SPECIAL COURT FOR SIERRA LEONE
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SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: **Hon. Justice Renate Winter, President,**
Hon. Justice Jon Kamanda,
Hon. Justice George Gelaga King
Hon. Justice Emmanuel Ayoola, and
Hon. Justice Shireen Avis Fisher

Acting Registrar: **Ms. Binta Mansaray**

Date filed: **24 Jnne 2009**

THE PROSECUTOR

V.

ISSA HASSAN SESAY

Case No. SCSL-2004-15-A

PUBLIC

Sesay Dcfence Response to Prosecution Gronnds of Appeal

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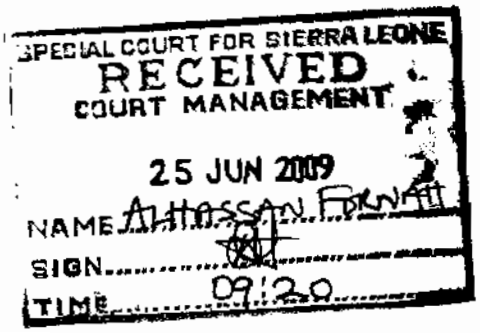

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GROUND ONE: RESPONSE

SECTION I: PRELIMINARY ISSUES

Preliminary Issue One: No findings of fact on Defence Case

1. It is submitted that the Appeal on Ground One cannot result in additional convictions for Sesay. As noted by the Prosecution in Ground One, as regards the erimes committed after the end of April 1998 in Koindadugu District, Bombali District and Port Loko District, the Chamber made no factual findings on the crimes.[1] Accordingly it would be impractical to remit the case to the Trial Chamber for further findings of fact on the evidence. It would also not be appropriate to request the Appeals Chamber to make findings of fact at first instance on the evidence of these crimes.[2] Similarly the Trial Chamber failed to explicitly examine the Defence evidence adduced to demonstrate Sesay's lack of *mens rea* for crimes committed in Freetown and the Western Area and provided only 16 paragraphs of reasoning purporting to deal with the remainder of the Defence case, which was, *inter alia*, relevant to Kailahun and Kono post April 1998.[3] Further the Trial Chamber excluded 18 statements that were highly relevant to Sesay's state of mind from December 1998 through 1999, illustrating the clearest repudiation of criminal conduct and constituting decisive proof of a lack of intent to commit crimes during this period.[4]

2. Accordingly, the Defence submits that Ground One should be dismissed as it relates to Sesay as it is impraetical and inappropriate to conduct the necessary analysis to allow proper findings of fact to be made with due regard for Article 17 of the Statute of the SCSL.

Preliminary Issue Two: Lack of specificity in Ground One (concerniug crimes committed after the end of April 1998 in Kono District)

3. The Prosecution have failed to specify the precise acquittals in Kono District that it seeks to have reversed in the event that Ground One is upheld.[5] It is submitted that it is insufficiently preeise to state that "[i]n case (sic) of some of these crimes, the Accused were convicted on

[1] Prosecution Appeal, Para. 2.171.
[2] Prosecution Appeal, Para. 2.172.
[3] Ground Two and Three of the Sesay Appeal.
[4] *See* Ground 20 of the Sesay Appeal that deals with the content of some of this evidenee and also Annex B: Proseeuting and Defence supporting Testimony, p. 180 – 195.
[5] Prosecution Appeal, Paras. 2.175-2.176.

the basis of modes of liability other than JCE. In those cases where this has occurred, in the interests of judicial economy, the Prosecution does not seek unnecessarily to substitute convictions already entered under another mode of liability with convictions under the JCE mode of liability."[6] This does not suffice to identify the crimes in the Kono District that are the subject of Ground One. An Appellant must identify with precision the grounds that are sought to be argued and the findings that are sought to be reversed.[7]

Preliminary Issue Three: Flawed legal assumptions

Part One: JCE with Non-criminal Purpose

4. The Prosecution alleges that "the Chamber erred in law and/or fact in finding that the common plan, design or purpose/joint criminal enterprise between leading members of the AFRC and RUF ceased to exist some time in the end of April 1998."[8] In alleging this error of law and/or fact the Prosecution's approach adopts in totality the errors made by the Chamber ("takes no issue" with[9]) in defining the joint criminal enterprise (JCE).[10] Consequently the very premise of the Prosecution's Appeal (Ground One) is indubitably flawed.

5. For the reasons advanced in the Sesay Grounds of Appeal at Paras. 81 to 103 this "fourth" category of JCE, has no basis in customary law. Three forms of JCE as modes of liability exist in international law[11] and the Chamber's interpretation – and the Prosecution's adoption of it – is akin to criminalising the membership of the RUF, which is a new crime, not foreseen under the Statute and amounts to a flagrant infringement of the principle *nullum crimen sine lege*.[12]

6. It ought to be noted that the legality and parameters of the three forms of JCE liability traditionally accepted as reflecting customary law are themselves not uncontroversial. The

[6] Prosecution Appeal, Para. 2.176.
[7] AFRC, Appeal Judgment, Para. 223.
[8] Prosecution Appeal, Para. 2.07.
[9] Prosecution Appeal, Para. 2.41.
[10] *E.g.*, Prosecution Appeal, Paras. 2.15 and 2.16 and Ground 24 of the Sesay Grounds of Appeal.
[11] These three forms are now well-settled and oft-reiterated in international jurisprudence. *See, e.g., Vasiljevic*, IT-98-32-A, ICTY, Appeals Chamber, Judgement, 25 February 2004, §§ 96-102; *Karemera, Ngirumpatse, and Nzirorera*, ICTR-98-44-AR72.5, ICTR-98-44-AR72.6, ICTR Appeals Chamber, Decision on Jurisdictional Appeals: Joint Criminal Enterprise, 12 April 2006, § 13; *Kayishema and Ruzindana*, ICTR-95-1-A, ICTR Appeals Chamber, Judgement (Reasons), 1 June 2001, § 193. *See also, Brima, Kamara, and Kanu*, SCSL-2004-116-A, Special Court for Sierra Leone, Appeals Chamber, Judgment, 22 February 2008, § 75 (describing *actus reus* for all forms of JCE).
[12] *Stakic*, TC, 31 July 2003, Para 433; *Kvočka*, AC, Paras. 82 and 96; *Brđanin*, TC, Para. 258; *Vasiljevic*, AC, Para. 96; *Limaj*, TC, Para. 511; *Krnojelac*, AC, Para. 30; Tadić, AC, Para. 195.

third – or extended – type of JCE (JCE III) is particularly so and has oft been compared to a form of guilt by association and a violation of the long-established principle of personal culpability.[13] Nonetheless, the Prosecution in Ground One seeks to entrench an interpretation of the JCE that could be nothing other than "guilt by association" or "membership of a criminal organization" as criminalized as a separate offence in Nuremburg and in subsequent trials held under Control Council Law No. 10, where knowing and volunrary membership in such an organization was sufficient in some cases to entail criminal responsibility.[14]

7. The subsequent development of the law was centered on the notion that acts – not organizations – are criminalized. The function of the JCE liability is to provide a strueture through which individuals are held responsible for *acts* where such responsibility arises through membership of an organization or other joint enterprise.

8. Consistent with the jurisprudenee, the Trial Chamber's task was to decide, first and foremost, whether there was a plurality and whether it acted together in the implementation of a criminal objective.[15] That question concerned the assessment and identification of "specifie material elements" that demonstrated the existenee of an objectively punishable criminal act, precisely determined in time and space.[16] Before looking at whether the Appellant participated in such an enterprise, it was necessary to determine whether such an enterprise existed.[17] The Trial Chamber erred by not conducting this analysis, instead determining that an agreement to take over a country could serve as the objectively punishable act. The Prosecution's First Ground of Appeal seeks to compound that error by extending the temporal and geographic parameters of this so-called "JCE." The Prosecution fails to rely upon a single piece of jurisprudenee to justify either the Trial Chamber's creation of a fourth

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[13] *See* Attila Bogdan, "Individual Criminal Responsibility in the Execution of a Joint Criminal Enterprise in the Jurisprudence of thc ad hoc Intemational Tribunal for thc Former Yugoslavia", 6 Int'l Crim. L. Rev. 63 (2006), "the application of 'joint criminal enterprisc' violates the principles of legality, specifically thc prohibition expressed in the prineiple *nullum crimen sine lege* and the prohibition against *ex post facto* law," at 115; ECCC, *Prosecutor* v. *KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Prof. Dr. K. Ambos *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 28 October 2008 ("K. Ambos); *Prosecutor* v. *Milan Martic*, IT-95-11-A, Jndgment (Appeals Chamber), 8 October 2008, "Separate Opinion of Judge Schomburg on the Individual Criminal Responsibility of Milan Martic," ("the enrrent shifting definition of the third eategory of JCE has all the potential of leading to a system, which would impute gnilt solely by association"), at 7; and George Fletcher and Jens Ohlin, "Rcelaiming Fundamental Prinelples of Criminal Law in the Darfur Case", 3 JICJ (2005) 539, at 550.

[14] *See*, e.g., *Prosecution* v. *Milutinovic*, "Dceision on Odjdanic's Motion Challenging Jurisdiction – Joint Criminal Enterprise," 21 May 2003, Paras. 13-33, for a clear enunciation of the distinction between the JCE mode of liability and guilt by association or membership of a criminal organisation.

