarising the apparent position of one of the witnesses:

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[455] Trial Transcript, TF2-190, 10 February 2005, at 29:17-29, 30:17-25.
[456] Trial Transcript, TF2-005, 16 February 2005, at 54:19.
[457] Trial Transcript, TF2-014, 10 March 2005, at 16:12.
[458] Exhibit 59.

> Justice Thompson: That's what he was saying. He was saying "I know for sure that this man was not even one of those commanders who planned or devised or conceptualised strategies to prosecute the war". The impression I got, rightly or wrongly, is that this person called the Director of War was, as it were, someone dressed in borrowed robes.[459]

*c. The CDF Calendar*

301. This position is exemplified by various witnesses responses to the CDF Calendar which has Fofana as a rather fetching "Mr February" with pen in hand (notwithstanding his illiteracy) under the title "National Director of War" and the inscription:

> As far as the Sierra Leone Civil Defence Forces are concerned, they don't say war unless he says they say war. Moinina Fofana, popularly known within the CDF as Director, is the man who overseas [*sic*] the mobilization and deployment of the volunteer fighters of the CDF.[460]

302. The calendar, like Fofana's title, was perceived as somewhat of a joke:

(i) Mustapha Lumeh described the quote under the photo in the calendar as a "farce".[461]

(ii) BJK Sei described the photo of Fofana with pen in hand as "empty bluff".[462]

(iii) Keikula Amara stated that the information and inscription in relation to Fofana in the calendar was "incorrect".[463]

303. In any event, as confirmed by Alfred Samforay in the 92*bis* email,[464] he set out the caption below Fofana's photo and confirms that "there was no formal verification of the information in the calendar." The calendar was published by the CDF support group in the USA who were not on the ground in Sierra Leone.

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[459] Trial Transcript, 5 May 2006, at 36:6-11.
[460] Exhibit 112.
[461] Trial Transcript, 5 May 2006, at 89:24-27, 90:11-16.
[462] Trial Transcript, 16 May 2006, at 15:15-20.
[463] Trial Transcript, 18 May 2006, at 67:18-22.
[464] Exhibit 167.

*d. The Importance of English titles*

304. English titles, such as "Director of War", were of limited importance within the CDF. Firstly English was not "that widely spoken" by the "majority" of people.[465] Accordingly, Kamajors would probably understand someone with an English title to be of importance but not necessarily know what the title itself denoted and meant.[466] Dr Hoffman confirmed that the title "Director of War" or "Director" was employed and expressed to him in relation to Moinina Fofana with a "certain amount of irony and ridicule".[467] Dr Hoffman later expanded and explained this "irony and ridicule" by saying:

> [I]n conversations with individuals about this definition of, or this term 'director of war', that it was very often sort of something that people, combatants acknowledged that they had used in a somewhat ironic fashion. That it was actually quite – that it was quite humorous to them that this individual, who was carrying that title could be called that. Some people pointed to his illiteracy as part of the explanation for this. Some people pointed to the fact of his relative marginality. Again, this is complex, because I do not mean to suggest that this is not somebody who was accorded a degree of respect. But, when I inquired with people about sort of how they were deploying that title, very often they sort of pointed to it as being a sort of ironic terminology which, incidentally in Mende is not uncommon. Nicknames quite frequently take on that role. I believe I mentioned that in the report that nicknames can be deployed humorously or ironically on a fairly regular basis. And this has been documented in ways that I've cited here.[468]

Of significant importance is perhaps the fact that such information and conversations by Dr Hoffman with interviewees was something "that predates the writing of [his] report".[469]

*4. Eduction in Mende Culture*

305. Dr Hoffman further emphasised the extent to which education "is a highly prized trait" among Mendes with the consequence that "within the movement, there was always a sense that those who were educated were the ones who were able to rise, those who weren't educated always risked being marginalized."[470] He gave the example of how

[465] Trial Transcript, 9 October 2006, at 106:4.
[466] Trial Transcript, 9 October 2006, at 106:17.
[467] Trial Transcript, 10 October 2006, at 26:22-24.
[468] Trial Transcript, 10 October 2006, at 81:12-28.
[469] Trial Transcript, 10 October 2006, at 81:10-11.
[470] Trial Transcript, 9 October 2006, at 107:1-5.

