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SCSL-04-14-T
(20316-20457)

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**SPECIAL COURT FOR SIERRA LEONE**

**In Trial Chamber I**

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

Registrar: Mr Lovemore Munlo, SC

Date: 27 November 2006

**THE PROSECUTOR**

**-against-**

**SAMUEL HINGA NORMAN, MOINANA FOFANA, and ALLIEU KONDEWA**

SCSL-2004-14-T

PUBLIC

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# NORMAN FINAL TRIAL BRIEF

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# Norman Final Trial Brief

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## Introduction

1. Pursuant to Rule 86(b) of the Rules of Procedure and Evidence (the "Rules"), Court Appointed Counsel for the First Accused (the "Defence") hereby submits its final trial brief in accordance with the "Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments".[1] The Defence adopts and incorporates by reference those factual and legal assertions raised by the co-Accused to the extent that they have application.

## Brief Procedural Background

2. Samuel Hinga Norman (the "First Accused") was indicted on 7 March 2003[2]. Moinina Fofana (the "Second Accused") and Allieu Kondewa (the "Third Accused") were indicted on 26 June 2003.

3. On the 15th, 17th and 21st March 2003, the First Accused was arraigned before the Trial Chamber and pleaded not guilty to the eight counts listed in the Indictment against him.

4. On the 9 October 2003 the Prosecution sought a Motion for Joinder of the First Accused with the Second and Third Accused.

5. On 27th January 2004 the Trial Chamber ordered the joint trial of Mr Norman, Mr Fofana and Mr Kondewa[3], and ordered that a single Indictment be prepared as the Indictment on which the joint trial would proceed. It further ordered that the Indictment should be served on each Accused in accordance with Rule 52 of the Rules of Procedure ad Evidence (the "Rules"). The Indictment was filed on the 5 February 2004.[4]

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[1] *Prosecutor v. Norman et al.*, SCSL-04-14-T-722, "Scheduling Order for Filing Final Trial Briefs and Presenting Closing Arguments", 18 October 2006.
[2] *Prosecutor v. Norman et al.*, SCSL-03-08-PT-002, Trial Chamber I, "Norman – Indictment", 7 March 2003.Hinga Norman was subsequently arrested on 10 March 2003.
[3] *Prosecutor v. Norman et al.*, SCSL-2003-12-PT-057, "Kondewa – Decision and Order on Prosecution Motions for Joinder", 28 January 2004; *Prosecutor v. Norman et al.*, SCSL-2003-08-PT-131, "Norman – Decision and order on prosecution motions for joinder", 28 January 2004; *Prosecutor v. Norman et al.*, SCSL-03-11-PT-093, "Fofana- Decision and order on prosecution motions for joinder", 28 January 2004 [and corrigendums].
[4] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-003, "Norman, Fofana, Kondewa – Indictment", 5 February 2004 ("Indictment").

6. Contrary to the order of the Trial Chamber, the Indictment was not served on the Accused personally but only to his Defence Counsel on 5 February 2004. Even though the Indictment charged the First Accused with the same crimes as contained in the Initial Indictment, the factual allegations against the First Accused varied from those contained in the Initial Indictment.

7. As a result of these procedural errors and omissions on the part of the Prosecution[5], Mr Norman repeatedly stated his position that in the absence of personal service of the Indictment, he was not properly within the jurisdiction of the Court.[6] He further held that there was an ongoing violation of his fundamental right to be personally presented with the charges against him as soon as possible after his arrest, a fundamental defence right guaranteed by the Special Court Statute and all international human rights instruments. Pending resolution of this issue, the First Accused did not attend the proceedings from approximately September 2004 until May 2005.[7]

8. The CDF trial began on 3 June 2004. The prosecution called 75 witnesses, including three expert witnesses. On 14 July 2005, the Prosecution concluded its case.

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[5] The Appeals Chamber notes a number of these errors and omissions by the Prosecution in its "*Decision on Amendment of the Indictment*", Prosecutor v. Norman et al., SCSL-2004-14-AP-73, 16 May 2005: "It appears to us that some of the difficulties in this case originated with the Prosecutor's failure to appreciate the clear distinction between what should go in the indictment and what should be left to the case summary" (para. 53); "It was from this unnecessary and unexplained request [the Motion for Joinder] that a great deal of confusion was later to arise (para. 56); "It [Rule 48(A)] does not provide for consolidation of individual Indictments, a step which is unnecessary and can make no sensible difference that we can see to the proceeding or outcome. The Prosecution in its appeal submission still cannot explain why it sought consolidation, other than that this is the "normal practice in other criminal tribunals:. So it may be, but in this court it still requires to be justified" (para. 58); "We do not understand how the Prosecution could have thought that these additions to the first two counts of the Indictment could have been added to the Indictment without making a specific application to amend (para. 86); See also, *Prosecutor v Norman et al.*, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", SCSL-2004-14-T-403, 24 May 2005: "The Prosecution, with the leave or knowledge of the Court, had taken advantage of the leave that was granted...to introduce to this Indictment, changes...characterized as being material and substantial...(para. 6); In a bid to circumvent its obligations to promptly inform the Accused of the offences he is alleged to have committed, the Prosecution alleges...that he has not suffered any prejudice in his ability to prepare this defence" (para. 26).

[6] For example, Transcript Hinga Norman, 15 June 2004, pg 2 line 27 – pg 5 line 24.

[7] The Trial Chamber reached its decision on 29 November 2004, *Prosecution v Norman et al,* "Decision on the First Accused's Motion for Service and Arraignment on the Indictment" SCSL-2004-14-T-282. This decision was appealed and the Appeal Chamber ruled on 16 May 2005, *Prosecutor v. Norman et al.*, "Decision on Amendment of the Indictment", SCSL-2004-14-AR73. The Prosecution presented its evidence over 5 trial sessions. The Accused effectively was absent from 3 of those trial sessions.

9. On 20 September 2005, the Trial Chamber heard oral arguments on Defence Motions for Acquittal.

10. On 21 October 2005 the Trial Chamber issued its judgment on the Defence Motions for Acquittal.[8] The Trial Chamber held that there was no evidence capable of supporting a conviction against the Accused Persons in respect of a number of geographical locations set out in paragraphs 25, 26 and 27 of the Indictment.[9]

11. After a motion requesting clarification[10], the Trial Chamber held that as a result of its Decision on the Defence Motions for Acquittal, sub-paragraph 25(g) of the Indictment are no longer operative as well as other paragraphs where the Indictment refers to the acts outlined in sub-paragraph 25(g) of the Indictment.[11] This effectively withdrew any alleged crimes relating to "Operation Black December".

12. The defence case of the First Accused began on 24 January 2006. The First Accused called 27 witnesses. The Second and Third Accused presented their defence cases from September – October 2006. The defence was closed on October 18 2006.

13. The combination of the denial of personal service, the length of time with which it took to reach final resolution on the issue of amendment of the Indictment, the perception of a breach of his fundamental fair trial rights by the First Accused, and his subsequent absence from a significant portion of the prosecution's evidence created a prejudicial atmosphere that pervaded throughout the trial proceedings. It is in this context that the Defence invites the Trial Chamber to review the evidence.

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[8] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-473, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005.
[9] Ibid "VII Disposition", pgs. 27-28.
[10] Prosecutor v Norman et al., SCSL-2004-14-T-477, Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgment of Acquittal Pursuant to Rule 98", 31 October 2005.
[11] *Prosecutor v. Norman et al.*, SCSL-2004-14-T-550, 'Decision on Joint Motion of the First and Second Accused to clarify the decision on Motion for Judgment of Acquittal pursuant to Rule 98", 3 February 2006.

**Overview of the Charges**

14. The accused Samuel Hinga Norman is jointly charged with Moinana Fofana and Allieu Kondewa on the an eight-count Indictment with war crimes, crimes against humanity and other violations of international humanitarian law committed within the territory of Sierra Leone from 31 November 1996. The Prosecution based its indictment on various acts and omissions alleged to have been committed by each of the accused either severally or jointly with co-perpetrators or both. Specifically the counts are:

    a. Paragraph 25 of the Indictment - Counts 1-2 Unlawful Killings;

    b. Paragraph 26 of the Indictment – Counts 3-4 Physical Violence and Mental Suffering;

    c. Paragraph 27 of the Indictment – Counts 4-5 Looting and burning;

    d. Paragraph 28 of the Indictment – Counts 6-7 Terrorising the Civilian population and collective punishments;

    e. Paragraph 29 of the Indictment – Count 8 Use of Child Soldiers.

15. Paragraphs 4-24 of the Indictment set out "General Allegations", "Individual Criminal Responsibility", and "Charges". The Defence submits that the Indictment is defective, is too vague and does not set out sufficient material facts to substantiate the Counts. This is discussed further at paragraph 53.

**Brief Historical Background**

16. Sierra Leone became independent in 1961 with Sir Milton Margai as the first Prime Minister. In 1968 Siaka Stevens became the head of state. In 1985 Major General Joseph Momoh was elected in a one party election under the All Peoples Congress (APC).[12]

[12] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73 bis) of 13 February 2004, 2 March 2004, paragraph 2. For further detailed background see also generally Defence Pre-Trial Brief paragraphs 2-14, Prosecutor v Norman, SCSL-2004-14-PT-111, 31 May 2004.

17. The organized armed group that became known as the Revolutionary United Front (RUF), led by Foday Sabayana Sankoh, was founded about 1988 or 1989 in Libya with support and direction from the government of Muammar Al-Qadhafi.[13]

18. On March 23 1991 a group of about a hundred fighters including Sierra Leonean dissidents and Liberian fighters loyal to Charles Taylor, and a small number of mercenaries from Burkina Faso invaded eastern Sierra Leone at Bomaru, Kailahun District.

19. From early in the conflict, the RUF perpetrated widespread violence across southern and eastern Sierra Leone.[14] Within the first 18 months of RUF attacks in Sierra Leone, over 400,000 people were internally displaced while hundreds of thousands became refugees.[15] RUF attacks continued, marked by brutality against civilians, and children being kidnapped and inducted into the RUF.

20. In April 1992, unpaid soldiers staged a mutiny that quickly escalated into a coup. The soldiers announced that that they had formed a junta, the National Provisional Ruling Council (NPRC) under the power of Captain Valentine Strasser, to replace Momoh's APC regime.

21. By the time the NPRC took over State House in 1992 the war had been going on for just over one year. The destruction was already immense.

> Whole towns in the Southern and Eastern Provinces had been razed to the ground, and the number of refugees fleeing from Sierra Leone to Guinea alone had reached 120,000. As the war-affected areas were the most productive in agriculture (the Eastern Province is traditionally Sierra Leone's breadbasket), the food situation in much of the country was becoming desperate. The brutalities associated with the war – hacking off hands and limbs, rape, all forms of torture, and the destruction of schools and the violent recruitment of schoolchildren into the rebel fighting force, all frequently reported in the country's lively tabloids—were causing deep demoralisation in the nation's population.[16]

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[13] *Prosecutor v. Norman et al.*, SCSL-2004-14-PT, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs (under Rules 54 and 73 *bis*) of 13 February 2004, 2 March 2004, paragraph 3.
[14] Ibid paragraph 3.
[15] Ibid paragraph 2.
[16] Lansana Gberie. "*A Dirty War in West Africa: The RUF and the Destruction of Sierra Leone*", 2005, pg 71.

## The Role of the Sierra Leonean Army

22. The role of the Sierra Leonean Army ("SLA") has been described as one of the most important elements in the war.[17] The Defence submits that an appreciation of the role of the Sierra Leone Army in the conflict is critical to understanding the dynamics that played themselves out during the war, the relationship between civilians and members of the Army, and the importance of particular geographic locations as military bases. Further, the role of the Kamajors in the conflict can only be understand within the framework of other factions who played the most significant part in the conflict – the Army and the RUF.

23. Due to the grave abandonment of the basic needs of the military forces under the APC government, Sierra Leone was essentially devoid of an operational army when in needed one most in 1991[18]. The army lacked the skills needed to counter the attacks that followed 23rd March 1991. The army at that time has been described as a "purely ceremonial army and was ill prepared for a war...It lacked logistics, and personnel, intense political interference suppressed most training initiatives and the military had less training in field exercise since 1980.[19]

24. The TRC succinctly summarised the role of the SLA during the conflict as follows:

> "The Army was not worthy of being called a military force when the war broke out and it was never going to be possible to make it worthy of that name during the war."[20]

25. As early as 1991, observers began to suspect a form of collaboration between the two apparently opposing forces, the RUF and the SLA.[21]

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[17] See for example, Keen, *Conflict and Collusion in Sierra Leone*, James Currey Ltd, 2005.
[18] Final Report, Truth and Reconciliation Commission of Sierra Leone ("TRC Report"), Volume 3a: Chapter 3, para. 243.
[19] TRC Report Volume 3a: Chapter 3, para. 265.
[20] TRC Volume 3a: Chapter 3 para. 270, see also para. 243: "The country was devoid of an operational Army when it needed one most in 1991", para 251 "In place of pride and professionalism, the soldiers – particularly senior officers – had indulged in vices such as embezzlement of public funds and favoritism along nepotistic and tribal lines".
[21] Supra note 15, pg 64, see also generally Keene, supra note 16.

26. The SLA was as interested in taking a piece of the diamond wealth as the RUF. There are numerous examples of the both the ineffectiveness and possible collusion on the part of the army.

27. Despite these factors, the SLA did manage to successfully dislodge the RUF from a number of locations from February 1993 through to the end of 1993.

28. However, as the TRC describes "in the space of little over one year, the whole context of the conflict in Sierra Leone changed for its civilian population".[22] In November 1993 every civilian settlement in the country had been purged of an RUF presence. By late January 1995 there was not a single District in the Provinces where the RUF was not present.[23]

29. The relationship between the SLA and civilians increasingly become one based on distrust and suspicion. As the TRC stated:

> "In times of crisis, according to the Constitution, the Sierra Leone Army has the duty to preserve the lives and property of the citizens of the state. The inescapable impression reached by the majority of civilians was that the Army was failing in its task. By any standards, the sheer breadth of geographic coverage achieved by the RUF represented a fundamental collapse in the state security apparatus. Naturally the civilians developed certain misgivings about the capacities of the soldiers on the ground to protect them."[24]

30. RUF guerrilla attacks were characterised by killings, abductions, and systematic destruction of property. After such attacks, the Army would claim that it could not prevent such attacks due to "institutional incapabilities", that they were forced to withdraw in the face of overwhelming pressure to an ambush or assault that was impossible to withstand. Civilians however refused to accept that such far-reaching and regulars spates of violations and abuse could continue to occur. Civilians pointed to highly suspicious circumstances surrounding guerrilla attacks on their

[22] TRC Report, Volume 3a, para. 489.
[23] Ibid para. 490.
[24] Ibid para. 491.

communities and suggested that soldiers had connived in these attacks. Civilians felt that the Army had abandoned civilians to suffer violations at the hands of the RUF or that the Army itself had carried out the attack themselves. The notion that SLA soldiers were working with the rebels, providing arms and logistics and even carrying out joint operations became commonplace. "In fact, according to conventional wisdom, many SLA men were 'soldiers by day, rebels by night'" which became encapsulated in the term "sobel".[25]

31. By the end of end of 1996, the RUF had wrecked destruction and violence throughout Sierra Leone. More than 15,000 people had been killed and almost two-thirds of the country's population of 4.5 million displaced. The economy had collapsed. By March 1996 an estimated 75 percent of school-aged children were out of school, and 70 per cent of the country's educational facilities were destroyed. Only 16 per cent of the country's health facilities were functioning by March 1996 and almost all of these were in the capital, Freetown, as yet untouched by the war.[26]

**Kamajors**

32. It is against this background that the Kamajors[27] and the eventual formation of the CDF must be understood. Communities were regularly being attacked by the RUF in brutal and violent ways. The Sierra Leonean army was to a large extent either doing nothing or complicit in the attacks, targeting civilians and attempting to reap as many profits from the diamond areas of Sierra Leone. "The failure of the army to protect the populace gave rise to an overwhelming desire among the people to institutionalise the existing civil militia as the only force that could protect the communities against attacks by the RUF."[28] The resort to traditional defence mechanisms is an entirely understandable, even logical progression from wanting to repel an enemy but not having the means to do so"[29]

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[25] Ibid para. 492-496.
[26] Ian Smillie, Lansana Gberie and Ralph Hazelton, *The Heart of the Matter: Sierra Leone, Diamonds and Human Security*, Ottawa, Partnership Africa Canada 2000, page 8.
[27] The term "kamajor" appears in many forms including kamajo, kamajoh, kamajoi, kamasoi, kamajesia, kamajoisia or kamasesia. See Dr Hoffman, "Expert Report on Kamajors in Sierra Leone", para C.1.a, EXHIBIT 165 ("Hoffman Report").
[28] TRC Final Report, para. 487.
[29] TRC Final Report, para. 563.