[15] *Brđanin* Appeal Judgement, Paras. 410 and 430.

[16] *Prosecutor* v. *Sagalnutu et al.*, ICTR-00-56-T, Trial Decision, 25 September 2002, at Para. 39.

[17] *Milutinovic*, TC, Para. 16.

type of JCE or reasons to extend it. The Prosecution's submissions are misconceived, have no basis in settled jurisprudence or customary law and no place in the evolving jurisprudence of international criminal law.

Part Two: Guilt by Association

9. It is instructive to collate the critical "legal" propositions in the Prosecution's analysis at paragraphs 2.1 to 2.180 of its Appeal. The Prosecution suggests that in order to find that a JCE existed post April 1998, the Trial Chamber had merely to be satisfied that, "[t]he two groups continued to act in concert, sharing the same common purpose [to take power and control over the country[18]] and remaining dependant on one another for the achievement of their objectives and *in their commitment to criminal means*."[19] According to the Prosecution, all that was ultimately required was the "common goal to liberate the country from the so-called corrupt government and its supporters [and that this] kept the AFRC and RUF aligned"[20] and that the same type of crimes were being committed by both armies in furtherance of this aim.[21]

10. Further, according to this interpretation of the JCE liability, an accused can be found guilty for crimes that fell outside of the common purpose to take over the country, but which were nevertheless a "natural and foreseeable" consequence of *this* purpose.[22] In other words, an Accused could be guilty under the extended form (JCE III), for intending to take over the country and foreseeing that crimes might be committed by someone during that endeavour, even though never sharing or forming an intention to commit a crime.[23]

11. At its outer limit, thus, the Prosecution's (and Trial Chamber I's) interpretation of the JCE makes it permissible for Sesay to be convicted of all the crimes committed by any member of the AFRC or RUF on the sole basis that he (militarily) collaborated to take over the country, even without intending the crimes. Even, interpreting the Prosecution's JCE narrowly – without reference to JCE III – this interpretation would enable Sesay to be convicted for all the crimes committed by the AFRC providing it can be shown that there was some military collaboration between the senior members of the RUF and AFRC, that Sesay's participation

[18] *E.g*, Prosecution Appeal Para. 2.33.
[19] Prosecution Appeal, Para. 2.109; emphasis added.
[20] *E.g.*, Prosecution Appeal, Paras. 2.110-2.117.
[21] Prosecution Appeal, Paras. 2.130-2.141.
[22] *E.g.*, Prosecution Appeal, Para. 2.148.
[23] *See, e.g.*, Gbao's convictions by the majority.

in the RUF's attempt to take over the country was significant, and that he intended a single crime. This is even more egregious than good old fashioned guilt by association or guilt for membership of a group since it completely removes the obligation to prove membership of a plurality acting *in concert to commit an objectively defined crime* (and participation of the accused therein) and replaces it with an irrefutable presumption of guilt.

Preliminary Issue Four: Failure of the Prosecution to identify findings or evidence that would demonstrate a significant contribution to a shared common purpose post April 1998

Part One: Importance of distinction between Purpose and Means

12. The impermissibility of the Prosecution's (and the Trial Chamber's) approach to the JCE doctrine becomes apparent upon an analysis of the various elements that underpin the "RUF" JCE. The Prosecution in this case seeks to avoid this analysis, blurring the distinction between the purpose and means of a JCE, in order to avoid the inevitable conclusion that a non-criminal purpose, such as the taking of power and control over a country – even when intended to be achieved by criminal means – is bound to lead to a legal *cul de sac*. It is simply meaningless to assess an accused's contribution to a non-criminal purpose.

13. The Prosecution correctly assert that the question is "whether he [Sesay] continued to share the AFRC/RUF common purpose" however err when asserting that the common criminal purpose was "to take power and control over the territory of Sierra Leone through the commission of crimes within the Statute of the Court."[24] This is to confuse purpose and means; a distinction that is essential for a proper analysis of liability pursuant to the JCE doctrine. The critical question, as noted by the Appeal Chamber in *Brđanin*, is that a trier of fact must find beyond reasonable doubt that a plurality of persons shared the common criminal purpose and that the accused made a contribution to *this* common criminal purpose.[25]

14. The jurisprudence is well established: first, where convictions under the first category of JCE

[24] Prosecution Appeal, Para. 2.159.

[25] *Brdanin*, AC, Para. 427, quoting *Tadić* Appeal Judgement, Para. 192 (considering that it would be wrong to disregard the role of "all those who in some way made it possible" to commit a crime); *Kvočka* Trial Judgement, Para. 311 (in light of the discussion in Kvočka Appeal Judgement, paras 95-98). *See also* the language and examples in *Tadić* Appeal Judgement, para. 191 and in *Vasiljević* Appeal Judgement, para. 119. This was also the view expressed in the case Trial of *Feurstein and others*, by the Judge Advocate who stated that, in order to be found responsible, an accused "must be the cog in the wheel of events leading up to the result which in fact occurred." p. 7 (as quoted in

are concerned, the accused must both intend the commission of the crime and intend to participate in a common criminal plan aimed at its commission, and the Trial Chamber can only find that the accused has the intent if this is the only reasonable inference on the evidence.[26] A Trial Chamber has to be satisfied that an accused was bound together with the other participants in the overall enterprise by their *common will* to achieve the ultimate goal by all means necessary – i.e., by the crimes (the means) that must be committed on the road to an ultimate criminal purpose. The Trial Chamber has to be satisfied that the Accused's participation "must form a link in the chain of causation" to the crimes and the significance of this contribution to the purpose is relevant for determining whether such a link exists.[27]

15. Patently, "responsibility pursuant to JCE does require participation by the accused, which may take the form of assistance in, or contribution to, the execution of the common purpose." This is what distinguishes JCE liability from guilt by association.[28] Whilst, as indicated by the jurisprudence, "that, to be held responsible for a crime pursuant to a JCE, the Accused need not have performed any part of the *actus reus* of the perpetrated crime, they also require that the Accused participated in furthering the common purpose at the core of the JCE."[29] As noted by ICTY Appeal Chambers, "not every type of conduct would amount to a significant enough contribution to the crime for this to create criminal liability for the accused regarding the crime in question."[30]

16. It is only when this requirement, amongst others, is met that "the accused has done far more than merely associate with criminal persons. He has the intent to commit a crime, he has joined with others to achieve this goal, and he has made a significant contribution to the crime's commission. Pursuant to the jurisprudence, which reflects standards enshrined in customary international law, he is then appropriately held liable not only for his own contribution, but also for those actions of his fellow JCE members that further the crime (first category of JCE) or that are foreseeable consequences of the carrying out of this crime, if he has acted with *dolus eventualis* (JCE III)."[31]

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[26] *Ibid*, AC, Para. 429.
[27] *Blagojevic*, TC, Para. 702; *Brđanin* TC, Para. 263; *Milutinovic*, Para. 105.
[28] *Brđanin*, AC, Para. 425.
[29] *Ibid*, Para. 427.
[30] *Brđanin*, AC, Para. 427, quoting Tadić Appeal Judgement, para. 192 (considering that it would be wrong to disregard the role of "all those who in some way made it possible" to commit a crime); Kvočka Trial Judgement, para. 311 in light of the discussion in Kvočka Appeal Judgement, paras 95-98.
[31] *Brđanin*, AC, Para. 431.

17. In other words, if the common purpose of the JCE was, as found by the Chamber, to "pursue the objective to control Sierra Leone and its resources by displacing the elected government and its ECOMOG allies"[32] the Appellant's contribution to the JCE must be assessed against this goal. That this becomes the basis upon which Sesay's *criminal* responsibility is assessed is obviously absurd. Nonetheless this is the logical consequence of the "JCE" found by Trial Chamber I and now sought to be furthered by the Prosecution. According to this JCE, in order for Sesay to be responsible for the "common purpose crime" (taking over the country) and the crimes committed by others in pursuit of the purpose (means), his contribution to the taking over of the country must be found to be significant. Absurdly, it is this contribution and its assessment as "significant," that provides the basis for an assessment of his *shared* criminal intent (to pursue the criminal purpose) and which ultimately has made him responsible for the hundreds of heinous crimes committed along the way by hundreds of others.