Kondewa, who was not educated and illiterate, was marginalized and out manoeuvred.[471] It is worth noting that at the time Dr Hoffman briefly met Fofana, Fofana was based in Bo while the principal CDF figures tended to be people that were based in Freetown.[472]

5. *Prosecution Assertions about Fofana's Role as Director of War*

306. In his expert report Colonel Iron asserts that Fofana, as Director of War, had *inter alia* the following responsibilities:

(i) Looking after ammunition until distributed according to Norman's orders;[473]
(ii) Being in charge of logistics;[474]
(iii) Being Norman's second in command;[475]
(iv) Being present at Briefings and Meetings;[476] and
(v) Planning the Bo-Koribondo campaign.[477]

Firstly, it should be noted that all of Iron's "expert" conclusions were based upon his discussions with a small number of Prosecution witnesses. He did not seek to verify the information he was provided from any independent source.[478]

Secondly, the Iron's Report suffers from the three highlighted flaws succinctly identified by Dr Hoffman: (i) the methodological, (ii) the empirical, and (iii) the theoretical or conceptual.[479]

Thirdly, it should be noted that Colonel Iron did not mention either Moinina Fofana or the role of the Director of War once in his oral testimony.

[471] Trial Transcript, 9 October 2006, at 141:10–142:11.
[472] Trial Transcript, 9 October 2006, at 25:7–29.
[473] Exhibit 97, Iron Expert Report, at 12840 E-4.
[474] Exhibit 97, Iron Expert Report, at 12850 C-4.
[475] Exhibit 97, Iron Expert Report, at 12851 C4.2.
[476] Exhibit 97, Iron Expert Report, at 12853 C4.6.
[477] Exhibit 97, Iron Expert Report, at 12856 D2.
[478] Trial Transcript, 14 June 2005, at 59:27–60:15.
[479] Trial Transcript, 9 October 2006, at 110:23–112:1.

307. Not surprisingly, Iron's conclusions are mirrored in the testimony of a number of Prosecution witnesses – not surprisingly because these are the self same witnesses that he spoke to and based his report upon.

308. These witness stated *inter alia* that Fofana was:

(i) In charge of "the administration".[480]
(ii) In charge of "all fighters, all fighting groups".[481]
(iii) To plan and execute the war and to supply arms and ammunition to commanders.[482]
(iv) To deploy Kamajors in areas of command.[483]
(v) To select commanders to go to battle and "dish out ammunitions if and when directed by Norman.[484]
(vi) To plan a war and to receive frontline reports from commanders.[485]
(vii) To deputise for Norman.[486]
(viii) To make arrangements for food at Base Zero.[487]
(ix) To be present at meetings for commanders.[488]
(x) To hold the key to the store at Base Zero.[489]
(xi) To receive situation reports in the absence of Norman.[490]

309. The first thing to note is that, on the whole, these are predominantly general allegations. They do not link Fofana, in any command position, to any actual crimes being committed by specific and known perpetrators.

310. Secondly, it should be noted that there is some evidence to suggest that the above was not necessarily the case. Some Prosecution witnesses intimated that Fofana was not in a position of "effective command and control" at Base Zero. Witness TF2-222 stated:

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[480] Trial Transcript, TF2-223, 28 September 2004, at 52:6-25.
[481] Trial Transcript, TF2-008, 16 November 2004, at 46:26.
[482] Trial Transcript, TF2-008, 16 November 2004, at 47:20.
[483] Trial Transcript, TF2-068, 17 November 2004, at 18:18.
[484] Trial Transcript, TF2-005, 15 February 2005, at 92:25.
[485] Trial Transcript, TF2-079, 26 May 2005, at 40–42.
[486] Trial Transcript, TF2-079, 26 May 2005, at 40–42.
[487] Trial Transcript, TF2-079, 27 May 2005, at 56:3.
[488] Trial Transcript, TF2-222, 17 February 2005, at 102:24.
[489] Trial Transcript, TF2-201, 4 November 2004, at 96:5.
[490] Trial Transcript, TF2-201, 4 November 2004, at 98:16.

> Also I saw – here was a man called the Director of War who was effective – he was more concerned with the receiving of the logistics and distributing logistics and I did not ever see a time when he came and really put in place, let's say, this is a deployment area, this is a number of manpower at that area. There was no proper nominal role. I could not see that also.[491]

311. Another Prosecution witness, stated that other people had the exact same duties that Fofana was alleged to have had. He stated that at Base Zero, CO Jayah was in charge of the food store and MO Moosa was in charge of the arms and ammo store.[492]

312. Similarly, it was suggested by Prosecution witnesses that Base Zero was effectively run and managed by one man, to the exclusion of all others, namely Chief Norman. Witness TF2-011 stated that the CDF was Chief Norman's "one man show" at Base Zero.[493] Colonel Iron stated that to exercise effective command you "need to have the responsibility to make decisions, you need to be able to exercise leadership and you need to be able to exercise control." He concluded: "the person who exercised all three of these for the CDF was Hinga Norman."[494]

313. That TF2-079 stated that Fofana may have deputised[495] for Norman does not confer command responsibility on Fofana. As demonstrated by ICTY jurisprudence, the effective control of the superior must be operative <u>at the time</u> the alleged subordinates are said to have committed criminal acts. Temporarily delegated authority is an insufficient bases from which to extrapolate command responsibility unless crimes occurred during the period of delegation. There is no evidence of this in the present case.