33. "Prior to the start of the war in 1991 and in its initial years, a Kamajor was "a Mende male who possessed specialised knowledge of the forest and was an expert in the use of medicines associated with the bush. At least since the introduction of shotguns to the rural areas, a Kamajor was also permitted the use of firearms, which were carefully regulated by local communities."[30]

34. A Kamajor was distinguished from ordinary hunters. A Kamajor was responsible "not simply for procuring meat but for protecting communities from both natural and supernatural threats said to reside beyond the village boundaries: elephant, leopard, witches and sometimes other human beings. In other words, the Kamajor provided a security function that was as important as his hunting role."[31] In short, "the Kamajors' very identity is predicated on the protection of villages.[32]

35. Historically there is a strong connection between the Kamajors and the community chiefs.[33] The work of the kamajor – both hunting and security services – were under the authorisation of the chief. Permission to hunt came from the chiefs and a part of the kills was owed to the chief. "Requests for the special services of the kamajor frequently came through the chiefs".[34] This historically strong connection between the Kamajors and the chiefs that had been in place for years prior continued throughout the war.

36. As the war progressed, various local defence activities began to appear towards the end of 1992. These activities were on the part of groups made up of these traditional hunters, including Kamajors, Tamaboros, Donsos, Kapras, Gbethis.

37. As noted in paragraph 32 above, the Sierra Leone army was unwilling and / or unable to protect rural villages in the early beginnings of the war. As a result, the

[30] Hoffman Report, para C.1.b
[31] Ibid para. C.1.c.
[32] Ibid para. D.2.c.
[33] "Local chiefs historically maintained a close relationship to the Kamajors in their communities", Hoffman Report, para C.1.d.
[34] Hoffman Report, para C.1.d.

NPRC government initially provided arms and used local hunters as guides and scouts to assist in fighting the RUF.[35]

38. As the war progressed, and the relationship with the Sierra Leone army either deteriorated or proved ineffectual in protecting communities from the RUF, increasingly "the Kamajors were a logical focal point around which rural communities could organize their own defense."[36] It is not surprising that the mobilization of communities increased in areas such as Kenema, Kailahun, and Pujehun grew around those who had knowledge of the bush and the use of firearms – the Kamajors[37]. It is also not surprising that this created disgruntlement amongst the soldiers.[38]

39. As Dr Hoffman noted, during the conflict and in particular during the time frames as set out in the Indictment, the majority of Kamajors who made up a part of the Civil Defense Forces had not been Kamajors prior to the start of the war. However the significance attached to the term "kamajor" remained. As Dr Hoffman explains:

> "It carried with it the same connotations of community defense, entitlement to carry firearms, and the possession of secret "medicines" (hale) that was embodied in the pre-war use of the term. This continuity of terms also signifies the continued importance to local chiefs to the Kamajors understanding of themselves. In other words, they retained the sense that the chiefs were the ultimate authorities to which a true kamajor was beholden, and that community defense was the Kamajors' principle responsibility."[39]

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[35] This continued through the conflict. See Transcript, Hinga Norman, January 25 2006, pg 9, lines 14-21 Q: So, effectively what you have said is that even before the civilian government of Tejan Kabbah, His Excellency the President Ahmad Tejan Kabbah, came to office, government had been supplying weapons to local hunters for the protection of their respective communities? A. Yes, My Lord. I was in this country, I saw it and I knew it. And this same trend continued even when there was a civilian government and I was a deputy minister of that government.

[36] Hoffman Report, para. D.2.c.

[37] Transcript, Dr Demby, February 10 2006, pg 7, lines 8-19.

[38] Transcript, Hinga Norman, January 24 2006, pg 72 lines 14-22: But you and myself would be very difficult – it would be very difficult for you and myself to say which was really true, whether the soldiers had really transformed their loyalty into becoming rebels or it was the rebel that was trying to cause confusion among the population. And eventually, if that was the situation, they succeeded in putting us against our soldiers. So when chiefs, including myself, decided to arm young men in our chiefdoms to protect our land, homeland, property and life, soldiers viewed this as a disservice to their loyalty..."

[39] Hoffman Report, para. D.2.e.

40. Samuel Hinga Norman was born on 1 January 1940 in Ngolala Village, Mongeri, Valunia Chiefdom, Bo District in the Southern Province of Sierra Leone.[40]

41. In 1989, prior to the start of the war in Sierra Leone, Mr Norman returned from having lived in Liberia for 11 years.[41] From 1989 – 1994 he served as the spokesman for Valunia Chiefdom. In 1994 Mr Norman was appointed the regent chief for Jaiama Bongor Chiefdom – a position he held until 2003.[42]

42. After his installation ceremony as Chief in October 1994, chiefs from around his chiefdom including Boama, Wunde, Gboyama, and Tikonko, came together to discuss ways to protect their chiefdoms from the war.[43]

43. In 1994 it was decided that the NRPC government would be approached to assist in the protection of the various chiefdoms. A chief's committee recommended the selection of 75 able-bodied young men from each chiefdom and for the NPRC government to provide training and weapons. The men would be chosen by the chiefs of each chiefdom.[44] The men were chosen and received some training and were then sent back to their respective chiefdoms.[45] This system continued throughout the NRPC government.

44. In 1996, after general elections saw the installation of the SLPP government, Mr Norman was appointed the Deputy Minister of Defence under the Minister of Defence President Kabbah.[46]

45. In April 1997 in his position as the Deputy Minister of Defence, Mr Norman approached the President with the concern that the security situation in the country was not stable – in particular that there was considerable disgruntlement within the

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[40] Indictment, para 1.
[41] Transcript, Hinga Norman, January 24 2006 pg 54 line 6 to pg 55 line 9.
[42] Transcript, Hinga Norman, January 24 2006, pg 55, line 12-17.
[43] Transcript, Hinga Norman, January24 2006, pg 56 line 15-20.
[44] Transcript, Hinga Norman, January 24 2006, pg 57.
[45] Transcript, Hinga Norman, January 24 2006, pg 59 lines 10-15.
[46] Transcript, Hinga Norman, January 24 2006, pg 68 lines 3-10.

army. He requested that Parliament to legitimise the use of firearms by the Kamajors and other traditional hunters to protect their homes, properties and lives.[47] Parliament approved this measure, adding further to the rift between the SLA and the government, who was increasingly being seen as relying on Kamajors and hunters for security.[48]

**AFRC Junta Period**

46. On May 25 1997 a coup took place. The AFRC formed a junta government with the RUF under the leadership of Johnny Paul Koroma. This action confirmed the longstanding belief of many that the army was indeed in connivance with the rebels.

47. The coup was greeted with world wide condemnation. Within the Economic Community of West African States (ECOWAS) the Heads of Government adopted a three-pronged progressive policy for the restoration of President Kabbah. The Commonwealth Conference, the OAU Summit and the United Nations General Assembly all gave their outright support for the policy of restoration.

48. The immediate impact of the coup was to force all of the key office-holders into exile. Kabbah and the core of his cabinet went to Conakry, Guinea. Conakry became the operational centre for the Government. President Kabbah established a structure known as the "War Council in Exile" – with the function to deliberate on operational and political elements of the efforts to restore the Government. It was clear that at this point the Government has lost all control of the SLA and therefore had to disown its conventional military force. The Government therefore concentrated its endeavours on the civil defence forces ("CDF").[49]

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[47] Transcript, Hinga Norman, January 24 2006, pg. 76 lines 9-18: "I took leave of His Excellency and went to Parliament and had talks with the Speaker of Parliament. I told the Speaker that the situation in the country was unsafe and that I had asked permission of His Excellency to proceed to Parliament to inform them of this situation so that I could request of them to do something. And that request was since the paramount chiefs in the entire Sierra Leone had put together an arrangement for hunter protection, local hunter protection, I was then requesting Parliament to legitimise their use of firearms for protection of their homes, land, life and property."

[48] See Transcript, Hinga Norman, January 24 2006 pg 76- 84 for a description of events leading to the AFRC coup.

[49] Transcript, Peter Penfold 09-02-2006, pg 8 lines 5-12 A. As I said, with the army having rebelled and the police force in disarray, other than the ECOMOG forces, the only indigenous Sierra Leone forces prepared to resist the illegal junta were the civil militia, notably at that time, the Kamajors. Q. Thank you. What period are

49. The evidence demonstrates that the CDF was acting with the support and approval of the Government and that one of its central goals was its restoration. The CDF motto was: "We Fight for Democracy". CDF military operations, including the attacks on Tongo, Bo, Kenema, and Koribundo were all legitimate armed attacks against the junta in furtherance of restoration of the Government. In fact the main objective of the CDF was the restoration of democracy.[50]

**SLPP Restoration in February 1998**

50. Through the intervention of ECOMOG with the support of the Kamajors, the AFRC government was ousted out of power on 12 February 1998. The SLPP government was restored on 10 March 1998.

51. Immediately after the restoration of the Kabbah government, steps were taken to formalise the CDF into the security apparatus of the State. All matters relating to security became the responsibility of ECOMOG. The Chief of Defence Staff was an ECOMOG Colonel, Colonel Khobe.[51] The evidence shows that ECOMOG planned

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we talking about, Mr Witness? A. We are talking of the period from the May 1997 coup - 25 May - until, certainly in the first instance, the restoration of President Kabbah in February or February/March 1998.

[50] Transcript, Defence Witness Lumeh May 8 2006 pg 2 – line 19 – pg 4 line 8: "A ... Can I begin by saying to you that the Prosecution do not dispute, nor does the Prosecution challenge much of the evidence you have given. Do you understand? A. Very well. Q. And I am going to specify for the avoidance of doubt. There is no dispute or challenge by the Prosecution that the CDF and the Kamajors fought for the restoration of democracy. No dispute. Do you understand? A. Yes. Q. Insofar as any further evidence on this subject is concerned, I say that, what the Prosecution position is. Secondly, there is no dispute that His Excellency, President Kabbah, was very grateful to the CDF and the Kamajors for what they did for the restoration of democracy. Do you understand? A. Yes, sir. Q. That is what you were telling us on Friday, how President Kabbah thanked you all at Lungi? A. Yes. Q. So there is no dispute? PRESIDING JUDGE: For restoration of democracy and his reinstatement? MR De SILVA: Yes, yes. Q. Thirdly, there is no dispute, nor is there any challenge, that the Kamajor fighters received aid from ECOMOG. Again that is something you were telling us about. A. Exactly. Q. What may be in dispute is the period, but in general terms there is no dispute about the fact that indeed the Kamajors in the CDF received aid from a number of sources. because PRESIDING JUDGE: When you say no dispute, may I ask you, Mr Prosecutor, to specify, if you can, what you mean by "aid," there has been evidence talking of ammunitions, weapons, food, medication? You know what I mean. MR De SILVA: My Lord, I encompass all the items that Your Lordship has mentioned. PRESIDING JUDGE: I thank you. I am just trying to make sure that there is no loose end in this respect. I didn't understand your comments to be to that effect, but -- MR De SILVA: All things that are necessary for a fighting force, whether it be blankets or bullets. MR MARGAI: My Lords, just for the sake of clarity, do I understand my learned friend to be using the word "aid" to connote providing logistical support? PRESIDING JUDGE: That is what I just classified with the prosecutor. It means anything that was supplied to the CDF and Kamajors from blankets to bullets. That is basically what the Prosecution is saying."

[51] Transcript, Dr Demby 10 February 2006, pg 52 line 20 – pg 53 line 4: "When the government returned, a request was made by the President -- Q. Please watch the pace. A. Yes -- asking for the secondment of Colonel Khobe from the Nigerian Army to help the Sierra Leone Army, which was granted. Colonel Khobe then became

jointly with, fought alongside, provide logistics to, and shared the same objectives as the CDF. 20331

52. In early 1999 the President set up a committee (the National Coordinating Committee - "NCC") to handle all policy matters relating to the National Militia/CDF. The committee was to determine an organisational structure for the CDF and to set up ways of reviewing the means of financial logistical support to the CDF.[52] This structure continued until the signing of the Lomé Peace Accord.

## Defects in the Indictment

### General submissions

53. The Defence submits that the Indictment is vague and does not provide adequate notice of the charges. This has prejudiced the defence's ability to organise its defence and the Accused's right to a fair trial. The Defence further submits that the defects in the Indictment are not cured through particulars set out in the Prosecution Pre-Trial Briefs as the Pre-Trial Briefs themselves are of such a contradictory, confusing and vague nature. The Defence accepts that particulars can also be accepted through the opening statement but that the vagueness of the Indictment is not remedied through the limited additional information provided in the statement.

54. The Defence submits that in order to ensure the integrity of the proceedings and to safeguard the rights of the Accused, the Trial Chamber should take full consideration of the concerns raised by the Defence pertaining to the Indictment.[53]

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Chief of Defence Staff - CDS - of the Sierra Leonean Army, who was charged with the responsibility of all military matters in the country. So he had control of the army, Sierra Leone Army, and the civil defence. He was responsible for all deployments, logistical support, arms, ammunition, food, et cetera, et cetera. And when ECOMOG came, together with the ECOMOG commander -- I think, if my memory serves me well, General Shelpidi. I think, was the first man, came and there was the ECOMOG commander, General Shelpidi."

[52] See Exhibit 120.

[53] Prosecutor v. Kupreskic, IT-95-16-A, Appeal Judgement, 23 October 2001, para. 79 ("Kupreskic Appeal"); *The Prosecutor v. Laurent Semanza* Case No. ICTR-97-20-T, Judgement, 15 May 2003, para 42 ("Semanza Judgement"); *The Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, 25 February 2004, para 28 ("Ntagerura Judgement"): "The Chamber will review the indictments in light of applicable pleading principles because of the paramount importance of fair notice to the integrity of the proceedings and because of the Chamber's duty to ensure the fundamental fairness of the trial."