18. A typical example of the type of analysis that must be conducted can be observed in the *Simić* case at the ICTY which reflects how contribution to means is utilised as a measure of contribution, significant or otherwise, to the overall purpose. In the *Simić* case, it was found that participants in the JCE acted in concert "to execute a plan that included the forcible takeover of the town of Bosanski Šamac ... and the persecution of non-Serb civilians."[33] This common plan was aimed at committing persecution against non-Serbs, and the means included acts of unlawful arrest and detention, cruel and inhumane treatment, including beatings, torture, forced labour assignments and confinement under inhumane conditions, deportations and forcible transfer.[34]

19. Simić and other members attended a meeting "to discuss the arrival of the paramilitaries" and meet again to plan the takeover. Following the takeover of the town, non-Serbs were arrested and detained by Serb police and paramilitaries and were subject to cruel and inhumane treatment, and interrogations. Several non-Serbs were further subjected to acts of deportation and forcible transfer.[35] The JCE members worked together to implement the persecution by

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[32] Prosecution Appeal 2.28.
[33] *Simić* TC Judgement, Para.987. Note also the dissenting view of Judge Liudhom, who, in addition to presenting a powerful criticism of JCE III, further adds: "Neither can I agree with the Majority that the takeover was planned and implemented with the purpose of persecuting the non-Serb population." *Prosecutor* v. *Simić et al.*, IT-95-9-T, Separate and partly Dissenting Opinion of Judge Per-Johan Lindholm, 17 October 2003, para.8.
[34] *Ibid*, TC, Para. 987.
[35] *Simić* TC Judgement, Para. 991.

these means.[36] *Simić* was, *inter alia*, found, through his knowledge of the eontinued arrests and detention of non-Serbs and his failure to take action to prevent these acts of persecution, to have "*shared the intent of the other participants in the joint criminal enterprise, executing the common plan of persecution and participated in this enterprise*."[37]

20. In relation to one of two JCE's alleged and found in *Krstić*, the Trial Chamber found that Krstić's role, in relation to the common purpose of the first, had been "significant." Krstić was aware of the likely mass displacement from Srebrenica and "subscribed" to creating the humanitarian disaster in Potočari.[38] Krstié also took an active role in the transfer of the displaced persons, and ordered the procurement of buses and supervised the transportation.[39] In relation to the seeond JCE, there was no evidence that Krstić was personally present at any of the execution sites.[40] Howevcr it was found that Krstić was certainly aware of the men who were separated from those transported away from Potočari, and was "kept fully informed" of developments relating to the capture of a column of men fleeing Srebrenica. The Chamber found that the Drina Corps rendered "substantial assistance" in the execution of the men,[41] and Krstić exercised effective control over the Drina Corps and "fulfilled a key co-ordinating role" in the implementation of the plan.[42]

21. This contribution was suffieient to leave the Trial Chamber satisfied that Krstić had intended to further the criminal purpose to transfer displaced persons from Potočari as "indisputably evidenced by his extensive participation in it."[43] Onee again, participation in the means being utilised to asscss both the Accused's contribution to the overall criminal purpose and the corresponding criminal intent.

22. In relation to the *Krajišnik* case, the common objectivc of the JCE was to ethnically recompose the territories targeted by the Bosnian-Serb leadership by drastically rcducing the proportion of Bosnian Muslims and Bosnian Croats through expulsion. The Trial Chamber judged that the crimes of deportation and forced transfer were the original crimes of this

[36] *Ibid*, Paras. 988-991.
[37] *Ibid*, Paras. 996-997; emphasis added.
[38] *Krstić*, Para. 615.
[39] *Ibid*, Para. 464.
[40] *Radislav Krstić*, "Srebrenica-Drina Corps" (IT-98-33), Case Information Sheet.
[41] *Krstić*, Para. 624.
[42] *Ibid*, Para. 644.
[43] *Krstić*, Para. 615.

eommon objective.[44] The Trial Chamber found that Krajišnik actively participated in the eriminal plan to expel non-Serbs forcibly, and gave the go-ahead for the expulsion programme to commenee.[45] "His positions within the Bosnian-Serb leadership gave him the authority to faeilitate the military, police, and paramilitary groups to implement the objective of the joint criminal enterprise."[46] The Trial Chamber found that he "not only participated in the implementation of the common objective but was one of the forces behind it."[47] His contribution to the JCE *inter alia,* was to (i) variously participate in policies designed to further the common objective; (ii) help establish and perpetuate the SDS party and state structures through which he could implement the common objective; (iii) disseminate information to Bosnian Serbs to win support for and partieipation in the common objective; (iv) direct, instigate, encourage and authorise political and military forces to further the common objective and (v) to deploy his political skills both locally and internationally to facilitate the implementation of the JCE's common objective through the crimes envisaged by that objeetive."[48]

23. The Accused's liability was found to be based upon his actions in *furtherance of the common objective* through *inter alia* participation in the means (the creation of governmental policies and institutions and the use of Serb forces to further this criminal objective).[49] Accordingly, after finding that Krajišnik had participated in the means it was found that he had significantly contributed to the purpose that it could thus be inferred that he had the "shared intent to secure the objective of forcibly removing non-Serbs from the targeted territory."[50]

24. The Prosecution's attempt to blur the distinction and the critical relationship between purpose and means must be resisted. It represents an attempt to "have" this so-called JCE but to avoid applying it fairly, thereby exposing its illogicality. The assessment required under Ground One is not, as sought to be argued by the Prosecution, reducible to the elaim that there "is no suggestion in the Trial Judgment that either group abandoned the purpose of taking power and control over the territory of Sierra Leone, or that either group abandoned the purpose of eommitting crimes as a means of furthering that purpose."[51] This is patently not the

[44] *Krajišnik*, Summary of Judgement, 27 September 2006.
[45] *Krajišnik* TC Judgement, Para. 1121.
[46] *Momcilo Krajišnik*, (IT-00-39), Case Information Sheet.
[47] *Krajišnik*, Para. 1119.
[48] *Ibid*, Para. 1121 aud 1120.
[49] *Ibid*, Paras. 7, 1121-1122.
[50] *Ibid*, Para. 1123.
[51] Prosecution Appeal, Para. 2.33.

assessment required.

25. The assessment required of the Accused's contribution to an *overall criminal purpose* is absent from the Prosecution's submissions and, accordingly, Ground One is tantamount to a request to the Appeals Chamber to supplement the Appellant's flawed convictions with additional findings of guilt by association.

Part Two: Proseeution Appeal: Paragraphs 2.153-2.161: 'Continued participation of Sesay' – lack of analysis

26. As indieated above the Prosecution at Paragraphs 2.153-2.161: 'Continued participation of Sesay,' fails to conduet the neeessary analysis. The Prosecution skirts around the essential issues and fails to identify the Trial Chamber's reasoning that support the required categorisation of Sesay's aets as a signifieant contribution to the taking of power and control of the eountry, post April 1998. Assuming – consistent with the Trial Chamber's finding and the Proseeution's adoption of it – that the taking of power and control was the shared crime, the Defence submits that the Prosecution submissions fail to (i) identify the findings in the judgment that provide this assessment and (ii) identify evidence that would allow an irresistible inferenee that Sesay's actions amounted to a significant contribution. Consequently the Prosecution have provided no assessment by which Sesay's criminal intent for the "crime" (or the underlying crimes in Freetown and the Western Area, Kono District, and Kailahun Distriet) might be eoncluded.

27. The Prosecution's reliance on the Trial Chamber's finding that, given Sesay's "position of power, authority, and influence including his role, rank and elose relationship and eooperation with Bockarie, Sesay contributed significantly to the JCE in the period up to the end of April 1998,"[52] is misplaeed. It is general assertion and lacks probative value, without reference to specified aets and conduct. As noted by the Trial Chamber in the previous paragraph of the Judgment these are "*considerations which are relevant in determining* whether [Sesay's] actions amounted to a significant contribution to the joint criminal enterprise."[53] These, without further explanation or reasoning, cannot stand as clarification of Sesay's contribution to any overall purpose, either pre- or post-April 1998.

28. As noted by the Prosecution in Paragraphs 2.154 and 2.155, the Trial Chamber made a

[52] Appeal, Para. 2.153.
[53] Judgment, Para. 1995.

finding that Sesay's conduct as regards the forced mining in Kono from December 1998 was a "significant contributory factor to the perpetration of enslavement" and was also a "substantial contribution to the planning of" the execution of the use of child soldiers. No relevant finding was made concerning the significance of this to the alleged overall AFRC/RUF purpose of taking over the country from 1996 to 2000 and consequently how this would enable intent for the *remainder* of the (other persons) crimes to be inferred.

29. The finding that Sesay was liable under Article 6(1) of the Statute for planning the use of persons under the age of 15 to participate in hostilities in Kailahun, Kono and Bombali Districts between 1997 and September 2000[54] is not a finding that this was a substantial contribution to the taking over of the country. None of these findings indicate the formulation or implementation of a shared common purpose with the AFRC post April 1998 or how these might have contributed to such purpose or how Sesay's intent for the *remainder* (other persons) crimes might be properly inferred.

30. In the section dealing with the 'Continued participation of Sesay' in the alleged ongoing post April 1998 JCE, there are but two references to Sesay's precise alleged contribution to the overall criminal purpose.[55]

31. In the first reference, at paragraph 2.156, the Prosecution inappropriately conflates means and purpose. It does not follow that because the "recruitment and use of child soldiers was found to be one of the criminal means to achieve the common purpose" that "Sesay's involvement in the crime consequently amounts to a substantial contribution to the fulfilment of the common purpose."

32. In the second reference at paragraph 2.160, the Prosecution fails to approach the issue fairly or logically. Plainly it does not follow that because the Chamber found that Sesay participated in "organising the availability of sufficient fighters for the RUF"[56] – and that this, *in combination with other acts*, amounted to a significant contribution to the common purpose[57] – that this provision of manpower will amount to a significant contribution to a criminal purpose that extends from April 1998 onwards through a myriad of events, including

[54] Judgment, Para. 2230.
[55] *See* Prosecution Appeal, Paras. 2.156 and 2.160.
[56] *See, e.g.*, Judgment, Para. 2000. The Prosecution reference paragraph 2101 which is a paragraph concerning Kallon. The Defence presume that the Prosecution intended to reference Para. 2000.

an attack on Freetown that was found to involve thousands of additional fighters. The Trial Chamber found that there were no RUF fighters involved in the January 6th invasion and only thirty low ranking RUF involved in the events that eneompassed the AFRC's actions in Koinadugu and Bombali.[58] Even, assuming for a moment that the Trial Chamber had found that Sesay's involvement with recruitment was on its own a significant contribution to a criminal purposc – which they did not – it is more than feasible that this 'significant contribution' would, with the passage of time, beeome much less significant and ultimately less than required for JCE responsibility.