*6. Defence case regarding Fofana's position as Director of War*

314. In addition to the Prosecution witnesses who undermine the Prosecution's position vis-à-vis Fofana's command position, there were a whole plethora of Defence witnesses who cast substantial doubt on Fofana's alleged command role:

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[491] Trial Transcript, 17 February 2005, at 92:2-9.
[492] Trial Transcript, TF2-008, 16 November 2004, at 65:19-25.
[493] Trial Transcript, 8 June 2005, at 19:7-9.
[494] Trial Transcript, 14 June 2005, at 50:16-20.
[495] Trial Transcript, TF2-079 26 May 2005, at 25–26.

(i) Norman himself, for what it is worth, stated that he had "no deputy".[496]

(ii) Norman stated that the Director of Operations decided how many Kamajors would go to the war front.[497]

(iii) Mohammed Kaineh also stated that Fofana was not regarded as second in command to Norman.[498]

(iv) Kaineh also stated that as a commander he never discussed matters related to the war with Fofana, he did not liase with him, Fofana did not give him orders and nor did he ever report to Fofana. Fofana was not responsible for deciding or planning the fighting in which Kaineh was involved and he did not consider Fofana to be in charge of his group.[499]

(v) MT Collier stated that: At Base Zero, Jajah Kamara was in charge of the food store (the storekeeper). Fofana was responsible for distributing food amongst the Kamajors. Mustapha Lumeh was the logistics officer. The three worked closely together, but apart from his involvement in food distribution, Collier did not see Fofana do any other work at Talia.[500]

(vi) Haroun Collier also stated that Jajah Kamara was the storekeeper at Talia.[501]

(vii) Osman Vandy stated that Fofana never directed or prepared him for war.[502]

(viii) Kenneth Koker stated that Augustine Ngaoujia headed the battalion in Bo.[503]

(ix) Koker further stated that although Fofana was Director of War, he never received any orders from him and never saw Fofana playing any role in relation to his title.[504]

(x) Ishmael Koroma stated that Fofana was a director but that he never received any orders from him.[505]

(xi) Arthur Koroma stated that he never received any orders from Fofana.[506] Koroma, who was highly connected to the fighting, stated that Fofana did not do anything to make him "personally feel he was director of war".[507]

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[496] Trial Transcript, 3 February 2006, at 32:4.
[497] Trial Transcript, 7 February 2006, at 39:4.
[498] Trial Transcript, 19 May 2005, at 37:19-21.
[499] Trial Transcript, 19 May 2005, at 38–41.
[500] Trial Transcript, 17 February 2006, at 3, 6, 7, and 10.
[501] Trial Transcript, 12 May 2006, at 36:25–37:3.
[502] Trial Transcript, 20 February 2006, at 21:6-23.
[503] Trial Transcript, 20 February 2006, at 50.
[504] Trial Transcript, 20 February 2006, at 65-66.
[505] Trial Transcript, 23 February 2006, at 25:1-10.

(xii) Arthur Koroma also confirmed that Norman did not have a second in command,[508] and he did not consider Fofana to be his superior.[509]

(xiii) Mustafa Lumeh stated that Fofana was a "congenial fellow, very affable, and mostly the initiators liked him very much. So his role was to mediate between petty quarrels and therefore was nicknamed the 'director'.[510]

(xiv) Mustafa Lumeh also stated that Fofana was not involved in matters of central strategy, tactics, operations.[511] Fofana did not command troops and nor did he make strategy or policy decisions; they were made by commanders.[512]

(xv) BJK Sei stated that Fofana was not in charge or involved in his combat activity.[513]

(xvi) Keikula Amara stated that Fofana never gave him orders and nor did he ever report to Fofana. He heard Fofana's name but Fofana was of "no importance" to him in relation to "Kamajor business". Amara did not consider Fofana to be in charge of fighting groups and nor did he play a role in deciding and planning how the war was to be fought.[514]

(xvii) Mohammed Bonnie Koroma stated that Fofana was not doing the job of a "head man" within the CDF. He never received orders from Fofana and nor did he report to him. Commanders did their own planning and Fofana did not command them.[515]

(xviii) Kenei Torma was a battalion commander and never received orders from Fofana in respect of any attack and nor was Fofana involved in the planning. Torma was eventually made overall chiefdom commander by his "chiefdom people".[516]