**Role of the Indictment**

20332

55. "The Indictment is the foundation on which every prosecution stands, in fact, the agenda on which criminal proceedings are based"[54] As such, the Indictment is meant to provide the Accused with sufficient information on the nature of the charges against them, as required by the Statute of the Special Court for Sierra Leone ("Statute") and the Rules of Procedure and Evidence (the "Rules") of the Tribunal.[55] As the primary accusatory instrument, an indictment must contain a concise statement of the facts detailing the crime or crimes with which an accused is charged[56]. As this Trial Chamber has stated, as the foundational instrument of criminal adjudication, the requirements of due process demand adherence...to the regime of rules governing the framing of indictments.[57] It is clear that the primary weight with respect to determining the scope of the counts and the material facts the Prosecution relies on to support those counts must be given to the Indictment.

56. The primacy of the Indictment has also been further reinforced by this Trial Chamber when it stated that even where there might be some indication that the Prosecution disclosed evidentiary material to the Defence (through other means such as the witness statements, the pre-trial briefs, the opening statement), there still must be some indication of such material in the Indictment, the principal accusatory instrument.[58]

57. Bearing these due process requirements in mind, the Defence submits the Indictment is the foundation for the review of all evidence in this case and serves as the guide as to the prosecutorial limits of the Prosecution's case against the Accused.

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[54] *Prosecutor v Norman et al.*, Separate Concurring Opinion of Hon. Justice Itoe, Presiding Judge, on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCSL-14-T-434, 24 May 2005, pg 25.
[55] *Prosecutor v Ntakirutimana*,ICTR-96-10-A and ICTR-96-17-A, Appeals Judgement , 13 December 2004, paras. 21-29 ("Ntakirutimana Appeal")
[56] *Semanza Judgement*, para. 42.
[57] *Prosecutor v Sesay,* SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 5.
[58] *Prosecutor v. Norman et al.*, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, SCCL-04-14-T-434, 24 May 2005, para. 19 (v).

**Pleading principles**

20333

58. As this Trial Chamber has stated, specific pleading in the Indictment "strikes at the very root of the procedural due process rights of the accused persons."[59] The Trial Chamber has also stated:

> "It is trite law that an indictment ... must be framed in such a manner as not offend the rule against multiplicity, duplicity, uncertainty or vagueness, and that were specific factual allegations are intended to be relied upon or proven in support of specific counts in the indictment they ought to be pleaded with reasonable particularity."[60]

59. The Prosecution's obligation to set out concisely the facts of its case in the indictment must be interpreted in conjunction with Article 17(4)(a)[61] of the Statute and Rule 47(c). These provisions state that in the determination of any charges against him, an accused is entitled to a fair hearing and, more particularly, to be informed of the nature and cause of the charges against him and to have adequate time and facilities for the preparation of his defence. This translates into an obligation on the part of the Prosecution to state clearly and fully the material facts underpinning the charges in the indictment.

60. Hence, the question whether an indictment is pleaded with sufficient particularity[62] is dependent upon whether it sets out the material facts of the

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[59] Ibid para. 17.
[60] Ibid para. 18.
[61] The Trial Chamber has stated: "The only way the Prosecution can be seen to have fully complied with its obligations under Article 17(4)(a) of the Statute to promptly inform the Accused Person of the offences for which he is charged is through an Indictment that has been preferred against him": *Prosecutor v Norman et al.*, SCSL-14-T-434, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 27.
[62] This Trial Chamber has deduced seven principles for the degree of specificity required in pleading of the indictment. The degree of specificity required must necessarily depend upon such variable as (i) the nature of the allegations; (ii) the nature of the specific crimes charged; (iii) the scale or magnitude on which the acts or events allegedly took place; (iv) the circumstances under which the crimes were allegedly committed; (v) the duration of time over which the said acts or events constituting the crimes occurred; (vi) the time span between the occurrence of the events and the filing of the indictment; (vii) the totality of the circumstances surrounding the commission of the alleged crimes, *Prosecutor v Sesay,* SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 8.

Prosecution case with enough detail to inform an accused clearly of the charges against him so that he may prepare his defence.[63]

20334

61. A failure to plead in the Indictment material facts and elements of offences which the Prosecution intends to rely on to prove it renders it vague, unspecific and therefore defective.[64] As a result, the First Accused cannot be convicted on any counts based on material facts not specifically pleaded in the Indictment, nor set out in the Pre-Trial Briefs or opening statement.

62. The Defence submits that the scarcity of material facts, the failure to plead mode and extent of the Accused's participation under Article 6(1), and the vagueness of the Counts in the Indictment renders it defective. In order to ensure the fundamental fairness of the proceedings, the Chamber should take these deficiencies into account in making its factual and legal findings.

**The Prosecution should know its case before going to trial**

63. The Prosecution is expected to know its case before it proceeds to trial.[65] It is not acceptable for the Prosecution to omit the material aspects of its main allegations in the Indictment with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.[66] Such a situation may require the indictment to be amended or certain evidence to be excluded as not being with in the scope of the Indictment.

64. This Trial Chamber has stated that "[I]t would gravely undermine the procedural due process rights of accused persons and thereby bring the administration into disrepute if, at every stage, during the conduct of the trial, they are confronted with

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[63] *Kupreskic Appeal,* para. 88; See also *Prosecutor v Sesay,* SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", 13 October 2003, para. 7.
[64] *Prosecutor v Norman et al.*, SCSL-14-T-434 "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para 36; *Semanza,* Judgement, para. 42; *Kupreskic Appeal* paras. 114, 122.
[65] *Ntakirutimana Appeal*, para. 92.
[66] Ibid.

new pieces of evidence designed to prove factual allegations not specifically pleaded in the Indictment ..."[67]

65. In addition to knowing its case before proceeding to trial, the Prosecutor must also make up its mind as to which of the several offences revealed in the witness statements and the exhibits he will prefer against the Accused.[68] It is not open to the Prosecution to rely on everything contained in each piece of disclosure as sufficiently meeting its Article 17(4)(a) obligations. Trial briefs as well do not assist the Prosecution in meeting its statutory obligations.[69]

66. This Trial Chamber has referred frequently to the "principal of orality". However there are limits to the application of this principle. The admission of evidence, whether documented or orally admitted must still fall within parameters set by the Indictment. Where such evidence is beyond the scope of the Indictment it must be excluded.

**Review of the evidence must be limited to what was pleaded**

67. The review of the evidence is limited to that was specifically pleaded by the Prosecution. "Indeed one of the fundamental principles on which International Criminal Justice is based is that an Accused Person should neither be tried nor convicted on the strength of evidence relating to an offence for which he has not been indicted, nor should such evidence be adduced or admitted if this would not only be contrary to the provisions of Article 17(4)(a) of the Statute, but will also amount to a flagrant violation of the principle of fundamental fairness."[70]

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[67] *Prosecutor v Norman et al.*, SCSL-14-T-434, Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para 19 iv.
[68] *Prosecutor v Norman et al.*, SCSL-14-T-434, Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para. 27 (i).
[69] Ibid, para. 27 (ii).
[70] Ibid para. 34.

68. Therefore one of the key principles relating to the adduction of evidence on the part of the Prosecution is that it must be directly or ex facie relevant to facts in issues, that is, to counts in the Indictment.[71]

69. This Trial Chamber has used the analogy of pleaded factual allegations as the "building blocks" of an indictment.[72] There must be some nexus between the pleaded factual allegations in the indictment and the evidence that is elicited to prove the allegation.[73] Clearly where the allegation is never made the evidence cannot be introduced or is to be disregarded in the final analysis.

70. The Defence would submit that the Trial Chamber take note that the Indictment and the Pre Trial briefs are silent on many alleged events on which the Prosecution led evidence. The Defence submits that in conformity with principals of fundamental fairness this testimony must be excluded.

**Defects in this Indictment**

*Failure to plead mode and extent of Accused's participation under Article 6(1)*

71. The Indictment charges the Accused with criminal liability under Sections 6(1) and 6(3) of the Statute. Each count charges each Accused as criminally responsible for Counts 1-8 "pursuant to Article 6.1 and, or alternatively Article 6.3 of the Statute". Paragraph 20 further alleges that the three accused are criminally responsible "for the crimes referred to in Articles 2, 3 and 4 of the Statute as alleged in this indictment, which crimes each of them planned, instigated, ordered, committed, or in whose planning, preparation or execution each Accused otherwise aided and abetted, or 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."

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[71] Ibid para.54.
[72] *Prosecutor v. Norman et al.*, SCSL-04-14-T-434 "Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 9 (i).
[73] Ibid para.19 (ii).

72. This is the full extent of the detail provided in the Indictment pertaining to the Accused's alleged criminally responsibility under Article 6(1) relating to planning, instigating, ordering, committing or aiding and abetting for Counts 1-8.[74] The sophistication of the Prosecution's theory of its case as set out in the Indictment appears to be almost exclusively set out in Paragraph 13 which alleges that Mr Norman was the National Coordinator of the CDF, he was leader and commander of the Kamajors and had *de jure* and *de facto* command and control over their activities. On this basis the Accused is alleged to have criminal responsibility for planning, instigating, ordering, committing, aiding and abetting every action of the CDF or Kamajors as set out in the subsequent and equally vague paragraphs of the Indictment.

73. The Defence submits that the mode and extent of an accused's participation in an alleged crime are always material facts that must be clearly set forth in the indictment.[75] Where an accused is charged with a form of accomplice liability, the Prosecutor must plead with specificity the acts by which the accused allegedly planned, instigated, ordered, or aided and abetted in the crime.[76]

74. The Prosecution has wholly failed to do this. It is impossible to know what the Accused is exactly said to have planned, instigated, ordered, committed or aided and abetted because the Indictment provides no such information. Rather the Indictment uses such vague language throughout Paragraphs 22-29 such as "Kamajors unlawfully killed or inflicted serious bodily harm" (para 24 a), "Kamajors continued

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[74] The Accused is also alleged to have participated in a joint criminal enterprise under Article 6(1) and paragraph 19 of the Indictment sets out the Prosecution's material facts relating to that. This is discussed in more detail in this final submission at paragraph 344.

[75] *Ntagerura Judgement*, para 31 "The Chamber recognises that the Prosecutor may allege more than one form of participation for each crime, but emphasises that it is vague for the Prosecutor to simply refer broadly to Article 6(1) without further particularising the alleged acts of the accused that give rise to each form of participation charged; See also, *Semanza,* Judgement para. 59 and *Prosecutor v Krnojelac*, IT- 97-25-A, 17 September 2003, para 138("Krnojelac Judgement (AC)"):"Since Article 7(1) allows for several forms of direct criminal responsibility, a failure to specify in the indictment which form or forms of liability the Prosecution is pleading gives rise to ambiguity. The Appeals Chamber considers that such ambiguity should be avoided and holds therefore that, where it arises, the Prosecution must identify precisely the form or forms of liability alleged for each count as soon as possible and, in any event, before the start of the trial."; *Prosecutor v Delalic et al.*, IT-96-21-A, Judgement, 8 April 2003 ("*Celebici* Judgement (AC)") para. 350."

[76] *Prosecutor v. Brdjanin*, Case No. IT-99-36-PT, "Decision on Objections by Momir Talic to the Form of Amended Indictment", 20 February 2001, para. 20; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgement and Sentence, 25 February 2004, para 33.

to identify suspected 'collaborators' (para 24b); "Kamajors attacked" (para 24c - e). There is not one instance of specification as to a particular crime that the Accused is accused of having planned, instigated, ordered, committed or aided and abetted. Further, there are no specifications as to time, date, location, victims or other material details concerning any single attack. This renders the Indictment ambiguous and therefore defective.

75. It is not the job of the Defence and certainly not the responsibility of the Trial Chamber to attempt to decipher the allegations of the Prosecution. The Prosecution must identify precisely the form or forms of liability alleged for each count. This should be clear in the Indictment. However, in this case, it is anything but clear. The Prosecution has broadly alleged criminal liability under Article 6(1), and or alternatively Article 6(3), and nothing more. The Defence submits that the Prosecution Pre-Trial Briefs also provide no further assistance in pleading the specific acts of the Accused falling under the rubric of Article 6(1). This is discussed in more detail at Paragraph 101.

*Allegations of "Committing" under Article 6(1) must be very specific*

76. In cases where the Prosecutor alleges that an accused personally "committed" criminal acts within the meaning of Article 6(1), an indictment generally must plead with particularity the identity of the victims, the time and place of the events, and the means by which the acts were committed. If a precise date cannot be specified, then a reasonable range of dates should be provided. If victims cannot be individually identified, then the indictment should refer to their category or position as a group.[77] Where the Prosecution cannot provide greater detail, then the indictment must clearly indicate that it provides the best information available to the Prosecutor.[78]

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[77] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe,* Case No. ICTR-99-46-T, "Judgement and Sentence", 25 February 2004, para 32.

[78] *See, e.g., Prosecutor v. Brdjanin,* Case No. IT-99-36-PT, "Decision on Objections by Momir Talic to the Form of Amended Indictment", 20 February 2001, para. 22; *Prosecutor v. Krnojelac,* Case No. 97-25-PT, "Decision on Preliminary Motion on Form of Amended Indictment", 11 February 2000 paras. 33-34, 43.

77. The Indictment is completely devoid of any particulars with respect to any crimes that the Prosecution alleges that the Accused committed. Given the higher requirement for specificity when alleging the committing of a crime, the Defence submits that it is entitled to assume that, in the absence of such allegations in the Indictment, that the Prosecution is not alleging that the Accused "committed" any crimes within 6(1) of the Statute.

*Defects in pleading joint criminal enterprise*

78. If the Prosecutor intends to rely on the theory of joint criminal enterprise to hold the Accused criminally responsible as a principal perpetrator of the underlying crimes rather than as an accomplice, the indictment should plead this in an unambiguous manner and specify which form of joint criminal enterprise the Prosecutor will rely.[79] In addition to alleging that the accused participated in a joint criminal enterprise, the Prosecutor must also plead the purpose of the enterprise, the identity of the co-participants, and the nature of the Accused's participation in the enterprise.

79. Paragraph 19 of the Indictment is where the Prosecution sets out its theory of criminal liability relating to joint criminal enterprise under Article 6(1) of the Statute. It states:

> "The plan, purpose or design of Samuel Hinga Norman, Moinana 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".

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[79] *Krnojelac* Judgement (AC), para. 138; *Prosecutor v. Mejakic*, Case No. IT-02-65-PT, "Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment" 14 November 2003, p. 3. *Prosecutor v. Tadic*, IT-94-1-AC, "Judgement and Sentence", July 15 1999, ("Tadic (AC)") paras. 185-226 (discussing the forms of joint criminal enterprise); *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, "Judgement and Sentence", 25 February 2004 para. 34.

80. Given the unclear wording of this paragraph, it appears that the Prosecution's theory relating to joint criminal enterprise is that the three Accused and everyone in the CDF ("subordinate members") were participants in the joint criminal enterprise – effectively making the CDF a criminal organisation and the entirety of its actions as perpetuating one joint criminal enterprise. The only indication the Defence is given as to the nature of the Accused's participation is that he "acted individually and in concert with subordinates (all unidentified) to carry out the said plan, purpose or design." Again on the basis of this paragraph the Prosecution alleges criminal responsibility for Counts 1-8. Pleading in this manner not only obfuscates the well documented role of the CDF in restoring democracy in Sierra Leone but it is so wide and all encompassing to make it impossible for the Defence to respond in any specific way.