33. In eonelusion, it is plain that the Prosecution was constrained to lapse into generalities when purportedly assessing Sesay's partieipation in any common plan. The Prosecution has been unable to state with particularity how the Appeals Chamber is expected to arrive at the *comparative* eonclusion that Sesay's acts had significantly contributed to the taking over of the eountry, whether pre or post April 1998.[59]

Part Three: Lack of comparative assessment of eontribution

34. The Prosecution's assertion, that "[h]owever in order to prove that Sesay continued to be a member of this eontinuing JCE in this period, there is no need to prove that he made a specific contribution to the Freetown operation" needs to be approached with a degree of eircumspection.[60] As noted above the Trial Chamber had to be satisfied that the accused participated in a common purpose and that this participation continued throughout the JCE:[61] "[t]his participation need not involve thc commission of a specific crime under one of the provisions (for example murder, extermination, torture, rape, *etcetera*), but may take the form of assistance in, or eontribution to, the execution of the common purpose."[62] The Trial Chamber did not have to be satisfied that the Accused's participation was necessary or substantial, but it had to be satisfied that it was a signifieant contribution.[63]

35. In other words, in the circumstances of taking control and powcr over Freetown and the magnitude of the January 6 events, it would not have been unreasonable for the Trial Chamber to have required proof of a significant contribution to those crimes. The Proseeution

[57] *See, e.g.*, Judgment, Paras. 1993-2002.
[58] Judgment, Para. 856.
[59] *See, e.g.*, Judgment, Paras. 1993-2002.
[60] Prosecution Appeal, Para. 2.159.
[61] *Stakic* Appeal Jndgement, Para. 64.
[62] *Tadic* Appeal Jndgement, Para. 227.

submission rests upon the erroneous conclusion that once an accused's contribution is assessed as significant it remains significant whatever the ensuing events. It is submitted that this is clearly not the case.

36. It may technieally be correct that it is not (always) necessary to prove that a particular Accused contributed to a particular operation, it may prove to be essential in a particular instance in order to be able to demonstrate the necessary nexus. In order to assess contribution a comparative analysis must be conducted: the larger the criminal event that is alleged the more direct participation in those events would be required for either the crimes to be imputed to the Accused and for appropriate inferences concerning intent to be reached.

37. The Accused must be must be a "cog in the wheel of events leading up to the result which in fact oecurred"[64] and "eoncerned in the commission" of the criminal offence and have "guilty knowledge" of the intended purpose of the erime.[65]

38. The Accused had to be shown to intend the underlying crimes committed in Freetown and the Western Area (the "means" directed to achievement of the eommon purpose).[66] It is difficult to see how the Accused's intent could be inferred for the thousands of crimes committed in Freetown and the Western Area unless a sizeable or significant eontribution was not demanded. As recognised at the ICTY – and ignored by the Prosecution – *mens rea* has to be assessed strictly and subjectively, recognising that "stretching notions of *mens rea* too thin may lead to the imposition of criminal liability on individuals for what is actually guilt by association."[67]

39. In all cases these assessments require as a first step that "the contours of the common criminal purpose have been properly defined in the indictment and are supported by the evidence beyond a reasonable doubt,"[68] which self evidently – given the multitude of factual events that were not pled in the indictment or Pre-Trial Brief[69] – was lacking from the RUF

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[63] *Brdanin* Appeal Judgemeut, Para. 430, citing *Kvocka et al.* Appeal Judgement, Paras. 97-98.
[64] *See* footnote 27
[65] *See* ECCC, *Prosecutor* v. *KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Prof. Dr. Cassese *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 28 October 2008, Para. 45 – 46..
[66] *Simić et al.*, "Bosanski Šamac" (IT-95-9), Case Information Sheet.
[67] *Prosecutor* v. *Dario Kordic & Mario Cerkez*, IT-95-14/2-T, Judgement (Trial Chamber), 26 February 2001, Para. 219.
[68] *Brdanin*, AC, Para. 424.
[69] *See* Sesay Defence Grounds of Appeal, Annex A.

case.

40. It is submitted – as is clear from Annex A of this Response – Sesay did not contribute to any of the AFRC crimes post April 1998, significantly or otherwise.

Preliminary Issue Five: No JCE III arises on the Chamber's findings

41. As argued above the Prosecution fail to follow through the logic of this "new" JCE. The refusal to apply it fairly and logically is an attempt to 'have' this JCE but not to apply it fairly and to avoid exposing its absurdity. It is trite law that JCE III rests upon proof of an agreement to commit a crime. The Prosecution fails to address how the common purpose identified by the Chamber and propounded by the Prosecution in Ground One could properly be the basis for an assessment of Sesay's subjective awareness that a further crime could arise or might be committed. The Prosecution fails to identify the crime that is the basis of the Aecuscd's alleged JCE III liability for events post April 1998.

42. As noted by Cassese:

> The third modc of responsibility concerns those participants who agree to the main goal of the eommon criminal design, for instanee, the foreible expulsion of civilians from an occupied territory, but do not share the intent that one or more members of the group entertain to also commit erimes incidental to the main eoneerted crime, for instance, killing or wounding some of the eivilians in the proeess of their expulsion. This mode of liability only arises if the partieipant, who did not have the intent to eommit the 'incidental' offence, was nevertheless in a position to foresee its eommission and willingly took the risk. A clear example in domestie criminal law of this mode of liability is that of a bank robbery where three or more people agree to rob the bank carrying guns. They have no intent to kill anyone and do not agree to kill (may even agree not to kill or that the guns are only to threaten). During the robbery one of them fires his weapon and kills a teller. In this scenario, all members of the JCE are liable for the killing because it was foreseeable that by carrying guns someone eould be killed (despite the absence of intent). The killing was an 'unintended' but foreseeable development. Another example is that of a gang of thugs who agree to rob a bank without killing anyone, and to this end agree to use fake weapons. In this group, however, one of the members seeretly takes real weapons with him to the bank with the intent to kill, if need be. Suppose another participant in the common criminal plan sees this gang member stealthily earrying those weapons. If the armed man then kills a teller or bank officer during the robbery, the one who saw him take the real weapons may be held liable for robbery and murder, like the killer and unlike the other robbers, who will only be liable for armed robbery. Indeed, he was in a position to expect with reasonable certainty that the robber who was armed with real weapons would use them to kill, if something went wrong during the robbery. Although he did not share the mens rea of the murderer, he foresaw the event and willingly took the risk that it might come about. Plainly, he could have told the other robbers that there was a serious danger of a murder being committed; eonsequently, he

could either have taken the weapons away from the armed robber, or withdrawn from the specific robbing expedition, or even dropped out from the gang. Arguably, for criminal liability under the third category of JCE to arise it is necessary for the crime outside the common plan to be abstractly in linc with the agreed-upon eriminal offence. In addition, it is also essential that the 'secondary offender' had a chancc of predicting the eommission of the un-concerted crime by the 'primary offender.'

For instance, if a paramilitary unit occupies a village with the purpose of detaining all the women and enslaving them, a rape perpetrated by one of them would be in line with enslavement, since treating other human beings as objects may easily lead to raping them. It would, however, also be necessary for the 'seeondary offender' to have specifically envisaged the possibility of rape (a circumstance that should be proved or at least inferred from the facts of the case) or, at least, to be in a position, under the 'man of reasonable prudence' test, to predict the rape. This mode of ineidental criminal liability based on foresight and risk is a mode of liability that is consequential on (and incidental to) a common criminal plan, that is, an agreement or plan by a multitude of pcrsons to engage in illegal eonduet. The 'extra crime' is the outgrowth of the common criminal purpose for which each participant is already responsible. This 'extra crime' is rendered possible by the prior joint planning to commit the agreed crime(s) other than the one 'incidentally' or 'additionally' perpetrated. There is a eausation link between the agreed-upon crime, the awareness in the seeondary offender that an extra offenee might be committed, his failure to prevent or stop it and the oecurring of such extra offence. The extra offence is predicated upon the agreed upon crime, and is made possible by the fact that the participant in the JCE who intends to perpetrate a further crime is not stopped by the partieipant who was cognizant of the likelihood that such further crime would be perpetrated (and did not abandon the primary criminal plan for fear that further crimes be eommitted). It follows that the eonduct of the secondary offender contributed in some significant way to the occurrence of the extra offence.[70]

43. It is plain from an analysis of the Proseeution arguments that they recognize the problem: that liability pursuant to JCE III relies, first and foremost, upon an assessment of an accused's agreement and eontribution to a erime, which allows an aeeused's JCE III liability to be thercaftcr assesscd. Accordingly thc Prosecution's analysis serupulously avoids going beyond a regurgitation of the legal statement that "[a]ll that is required is that the accused was a participant in the JCE, and the accused intended that crimes of the type in question would be committed in furtherance of the common purpose, or that it was a natural and foreseeable consequencc that crimes of the type would be eommitted in exeeution of the common purpose."[71]

44. The Prosecution also fail to identify how JCE III could arise when the Trial Chamber found that Counts 1-14 were all agreed by the JCE members as the means by which the purpose

[70] *See* ECCC, *Prosecutor* v. *KAING Guek Eav alias "Duch"*, 001/18-07-2007-ECCC/OCIJ (PTC 02), Prof. Dr. Cassese *Amicus Curiae* concerning Criminal Case File No. 001/18-07-2007-ECCC/OCIJ (PTC 02), 28 October 2008, Para. 26.

would be achieved. In this ease the crimes were not only foreseen but were intended by the Aceused.