(xix) Junisa Conneh stated that he took instructions from Fofana at Base Zero regarding the distribution of salt.[517]

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[506] Trial Transcript, 4 May 2005, at 34:10-12.
[507] Trial Transcript, 4 May 2005, at 35–37.
[508] Trial Transcript, 4 May 2005, at 39:3-5.
[509] Trial Transcript, 4 May 2005, at 45–46.
[510] Trial Transcript, 5 May 2006, at 87:23–88:4.
[511] Trial Transcript, 5 May 2006, at 89:1-17.
[512] Trial Transcript, 5 May 2006, at 91:18-29.
[513] Trial Transcript, 16 May 2006, at 16–17.
[514] Trial Transcript, 18 May 2006, at 64-65.
[515] Trial Transcript, 22 May 2006, at 34-38.
[516] Trial Transcript, 2 June 2006, at 37–38 and 49.
[517] Trial Transcript, 28 September 2006, at 17–19.

315. After conducting extensive research with over 200 witnesses, Dr Hoffman concluded in his report that:

> For the matters under consideration by the Special Court in the case of Moinina Fofana, this calls into question the use of the term "Director of War" in two ways. First, unlike a professional European army, titles such as this do not come with a specific and codified set of responsibilities, duties or privileges. They refer more to a person's social standing and patronage position than they do to that person's military rank. The title came into use at Base Zero when Fofana was tasked with food distribution, clearly a critical administrative job given the chronic shortages of provisions at Talia. Second, the use of the English term further suggests a lack of fixed comprehensible meaning for most combatants. The term "Director of War" clearly signifies a person of some importance, but does not specify why. Fofana was referred to most often by combatants simply as "Director", a nickname that would imply respect but would mean nothing to most combatants. What's more, that generic term was used for a number of other individuals, including the various regional Directors of Operation.[518]

316. That Fofana provided food, and the importance of this, was confirmed by Dr Hoffman during cross-examination.[519] Dr Hoffman stated that during the course of his extensive research he did not have "any commanders say to me that they received weapons from Moinina Fofana, commanders or rank and file individuals I've spoken to."[520] This was notwithstanding his enquiries into the role of this "Director of War".[521]

317. Dr Hoffman confirmed:

> Nobody that I have spoken to said they received direct orders for combat from Moinina Fofana.[522]

*7. Conclusion*

318. To conclude:

(i) Moinina Fofana was Director of War but in title only.

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[518] Exhibit 165, Hoffman Expert Report, § D.4.u.
[519] Trial Transcript, 10 October 2006, at 51:11–53:17.
[520] Trial Transcript, 10 October 2006, at 54:2-4.
[521] Trial Transcript, 10 October 2006, at 54:12-29.
[522] Trial Transcript, 10 October 2006, at 27:3-4.

(ii) At most Fofana was someone who held, as in *Halilovic*, a degree of influence insufficient to give rise to Article 6(3) liability.

(iii) The Prosecution have failed to establish beyond reasonable doubt that he had *de jure* or *de facto* power over any subordinates – at best the overall picture is confused and blurred.

(iv) For the reasons set out below—to the extent that any *de facto* responsibility can be attributable to Moinina Fofana—the Prosecution cannot prove that any of the alleged crimes were committed by his direct subordinates.

(v) There was a distinct possibility that other Kamajors from other areas were operating in areas where Kamajors associated with Fofana, such that there were any, were operating.

(vi) There is no evidence to suggest that, at the time Fofana held any superior position as deputy or otherwise (such that there is any evidence of this), that discernable crimes were committed by his identifiable subordinates.

(vii) Fofana had no knowledge that crimes were about to be or had been committed by his subordinates.

(viii) Fofana had no power to either prevent or punish any such alleged crimes.

**D. Crime Base Analysis**

319. This section will consider whether there is any evidence of Moinina Fofana's Article 6(3) liability for each crime base area.

320. The extent to which any crimes may have been committed in each crime base, and the alleged perpetrators thereof is considered and set out in Annex A.