*Defects in Pleading Superior Responsibility under Article 6(3)*

81. Where superior responsibility is alleged as it is in the Indictment, the relationship of the accused to his subordinates is the most material fact to be pleaded, as is his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[80]

82. It is acknowledged that the specificity required to plead the identity of the victims, the time and place of the events, and the means by which the acts were committed is not as high where criminal responsibility is predicated on superior responsibility.[81] However, that the Accused must be informed not only of his own alleged conduct giving rise to criminal responsibility but also of the acts and crimes

[80] *Prosecutor v. Mejakic*, ICTY Case No. IT-02-65-PT, "Decision on Zeljko Mejakic Preliminary Motion on the Form of the Indictment (TC)", 14 November 2003, p. 3; *Prosecutor v. Deronjic*, Case No. IT-02-61-PT, "Decision on Form of the Indictment (TC)", 25 October 2002, para. 7; *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T "Judgement and Sentence", 25 February 2004, para 33; *Prosecutor v. Blaskic*, IT-95-14 "Judgement", 29 July 2004, para 19 ( "Blaskic Judgment (AC)"), cited in *Prosecutor v Norman et al.* SCSL-04-14-T-434, "Dissenting Opinion of Justice Pierre Boutet on Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence" 24 May 2005, para. 8.

[81] *Semanza* Judgement (TC) , para. 45; *Prosecutor v. Galic*, Case No. IT-98-29-AR72, "Decision on Application by Defence for Leave to Appeal (AC)", 30 November 2002, para 15 ("As the proximity of the accused person to those events becomes more distant, less precision is required in relation to those particular details, and greater emphasis is placed upon the conduct of the accused person himself upon which the prosecution relies to establish his responsibility as an accessory or as a superior to the persons who personally committed the acts giving rise to the charges against him.").

of his alleged subordinates or accomplices.[82] Thus, pleading superior responsibility does not obviate the Prosecution's obligation to particularise the underlying criminal events for which it seeks to hold the accused responsible, particularly where the accused was allegedly in close proximity to the events.[83]

83. While it is accepted that the level of precision required for allegations under Article 6(3) is less, the Defence submits that the pleading as set out in Paragraph 21 is not acceptable. While Paragraphs 23-24 set out details as to geographic areas and time frames as to when Kamajors are alleged to have targeted "collaborators", the Indictment fails to plead any factual connection between those charges and the First Accused. No subordinates are named, no commanders identified, nor is there an identification of the relationship between the Accused and his alleged subordinates. Most importantly there are no material facts which allege conduct of the Accused by which he may be found to have known or had reason to know that the acts were about to be done, or had been done, by those others, and to have failed to take the necessary and reasonable measures to prevent such acts or to punish the persons who did them.

84. In this respect the Defence submits that the Indictment is defective.

*Lack of Specificity with respect to the particular counts*

85. There is no rule specifying what must be included in the content of each "count" set out in the Indictment. However as tribunal jurisprudence has pointed out, it is evident from the context of Rule 47 that this term refers to the legal characterisation or qualification of the crime alleged in the concise statement of facts of the crime.[84] This legal qualification must include both the crime alleged and

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[82] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC)", 28 June 2002, para 22: "The Prosecution is directed to clarify if reference to "others" relates only to the four co-accused and their subordinates or others in that chain of command."
[83] *Prosecutor v. Strugar*, Case No. IT-01-42-PT, "Decision on Defence Preliminary Motion Concerning the Form of the Indictment (TC)", 28 June 2002, para. 24. *See also Brdjanin and Talic*, Case No. IT-99-36, "Decision on Objections by Momir Talic to the Form of the Amended Indictment (TC)", 20 February 2001, paras. 19-20.
[84] Rule 47(I).

the mode of the accused alleged participation. Thus a "count" defines the nature of the charge referred to in Article 17(4)(a) of the Statute.

86. Accordingly, each count in the indictment should indicate the precise legal qualification of the crime charged which should be based on the material facts alleged in the indictment. The count must also clearly identify the mode of the Accused's alleged participation in the crime; for example, as stated above, mere reference to Article 6(1) of the Statute, which lists multiple forms of individual criminal responsibility, is insufficient.[85]

87. Jurisprudence also indicates that each count in the indictment must indicate which paragraphs of the statement of the facts of the crime support the charge. For example, where a count charges the accused with accomplice liability, then it must refer to the paragraphs describing the relevant conduct of the accused and of the principal perpetrator. When a count charges superior responsibility pursuant to Article 6(3), then it is essential for the count to refer to the paragraphs describing the relationship between the accused and the alleged subordinates, the basis for the alleged knowledge of the accused, and the alleged failure to prevent the crime or to punish the subordinate. [86]

88. In this regard, each count in the Indictment is pleaded without adhering to these basic principles.

89. With respect to Count 3, "inhumane acts" are charged, punishable under Article 2.i. of the Statute. It is impossible to decipher, based on the facts pleaded in paragraph 26 (a) and (b) what the Prosecution is charging as "inhumane acts". For example, the paragraph begins by stating "acts of physical violence and infliction of mental harm or suffering included..." The charge of physical violence and mental harm falls under Article 3(a) of the Statute. Therefore, presumably, the Prosecution is setting out material facts relevant to Count 4. If this is the case what are the

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[85] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Sentence and Judgement, 25 February 2004, para 37; *Semanza*, Judgement (TC), para. 59; *Krnojelac* Judgement (AC), para. 138; *Celebici* Judgement (AC) para. 350.

[86] *Prosecutor v. André Ntagerura, Emmanuel Bagambiki, and Samuel Imanishimwe*, Case No. ICTR-99-46-T, Judgment and Sentence, 25 February 2004, para 38.

"inhumane acts" then that the Prosecution charges under Count 3? Is it the "screening for collaborators" that is the inhumane act? Is it the "unlawful[ly] killing of suspected 'collaborators'", though this would be included in Counts 1 and 2? Is it the unlawful killings "often in plain view of friends and relatives" – that fact that alleged unlawful fillings were in front of friends and relatives – are those the inhumane acts? Illegal arrest and unlawful imprisonment of collaborators cannot be considered a crime against humanity. Are the "inhumane acts" referring to the destruction of homes and other buildings – though this is alleged in Count 5, as is looting? Perhaps the "inhumane acts" are the "threats to unlawfully kill, destroy or loot"? It is impossible to tell.

90. In the ICTY *Simic* case, the Accused was charged with the crime of cruel and inhumane treatment as acts of persecution. In its judgement, the Trial Chamber declined to consider any cruel and inhumane treatment falling outside the categories of beatings, forced labour assignments and confinement under inhumane conditions which were specifically pleaded in the Indictment. The wording "cruel and inhumane treatment including" was considered too vague and unspecific to have "provided notice to the Defence of the incidents not explicitly set out in the Amended Indictment".[87]

91. In the *Kayishema* case, the Prosecution failed to particularise the portions of evidence that supported the "Other Inhumane Acts" charges and the Trial Chamber was of the opinion that "this method of using a crime as a "catch-all" specifying which acts support the count almost as a postscript – does not enable the counts of the "Other Inhumane Acts" to transcend from vagueness to reasonable precision."[88]

92. This Trial Chamber has already ruled that the Prosecution's failure to plead "gender offences" more specifically in the Indictment and attempting to include it as "inhumane acts" as offences against humanity was too vague, and not as specific as

[87] *Prosecutor v. Simic et al.*, IT-95-9, Judgment, 17 October 2003, para 73. ("Simic (TC)").
[88] *Prosecutor v Kayishema* , ICTR-95-1-T, Judgement, 21 May 1999

required within the context of Rule 47(c). This proved fatal to the admissibility of all related evidence.[89]

93. In this case, the Prosecution charges "inhumane acts" but fails to enumerate and specifically plead what incidents the Prosecution believes constitutes those acts. The Defence submits that Count 3 is so vague to have provided the Defence with notice as to what incidents that the Prosecution were alleging and should therefore be dropped from the Indictment.

*Count 5 does not include burning of property*

94. Count 5 charges the Accused with "pillage" punishable under Article 3.f. of the Statue. In paragraph 27 the Prosecution pleads the "destruction and burning of civilian owned property" in various geographic locations as constituting the crime of pillage.

95. This Trial Chamber has set out the elements of pillage as follows:

- The perpetrator appropriated private or public property;
- The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;
- and such appropriation was without the consent of the owner[90].

96. It is clear that "destruction by burning of civilian owned property" does not fall within the crime of "pillage".

97. The Defence submits that all evidence pertaining got the burning of civilian property must be disregarded by the Trial Chamber as it does not fall within the ambit of any of the Counts in the Indictment. This is also discussed in further detail at paragraph 413.

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[89] *Prosecutor v Norman et al.* SCSL-04-14-T-434, "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence", 24 May 2005, para. 78 (i).

[90] *Prosecutor v Norman et al.*, SCSL-04-14-T-473, "Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005", para. 102 ("Rule 98 Decision").

98. The paragraphs in the Indictment allege in a very general way instances of specific conduct, which, if proven, are either criminal or could be used to infer *mens rea* in support of a criminal conviction. The Indictment's use of these exceedingly broad date ranges provides grossly inadequate notice of particular conduct or events, making it difficult for the Accused to prepare his defence.

99. Though the Prosecutor is allowed a degree of latitude where the exact dates of events are not known, the nearly two and a half year ranges cited in paragraphs 24d)[91], 24e),[92] 25e)[93], 25f)[94] 26b)[95] in reference to the Bonthe and Moyamba geographic areas are not acceptable. This is particularly so where the allegations are also devoid of any other detail that might assist the Accused in identifying the events alluded to in the Indictment. It is also noted that the Pre-Trial Brief provides no further detailed dated information other than providing information relating to one alleged incident on January 26 1998 and a meeting on 15 February 1998.[96]

100. The Defence would submit that the broad allegations made in these paragraphs leaves the impression that the Prosecutor had not obtained any particular and specific information or evidence regarding these allegations. Under such circumstances, the Accused cannot possibly be expected to effectively prepare his defence.

**Indictment defects not cured through Pre-Trial Brief and Opening Statement**

101. Tribunals have stated that a defective indictment can in some instances be cured if the Prosecution provides timely clear and consistent information detailing

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[91] "Between about October 1997 and December 1999, Kamajors attacked or conducted arms operations in the Moyamba District..."
[92] "Between about October 1997 and December 1999..."
[93] "Between about October 1997 and December 1999 in locations in Moyamba District..."
[94] "Between about October 1997 and December 1999 in locations in Bonthe District..."
[95] "Between November 1997 and December 1999 in the towns of Tongo Field..."
[96] Pre Trial Brief ("PTB") see footnote 99, paras. 299d and 307d [It should also be noted that no evidence was led pertaining to either of these two allegation]

the factual basis underpinning the charges against the accused. However, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of the tribunal, it has been stated there can only be a limited number of cases that would fall with that category.[97]

102. The Prosecution filed its first Pre-Trial Brief ("PTB") on 2 March 2004[98] and filed a subsequent PTB on 22 April 2004.[99] The Defence submits that the initial Pre-Trial Brief contains little in the way of material facts that substantiate the Indictment but is largely a review of the law the Prosecution believes is applicable.

103. The PTB is not meant to be an opportunity for the Prosecution to "cover all the bases" as it were, through repetitious and vague pleading of material facts. Rather it is meant to clarify and elucidate the material facts that the Prosecution intends to rely on as set out in the Indictment. However the Prosecution has failed to do this.

104. The PTB presents conflicting and inconsistent material facts from one Accused against the other, pleads materials facts inconsistently and contains a near complete absence of specific details such as the names of alleged subordinates of the Accused, or the names of any alleged perpetrators of crimes.

*The position of the First Accused is unclear and contradicted throughout the Pre Trial briefs*

105. Of particular relevance is the fact that the Prosecution is never clear in the PTB what position and role it alleges that the Accused held. In fact the Prosecution changes the role and position of the First Accused throughout the PTB. Absolute clarity on his position is of fundamental important in light of the fact that the Accused, with the co-accused are said to have held "positions of superior

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[97] *Nkatirutima* (TC) para 114, *Kupreskic* (AC) para 114.
[98] *Prosecutor v Norman et al*, SCSL-2004-14-PT-24, "Prosecution's Pre-Trial Brief Pursuant to Order for Filing of Pre-Trial Briefs (Under Rules 54 and 73 bis) of 13 February 2004" 2 March 2004.
[99] *Prosecutor v Norman et al*, SCSL-2004-14-PT-63, "Prosecution's Supplementary Pre-Trial Brief Pursuant to An Order to the Prosecution to File a Supplemental Pre-Trial Brief of 1 April 2004", 22 April 2004. All subsequent references to Pre Trial Brief ("PTB") in this submission are to this Supplementary Pre Trial Brief.

responsibility and exercising command and control over their subordinates"[100] What exactly is this "position" that the Prosecution alleges? The Prosecution states at various points that:

- "Samuel Hinga Norman was the head of the War Council and as such reviewed and approved or disapproved all decisions made by that body"[101]
- "Samuel Hinga Norman was "a member of the War Council"[102]
- Samuel Hinga Norman was one of the commanders "who ordered that checkpoints be constructed"[103] or "who visited Moyamba Town to oversee the operations"[104]
- Samuel Hinga Norman was "the commander of the CDF"[105]
- Samuel Hinga Norman was the National Coordinator of CDF[106].

106. According to the Prosecution the Accused appears to have been all things at all times. If for a particular Count the Prosecution is alleging that Mr Norman was a member of the War Council, then clearly the analysis pertaining to command responsibility would be different that alleging that he was a commander with respect to another Count. It is difficult for the Defence to confront such imprecise allegations.

107. Further the PTB is contradictory in its material fact allegations and this further reinforces the difficulty of the Defence to know what allegations it must confront. For example, at paragraph 301(e) of the PTB the Prosecution is alleging that liability under Article 6(1) for the Moyamba area can be inferred from the fact that Hinga Norman "was in Moyamba when members of the CDF opened fire on a group of civilians in order to clear traffic from Mbang Bridge injuring several persons." However, further in the PTB at paragraph 346 (f), the Prosecution alleges that Article 6(1) responsibility can be inferred from the fact that Hinga Norman was

[100] Indictment, para. 21.
[101] PTB, para 276 b, para. 285 (b).
[102] PTB para 293 b., 301 (b), 317 (b).
[103] for example, at PTB para. 339 (c)
[104] for example, at PTB para. 346 (e)
[105] for example at PTB para. 332 (g)
[106] for example, at PTB para. 276 (a)

"at the Mbang Bridge where he instructed his bodyguards and entourage to clear the bridge where a commercial vehicle had wrecked with its civilian passengers...". It is unclear where exactly the Accused is said to have been at the time of this alleged incident and as such it is impossible to refute such ambiguous allegations.