45. The attempt by an international Prosecutor to increase the Accused's eonvictions and sentence whilst avoiding a fair applieation of the law is unfortunate. Moreover, a finding that Sesay was responsible for crimes post April 1998 that were foreseeable from a common purpose to take over the eountry will impermissibly blur the distinction between the use of force (*jus ad bellum*) and the law applicable in armed confliet (*jus in bello*) and effectively eriminalises aggression or rebellion and is impermissible under the Statute of the SCSL.[72]

SECTION II: NO JCE POST MARCH 1998

Lack of a plurality engaged in concerted action to commit a crime

April to August 1998

46. It is submitted that the Prosecution have failed to demonstrate "that the Trial Chamber erred in law and/or erred in fact in finding that the common plan, design or purpose/joint criminal enterprise between leading members of the AFRC/RUF ceased to exist some time in the end of April 1998."[73] It is submitted that the evidence could not support a finding that the plurality of persons identified, Sankoh, Bockarie, Sesay, Gbao, Superman, Eldred Collins, Mike Lamin, Isaac Mongor, Gibril Massaquoi, JPK, Gullit, Bazzy, Five-Five, SAJ Musa, Zagalo, Eddie Kanneh,[74] remained participants in a JCE after March 1998.

47. First, the Proseeution's submissions eoncerning the "rift" between the AFRC and RUF are based on an incomplete reading of the Judgment. The Trial Chamber held, on the basis of evidence adduced through Proseeution witnesses, that following the Intervention, relationships between the RUF and AFRC senior commanders deteriorated dramatically with the arrest of JPK, rumours of the rape of his wife, and the assault and detention of Gullit in

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[71] Prosecution Appeal, Para. 2.161.

[72] *Prosecutor* v. *Morris Kallon & Brima Kamara*, SCSL-2004-15-AR72(E), Decision on Challenge to Jurisdiction: Lomé Accord Amnesty, 13 March 2004, Para. 20. *See also*, M. Shaw, *International Law* (5th edition), 2003, p.1040.

[73] Prosecution Appeal, Para. 2.7.

[74] The Trial Chamber clearly did not iutcnd to include Zagalo and Eddie Kanneh in its enumeration of the JCE members – these two men had not at any time been alleged to be members of the JCE (Indictment, Para. 34).

Kailahun.[75] The Trial Chamber found that on Gullit's return to Koidu, "the relationship between the AFRC and RUF in Kono Distriet was fraetious" as a result of Kallon having exeeuted two AFRC fighters for holding muster parades on the grounds that only the RUF, as the one true fighting foree in Kono, had the right to assemble.[76] The Trial Chamber further found that "these tensions eoineided with sustained military pressure from ECOMOG on the RUF and AFRC positions."[77] The Trial Chamber found that "the rift between the two forees *erupted* after the Sewafe Bridge attack when Gullit disclosed to his troops that Boekarie had beaten him and seized his diamonds and that Johnny Paul Koroma was on RUF arrest."[78] In other words, the Trial Chamber did not limit its analysis to the issue of the ill treatment of JPK and Gullit in Kailahun, but attributed the rift to a relatively protracted and prolonged process, involving a number of causative factors, whieh were logieal and reasonable.

Ongoing Cooperation Post-Rift

48. The Prosecution's submissions eoneerning the AFRC and RUF's 'Cooperation in military operations';[79] 'Communieation between Gullit and the RUF';[80] and the 'Continued Cooperation between Superman and the RUF High Command'[81] represent the ambition of the Proseeution ease (eoncerning the existence of JCE following the departure of the AFRC from Kono) but not the evidence adduced or a reasonable interpretation thereof.

49. The Chamber made the following findings, which are not ehallenged by the Proseeution. The Prosecution do not challenge the finding that Sesay raped JPK wife (notwithstanding that it was reached on the basis of a single insider witness whose shockingly contradictory evidence placed the rape in two places, ten kilometres apart[82]); do not challenge the faet that JPK was under house arrest and held incommunicado; do not challenge the finding that Gullit was beaten up and detained in Kailahun;[83] and that the bulk of the AFRC did leave after the

[75] Judgment, Paras. 800-804.
[76] Judgment, Para. 817.
[77] Judgmeut, Para. 817.
[78] Judgment, Para. 819; emphasis added.
[79] Prosecution Appeal, Paras. 2.42-2.45.
[80] Prosecution Appeal, Paras. 2.46-2.50.
[81] Prosecution Appeal, Paras. 2.51-2.62.
[82] Judgment, Para. 801. On direct examiuation JPK's wife was raped near Buedu (Transcript/TF1-045, 21 November 2005, p. 56); ou cross-examination, she was raped near Kangama (Transcript/TF1-045, 24 November 2005, pp. 55). Further, the Defence notes that, as the Chamber cited to only TF1-045 for this finding, TF1-045's account is uncorroborated. As such, the Chamber did uot follow its own admonishmeut that "When TF1-045 gave testimony that related directly to the acts and conduct of the Accused, the Chamber has required corroboration of that evidence." Judgment, Para. 561.
[83] Judgment, Paras. 803-805.

Sewafe Bridge Operation (whether that departure was caused by the rape of JPK's wife and the assault on Gullit in Kailahun or by another occurrence.[84] Tellingly, the Prosecution offers no alternative reason to explain why Gullit and the AFRC would leave to join SAJ Musa.

50. Further, the Prosecution does not challenge the finding that Gullit traveled to SAJ Musa, that Musa had departed from the RUF in Febuary 1998, and had refused to have any relationship with the RUF.[85] Further, the Prosecution do not challenge that Gullit then took orders from SAJ Musa to open an AFRC defensive base in Bombali;[86] that the small number of RUF fighters were commanded by Gullit;[87] that the AFRC no longer received any arms and ammunition from the RUF and were, instead, forced to be self reliant;[88] and that Gullit was not in communication with the RUF High Command from March until August 1998.[89]

51. Moreover, based on the evidence of Prosecution witnesses TF1-360 and TF1-334, the Trial Chamber found that "Gullit decisively refused to accept Superman's attempt to re-impose cooperation, ignoring a directive from him to return to Kono District."[90] It is not known why the Prosecution led this evidence if it did not accept that it was true.

52. The Trial Chamber found, on the basis of TF1-334's testimony, that following the capture of their radio operator and the loss of the microphone, they were unable to transmit radio signals and were not in radio communication with SAJ Musa or the RUF High Command until after their arrival in Rosos in July or August 1998. It should be noted that it was the evidence of TF1-334 that the loss of the operator and microphone occurred at Mandaha just before the group settled at Rosos and before the bloody attacks on Karina and Mateboi.[91] No reasonable Tribunal could have concluded that these crimes fell within a common purpose between senior members of the AFRC and the RUF.

53. Further, George Johnson, a senior member of the AFRC, found by the Trial Chamber to be a "credible witness whose testimony was forthright and compelling in that he exhibited a

[84] Judgment, Paras. 800-804.
[85] Judgment, Paras. 792-793.
[86] Judgment, Para. 845.
[87] Judgment, Para. 846.
[88] Judgment, Para. 845.
[89] Judgment, Para. 848.
[90] Judgment, Para. 819, citing Transcript/TF1-360, 25 July 2005, p. 4 (CS); Exhibit 119, AFRC Transcript/TF1-334, 23 May 2005, pp. 41-42.
[91] AFRC Transcript/TF1-334, 23 May 2005, pp. 40, line 10 – pp. 42, line 3; and Sesay Defence Closing Brief, Paras. 956-959, 1048-1057, 1071, and 1080-1082.

convincing grasp of the events and did not testify about events beyond his knowledge"[92] testified that the group had no direct communieations with the RUF as it moved towards Rosos. He specifically stated that the group led by Gullit was not taking orders from the RUF, was not planning joint operations with the RUF and was not sharing information with the RUF.[93] It is not known why the Prosecution led this evidenee if it did not accept that it was true.

54. In other words, the Prosecution accept that the Trial Chamber was correct in finding that therc cxisted no funetioning relationship between any AFRC JCE member (notably Gullit, Bazzy, Five-Five, SAJ Musa and Zagalo[94]) and any RUF JCE member at any time between April and August 1998. The reason for this lack of relationship would appear to be irrelevant to the issue:[95] no reasonable Tribunal could have found that the plurality continued to function during this time and was engaged in concerted action of any kind, let alone action to commit crime.

55. It is trite law that a eommon objective alone is not always suffieient to determine a group, because different and independent groups may happen to share identical objeetives. It is the interaction or cooperation among persons – their joint action – in addition to their common objective that forges a group out of a mere plurality. In other words, the persons in a criminal cnterprise must be shown to act together, or in coneert with eaeh other, in the implcmentation of a common objective, if they are to share responsibility for erimes committed through the JCE.[96] In light of thc fact that the unchallenged findings demonstrate the eomplete severing of all relations between the AFRC JCE members and the RUF JCE members for up to three months, the Prosecution's claim that: the "only conclusion reasonably open to the Trial Chamber was that the RUF High Command sent Superman to SAJ Musa in order to ensure that the AFRC and RUF *continued* to act in eoncert with the aim of achieving their common goals"[97] must be wrong.