1. Tongo Field

321. The Prosecution allege Fofana's Article 6(3) responsibility for Tongo Field in the following terms:

> It is the prosecution theory of the case that Moinina Fofana held, individually or in concert with other CDF superiors, a position superior to the CDF

subordinates engaged in the unlawful killings and had effective control over those subordinates.[523]

It is the prosecution theory of the case that the fact that Moinina Fofana knew of should have known that the unlawful killings were about to be committed can be reasonably inferred from, *inter alia*:

(a) his position of authority within the CDF;
(b) the fact that he was a member of the War Council;
(c) the fact that he was physically present and participated in the planning of attacks and was in receipt of reports about these attacks;
(d) the announced position of the CDF with respect to civilians, in particular those civilians in Tongo;
(e) the fact that during the relevant times in the indictment, Moinina Fofana was in regular communication with Samuel Hinga Norman;
(f) the fact that during the relevant times in the indictment he provided logistical support to the CDF in the field;
(g) the fact that he received regular status reports of war operations and frequently visited the CDF bases in and around Tongo.[524]

It is the prosecution theory of the case that given all of these matters it can be reasonably inferred that Moinina Fofana failed to take necessary and reasonable measures to prevent the unlawful killings or to punish the perpetrators thereof.[525]

322. Annex A sets out the evidence which, if believed, describes what allegedly occurred at the Tongo Field crime base.

323. The first thing to note is that the vast majority of crimes were allegedly committed by "unidentified" Kamajors. Fofana cannot be held to be a superior to such individuals. They could have been under the command and control of any number of individuals. Fofana cannot be held to be their superior with the power to prevent or punish their actions.

324. Witness TF2-027 stated that BJK Sei was in charge of the Kamajors and Siaka Lahai his deputy.[526] CO Kamabote is also alleged to have been involved in the attack and to have committed crimes.[527]

325. Chief Baimba and Bimba Aruna are alleged to have committed crimes in Lalehun.[528]

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[523] Supplemental Pre-Trial Brief, ¶ 18.
[524] Supplemental Pre-Trial Brief, ¶ 19.
[525] Supplemental Pre-Trial Brief, ¶ 20.
[526] Trial Transcript, 18 February 2005, p. 92 and 22 February 2005 p. 50 – 51; 22 February 2005 p. 59; 22 February 2005 p. 71 – 73.
[527] Trial Transcript, 1 March 2004, p. 82-84.

326. Keikula Kamagboty[529] and Kamabote[530] are alleged to have committed crimes in Talama.

327 There is no evidence at all that Fofana had any sort of relationship, superior or otherwise with Baimba, Aruna, Kamagboty, or Kamabote. Accordingly there can be no Article 6(3) liability.

328. The Prosecution's position in relation to Fofana's connection to BJK Sei, Siaka Lahai and CO Kambote for alleged crimes in Tongo Field is even weaker. Witness TF2-022 stated that the Kamajor Commanders operating at NDMC headquarters had their own groups of Kamajos and seemed to give their own, at times contradictory, orders.[531] It was stated that different "types" of Kamajors had different commanders.[532] Some Kamajors guided civilians, others chopped them: a 'good number' of Kamajors did not appear to follow orders.[533]

329. Again. from this it cannot be discerned that Fofana was in command or had any responsibility for any Kamajors responsible for committing alleged crimes. The situation is, at best, confusing.

330. Specifically, BJK Sei gave evidence that during the time of the Tongo attacks: He did not discuss matters of policy or strategy with Fofana. He did not receive orders from Fofana or report to him.[534] He stated Fofana was not in charge or involved in his combat activitiy.[535]

331. There is some confusion as to who planned the Tongo attack. Keikula Amara stated that it was done at Panguma by Chief Kamajor BJK Sei.[536] Conversely, TF2-201 stated that

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[528] Trial Transcript, 24 February 2005, and 1 March 2004 p. 36-38.
[529] Trial Transcript, 14 February 2005, p. 12 – 20.
[530] Trial Transcript, 1 March 2004, p. 88-89.
[531] Trial Transcript, 11 February 2005, p. 71 – 73.
[532] Trial Transcript, 22 February 2005, p. 104-105.
[533] Trial Transcript, 22 February 2005, p. 81-82.
[534] Trial Transcript, 16 May 2006, p. 11-13 and p. 33.
[535] Trial Transcript, 16 May 2006, p. 27 line 28 – p. 28 line 3.
[536] Trial Transcript, 18 May 2006, p. 24-25 .

Chief Norman gave the order, in the presence of amongst others, Fofana.[537] He also alleged that Norman order Fofana to "dish out the ammunitions".[538]

332. Witness TF2-005 stated that Norman told the Kamajors to take Tongo "at all costs" and that Fofana was present at this meeting. Norman ordered Fofana to distribute ammo for the operation.[539]

333. Witness TF2-222 said Norman ordered the attack and stated that at the meeting Fofana said "any commander failing to perform accordingly and loosing you own ground, just decide to kill yourself there and don't come to report to us".[540]

334. Witness TF2-079 stated that he gave a written situation report from Tongo to Fofana.[541] (Obviously Fofana himself could not read the report). The witness later met with Norman and Fofana "brought the situation report".[542] The witness prepared the report himself.[543] The Report, Exhibit 86, is addressed directly to Chief Norman and discloses no information about alleged crimes or wrongdoing.