*General nature of the information set out in the PTB*

108. With respect to the modes of criminal liability, under Article 6(1) the Prosecution merely reiterates over and over that their theory of the case is that the First Accused was involved in "planning, ordering or committing, or aiding and abetting" of the various alleged crimes in furtherance of the "common plan to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone".[107]

109. Generality is even more pronounced in the material facts that the Prosecution relies on to prove their theory of liability of the First Accused under Article 6(3). For example, the Prosecution merely repeatedly states that liability under Article 6(3) for the alleged unlawful killings in Tongo can be inferred from: the accused's position in the CDF, his leadership role in Kamajor structure, that he was in regular communication with other commanders at the various battle fronts, that he provided logistical support to the CDF, received status reports of war operations and frequently visited Kamajor bases. Notwithstanding the fact that the Prosecution's evidence has wholly failed to demonstrate these facts, these allegations are so vague as to not provide the Defence with more specific details as to the Prosecution's case.

*Complete absence of any specific names*

110. The Prosecution fails to mentions the names of any of the commanders in either the Indictment or the Pre-Trial Brief that the First Accused allegedly was in communication with, had as subordinates, held meetings with, or supplied with logistics etc. The Prosecution provides no dates as the visits to the Kamajor bases

[107] PTB paras. 275, 284, 292, 300, 308, 316, 324, 331, 338, 345, 352, 360, 367, 374, 381, 394.

that allegedly took place, and no specifics beyond stating "logistical support" is provided. TF2-014, arguably the witness the Prosecution considered to have the most significant and relevant evidence against the Accused, is not mentioned once either in the Pre-Trial Briefs or in the Indictment, nor are any other "commanders".

111. As stated above, if the Prosecution is in position to provide details it should do so. In this case, witness statements containing specific allegations were available to the Prosecution well before the trial. The Prosecution had met on numerous occasions with a number of their key witnesses and would have been in a position to provide more specific details in the PTB and the attached witness testimony summaries. However, as in the case of TF2-014, the extent of information provided is as follows:

> "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."[108]

112. On the basis of the above, the Defence would submit that the defects in the Indictment had not been cured, because timely, clear and consistent information has not been provided to the Accused.

## GENERAL CONSIDERATIONS REGARDING THE EVALUATION OF EVIDENCE

### BASIC PRINCIPLES

113. As a preliminary general statement, the Trial Chamber is to assess the evidence in this case in accordance with the Tribunal's Statute and the Rules, and where no such guidance is provided by those sources, in such a way as will best favour a fair determination of the case against the Accused and is consonant with the spirit of the Statute and the general principles of law.[109]

[108] PTB Annex A, Testimonial Evidence, pg 3438.
[109] Simic (TC) , para 17.

**Joint trials – basic principles when trying more than one accused at the same time.**

114. In cases where more than one Accused stands trial, the Trial Chamber is to be diligent to evaluate the charges against each of the Accused. In joint trials each Accused shall be accorded the same rights as if he or she were being tried separately.[110] The evaluation of the guilt of each of the Accused should be considered in light of all the evidence presented by the Prosecution and each of the Defendants, "not just the evidence of the Prosecution and the Defendant under consideration."[111]

115. The Defence submits that in light of this principle, where one of the other Accused presents evidence which discredits Prosecution witnesses this applies to each of the three Accused in this trial.

**Rights of the Accused**

*Burden of Proof*

116. Pursuant to Article 17(3) of the Statute an Accused is entitled to a presumption of innocence. This presumption places the burden on the Prosecution of establishing the guilt of the Accused, i.e. the burden of proving beyond a reasonable doubt that all the facts and circumstances which are material and necessary to constitute the crimes charged and the criminal responsibility of the Accused. The burden of proof remains with the Prosecution for each individual fact alleged; in no circumstances does it shift to the Defence.[112] This is also in accordance with Rule 87 (a) of the Rules, which states that "[a] finding of guilt may be reached only when a majority of the Trial Chamber is satisfied that guilt has been proved beyond reasonable doubt." "It is not sufficient that it is a reasonable conclusion available from that evidence. It must be *the only* reasonable conclusion available. If there is another conclusion which is also reasonably opened from that evidence, and which is consistent with the innocence of the accused, he must be acquitted" (emphasis in the original quote).[113]

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[110] See Rule 82(A) of the Rules. See also, *Prosecutor v Norman et al.* SCSL-04-14-T-282, Decision on the First Accused's Motion for Service and Arraignment on the Indictment, , 29 November 2004, para.30.
[111] *Simic* (TC), para. 18.
[112] *Prosecutor v. Brdjanin*, IT-99-36-T, Judgment, 1 September 2004, para. 22; *Prosecutor v. Kunarac*, Appeals Judgment, IT-96-23-A, IT-96-23/1-A, 12 June 2002, paras. 63 and 65.
[113] *Celibici* (AC) para. 458.

117. At the conclusion of the case the accused is entitled to the benefit of the doubt as to whether the offence has been proved.[114] The Trial Chamber must acquit the accused if another conclusion can reasonably be drawn from that evidence pointing to the lack of guilt of an accused.[115]

118. Although pursuant to Article 17(g) of the Statute, an accused in not compelled to testify, the Accused in this case chose to testify before the Trial Chamber. His election to give evidence does not connote that the First Accused accepted any onus to prove his innocence.[116] Nor this it mean that a choice must be made between his evidence and that of the Prosecution witnesses. It is submitted that the approach to be taken by the Trial Chamber is to determine whether the evidence of the Prosecution witnesses should be accepted as establishing the facts alleged beyond reasonable doubt, notwithstanding the evidence which the Accused and other defence witnesses gave. The Trial Chamber should also take note that the Accused chose to give evidence prior to calling other Defence witnesses, and thus did so without the benefit of knowing what those other witnesses would say in their evidence. The Trial Chamber should take this factor into account in considering the weight to be accorded to the evidence he gave.[117]

## EVALUATION OF THE EVIDENCE:

### Relevance and Probative Value of the Evidence

119. Pursuant to Rule 89 (c), the Trial Chamber may admit relevant evidence that is deemed to be relevant, probative, and reliable. This broad approach is limited by Rule 89(B) which provides that the Chamber shall apply "rules of evidence which will best favour a fair determination of the matter before it and are consonant with the spirit of the Statute and the general principles of law."

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[114] *Delalic et al.*, IT-26-21-T, Judgment, November 16 1998 para 599.
[115] *Brdjanin* (TC) para. 20
[116] *Simic* (TC), para. 20
[117] *Prosecutor v. Vasiljevic*, IT-98-32, Judgment, 29 November 2002, para 13 ("Vasiljevic (TC)")

120. The overriding principle concerning the admissibility of evidence is to ensure that it promotes a fair and expeditious trial.[118] As stated numerous times throughout the proceedings, the Trial Chamber stated that it would adopt a flexible approach admitting any relevant evidence, with the determination of the weight to be given to the evidence left to the Trial Chamber in the context of all the evidence admitted.[119] Therefore the threshold of admissibility is low; the weight of the evidence to be determined at a later stage.

121. However one limitation on the doctrine of relevance and the admissibility of evidence is that evidence should only be admitted if the evidence is related to facts in issue, that is, "to the offences charged in the Indictment, rather than throw open the gates for the admission of evidence which may either be irrelevant to the facts in issue or prejudicial to the interests of the Accused."[120]

122. In making the determination of weight, the evidence must, at a minimum, be relevant and probative. While not explicitly set out in the Rules, it follows that where the probative value of evidence is substantially outweighed by the need to ensure a fair trial, that evidence should be excluded.[121]

123. Reliability of evidence is to be assessed in the context of the facts of each particular case. To determine whether evidence is reliable the Trial Chamber should consider the circumstances under which the evidence arose, the content of the evidence, whether and how the evidence is corroborated, as well as the truthfulness, voluntaries and trustworthiness of the evidence.[122]

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[118] *Prosecutor v. Aleksovski*, IT-95-14/1, Decision on Prosecutor's Appeal on Admissibility of Evidence, February 16 1999, para 19.
[119] See also Rule 89 of the Rules of Procedure and Evidence.
[120] *Prosecutor v Norman et al.*, SCSL-04-14-434, Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, pg 42.
[121] *Prosecutor v Tadic*, IT-94-1, Decision on Defence Motion on Hearsay, August 5 1996, para 18 and Rule 95 generally: "Exclusion of Evidence - No evidence shall be admitted if its admission would bring the administration of justice into serious disrepute."
[122] See *Archibald International Criminal Courts, Practice and Procedure*, 2002, pg 253, §9-12b.

**Corroborative Evidence**

124. Other tribunals have determined that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration.[123] However, this Trial Chamber has stated that it is not prepared to go as far as accepting that it is a general principle of international law, calling it a "contentious proposition".[124]

125. Witness testimony is strengthened when it has been corroborated, and conversely, testimony is weakened in the absence of corroboration.[125] It is submitted that where evidence is not corroborated, the Trial Chamber must scrutinise the evidence against the accused "with great care before accepting it as sufficient to make a finding of guilt against the Accused".[126] The Trial Chamber may in such situations decide not to rely on the evidence at all.[127]

126. In the instant case, the Defence highlights the need for the Trial Chamber to carefully scrutinise non-collaborated evidence. In particular the Defence draws the attention of the Trial Chamber to the testimony of the following witnesses:

i. **TF2-165** testified that sometime in 1997 or later, a group of unidentified Kamajors, under the command of one Mr Ngobeh, arrested a suspected collaborator called Mr Thomas in Moyamba. Mr. Thomas was shot dead and decapitated in Shenge Park; some of the Kamajors drank Thomas's blood, some rubbed it on their bodies, and one paraded through town with Thomas's head.[128]

ii. The evidence of **TF2-035** who testified that at Telama, a Kamajor commander called Keikula Kamagboty ordered that the belongings and persons of a group of civilians be searched; also upon his orders, a group of 150 Limba, Temne, and Loko

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[123] *Prosecutor v Aleksovski*, Case IT-95-14/1-A, Judgment 24 March 2000, para 62; *Krnojelac* TC para 71.
[124] Transcript, September 27 2006, pg 59 lines 5-16: MR KAMARA: -- but the principles of international law, that there is no need for collaboration. JUDGE ITOE: Oh, well, I'm not saying -- I don't accept -- I don't think I'm prepared to go that far, that there is no need for corroboration, no. MR KAMARA: Yes, My Lord. JUDGE ITOE: I contest that. MR KAMARA: My Lord -- PRESIDING JUDGE: I think it is a very, very -- MR KAMARA: My Lord -- PRESIDING JUDGE: -- contentious proposition. JUDGE ITOE: It is a very contentious, legal proposal.
[125] *Prosecutor v Tadic*, IT-94-1-T, Judgment on Allegation on Contempt Against Prior Counsel Milan Vujin, 31 January 2000 para.92.
[126] *Krnojelac (TC)*, para. 8.
[127] *Krnojelac*, (TC), para. 71; *Prosecutor v. Brdjanin* IT-99-36-T, Judgment, 1 September 2004, para. 27.
[128] Transcript, TF2-165, 7 March 2005 pg 9, lines 13-25, pg10 lines 22–12:17, pg12 line 25 – pg 13 line22. The need for corroborated is heightened by the fact that the date of the alleged killing is never made clear in the testimony.

civilians were taken a short distance away and systematically hacked to death by a group of 30 unidentified Kamajors.[129]

iii. **TF2-022** gave evidence of a number of alleged killings, none of which were corroborated, including[130]: at a field near the NDMC headquarters, unidentified Kamajors chopped three unnamed people with cutlasses[131]; on the day following the attack, unidentified Kamajors armed with guns and machetes captured 20 captured soldiers and 4 soldier's wives and hacked them to death;[132] upon orders from an unidentified commander unidentified Kamajors opened fire on a group of civilians; another unidentified commander then ordered the Kamajors to stop; some civilians were hit by bullets; one civilian who was hit was further chopped to death by an unidentified Kamajor;[133] an unnamed civilian was hacked to death by an unidentified Kamajor at a checkpoint because he had a picture of a soldier in his bag;[134] another unnamed civilian was hacked by an unidentified Kamajor at the next checkpoint because he was accused of being a soldier.[135]

iv. **TF2-071** gave evidence of extensive alleged killings, looting and burning in the Bonthe District including: Unidentified Kamajors capturing 34 civilians and took them to Mosandi where three of them—Bockarie Kpaka, Junisa, and Pa Samuel Kamara—were killed and eaten;[136] 5 civilians were captured by unidentified Kamajors in an ambush near the bridge linking Gbongboma and Molakaika; 3 escaped and reported that the other two had been killed by the Kamajors; Kamara's body was later found and buried;[137] Unidentified Kamajors burnt a number of houses in Baimbay;[138] Unidentified Kamajors looted and burnt houses at Mobayei and an old woman;[139] Unidentified Kamajors stabbed to death a pregnant woman called Jebbeh[140]; At Bolloh village, Kong Sam was killed by Adu Kai Ne Challey, and Ndogbei was killed.[141]

127. Lastly, the defence would submit that even where evidence is corroborated it does not necessarily follow that it is credible or reliable. In particular, in the circumstances of the Special Court, where the trial was held in the country the

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[129] Transcript, TF2-035, 14 February 2005 pg 12, lines 21-25, pg 13 lines 11-16, pg 15 lines 13-17, pg 16 lines 10-11, pg 17, lines 11-15, pg 18, lines 23-24, pg 20 lines 1-20. This evidence was also not set out in the PTB or the Indictment and such not be considered for that reason as well. Further, evidence of such a highly incriminating nature must be corroborated.

[130] It should also be noted that the evidence of TF2-022 does not correspond to the description given in the witness summary attached to the PTB (at Pg 3440) nor does it correspond to any information provided in the Pre-Trial brief itself. NDMC headquarters is not mentioned in the Indictment.

[131] Transcript, TF2-022, 11 February 2005 pg 46, lines 14-29.

[132] Transcript, TF2-022, 11 February 2005 pg 50 lines 19–53:3

[133] Transcript, TF2-022, 11 February 2005 pg 56, lines 9-28, pg 5, lines 1-10, pg 57 lines 13-26

[134] Transcript, TF2-022, 11 February 2005 pg 59, lines 15-29

[135] Transcript, TF2-022, 11 February 2005 pg 61, lines :8-20

[136] Transcript, TF2-071, 11 November 2004 pg 57 lines 23–59:19, pg 109 lines 14-19

[137] Transcript, TF2-071, 11 November 2004 pg 59, lines 23–61:16, pg 62 line 20– pg 63 lines 7, pg 64 lines :8-27, pg 65, lines 8-26.

[138] Transcript, TF2-071, 11 November 2004 pg 68 lines 18– pg 69 line 15

[139] Transcript, TF2-071, 11 November 2004 pg 71 lines 1-12

[140] Transcript, TF2-071, 11 November 2004 pg 71 lines 13-21

[141] Transcript, TF2-071, 11 November 2004 pg 73 lines 10-18, pg 74 line 24– pg 75 line 18

crimes were alleged to have taken place, that communities are small, that the dissemination of information either through the Special Court outreach department or through the local media, testimony of other witnesses was relatively accessible to witnesses, the need to test the reliability and credibility of the evidence is even greater.