56. Moreover it is wholly beside the point. It was entirely lawful for senior AFRC and RUF

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[92] Judgment, Para. 558.
[93] Transcript/Johnson, 19 October 2004, pp. 47, line 11 – pp. 48, line 20.
[94] The Trial Chamber clearly did not intend to include Zagalo and Eddie Kanneh in its enumeration of the JCE members – these two men had not at any time been alleged to be members of the JCE (Indictment, Para. 34).
[95] Prosecution Appeal, Para. 2.46.
[96] *Haradinaj et al.* Trial Judgement, Para. 139, citing to *Krajisnik* Trial Judgement, Para. 884, and *Brdanin* Appeal Judgement, Paras. 410 and 430.
[97] Prosecution Appeal, Para. 2.62; emphasis added.

members to cooperate to act in eoncert, providing that this was not directed at furthering crimc. In these circumstanccs, the Prosecution have failed to demonstrate any error of law or fact in the Chambcr's overall finding of the extinction of the JCE at the time when the AFRC left Kono and through to August 1998.

August 1998 to December 1998

57. In light of the findings, illustrating the aforementioned prolonged severing of all communication and interaction, it was incumbent upon the Prosecution to demonstrate how a reasonable trier of fact would have been satisfied beyond a reasonable doubt that (i) the same (or essentially thc same) plurality was acting in concert to commit crime and (ii) that this relationship represented a resurrection of the previous JCE, not a wholly new enterprise.

58. Given the fact that SAJ Musa had withdrawn from the plurality and any eoncerted action since February 1998 and was in control of all of the AFRC troops in the North,[98] it was plainly open to a reasonable Tribunal to conclude, that this became an insuperable obstaele to any future concerted action.

Relationship with Gullit in Rosos

59. The Trial Chamber found that there was sporadic communication from Gullit to Boekarie and Sesay while Gullit was in Rosos but did not find that this eommunieation was sueh as to revive any joint criminal enterprise between thc two groups.[99] The Trial Chamber held that there was one radio eommunication between Gullit and Sesay in which Gullit told Sesay to have confidence in him and that they needed to eooperate. [100] No evidence was adduced as to Scsay's response or what this generalized greeting might have been intended to mean. The Trial Chamber also found that there was communication betwecn Boekarie and Gullit. Gullit explained why he had not been in contact and Bockarie indicated that "he was happy that the two sides, the RUF and SLA, were brothers."[101]

60. In light of the paucity of communication, even if Bockarie did (later) send a handful of RUF

[98] Judgment, Para. 845.
[99] Judgment, Paras. 848-850 and 1507-1508.
[100] Judgment, Para. 849.
[101] Judgment, para. 849.

men to reinforce the AFRC force at Rosos,[102] it was plainly open to a reasonable Tribunal to require more before drawing the conclusion that this represented cogent proof of concerted action to commit crime.

61. Further, the Prosecution's submission that "the only conclusion reasonably open to the Trial Chamber was that Bockarie sent the radio operators to reinforce the RUF/AFRC fighting force at Rosos"[103] must be approached with caution. It is not disputed that this *was* a reasonable inference. However, in light of the antipathy that had developed between Gullit and Bockarie and the RUF and the AFRC – as found by the Trial Chamber – there were competing inferences; one being that Bockarie sent them as informants.

62. Given that these groups were insurgents groups in which "there was continuous infighting, suspicion, mistrust, and rivalry,"[104] that Bockarie did not see fit to send a proper fighting force as "reinforcements" and that SAJ Musa upon his arrival to Gullit's location immediately presumed that they were spies for Bockarie,[105] it was not unreasonable for the Chamber to conclude that this was the underlying reason.

63. Moreover, even if the Chamber did err and the only conclusion open to the Chamber was that Bockarie sent the radio operators as reinforcements, this would appear to be legally insignificant. The Trial Chamber had to be satisfied that such "reinforeements" represented concerted action by the plurality in furtherance of crime. Putting aside the absence of any detail as to the content of the communications sent by Gullit, it is evident that SAJ Musa was in command of the forces and remained diametrically opposed to any agreement or cooperation with the RUF.

Relationship with Gullit in Major Eddie Town

64. Two months later – in September or October 1998 – the AFRC forces under Gullit moved to the location they named "Major Eddie Town" as a result of ECOMOG's aerial bombardment of Rosos. The Trial Chamber found, based on the evidence of TF1-360, that whilst at Major

[102] Prosecution Appeal, Para. 2.50.
[103] Prosecution Appeal, Para. 2.50.
[104] Judgment, Para, 608.
[105] Judgment, Para. 856.

Eddie town, Gullit communicated with SAJ Musa, Superman and Bockarie.[106] TF1-360 did not give evidence about the content of these communications. No reasonable Tribunal could have found this probative of the continuation of a criminal purpose. The evidence was barely relevant to the charges being prosecuted.

65. The Prosecution does not challenge the findings that: (i) communication between Gullit and any other senior member of the RUF was restricted as aforementioned; (ii) that the AFRC (or STF) forces were not under the effective control of Bockarie or the High Command of the RUF;[107] and (iii) that Gullit did not receive any substantial assistance from the RUF during this time.[108] No reasonable Tribunal could have concluded that this limited interaction (and reporting of activities, criminal or otherwise) was sufficient to be satisfied that the same AFRC/RUF plurality as pre-April 1998 were engaged in concerted action in furtherance of crime.

Continued cooperation between Superman and the RUF High Command?[109]

66. The Prosecution appears to contend that any cooperation between Superman and the RUF High Command following Superman leaving Kono and joining SAJ Musa is significant proof that the "AFRC and RUF continued to act in concert with the aim of achieving their common goals."[110] This submission is misconceived for the following reasons.

(i) One week only

67. First, the Prosecution curiously omits to mention the critical piece of evidence given by TF1-361, namely that whatever the nature of the ongoing collaboration between Superman in the Koinadugu and Bockarie in Kailahun, it lasted for only one week before the two men argued and fell out, leading to Bockarie sending a message out to all RUF stations that from henceforth Superman was no longer a part of the RUF.[111] In cross-examination, TF1-361 confirmed this and stated that this occurred at the end of the second week that Superman was in Koinadugu. He testified:

Q. And what you said … was that the message from Sam Bockarie was, in effect,

[106] Judgment, Para. 850.
[107] Judgment, Para. 1508.
[108] As found by the Trial Chamber; Judgment, Para. 1508.
[109] Prosecution Appeal, Paras. 2.51-2.62.
[110] Prosecution Appeal, Para. 2.62.
[111] Transcript/TF1-361, 12 July 2005, pp. 56, line 21 – pp. 57, line 6.

that Superman was no longer part of the RUF; is that right?
A. Yes, that was the last message.
Q. And the operations Superman then conducted were conducted along with SAJ and Brigadier Mani until later on in the year 1998. Is that correct?
A. Yes.
Q. Now, do you know why -- before I ask you this, was this common knowledge amongst the RUF men that Sam Bockarie had cut off communication?
A. No, it was instructions given to all the stations informing them that if anyone is caught talking to Superman's station it means that particular person is a collaborator.
Q. And would be punished by death; was that the threat?
A. Yes.[112]

68. TF1-361 confirmed that Superman was ordered to go to Buedu but refused as he believed that Bockarie would kill him.[113] At its highest, therefore, TF1-361's evidence, if reliable, shows communication between Superman in Koinadugu and Bockarie and Sesay in Kailahun for one week. As implicitly acknowledged by the omission of this significant evidence from the Prosecution's arguments, this undermines any residual inferenee that Superman's journey north amounted to the resurrection of any former common purpose or the commencement of another.

(ii) SAJ Musa's Ongoing Hostility towards the RUF

69. The argument that the only reasonable conclusion was that "SAJ Musa also worked in coneert with the RUF High Command"[114] is equally, if not more, fanciful. The Trial Chamber found that prior to the taking of Koidu by the retreating forces, a rift developed between SAJ Musa and the forees moving to Kono; SAJ Musa decided to establish his own base in Koinadugu district.[115] In particular the Trial Chamber noted that SAJ Musa was unwilling to subordinate himself to RUF command and refused to take orders from Boekarie and Sesay.[116] In reaching this conclusion, thc Trial Chamber cited two *Prosecution* witnesscs: George Johnson and TF1-184.

70. Johnson described a meeting in Kabala taking place following the taking of Makeni but prior to the attack on Kono in February 1998:

> In the meeting there was a tussle between SAJ Musa and Denis Mingo aka Superman that the troops should move to Kono as one, but SAJ Musa refused that order, that he's a

[112] Transcript/TF1-361, 18 July 2005, pp. 39, lines 4-29.
[113] Transcript/TF1-361, 18 July 2005, pp. 40, lines 5-28.
[114] Prosecution Appeal, Para. 2.52.
[115] Judgment, Paras. 792-793.
[116] Judgment, Para. 792.

soldier and he will never [inaudible] himself under the Revolutionary United Front. So he's going further to the north to Kurubonla to open his own jungle.[117]

71. Prosecution witness, TF1-184 stated that when JPK sent soldiers with a message that the SLAs should from henceforth be answerable to the RUF, SAJ Musa "said he would not be answerable, that that was a great mistake for him to answer to the RUF."[118] In cross-examination, TF1-184 eonfirmed that Korpomeh arrived in SAJ Musa's location in Mareh 1998 and refused to take instructions from SAJ Musa or surrender his and his men's weapons to TF1-184. SAJ Musa instructed TF1-184 to arrest Korpomeh and his men and TF1-184 arrestcd five of them. As they resisted all but Korpomeh, who eseaped, were executed. Following the exeeutions, SAJ Musa ordered a strong defensive to be set up in case of an RUF retaliatory attack.[119] It is not known why the Proseeution led this evidenee if it did not aecept that it was true.