335. Even if Norman did order the carrying out of crimes in Tongo, there is no evidence that anyone present at any such meeting did, in fact, commit any crimes. Even if Fofana advised men to kill themselves if they lost ground this does not demonstrate either (a) an order to commit crimes, or (b) Fofana's superiority over anyone who may have committed crimes. Such instructions could have been limited to the taking of legitimate targets. There is no evidence that persons present at this alleged meeting ultimately committed any crimes.

336. Thus, in relation to the Tongo crime base there is either no evidence or no credible evidence that Moinina Fofana was the superior to <u>any</u> subordinate who actually committed crimes in Tongo. There is no evidence that he knew of the commission of such crimes and there is no evidence that he had the power to prevent or punish such crimes. Norman was clearly the driving force who could not be subverted.

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[537] Trial Transcript, 4 November 2004, p. 106.
[538] Trial Transcript, 15 February 2005, p. 105 lines 20 – 25 and p. 106 – 107.
[539] Trial Transcript, 16 February 2005, p. 106.
[540] Trial Transcript, 17 February 2005, p. 119.
[541] Trial Transcript, 25 May 2005, p. 25.
[542] Trial Transcript, 25 May 2005, p. 27.
[543] Exhibit 86.

Kenema District

*Kenema*

337. The Prosecution allege Fofana's Article 6(3) Responsibility for the Kenema District in almost identical terms as those alleged for the Tongo Field. The only addition is that it is alleged that Fofana knew or should have known that the unlawful killings were about to be committed by inference from "the fact that he regularly received reports of police officers being targeted and took no action in relation to such reports".[544]

338. Annex A sets out the evidence which, if believed, describes what allegedly occurred in the Kenema crime base.

339. The first thing to note is that the vast majority of crimes were allegedly committed by "unidentified" Kamajors. Fofana cannot be held to be a superior to such individuals. They could have been under the command and control of any number of individuals. Fofana cannot be held to be their superior with the power to prevent or punish their actions.

340. The only named individuals alleged to have committed crimes in Kenema are Brima Massaquoi (who spoke with a Liberian accent),[545] "Magona",[546] and Mualemu Sheriff.[547] There is no evidence that Fofana had any sort of relationship, let alone a superior one, to any of these individuals and there can accordingly be no Article 6(3) liability.

341. It was Norman who gave the instructions to the operation commanders for the Kenema attack.[548]

342. Witness TF2-201 claims that Fofana was present at a planning meeting for the attack on Kenema.[549] This alone does not demonstrate that Fofana had a superior position over anyone involved in the Kenema attack.

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[544] Supplemental Pre-Trial Brief, ¶ 28.
[545] Trial Transcript, 23 September 2004, p. 102-105.
[546] Trial Transcript, 22 Septmber 2004, p. 43 and 23 September 2004 p. 6-9.
[547] Trial Transcript, 24 September 2004, p. 52.
[548] Trial Transcript, 5 November 2004, p. 41.

343. The only witness to give evidence about Fofana's alleged command role in the Kenema attack was TF2-223. According to him Fofana and Kondewa were "in charge of the Kamajors" in Kenema.[550] He based this assessment on an announcement made by Fofana and Kondewa the day following the attacking that the NIC building on Dama Road would be the CDF HQ.[551] The witness was unable to say whether the two arrived on that day (ie the Monday) or previously.[552]

344. The only two examples of the "exercise of authority" by Fofana and Kondewa that TF2-223 could only point to were:

(i) That "even though [TF2-223] had been told by Chief Norman that whatever we get at the war front belongs to us, but this time now when we came down to Kenema we caught a huge quantity of tonnage in this cocoa produce at FD Saad's place … we are now instructed [by Fofana and Kondewa] not even to go around there again."[553]

If anything this seems to be implying that the witness was told not to loot contrary to his previous instructions by Norman.

(ii) There were orders for one corpse to be burnt.[554] TF2-223 never enquired why the corpse was burnt.[555]

There could have been a whole plethora of reasons why a corpse should be burnt – not least hygienic.

These examples do not come close to establishing proper command authority.

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[549] Trial Transcript, 5 November 2004, p. 42.
[550] Trial Transcript, 28 September 2004, p. 98 line 18.
[551] Trial Transcript, 28 September 2004, p. 98 lines 23-29.
[552] Trial Transcript, 28 September 2004, p. 99 line 17-22.
[553] Trial Transcript, 28 September 2004, p. 100 lines 14-27.
[554] Trial Transcript, 28 September 2004, p. 101 line 14-19.
[555] Trial Transcript, 28 September 2004, p. 102 line 4.