**Hearsay Evidence**

128. The Defence submits that any hearsay evidence presented in this case should not be relied on before the Chamber has satisfied itself as to its reliability given the context and character of that evidence.[142]

129. Where the hearsay evidence is especially incriminating, it should not be relied on at all. In this instant case, the Trial Chamber has highlighted the caution that should be attached to such hearsay evidence. For example, where Prosecution witness TF2-198 recounted being told that Kamajors had burnt houses in Koribundo, the Trial Chamber made the following caution:

> "In support of what the learned Presiding Judge is saying that I am sure that my own understanding of all relevant evidence does not really mean all relevant evidence, admissible or inadmissible. At least we operate a system which, of course, is probably a crystallisation of the common law and the civil law systems, and I think we need to avoid in any way, leading evidence of an incriminating nature, even though that is legitimate. That may well violate fundamental principles of fairness. And we do not want you to say that because you have the latitude to lead all relevant evidence, therefore, basic principles of fundamental fairness should not -- I think it is fair to say that we have some doubts as to whether this witness should continue to give evidence of such dimension and of incriminating nature when he did not witness any of these particular alleged incidents."[143]

130. Further, while the Rules favour a flexible approach to the issue of admissibility of evidence, this flexibility should not lead the Chamber to admit

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[142] See *Prosecutor v Tadic*, IT-94-1-T, "Separate Opinion of Judge Stephen on the Prosecutor's Motion Requesting Protective Measures for Victims and Witnesses", 10 August 1995, pp 2-3: "that the weight or probative value to be afforded to that evidence will usually be less than that given to the testimony of a witness who has given it under a form of oath and who has been cross-examined, even this will depend upon the infinitely variable circumstances which surround hearsay evidence".
[143] Transcript, TF2-198 pg 34, lines 12-20.

"evidence where its probative value is manifestly outweighed by its prejudicial effect".[144]

131. The Defence would submit the following examples to demonstrate the extent to which hearsay evidence prevails throughout the proceedings and submit that this evidence is of such an incriminating nature it cannot be relied on:

- TF2-198, in testifying to the burning of houses stated that he returned to Koribundo from Bo. On describing seeing 106 houses burnt in Koribundo he stated that he was told that it was the Kamajors who burnt the houses.[145]

- TF2-042 gave evidence that 36 police officers were killed in Kenema, a number he says he received from ECOMOG.[146]

- TF2-144 testified that he had heard that a Mr Ojuku had been decapitated and that Kamajors processed through the streets with his head; witness also heard that Kamajors asked Ojuku's wife for money.[147]

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[144] See e.g. *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T, "Ruling on Gbao Application to Exclude Evidence of Prosecution Witness Mr Koker", 23 May 2005, paras 7 and 8. See also, *Prosecutor v Norman et al.*, SCSL-04-14-T-434 "Separate Concurring Opinion of Hon. Justice Itoe on the Chamber Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, 24 May 2005, para 75.

[145] Transcript, TF2-198, 15 June 2004 pg 32 lines 26– pg 33 line 10: Q. And when you returned to Koribundu, what did you see? A. When I returned to Koribundu some people who went to Bo were not able to stay there because they had problems of food, so they had to come back. When they had returned I found out that in fact almost all the houses are burnt. In fact, all the people that came, they started asking, "Who -- who burnt this place?" And they said it was the Kamajors that burnt and they said they had killed a lot of people here, and they started working with us and they started showing us graves, and they said, "You are here, you have Limba men that were buried." And they said in fact, "We are the ones who buried them." So we started working with them and they showed us where they buried different people and they returned to search with them. Q. Were you told who burnt the houses? A. Yes, they told us that it was the Kamajors and it was only they that were there. You know, in fact, almost everybody had left the place; it was only they that were there. In fact, there are some civilians who are trying to put out the houses which were burnt and in fact they gave testimony that it was the Kamajors who had burnt these houses.

[146] Transcript, TF2-042, 17 September 2004 pg 109 lines 2-7 A. Okay, the whole exercise. Well, I later came to know that there were 36 officers dead in Kenema. Q. Who told you that 36 officers were killed? A. Well, when we surrendered to the ECOMOG at the NIC building in Kenema, a report was given that 36 officers were killed.

[147] Transcript, TF2-144, 24 February 2004 pg 77 line 3– page 79 line 8: Q. Coming back to the question whether or not you could see what happened at the back of the house of Mr Ojuku, your answer you went into your parlour, could you see anything from your parlour? A. Well, when I entered my parlour I was not able to see what happened when they took him at the back of the house. Q. Did you learn at any time what happened to Mr Ojuku? A. When I came out I heard people say that they cut off his head and processed with him up to where his wife was doing business in the market. Q. To your knowledge, did they ask anything from Mr Ojuku's wife? A. He asked his wife to give them money so they could buy pepper, salt, and Maggi cubes. Q.

- TF2-147 testified to the killing of a Mr Abu Samuka Kamara by unidentified Kamajors which he told about.[148]

- TF2-056 gave evidence of hearing about unidentified Kamajors killed eight unnamed policemen at the barracks on the day the Kamajors entered Bo.[149] The witness was also told that unidentified Kamajors burnt four houses at the barracks.[150]

**Witness Credibility**

132. As one of the Judges remarked that the witness was "a very good story-teller"[151], the Defence also would submit that a number of Prosecution witnesses were also very good story tellers, to such an extent that their evidence is not credible and should be disregarded by the Trial Chamber in its assessment of the evidence.

133. TF2-006 appeared unable to maintain a consistent position on a question as straightforward as his profession. The witness agreed at various times that he was a welder, and then claimed that he was not. He also stated that he never told the OTP investigators that he was a welder and denied that the reason he lost his fingers was in a welding accident, quite contrary to the evidence he gave which alleged that Kamajors cut his fingers.[152]

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Did you learn at any time for what purpose they were asking for Maggi, pepper and so on? A. Well, I don't know. I was not there.

[148] Transcript, TF2-147, 10 November 2004 pg 40 line 2– page 41 line 9) Did you notice anything about that corpse? A. Well, it was lifeless. That is what I could remember. Q. Were there any marks, bullets or anything on the body that you noticed? A. No, I couldn't. Q. And, Father Garrick, were you told how he was killed? A. I was only told that he was killed by the Kamajors. Q. Did you notice anything? A. Well, not really. I can't remember now.

[149] Transcript, TF2-056, 6 December 2004 pg 68 lines 15-24.

[150] Transcript, TF2-056, 6 December 2004, pg 68 line 29– page 70 line 8 Q. Did the Kamajors do anything else within the police barracks, apart from killing? A. They destroyed four houses. Q. Did you see them destroying four houses? A. I was not there, but when I came, I saw four burnt houses and the eight corpses I talked about. Q. And how did you learn that these four houses were destroyed by Kamajors? A. All those leaving the barracks told me about it, even the men in the barracks they said "These houses were burnt by Kamajors."

[151] Transcript. TF2-162 Pg 29, lines 14-16.

[152] Transcript, TF2-006, 9 February 2005 pg 39 lines 19-21, pg. 40 lines 1-2, page 40, lines 7-10, pg. 40, lines 23-26.

134. The Prosecution should call only those witnesses they believe will tell the truth. However, when a witness admits to telling lies it becomes impossible for the Trial Chamber to know what parts of the evidence can be relied on and what should be disregarded. The entire evidence becomes tainted. This is the position of two Prosecution witnesses who admitted to not telling the truth. Witness TF2-017 admitted to giving false information to the OTP and admitted that he felt that it was acceptable to invent facts about which one is unsure.[153] Also, witness TF2-190 admitted outrightly that he did not tell the truth to OTP investigators because he was scared.[154] Such evidence, the extent of its veracity being unknown, is unsafe to be relied upon to render a verdict.

135. It is submitted that the Trial Chamber must take into account the extent of the consistency between the oral evidence of the witnesses at trial and statements given prior to trial. While the defence accepts that minor discrepancies do not discredit the evidence of a witness as a whole,[155] where the discrepancy goes to the essence of their testimony the evidence should be treated with caution, and in some instances completely disregarded.

136. In this respect the Trial Chamber should regard the reliability and credibility of a number of the Prosecution witnesses with caution.

137. For example, TF2-021 refuted significant portions of his statement, to such an extent that the Presiding Judge stated it was becoming a pattern[156] and it was noted that the probative value to be attached to this testimony would be reviewed.[157] The witness refuted such a large portion of his various statements that the Defence

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[153] Transcript, TF2-017, 22 November 2004 pg 38 lines 25-27. Q. Now you admit that you gave them false information; is that correct? A. Yes.; TF2-017, 22 November 2004 (44:9-12) Q Let me rephrase the question to you then. In your mind, it is okay to make up facts if you are hesitant about the facts; is that correct? A. Yes, you are correct.

[154] Transcript, TF2-190, 10 February 2005 pg 7 lines 18-21: Q. So you admit to lying to the investigators then to protect yourself? A. I was not telling lies. I was really afraid and when you are scared you do not know how to position yourself. And see Exhibit 56.

[155] *Vasiljevic*, (TC) para 21.

[156] Transcript, TF2-021, 4 November 2004 pg 7 lines 17-20: PRESIDING JUDGE: His consistent refusal of the contents of statements which are alleged to have been made by him is degenerating into a pattern, because yesterday, when Mr Williams was cross-examining, it was the same thing. We, of course, have it on record that he is an illiterate, but it is getting into what we would like to feel is a pattern.

[157] Transcript, TF2-021, 4 November 2004 pg 8 lines 6-12: Judge Thompson:...this witness has responded the way he thinks he should respond. The judges will, at the end of the day, in the light of testimony that may be forthcoming, determine what probative value to attach..."

requested that the investigators who took the statement be called as witnesses to verify the process of statement-taking by the Prosecution.[158] It is clear that this witness through the consistent refuting of his statement thoroughly impeached himself and his evidence should be disregarded in its entirety.

138. Another example is the testimony of TF2-012 which contained a number of significant inconsistencies between the statements given to the Prosecution investigators and his oral testimony. In particular the witness was adamant on the point of the number of houses he testified that Hinga Norman said should remain in Koribundo – three, not four as in his statement.[159] Further the Defence submits that the demeanour of the witness throughout his cross examination should also be noted in assessing his credibility as a witness[160].

**Inability to recall dates**

139. A number of Prosecution witnesses were unable to provide an accurate date in their testimony as to when events are alleged to have occurred. For example, TF2-152 could not recall when the time period when the junta government was in power.[161] TF2-096's testimony refers only the period "between the rainy and the dry season."[162] TF2-004 provides no dates as to his involvement in any of the

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[158] Transcript, Virginia Chatanda, OTP Investigator, 2 March 2005.

[159] Transcript, TF2-012, 22 June 2004 Pg 16 lines 21-25, Q. Now, Mr. Witness, referring to your first statement made on the 19th of January 2003, did you say, and I quote: "I was the section commander of the *Kamajors* for Wunde Chiefdom"? ... THE WITNESS: I didn't say that. I only said that I was sent by the section chief, and it is he who sent me. Pg 17 lines 34-36 Q: And did you say that when Hinga Norman addressed the meeting at Koribundu in early March of 1998, that he said he expected only four houses to be spared? A. I only spoke about three houses. I talked about three houses: Pg 18 lines 16-31 Q. Now, you said, and I quote: "Hinga Norman commended Joe Tamidey and admitted he sent him to capture Koribundu. He went further to say that he was responsible for the destruction of Koribundu and not the *Kamajors*. He said he was annoyed at seeing a lot of houses standing since he was only expecting to see four houses." ... Q. How -- having heard that, Mr. Witness, again, I'm putting to you, did you say Hinga Norman expected to see four houses? I said three houses. I said three houses. Q. Thank you. On the next page, you also said, and I quote: "He then said that the four houses at the junction by Sumbuya-Bo Road belonged to *Kamajors*." Did you refer to four houses as having been so said by Hinga Norman? A. Only one house should be standing there and that was the storey building. That was where the *Kamajors* should stay. I only talked about one house. Maybe that's the house because it's a storey building. Maybe that's the house they understood as two."

[160] Transcript, TF2-012, 22 June 2004, Pg 24 lines 31-37: MR. MARGAI: My Lord, this is a court of fact and a court of credibility. This is why Your Lordships need to watch the demeanour of the witness. MR. PRESIDENT: We are watching him. MR. MARGAI: I know that, very keenly too.

[161] Transcript, TF2-152, 27 September 2004, pg 97 lines 11-15 Q. Mr Witness, do you recall a time called the junta time? A. Yes. Q. When was this? A. I can't remember the time nor recall the day, but I can remember the time they were in power.

[162] Transcript, TF2-096, 8 November 2004, pg 1-2.

attacks he testified to, nor was he able to confirm his age with any clarity though his testimony relates to his participation as a child soldier.[163] TF2-048 spoke only of the "dry season" in 1997.[164]

140. The Defence submits that the Trial Chamber can only review evidence that falls within the relevant timeframe of the Indictment. Where it has not been made clear by the witness when the events they are testifying to took place, the Trial Chamber should not infer or speculate as to when exactly the witness was referring.

141. Further, testimony often focused on events which do not fall within the timeframes of the Indictment and the Defence also submits that the Trial Chamber maintain a cautious stance in reviewing such evidence. For example, a significant portion of the testimony of Father Garrick, TF2-147 related to attacks on Bonthe in September 1997 which is clearly outside the timeframe of the Indictment.[165]

**Leading questions**

142. The overall conduct of the prosecution's examination and the propensity towards asking leading questions sets the context in which the evidence must be evaluated. While the Trial Chamber stated that "leading questions are permissible on not contentious issues"[166] examples pervade throughout the proceedings of the Prosecution leading its witnesses through key areas of evidence.[167] Information

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[163] Transcript, TF2-004, 9 November 2004, pg 86 lines 4-18 Q. What age did you think you were before your father told you that? PRESIDING JUDGE: What a question. THE WITNESS: Could you please go over that again. PRESIDING JUDGE: Ms Whitaker, what a question. MS WHITAKER: Well, Your Honour, he's given an age to the investigators. He must have got his information from somewhere. Prior to this 20, Your Honour, he gave a different age on his statement. PRESIDING JUDGE: Well, proceed. MS WHITAKER: So he had an idea of an age prior. PRESIDING JUDGE: If he had one, he wouldn't be going to his father. MS WHITAKER: Well, Your Honour, he's asserted an age on this statement.

[164] Transcript, TF2-048, 23 February 2005, pg 8, lines 13-17 Madam Witness, I'd also like to take you back to the time when this happened, when you had to go to the headquarters. Was this during the dry season or the rainy season? Do you remember? A. It was during the dry season.

[165] See for example, Transcript TF2-147, 10 November 2004 page10 lines 2-17.

[166] Transcript. Judge Thompson November 11 2004, pg 52 lines 7-8.

[167] For example, transcript, Novemeber 11 2004, pg 52 line 29 PRESIDING JUDGE: But it doesn't mean that Mr Sauter will persist on asking leading questions. He should avoid asking leading questions; Transcript, TF2-198, June 15 2—4 pg 17 lines 4-7: Q. Do you know who the CDF was, or the Civil Defence Forces? A. Yes, they are the Kamajors? Q And Sam Hinga Norman was their leader? A. Yes, certainly he was the leader of the Kamajors.; Transcript. November 23 2004, pg 107, lines 11-14: Mr Sauter: Q. So, Mr Witness, would I be right to say that most of your belongings were taken away? Presiding Judge: That is a leading

obtained from a leading question should not be relied on as evidence supporting the allegations against the Accused in the present trial, as the evidentiary weight to be given to testimony that is elicited from leading questions is significantly decreased.