72. A third Prosecution witness, TF1-071, stated in the course of his evidenee,

> A. There have always been the problem of SAJ Musa not subordinating to Sam Boekarie, cause that was the problem between he and Sam Bockarie.
> Q. Do you know why that was?
> A. Yeah, from the initial stage, before even getting the bush, SAJ Musa said he was not going to become, let me just say, a jungle fighter. So he created his own division, that was he went by Koinadugu axis.[120]

73. The Prosecution adduced *no* evidence at trial of any communieations between SAJ Musa's group in Koinadugu and any member of the RUF prior to Gullit's move to Koinadugu. Indeed, TF1-036, an RUF insider close to Bockarie in Buedu in 1998,, stated that SAJ Musa, Brigadier Mani and the fighters based in Koinadugu "were on a different operation.... Mosquito tried to talk to them over the radio, to talk to SAJ Musa, that we should come together, but SAJ Musa refused. So they were on their own."[121] No reasonable Tribunal could therefore have found that SAJ Musa worked in eoncert with Bockarie at any time after the intervention.

74. The Prosecution's reliance on TF1-184 to support the Prosecution's submission that the evidence shows that there was contact between the AFRC and the RUF in Kailahun

[117] Transcript/Johnson, 14 October 2004, pp. 57, line 14 – pp. 59, line 7.
[118] Transeript/TF1-184, 5 December 2005, pp. 88, line 7 – pp. 89, line 19.
[119] Transcript/TF1-184, 6 December 2005, pp. 25, line 4 – pp. 28, line 1.
[120] Transcript/TF1-071, 25 January 2005, pp. 59, line 20 – pp. 60, linc 1.
[121] Transcript/TF1-036, 28 July 2005, pp. 43, lines 10-25.

misrepresents the thrust and tenor of the evidence[122] and is wholly misplaced. The Proseeution omits to mention the additional evidence provided by TF1-184, who, when cross-examined, agreed that upon arrival at SAJ Musa's location Superman and about 20 SLA and RUF were captured in an ambush and brought to SAJ Musa. There, Superman admitted to having instructions to take SAJ Musa to Kailahun. SAJ Musa declined the "invitation" and then ordered that Superman not be allowed to leave. It was after this, according to TF1-184, that Superman became subordinated to SAJ Musa's direct command (although this was qualified later inasmueh as TF1-184 defined this period as the time that SAJ Musa and Superman worked together).[123] In other words, this evidence was further proof of the entrenched hostility SAJ Musa maintained for any dealings with Bockarie's RUF.

(iii) The Training Base

75. The Prosecution submits – again relying solely on the evidenee of TF1-361 – that it was significant that "Superman and SAJ Musa consulted Bockarie" over the radio about the setting up of a training base in Koinadugu.[124] First, this evidenee was uncorroborated by any other witness. Second, it was contradicted by TF1-361's own testimony, that there was no communication between Superman and Bockarie after the first week in Koinadugu.[125]

76. It is not unreasonable that the Trial Chamber chose not to rely on the uncorroborated and internally contradictory account of TF1-361. The evidence was absurdly implausible. As noted above SAJ Musa had vowed not to work with Bockarie and the evidence showed that this hostility remained. The notion that both Superman and SAJ Musa compliantly "consulted" Bockarie was eorrectly recognised as ridiculous. Given the weight of evidence to the contrary, no reasonable trier of faet could have concluded otherwise.

TF1-361

77. As is plain from the Prosecution's arguments, the submission that "Superman, in joining SAJ Musa in Koinadugu District, continued to work in eoncert with SAJ Musa and the RUF High Command, during this time, SAJ Musa also worked in coneert with the RUF High Command"[126] rests in large part on the evidence of TF1-361. As submitted previously – *see*

[122] Prosecution Appeal, Para. 2.56.
[123] Transeript/TF1-184, 6 December 2005, pp. 24, line 5; and pp. 29, linc 1 – pp. 30, line 3.
[124] Prosecution Appeal Brief, para. 2.60
[125] Transcript/TF1-361, 12 July 2005, pp. 56-57.
[126] Prosecution Appeal, Para. 2.52.

Sesay Defence Closing Brief[127] – the witness was wildly inconsistent in providing evidence concerning ongoing collaboration between Superman and Bockarie or Sesay. No reasonable Tribunal could have relied upon the evidence given by this witness to draw adverse inferences against the Accused.

78. Moreover, no other witnesses save for TF1-361 gave evidenee of communications between Superman and Bockarie during the time that Superman was in Koinadugu. The absence of any corroborating evidence was notable given that TF1-036 (one of Bockarie's right hand men), TF1-371 (a senior RUF commander), and TF1-360 (another radio operator), all testified about radio communication between the RUF and AFRC and none recalled this so-called critical ongoing cooperation. No reasonable Tribunal could have inferred from TF1-361's uncorroborated, contradictory evidence that Superman remained cooperating, for one week or otherwise.

(iv) Ammunition

79. The Prosecution further assert, again based on the testimony of TF1-361, that Boekarie sent ammunition with Superman to SAJ Musa in Koinadugu.[128] The Prosecution, on the basis of TF1-361, submits that Gullit via SAJ Musa asked Bockarie to send ammunition to him in Rosos and that Bockarie did so with a Commander named Jin Gbandeh.[129] Again this submission rests upon the uncorroborated testimony of TF1-361 and, again, it contradicted all other available evidence.

80. It is, however, worth noting that TF1-361 stated that by the time Jin Gbandeh arrived, Bockarie and Superman were no longer communicating and therefore the alleged ammunition must have been used by Superman, SAJ Musa and General Bropleh who were no longer in contact with the RUF in Kono and Kailahun.[130] It is difficult to see how a reasonable tricr of fact could have concluded that this alleged delivery was probative of an ongoing criminal purpose or assessed that it was used to further such a purpose.

(v) Insignificant Cooperation and non-contribution to crime

81. Finally, the evidenee and findings relied upon by the Prosecution to demonstrate that the two

[127] Sesay Defence Closing Brief, Paras. 1020-1023 and 1030-1034.
[128] Prosecution Appeal, Para. 2.57
[129] Prosecution Appeal, Para. 2.59
[130] Transcript/TF1-361, 18 July 2005, pp. 43, lines 6-26.

groups (Superman's/SAJ Musa's and Bockarie's) worked together to achieve common goals cannot be presumed to be evidence of concerted action to commit crime. The evidence of communication: that Superman communicated with the RUF High Command in this period (e.g., "For instance, he informed Bockarie and Sesay of the attack on Kabala via the radio"[131]) has almost negligible probative value. Equally, aetions such as the fact that four radio operators were found to have been sent by Bockarie (whether as reinforcements or otherwise),[132] take the matter no further.

82. Even if reliable, the evidence given by TF1-361 that Superman was sent ammunition by Bockarie before leaving to go North lacks probative value. It is not unlawful for a military group to send ammunition, even though this would appear to be the consequence of the Trial Chamber's finding that the taking power and control of the eountry is criminal. As noted by the Prosecution, according to TF1-361, upon arriving at SAJ Musa's base, "Bockarie responded that Superman's group should earry on with the plan, which was to attack the Koinadugu Headquarters."[133] In other words, aceording to TF1-361 the plan related to a military operation and was not in furtherance of crime.

83. Whilst the aforementioned evidence, and that which was similar, might have assisted in proseeuting rebellion and imputing guilt by assoeiation, they remain almost wholly irrelevant to the issues that ought to have been at the forefront of the Trial Chamber's mind.

No Cooperation Between the AFRC and RUF in the January 1999 Invasion

84. The Prosecution's submissions in paragraphs 2.63 to 2.86 concerning the 6th January 1999 are plainly miseonceived. Even if accepted, the submissions do not identify any discernible error that would provide the basis for a conclusion that there was an ongoing criminal purpose between the original JCE members.

85. Conversely, the Prosecution's principle submissions that: (i) it was significant that the reason that the AFRC decided not to wait for RUF reinforcements was "not found to emanate from any lasting rift with the RUF";[134] (ii) "that Bockarie intended that the RUF would not miss out on participating in the capture of Freetown";[135] (iii) that "Gullit acted in concert with

[131] Prosecution Appeal, Para. 2.53.
[132] Prosecution Appeal, Para. 2.54.
[133] Prosecution Appeal, Para. 2.58.
[134] Prosecution Appeal, Para. 2.72.
[135] Prosecution Appeal, Para. 2.77.

Bockarie to achieve the result of burning the eentral part of Freetown";[136] (iv) that "Bockarie eontinued to act in eoncert with the AFRC Commanders leading the attack on Freetown";[137] (v) that "Gullit intended to eooperate with the RUF in the attack on Freetown and that it was only logistical constraints and opposing military pressure that prevented the AFRC from waiting for the promised RUF support";[138] (vi) that the RUF may have been "an evident cause of the AFRC retreat from Freetown being facilitated";[139] (vii) that "at the level of AFRC/RUF commanders the two were working together to make a second attempt to eapture Freetown";[140] and (viii) that the plan to "reinstate the army" was SAJ Musa's only[141] are legally and faetually insignificant. Even if accepted they would represent poor reasons to conclude that the Accused ought to be held responsible for the hundreds, if not thousands of erimes, committed by the AFRC.