345. There is some evidence to suggest that ECOMOG exerted a degree, if not significant control, over matters in Kenema.[556] This was confirmed by Brima Moriba who stated that it was announced that ECOMOG would be incharge of security in Kenema.[557] Moreover, Arthur Koroma was emphatic that Fofana was not involved in the attack on Kenema.[558]

346. The crucial matter to note from TF2-223's evidence set out above is that it does not clearly establish that Fofana was in a position of authority with the power to prevent or punish crimes of any subordinates. To the extent that TF2-223 can be established as a subordinate it is not clear, from the evidence, that Fofana knew of his activities and alleged crimes and not clear that Fofana would have had the authority and power to either prevent or punish them. Moreover, as in *Limaj*, it is clear that other units could have been operating in the area over who Fofana had no responsibility or control.

*SS Camp*

347. The only witness to allege Fofana's involvement in anyway to SS Camp was TF2-223. It is not possible to discern from his testimony that Fofana had any command role in relation to the camp.

348. TF2-223 claims that his unit was assigned to take SS Camp. The witness gave hearsay evidence that CO Ngaoujia had told him that the the orders came from Norman but were "dished out" by Fofana.[559] The bulk of casualties at SS Camp were civilian.[560]

349. After the Kenema operation, TF2-223 states that he transferred to SS Camp on the orders of Fofana and Kondewa.[561] Fofana is said to have handed SS Camp over to the witness's unit.[562]

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[556] Trial Transcript, 23 February 2006, p. 26, 29, 39 and 42.
[557] Trial Transcript, 23 May 2006, p. 15 lines 11-24.
[558] Trial Transcript, 4 May 2005, p. 51, 52, and 54.
[559] Trial Transcript, 28 September 2004, p. 57.
[560] Trial Transcript, 28 September 2004, p. 61-62.
[561] Trial Transcript, 28 September 2004, p. 104.
[562] Trial Transcript, 28 September 2004, p. 105-106.

350. Norman is said to have announced that SS Camp would be a place for executions and that Magona be in charge.[563] Norman gave TF2-223 a daily occurrence book to record the activity at SS Camp.[564] Norman visited the camp on many occasions.[565] It is alleged that Fofana may have sometimes been with him and may have seen the daily occurrence book.[566]

351. A few short points should be made:

(i) It was only hearsay evidence that Fofana "dished out" Norman's orders to take SS Camp. Crucially there is no evidence that the orders were unlawful or gave instructions to target civilians.

(ii) To the extent that there were civilian casualties in the taking of SS Camp, it is not clear from the evidence whether they were deliberate targets or collateral casualties.

(iii) Fofana was not involved giving orders regarding the running of SS Camp ie as a place for executions.

(iv) It is not clear what was actually in the Daily Occurrence Book that, at most, Fofana <u>may</u> have seen. It is not clear that it contained details of alleged crimes. In any event – unless the book was in pictorial form – as Fofana is illiterate he would not have been able to understand it.

352. It is submitted that from the above it is impossible to be sure, beyond reasonable doubt, that Fofana occupied a sufficient position of superiority over any of the alleged perpetrators of crimes in either Kenema or SS Camp.

<u>Bo District</u>

353. The Prosecution allege Fofana's liability pursuant to Article 6(3) in similar terms to the allegations pertaining to Tongo Field.[567]

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[563] Trial Transcript, 28 September 2004, p. 110.
[564] Trial Transcript, 28 September 2004, p. 120.
[565] Trial Transcript, 28 September 2004, p. 121.
[566] Trial Transcript, 28 September 2004, p. 125.
[567] Supplemental Pre-Trial Brief, ¶ 35.

354. It is alleged that the fact that Moinina Fofana knew or should have known that the unlawful killings were about to be committed can be inferred from the following factors in addition to those set out for Tongo Field above:

(i) the fact that he was in charge of CDF activity in the Bo District;
(ii) the fact that the commanders put in place at the checkpoints around Bo were appointed by Fofana;
(iii) the fact that the killings at these checkpoints were reported to Moinina Fofana;
(iv) the fact that he received regular status reports of war operations;
(v) the fact that reports of CDF atrocities were brought to his knowledge with no action taken.