143. In instances, the Trial Chamber admonished the Prosecution for asking leading questions during the examination. Judge Thompson asked the Prosecution to desist from asking leading questions on a number of occasions.[168]

144. The example of TF2-157 provides a good example of the extent to which leading questions formed the examination style of the Prosecution:

> TF2-157 Transcript June 16 2004, Pg 16 Lines 3-18 Q. Do you know a person by the name of Chief Kafala -- Kafala? MR. JABBI: Objection, My Lord. My Lord, the Prosecutor has asked a question which was in the process of being answered and he is already suggesting a name in answer to that question which is of course hidden. JUDGE BOUTET: Objection sustained. MR. PRESIDENT: You can reframe your question, you know, employ your prosecutorial strategies and reframe your question, you know. BY MR CARUSO: Q. Yes. So did you ever witness anyone else in Koribundu being killed? A. Yes. Q. Did you know that person by name, sir? A. Yes. Q. And who was that person, sir? A. His name was Chief Kafala.
>
> ...
>
> pg 18, lines 2-7: Q. Now, did you see anyone else in your -- in Koribundu mistreated or beaten by the *Kamajors*? A. Yes. Q. Who was this, sir? A. I know of a man, an elderly man that is called Lahai Bassie, he is an old man, or he was an old man. At the time that we were about to leave the town, he didn't leave the town. He was there, he stayed.
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> ...
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> Pg 20 lines 11-12 Q. Whilst you were in Koribundu, did you ever see Hinga Norman? Yes, when I went back to Koribundu, after it had taken some time, I saw him
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> ...
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> Pg 20, lines 21 – 34. Q. And did you attend the meeting? A. Yes. Q. And it was at the town b*array*? A. Yes, at the court *barray*. Q. Who else attended the meeting, sir? A. There were a lot of people there. If there was an edict from the *Kamajors*, everybody would have to abide by that, so a lot of people went -- a lot of people attended the meeting. Q. Were there only civilians there? A. There were a lot of civilians and a lot of *Kamajors*. At that time then a lot of civilians had returned to the town. Q. Did Mr. Norman appear at the meeting? A. Yes. Q. As you recall now, sir, did Mr. Norman speak at the meeting? A. Yes.

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question. You cannot ask this question; TF2-157, Transcript, pg 14 lines 33-35: Q. Did you ever observe after that any one being -- did you ever observe anyone being killed after that in Koribundu? A. Yes, on that Sunday.;

[168] Transcript, 11-11-04, pg 52 line 29 PRESIDING JUDGE: But it doesn't mean that Mr Sauter will persist on asking leading questions. He should avoid asking leading questions;

145. The Defence submits that the evidence is replete with evidence on substantive issues being elicited through leading questions.[169]

**Applicable Law**

146. The Indictment charges the Accused with unlawful killings (murder), physical violence and mental suffering, looting and burning, terrorizing the civilian population and collective punishments, and use of child soldiers[170].

147. Counts 1 and 3 charge the Accused with murder and inhumane acts as a crime against humanity. Counts 2, 4, 5, 6, 7 charges the Accused with murder, cruel treatment, pillaging, acts of terrorism, and collective punishments as violations of Article 3 common to the Geneva Conventions and of Additional Protocol II. Count 8, enlisting and or using children under 15 years as an "other serious violation of international humanitarian law."

148. The Defence would note that acts of pillage, terrorism and collective punishments do not form part of the enumerated offences under Common Article 3 of the Geneva Conventions and therefore the Accused cannot be charged as being in violation of the Article 3 of the Convention on Counts 5-7.

149. The following are the elements of the crimes as set out by Trial Chamber I in its "Decision on Motions for Acquittal Pursuant to Rule 98".[171]

**Elements for Crimes against Humanity**

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[169] See also for example, Transcript. TF2-151, 23 September 2004 pg 7 lines 1-5: A. Well, I didn't know. I didn't know [Arthur Koroma's] position, but all I knew was that he was a big man in his office. Q. But do you agree with me that he was one of the leaders of the Kamajors in Kenema? A. Yes, sir; Transcript TF2-159 9 September 2004 Pg 14 lines 12-13 Q. Now, Mr Witness, I want to take your mind far back to the 13 year of 1998. Do you recall the 13th February 1998?; Pg 49 lines 21-28 Now, Mr Witness, let me take you to some time in March of 1998. Do you recall the month of March 1998? A. Yes. Q. Where were you? A. I was in Koribundu. Q. You were in Koribundu? A. Yes. Q. Did anything happen in Koribundu that you want this Court to know? Transcript, TF2-082 16 September 2004 Pg 40 lines 5-6 Thank you. Mr Witness, after the attack on Koribundu did you have cause to see the second accused, Moinina Fofana at any other point in time?

[170] Indictment, paragraphs 25-29.

[171] Rule 98 Decision.

150. The general elements that the Prosecution must prove for a crime against humanity are:[172]

(a) There must be an attack;
(b) the acts of the accused must be part of the attack;
(c) the attack must be directed against any civilian population;
(d) the attack must be widespread or systematic;
(e) the accused must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.

**Murder as a crime against humanity (Count 1)**

151. To prove murder as a crime against humanity, the Prosecution must prove the death of the victim—a person taking no active part in hostilities—resulting from an act or omission of the accused committed with the intent to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death[173].

**Inhumane Acts as a crime against humanity (Count 3)**

152. To prove the a*ctus reus* the following elements must be demonstrated beyond a reasonable doubt:

(a) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article;
(b) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity; and
(c) the act or omission was performed deliberately by the accused or a person or persons for acts and omissions he bears criminal responsibility[174].

153. The m*ens rea* which must be proven is:

(d) At the time of the act or omission, the principal offender had the intention to inflict serious physical or mental suffering or where he knew that his act or omission was likely to cause serious physical or mental suffering and was

[172] Rule 98 Decision paras. 54–59.
[173] Rule 98 Decision para. 72.
[174] Ibid para. 93.

reckless as to whether such suffering or attack would result from his act or omission[175].

**War Crimes (Article 3 Common)**

154. The general elements that the Prosecution must demonstrate for an alleged crime to violate Common Article 3 or Protocol II are:[176]

(a) The alleged acts of the Accused should have been committed in the course of an armed conflict;
(b) The alleged acts must be against persons taking no active part in the hostilities.

**Murder (Count 2)**

155. The Prosecution must prove the death of the victim—a person taking no active part in hostilities—resulting from an act or omission of the accused committed with the intent to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death[177].

**Cruel Treatment (Count 4)**

156. The Prosecution must prove that there was an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity against a person taking no active part in hostilities. Such act or omission may include treatment that does not meet the purposive requirement for the offence of torture[178].

**Pillage (Count 5)**

157. The elements of pillage are to be proven are:

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[175] Ibid para. 94.
[176] Ibid paras. 67–70. N.B. Judicial notice has been taken of the fact that an armed conflict occurred in Sierra Leone from 1991-2002.
[177] Ibid para. 73.
[178] Ibid para. 95.

(a) The perpetrator appropriated private or public property;

(b) intended to deprive the owner of the property and to appropriate it for private or personal use; and

(c) such appropriation was without the consent of the owner[179].

**Acts of Terrorism (Count 6)**

158. The elements of terrorism are:

(a) Acts or threats of violence wilfully directed against protected persons or their property;

(b) The acts or threats are committed with the primary purpose of spreading terror among protected persons[180].

**Collective Punishments (Count 7)**

159. In aggregation, the elements are:

(a) the elements constitutive of Common Article 3 crimes;

(b) a punishment imposed upon protected persons for acts that they have not committed; and

(c) the intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment[181].

**Child soldiers (Count 8)**

160. The Prosecution alleges that the First Accused, as National Coordinator of the CDF and Commander of the Kamajors knew and approved the recruiting, enlisting, conscription, initiation and training of Kamajors, including children below the age of 15 years. It is also alleged that the First Accused, along with the co-accused, knew and approved the use of children to participate actively

[179] Ibid para. 102.
[180] Ibid para 109–112. N.B. The Chamber here relied on the *Galic* decision, ICTY-IT-98-29, Judgement, 5 December 2003 ("Galic (TC)"), a Trial Chamber decision with a strong dissenting opinion supporting the position that this "offence" has not yet attained the status of an international crime.
[181] Ibid para 118.

in hostilities.[182] Count 8 charges the Accused with enlisting or using children under 15 in hostilities.

**The Prosecution has failed to show Crimes against Humanity**

161. The main thrust of the Prosecution's argument that the alleged evidence reachs the level of crimes against humanity appears to be to repeatedly state in its Pre-Trial Brief in the statement that crimes of humanity are evident from "the overall conduct of the CDF, not limited to one district, which engaged in the widespread killing of civilians as part of a campaign of terror and collective punishment".[183] The Defence submits that the Prosecution's evidence fails to demonstrate that the alleged crimes in Counts 1 and 3 are crimes against humanity.

162. As stated above the general elements for the applicability of Article 2 of the Statue are that:

- there must be an attack;
- the acts of the accused must be part of the attack;
- the attack must be directed against any civilian population;
- the attack must be widespread or systematic;
- the accused must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.[184]

163. The *mens rea* element is satisfied if the perpetrator has knowledge of the general context is which his acts occur and of the nexus between his action and that context, in addition to the requisite *mens rea* for the underlying offence or offences with which he is charged.[185]

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[182] Indictment para. 17
[183] PTB paras. 275 (e), 284 (a), 308 (a), 324 (a), 331 (a), 338 (a), 345 (a), 352 (a), 360 (a), 367 (a), 372 (a), 381 (a),
[184] Rule 98 Decision, paras. 54–59.
[185] *Kayishema and Ruzindana,* (Trial Chamber), May 21, 1999, para. 133-134

164. There must be an attack. An attack has been defined as "a course of conduct involving the commission of acts of violence,"[186] which need not constitute a military attack.[187]

165. The acts of the accused must constitute part of the attack.[188] The required nexus between the acts of the accused and the attack consists of two elements:

> - the commission of an act which, by its nature or consequences, is objectively part of the attack; coupled with
> - knowledge on the part of the accused that there is an attack on the civilian population and that his act is part thereof."[189]

166. The attack must be directed against a civilian population. For an attack to qualify as "d*irected against any civilian population",* it must be shown that the civilian population was "the primary rather than an incidental target of the attack".[190] As the ICTY Appeals Chamber has stated:

> "The expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack'. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes committed in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war. To the extent that the alleged crimes against humanity were committed in the course of an armed conflict, the laws of war provide a benchmark against which the Chamber may assess the nature of the attack and the legality of the acts committed in its midst."[191]

167. The "targeted population must be predominantly civilian in nature, although the presence of a number of non-civilians in their midst does not change the character of that population as civilian".[192] It is established that the targeting of a select group

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[186] *Prosecutor v Limaj et al.* IT-03-66, Judgement , November 30, 2005 ("Limaj (TC)"), para. 182; *Brdjanin*, (TC), para. 131 (similar); *Galic*, (TC),para. 141 (similar); *Prosecutor v. Naletilic and Martinovic,IT-98-34, Judgement,* (Trial Chamber), March 31, 2003, para. 233 ("*Naletilic* (TC)"), para 233.
[187] *Naletilic TC*, para 233.
[188] *Prosecutor v. Kunarac, Kovac, and Vokovic*, IT-96-2- A, Judgement ("Kunarac (AC)"), June 12, 2002, para. 99.
[189] See also *Limaj (TC)*, para. 188; *Prosecutor v. Blagojevic and Jokic*, IT-02-60, Judgement, (Trial Chamber), January 17, 2005, para. 547.
[190] Rule 98 Decision.
[191] *Kunarac (AC)* para 91, referred to in Rule 98 Decision.
[192] *Prosecutor v. Jelisic*, IT-95-10, 14 December 1999, para 54; *Kupreskic* (TC) paras 547-549; *Natetilic* (TC) para 235; *Blaskic* (TC) para 214.

of civilians – for example, the targeted killing of a number of political opponents – cannot satisfy the requirements of Article 5. It is insufficient to demonstrate that there was and attack was in fact directed against a civilian "population" where there are a randomly selected number of individuals.[193] As the ICTY has stated, it must shown that most of the population was directly affected, not a limited and selected group of individuals.[194]

168. To qualify as a crime against humanity, the acts of the accused must be "part of widespread or systematic attack against any civilian population".[195]

169. As the ICTY has noted, for reasons related to structural factors and organisational and military capabilities, and "attack against a civilian population" will often be found to have been at the behest of a State.[196] Further existence of an attack is often most evident when a course of conduct is launched on the basis of massive state action.[197]

170. The attack must be either widespread or systematic. The "widespread" characteristic refers to the large scale of the attack and to the number of victims"[198] and the "adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes—that is the non-accidental repetition of similar criminal conduct on a regular basis—are a common expression of such systematic occurrence.

**Prosecution theory of Crimes against Humanity**

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[193] *Limaj* (TC), para 187, *Kunarac* (AC), para 90.
[194] *Prosecutor v Stakic*, IT-97-24, Judgement (Trial Chamber), July 31, 2003, para. 627: "The Trial Chamber is satisfied that the events which took place in [the] Prijedor municipality between 30 April and 30 September 1992 constitute an attack directed against a civilian population. The scale of the attack was such that it cannot be characterised as having been directed against only a limited and randomly selected group of individuals. Rather, most of the non-Serb population in the Municipality of Prijedor was directly affected. Moreover, it is clear from the combat reports that the Serb military forces had the overwhelming power as compared to the modest resistance forces of the non-Serbs."
[195] Article 2 Statute of the Special Court.
[196] *Limaj* (TC) para 191.
[197] *Limaj* (TC), para 194 citing *Prosecutor v Nikolic* where the Trial Chamber noted the "authoritarian take over" as evidence of an attack and *Prosecutor v Mrksic* et al, where the Trial Chamber looked to the massive land, naval, and air offensive by the forces of the JNA, intensive shelling of Vukovar for 3 months and the en masse deportation of women and children as amounting to an "attack".
[198] *Limaj* (TC) para. 183.

171. It is unclear what exactly is the prosecution's theory relating to crimes against humanity other than the Prosecution repeatedly stating that crimes against humanity can be inferred from the "overall conduct of the CDF, not limited to one district, which engaged in the widespread killing of civilians as part of a campaign of terror and collective punishment."[199]

172. The Defence is presuming that on the basis of this reiteration by the Prosecution that it does not seek to demonstrate that crimes against humanity occurred in a systematic way – only on a widespread basis. Regardless, the Defence submits that there is no evidence to suggest a systematic nature to the alleged crimes.

173. The Prosecution has suggested that "there is evidence that CDF campaigns spread throughout Sierra Leone in identified geographic locations." Further the Prosecution contends that these CDF campaigns were "massive, frequent, large scale actions, directed against multiple victims" and that "the attacks followed a clear pattern, spreading from Bonthe District throughout the country."[200]

174. The Defence submits that the means and methods used by the CDF in the period relevant in the Indictment do not evince characteristics of an attack directed against a civilian population. Even taken at its highest, the bulk of the evidence of alleged killings is in relation to individuals who were singled out as individuals because of their suspected or known connection with, or acts of collaboration with, RUF / AFRC forces – and not because they were members of a general population against which an "attack" was directed by the CDF. This sort of evidence does not meet the required level of an "attack against a civilian population" and therefore cannot fall with the ambit of crimes against humanity.[201] Other evidence on alleged killings can best be described as random killings by unidentified Kamajors that can hardly said to fall within the ambit of an "attack".[202] There is no evidence that could lead to the conclusion that there was ever an "attack" against the civilian population.