Unlike for Tongo Field it is not alleged that Fofana was physically present and participated in the planning of attacks and was in receipt of reports about these attacks.[568]

The Prosecution allege that from all these matters it can be inferred that Moinina Fofana failed to take necessary and reasonable measures to prevent the unlawful killings or to punish the perpetrators thereof given that:

(a) after the CDF captured Bo (on or about 15 March 1998) checkpoints were set up by the CDF to screen the collaborators from the civilians as the fled the town;
(b) Fofana knew killings took place at these checkpoints but no preventative action was taken;
(c) At the time, Fofana had an office on Mahei Boima Road in Bo;
(d) Many meetings were over the fact of CDF atrocities in which Fofana was present and informed of such conduct;
(e) All atrocities occurring in Bo were reported to Fofana.[569]

[568] Supplemental Pre-Trial Brief, 36.
[569] Supplemental Pre-Trial Brief, 37.

355. There are two aspects to Fofana's alleged command role in Bo: (i) the attack of Bo, and (ii) the management of Bo after is capture.

*The Attack of Bo*

356. With regards the attack on Bo two witnesses claim to have been involved in the attack and commission of crimes in Bo and assert Fofana's involvement in the attack: Albert Nallo and TF2-017. Annex A sets out the alleged crimes that these two men claim to have committed. It is apparent from the Annex that, apart from these two men, all other alleged crimes in Bo were committed by "unidentified Kamajors" over whom it cannot be said that Fofana exercised Article 6(3) responsibility.

357. There are two points to make about Nallo and TF2-017: Firstly, both Nallo and TF2-017 are reprehensible, dishonest and unreliable witnesses. The Trial Chamber should not place significant, if any, weight on the testimony of self-confessed murderers who have themselves by doing so been granted complete amnesty. Secondly, there is no clear and reliable evidence that Fofana was in a position of command of either of these two men for the purpose of Article 6(3) liability.

358. Albert Nallo asserts that Fofana was present when Norman gave orders regarding the Koribondo and Bo attacks,[570] for example with regards looting the killing of policemen, and collaborators.[571] Even if believed, Fofana's presence when such orders were given does not give rise to any Article 6(3) liability unless it is proved that the alleged crimes were eventually committed by persons who he had Article 6(3) control over. It is worth noting that Nallo stated that about a week after the fall of Bo, Norman is alleged to have addressed a large meeting of Kamajors and civilians and said, effectively, they should not grumble about Kamajors who did things. Rather than blame the Kamajors Norman is said to have stated that they should blame him for it was he who "gave them directions".[572] Moreover, witness TF2-011 stated that it was Norman who appointed the

[570] Trial Transcript, 10 March 2005, p. 64-65.
[571] Trial Transcript, 10 March 2005, p. 65-71.
[572] Trial Transcript, 10 March 2005, p. 81-82.

commanders for Koribondo and Bo.[573] This casts substantial doubt over whether Fofana had any responsibility over the actions of Kamajors in Bo.

359. TF2-017 stated that it was Albert Nallo who commanded the attack on Bo.[574] This is confirmed by TF2-001.[575] It should be noted that in cross-examination Nallo confirmed that he had been told by the Prosecution that he would be prosecuted only if he bore the greatest responsibility—if he gave commands.[576] There is more evidence of Nallo's command role with regards the attack than Fofana's, but Nallo has escaped Prosecution ostensibly by implicating others.

360. Witnesses gave evidence that Fofana was present when Norman gave instructions for the attack on Bo.[577] Fofana's mere presence at such a meeting does not connote that he possessed any command position vis-à-vis the attack. TF2-017 further alleges that Fofana distributed arms and ammunition prior to the attack.[578] It was not established that these arms and ammunition were used in the perpetration of specific crimes by forces in Bo and certainly does not indicate that Fofana had any command position over persons who may have used them.

361. TF2-001 stated that in April 1998 he saw Kamajor leaders at a parade at the new police barracks.[579] Norman purportedly stated at this meeting that Fofana had reported that the police barracks had been burned down when they had in fact not been burned down.[580] So it appears that according to the witness, Norman was displeased for having been given information about an event that had <u>not</u> in fact taken place. This clearly does not indicate that Fofana was responsible for the action or had authority over those who carried it out.

362. Bob Tucker asserted that crimes had been committed as part of the Bo attack.[581] He asserts that he made a report of the Bo mission to MT Collier.[582] There is no evidence

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[573] Trial Transcript, 8 June 2005, p. 29 lines 6-8.
[574] Trial Transcript, 22 November 2004, p. 2.
[575] Trial Transcript, 14 February 2005, p. 75.
[576] Trial Transcript, 11 March 2005, p. 41.
[577] Trial Transcript, 5 November 2004, p. 42 and Trial Transcript 19 November 2004 p. 92-93.
[578] Trial Transcript, 19 November 2004, p. 96.
[579] Trial Transcript, 14 February 2005, p. 98.
[580] Trial Transcript, 14 February 2005, p. 99.
[581] Trial Transcript, 10 February 2005, p. 56.