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[199] PTB para 275 (e), paras. 284 (a), 292 (a), 300 (a); 308 (a), 316(c), 324 (a), 331 (a), 338(a), 345(a), 352(a), 360 (a), 367(a), 374(a), 381 (a).
[200] *Prosecutor v Norman et al*, SCSL-04-14-T-468, Public Version of the Prosecution Response to Motion for Judgement of Acquittal of the First Accused, Samuel Hinga Norman, 27 September 2005, para 16.
[201]. See *Limaj,* Judgment Para 227.
[202] *Limaj et al.*, (Trial Chamber), November 30, 2005, para. 194: "It has been emphasised, repeatedly, that the contextual element required for the application of Article 5 serves to exclude single, random or limited acts from

175. In contrast to other tribunal jurisprudence where the attacking force possessed overwhelming military superiority, the situation with the CDF is different. The CDF was, for the majority of the timeframe in the indictment, a community defense organisation, engaged in combat with a junta government made up of a conventional military force and a rebel organisation. The battles were, even as set out in the Indictment, localised battles between the AFRC/RUF forces and the CDF in discreet limited number of geographic areas. Often a town would be taken over by the CDF in a matter of hours or days and then a few days the AFRC/RUF junta would re-enter the town[203] or as in the case of Koribundo, the AFRC junta soldiers just left Koribundo and there was no combat, and certainly nothing that could be said to have been an "attack". This is the same for Bonthe where TF2-071 testified that the Kamajors entered Bonthe after the soldiers had fled.[204]

176. Describing the 'overall conduct' of the CDF as amounting to a crime against humanity is also counter to the bulk of the evidence which clearly demonstrates that the CDF played a significant role in returning the legitimately elected government of President Kabbah to power and to countering the attacks by the RUF[205] and the AFRC.

177. Witnesses gave testimony as to the pride of belonging to the Kamajors and that Kamajors played a significant role in liberating many communities across Sierra Leone.[206] There was also evidence that President Kabbah was immensely grateful to

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the domain of crimes against humanity." *Limaj et al.*, (Trial Chamber); and para. 189: "[I]t must be established that the acts of the accused are not isolated, but rather, by their nature and consequence, are objectively part of the attack."

[203] For example TF2-021 testified that Kamajors had taken Tongo in 4 days (Transcript, TF2-201 4 November 2004, pg 110 line 25 – pg 111 line 1, pg 112 lines 8-17.

[204] Transcript TF2-071, 11 November 2004, page 76 line 24– page 77 line 8.

[205] For example Transcript Kenei Torma, June 2 2006, pg 16, lines 11-20 Q. Yes, the rebels drove the civilians out of town and took over Moyamba? A. They dislodged the Kamajors and the civilians and they settled there. Q. Yes? A. And the chiefs, all of them assembled in Sembehun and they were guests to the other chiefs there and they said, "What is happening? Our district is being destroyed. Let's provide Kamajors by chiefdoms so that they can go and dislodge the rebels from our districts." And they arranged that –

[206] See for example TF2-012 Transcript. June 21 2004 , pg 57, line 26-27 Why did you join the *Kamajors*' society, to burn houses? A. No. Pg 58 lines 3-4 Q. As a *Kamajor*, did you fight for your country or did you fight against your country? A. I didn't fight. Pg 58, lines 8-9 Q. At the time when you went to the bush who were you afraid of, *Kamajor* or soldier? I was afraid of the soldiers and the rebels. Pg 62 lines 2-12 Q. You will agree with me that the chiefdom organised these *Kamajors* to go and liberate Wunde from the RUF; isn't it? A. Yes. Q. Now tell me, were you happy when Wunde was eventually -- Wunde, was it eventually liberated? A. Yes.Q. Did you go back to Wunde after its liberation? A. Yes, we went back there. Q. So the Kamajors drove the rebels? A.

the Kamajors and the CDF and the role they played in assisting to return the government to power. The Kamajors were to receive recognition for their role with certificates[207] and the President distributed bags of rice and money to those Kamajors who did not benefit from demobilisation programs.[208] It is difficult to conceive of a government wanting to recognise the role of a group and reward them with rice and money f they had committed crimes against humanity against the population of Sierra Leone.

**Identification of particular individuals not an "attack"**

178. As previously stated, taken at its highest the evidence presented by the Prosecution does not demonstrate that there was an "attack". The bulk of the evidence shows that persons allegedly killed by Kamajors were targeted as being collaborators or of belonging to particular ethnic groups. This evidence does not amount to an "attack against a civilian population".

179. Such evidence of allegedly killings of targeted individuals includes, but is not limited to, the following witness testimony:

- TF2-198 gave evidence his brother's killing by unidentified Kamajors saying he had been accused of being a Junta member.[209] This witness also testified that he returned to Koribundo and was told that Kamajors had killed Limba men;[210]

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Drove the rebels, yes. Q. At this time it was very fashionable to be a *Kamajor,* wasn't it? A. Yes, it was really nice to be a *Kamajor*. Pg 62 lines 21-29 Q. Now, tell this Court, is it not a common practice for initiates of the Kamo -- of the *Kamajor* society to take an oath to, one, not to kill innocent civilians? A. Yes. Q. Two, not to loot civilians' property? A. The time when I joined the *Kamajor,* yes, they told us that. Q. And three, not to rape? A. Yes, they said that. Q. And the most important to respect the dignity of civilians? A. Yes.

[207] See Exhibit 146

[208] Transcript, Arthur Koroma, May 4, pg 10 line 56.

[209] Transcript, TF2-198, June 15 2004, pg 22 lines 7-11 "A. At that time when he identified me as somebody from Koribundu, they held me, they threw me to the ground, they beat me and when I was shouting, my younger brother woke up and he came and he peeped, they saw him and they said, "Oh, look at one Junta peeping." And they held him. They brought him out and they threw him to the ground, and they tied him, and they said we should be killed by Sikissi."

[210] Transcript TF2-198, June 15 2004, pg 32 lines 27-34, pg 33, lines 4-7.

- TF2-157 gave evidence as to some of the same deaths as TF2-198 saying that they had been killed because were Limbas;[211]

- TF2-176's testimony was that a kamajor said he should be killed because he was a soldier;[212]

- TF2-159 evidence was to the same alleged killings as described by TF2-198 and TF2-157, stating that the people killed were Limba men;[213]

- TF2-030 testified that her husband was killed because he was Temne;[214]

- TF2-156 gave evidence that while he was in the hospital, a group of unidentified Kamajors came, announced that all policemen were with the junta and should be killed;[215]

- TF2-067's evidence was that n unidentified Kamajor shot to death an unnamed Temne man in a park;[216]

- TF2-058 said her husband was killed by unidentified Kamajors because he was accused of being a soldier;[217]

180. The evidence of alleged killings continues in this same vein, where the alleged killing specifically targeted an individual or is a random act of violence, in some instances as acts of retaliation from past vendettas.[218] Therefore the Defence would

[211] Transcript, TF2-157 pg 15, June 16 2004, line 27.
[212] Transcript, TF2-176 June 17 2004, pg 82, lines 36.
[213] Transcript, TF2-159, September 9 2004, pg 29 lines 1-28 pg 30 lines 1-5.
[214] Transcript, TF2-030, 25 November 2004 pg 5 lines 19 – page 7 line 26, pg 8 line 9 page 9, line 8, page 10 lines 1-2, page 10 lines 15-23, page 11 lines 3-5, page 11 lines 6-19
[215] Transcript, TF2-156, 25 November 2004 pg 51 lines 6-22, page 53 lines 3-7, page53 lines 13-21.
[216] Transcript, TF2-067, 1 December 2004 pg 4 line 19– page 5 line 15
[217] Transcript, TF2-058, 3 December 2004 page 50 lines 10-22, page 51 lines 14-25, page 51 line 26–page 52 line 6, page52 lines 7-9), page 53 lines 23– page 54 line 11, page 54 line16– page 55 line 13, page 55 line 14–page 57 line 12, page 60, lines 2-10.
[218] For example, TF2-166 stated that each of the five people involved in the killing of witness's father owed him money: Transcript, TF2-166, 8 March 2005 pg 80 lines 13-19, pg 81 lines 12-16.

submit that there is no evidence of an "attack", let alone an attack against a civilian population.

**Attacks not widespread nor systematic**

181. Even if the Trial Chamber were to find that there was an attack, it is clear that the weight of the prosecution's evidence even taken at its highest fails to demonstrate that such an attack was widespread or systematic.

182. As referred to above, widespread refers to the large scale of the attack and to the number of victims.

183. As the ICTY has stated, "History confirms, regrettably, that wartime conduct will often adversely affect civilians."[219] However, the Defence submits that even if it is be accepted that civilians were killed by renegade Kamajors in and around the relevant period, then, nevertheless, in the context of the population of Sierra Leone as a whole these were relatively few in number and could hardly be said to amount to a "widespread" occurrence for the purposes of Article 2 of the Statute.

184. The Defence has already stated that it presumes that the Prosecution is not alleging systematic attacks. However, even if the Trial Chamber finds that the evidence discloses that there was some lose form of a "systematic" attempt by the CDF or random elements within the CDF, or rogue Kamajors to target individuals believed to be, or suspected of, collaborating with the AFRC junta, there is still no evidence to demonstrate that there was an attempt to target a civilian population as such.

**Command Responsibility under Article 6(3)**

185. The Accused is charged with responsibility for the crimes in the Indictment under Article 6(3). For criminal responsibility to attach by virtue of Article 6(3), the Prosecution must prove each of the elements of each of the crimes beyond a

[219] *Limaj Trial Judgment*, para. 210.

reasonable doubt. If it succeeds in doing so for any crime, then the Prosecution must prove each of the following elements of command responsibility in relation to that crime, again beyond a reasonable doubt.

**Command Responsibility – The Law**

186. Article 6(3) of the Statute of SCSL incorporates the customary law doctrine of command responsibility. This doctrine is predicated upon the power of the superior to control or influence the acts of the subordinates. Failure by the superior to prevent, suppress, or punish crimes committed by subordinates is a dereliction of duty that may invoke individual criminal responsibility.[220]

187. The Trial Chamber in *Celebici* formulated the three elements of command responsibility:

1) the existence of a superior-subordinate relationship (functional);
2) the superior knew or had reason to know that the criminal act was about to be or had been committed (cognitive aspect), and
3) the superior failed to take the necessary and reasonable measures to prevent the criminal act or to punish the perpetrator thereof (operational aspect).[221]

188. These criteria reflect the three aspects of the concept of superior responsibility established in post-second World War case law. The Trial Chamber in the case of *Akayesu*, held that in the case of civilian superiors, the principle of command responsibility as laid down in Article 6(3) of the ICTR Statute remains 'contentious'.[222] The *Kayishema* and *Ruzindama* judgment, in which a prefect and a businessman stood trial, which was delivered a year after *Akayesu*, incorporated the *Celebici* decision. The ICTR Trial Chamber was of the view that 'superior' encompasses political leaders and other civilian superiors, as long as civilian/non-military superior holds a position of authority.[223] Unlike the Trial Chamber in

[220] *Prosecutor v Delalic et al.*, IT-26-21-T, "Judgment" November 16 1998 (*Celebici* Judgment, 346), confirmed in Appeal;, Prosecutor v. Delalic et al, case No. IT-96-21-A, 8 April 2003 (Celebici AC) paras. 333-343.
[221] *Celebici* AC, paras. 189-198.
[222] *Akayesu* Judgment, para. 490.
[223] *Kayishema and Ruzindana* Judgment, para. 16.

*Akayesu*, it held that 'the application of criminal responsibility to those civilians who wield the requisite authority is not a contentious one'.[224] It further emphasized that the crucial question was not the civilian status of the accused, but the degree of authority exercised by the accused over his subordinates.[225] In *Musema*, the Trial Chamber subscribed to this position, but asserted that authority should be assessed on a case-by-case basis.[226] This case law demonstrates that the concept of a superior is far from a settled proposition.

189. Command is 'the authority vested in an individual of the armed forces for the direction, co-ordination, and control of military forces.[227] In the *Celebici* case, the Trial Chamber held:

> "[a] position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position cannot be determined by reference to formal status alone. Instead, the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates. Accordingly, formal designation as a commander should not be considered to be a necessary prerequisite for command responsibility to attach, as such responsibility may be imposed by virtue of a person's de facto, as well de jure, position as a commander.[228]

190. It is important at this stage to realise that different types of command do not incur different types of superior responsibility. Whether it is direct or indirect subordination that characterises the relationship between subordinates and superior,

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[224] Ibid.
[225] van Sliedregt E. The Criminal Responsibility of Individuals for Violations of International Humanitarian Law (2003) T.M.C Asser Press, p. 145
[226] *Prosecutor v. Musema*, ICTR- 96-13-A, "Judgment", 16 November 2001 (*Musema* Judgment), para. 135, See also Prosecutor v Akayesu, ICTR-96-4-T, Judgment and Sentence, 2 September 1998 (Akayesu Judgment) para. 491: '[i]t is appropriate to assess on a case by case basis the power of authority actually devolved upon the accused in order to determine whether or not he had the power to take all necessary and reasonable measures to prevent the commission of the alleged crimes or to punish the perpetrators thereof '
[227] van Sliedregt, supra note 226, p. 146.
[228] Celebici Judgement paras. 205-206.

occupation or operational level of command, there is only one type of criminal superior responsibility, i.e. control.

191. Having control means having *effective* authority over subordinates.[229] Control 'requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders'.[230] In *Celebici,* the Trial Chamber ruled that in order for the principle of superior responsibility to be applicable to non-military superiors, an element of control is vital:

> " [t]he doctrine of superior responsibility extends to civilian superiors only to the extent that they exercise a degree of control over their subordinates which is similar to that of military commanders."[231]

192. Furthermore, the exercise of *de facto* authority must be accompanied by "the trappings of the exercise of *de jure* authority."[232] In *Bagilishema,* the Trial Chamber concurred but held the view that these trappings of authority include, for example, awareness of a chain of command, the practice of issuing and obeying orders, and the expectation that insubordination may lead to disciplinary action. It is by these trappings that the law distinguishes civilian superiors from mere "rabble-rousers" or other persons of influence.[233]

193. Having examined customary law on superior responsibility, the Appeals Chamber in *Celebici* ruled that *'sufficient influence'* is not an element of command responsibility, and that where influence plays a role in prompting subordinates to commit crimes, for instance, influencing criminal policies by writing them into orders, direct liability for aiding and abetting is more appropriate[234].

194. The Defence submits that the nature of the concept of superior responsibility concerns the relationship between superiors and their subordinates. This relationship should be marked by a hierarchy built on elements such as command and control, not by influence.

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[229] *Celebici Judgement*, paras. 256 and 256-266.
[230] van Sliedregt, supra note 226, p. 149.
[231] Celebici Judgment, para. 378.
[232] Ibid
[233] *Prosecutor v Bagilishema*, ICTR-95-1A-T, "Judgment," June 7, 2001 (Bagilishema Judgment), para. 43.
[234] *Celibici (AC)*, paras 258-264.