86. First, as the Prosecution submissions implicitly acknowledge, there was no interaction bctween the alleged JCE members of the AFRC and the RUF in the preparation for the attack on Freetown. The Prosecution do not challengc thc fact that from October 1998 through to his death in late Deeember 1998, SAJ Musa refused to allow any communication with Superman in Koinadugu or Bockarie in Buedu.[142] This would appcar to further undcrmine the proposition that a JCE continued throughout the year. The Prosecution fails to address the legal significance of this non-communication.

87. Whilst the Prosecution is correct that "the fact that members of a JCE have disagreements, or even strong personal rivalries, does not prevent them from sharing a common criminal purposc and from each contributing substantially to the realization of that purposc"[143] and that this can be the case, even "if they have their own separate motives"[144] therc would appcar to bc a minimal rcquircmcnt, evcn on this absurdly large, nebulous and impermissible JCE, that the JCE members actually talked to cach other occasionally and that this was in furtheranee of the crimes in Frectown and the Western Area.

88. The Prosecution's submissions at Paragraphs 2.63-2.86 fail to demonstrate that this would

[136] Prosecution Appeal, Para. 2.77.
[137] Prosecution Appeal, Para. 2.77.
[138] Prosecution Appeal, Para. 2.79.
[139] Prosecution Appeal, Para. 2.85.
[140] Proscculion Appeal, Para. 2.86
[141] Prosecution Appeal, Paras. 2.87-2.93.
[142] Judgment, Para. 856.
[143] Prosecution Appeal, Para. 2.94.

have been a reasonable conclusion on the evidence. According to the Prosecution's submissions, the closest that the evidence came to suggesting such an agreement was that "Gullit acted in concert with Bockarie to achieve the result of burning the central parts of Freetown." Putting the unreasonableness of this assertion to one side for the moment,(see paragraph 101 below), the Trial Chamber had to be satisfied that there was a sufficient degree of interaction and cooperation between the two rebel forces and that this amounted to group action to commit crime – this is what forges a group out of a mere plurality."[145]

89. Even if it is accepted that, the "only reasonable conclusion open to the Trial Chamber on the basis of the evidence as a whole was that Gullit intended to cooperate with the RUF on the attack on Freetown and that it was only logistical constraints and opposing military pressure that prevented the AFRC from waiting"[146] and that "Bockarie intended that the RUF would not miss out on participating in the capture of Freetown"[147] these intentions are probative of little, except perhaps a conspiracy: without acts in furtherance of crime they would appear not to take the Prosecution's submissions very far.

90. Further, the proposition that there was concerted action and therefore a JCE and that it continued from April 1998 and extended to the events surrounding January 6 1999 was further undermined as outlined below.

Cooperation between Superman and the RUF High Command

91. The Prosecution adduced no evidence of any communications between Superman and the RUF High Command from August 1998, when Bockarie forbade the RUF from communicating with Superman, to mid-December 1998 following the capture of Koidu in an attack led by Sesay.

92. It was not contested that Superman's forces were a part of the 23 December 1998 attack on Makeni.[148] It is clear however that whatever limited cooperation took place between Superman's force and Sesay's force was short-lived, ending prior to January 6th 1999. The Trial Chamber found that "the RUF troops in Makeni remained divided" with Superman

[144] Appeal, Para. 2.94.
[145] *Haradinaj et al.* Trial Judgement, Para. 139, citing to *Krajisnik* Trial Judgement, Para. 884, and *Brdanin* Appeal Judgement, Paras. 410 and 430.
[146] Appeal, Para. 2.79.
[147] Appeal, Para. 82.

retaining a discrete group of loyal fighters around him.[149] This is not challenged by the Prosecution.

93. Within one week, on 28 December 1998, Superman fled from Makeni after Bockarie ordered his arrest after claims were made that Superman had taken ammunition from the RUF store in Makeni.[150] Superman was convinced to return briefly but by the second week of January 1999 had set up his own base in Lunsar from where he launched attacks on the RUF in Makeni in early March 1999. No reasonable Tribunal could have found Sesay remained in a plan with Superman to commit crime in Freetown and the Western Area on or following 6 January 1999.

No cooperation between the AFRC and RUF leading up to the Freetown invasion

94. There was no evidence adduced of communications between the AFRC under SAJ Musa and the RUF, either under Bockarie or under Superman, during the time that the RUF, led by Sesay, captured Koidu on or about 16 December 1998 or Makeni on or about 23 December 1998.

95. As found by the Trial Chamber, following SAJ Musa's death, Gullit assumed control of the fighting forces, now in the Western Area. The Trial Chamber found that immediately prior to the invasion of Freetown, Gullit contacted Bockarie only twice. The first communication informed Bockarie of Musa's death and requested reinforcements. Bockarie believed the call to be a ruse and accused Gullit of trying to trick him.[151]

96. The second communication took place on 5 January 1999 when Gullit requested ammunition and reinforcements from Bockarie. Bockarie said that the plan was foolish but agreed to send reinforcements if the AFRC fighters postponed their attack. The fighters under Gullit delayed for one day but impatience and the pressure of Kamajor attacks led to their advance before any assistance from the RUF arrived.[152]

97. The Trial Chamber also found that, notwithstanding Bockarie's representations to Gullit,

[148] Appeal, Para. 2.64.
[149] Judgment, Para. 873.
[150] Judgment, Para. 890.
[151] Judgment, Para. 875.
[152] Judgment, Para. 876.

Boekarie did not immediately order the deployment of RUF troops. When the AFRC eommeneed their attaek on Freetown regardless, Boekarie regarded their failure to wait for reinforeements as evidenee that Gullit had lied to him and that SAJ Musa was in fact still alive.[153] No reasonable trier of faet could have coneluded that these minimal and unsatisfactory communications were sufficient to revive a pre-existing eommon plan or to signal the creation of a new common plan (which had not, in any event, been pleaded by the Prosecution).

No cooperation bctween the AFRC and RUF during the Freetown invasion

98. The Trial Chamber found that the AFRC under Gullit advanced quiekly into Freetown on the morning of 6 January 1999, eapturing the State House by 7:30am.[154] The AFRC held the centre of Freetown for approximately three days before eommencing their retreat on 9 January 1999.[155]

99. The Trial Chamber found that there was no genuine understanding and eooperation between the RUF and AFRC over the military reinforeement during the attack on Freetown. While the Trial Chamber found that there had been limited eommunication between Bockarie and Gullit during the time that the AFRC held State House, Gullit initiated the eommunication after ECOMOG had eneireled him.[156] The Prosecution omitted to reference (or challenge) the finding that Bockarie terminated this eommunication as he believed that Gullit had not taken his advice and advaneed to Freetown without waiting for reinforcements.[157]

100. The Trial Chamber's finding that Bockarie's statements over the international media "intended to overstate his actual role in the Freetown attack"[158] was eminently reasonable given that Sankoh was still being held by the Sierra Leonean government, the poor relationship that existed between the AFRC and the RUF, the laek of cooperation between the two and the faet that, on the evidenee adduced by Prosecution witnesses, the fighters in Freetown did not consider themselves subordinate to Bockarie. The fact that Bockarie was not present nor were any of the men under his command would appear to be dispositive proof of this exaggeration!

[153] Judgment, Para. 889.
[154] Judgment, Para. 879.
[155] Judgment, Para. 884.
[156] Judgment, Para. 2198.
[157] Judgment, Para. 2198.

101. While the Trial Chamber found that Boekarie had advised Gullit, just before the AFRC forees had started to retreat from eentral Freetown, to burn the key buildings (ineluding government buildings), the Trial Chamber also found that Gullit informed Boekarie that those loeations had already been burnt.[159] This finding is not ehallenged by the Prosecution.

102. Further, it would appear entirely implausible that this "advice" was heeded or needed. The Trial Chamber took into aecount, in reaehing it findings that these erimes had already been eontemplated and eommitted by the AFRC forees and that from their movement through Koinadugu and Bombali Districts up to Freetown, the AFRC forces beeame notorious for the eommission of the most brutal and horrendous crimes without any evidenee of any communieation or cooperation with the RUF. There was no dispute that the crimes that were eommitted in Freetown, including all the signifieant burning, oecurred before any "adviee" from Bockarie. This evidence was adduced by the Prosecution in support of their case and was not challenged by the Defenee.[160] It is not known why the Proseeution led this evidenee if it did not aeeept that it was true. No reasonable Tribunal would have eoneluded that there was a nexus between these Freetown crimes and any advice given or agreement formed with Bockarie.

No cooperation between the AFRC and RUF during the retreat

103. On 9 January 1999, the AFRC forces under Gullit began to retreat from eentral Freetown eastwards. The Trial Chamber found that there was sporadic communieation between Bockarie and Gullit with Gullit requesting reinforcements. The Trial Chamber found that no sueh reinforcements entered Freetown save for approximately 20 men under the eommand of an SLA, Red Goat Rambo who crossed into Freetown in contravention of orders given by Morris Kallon that no fighter should enter Freetown.[161] It is submitted therefore that Red Goat Rambo entered Freetown of his own accord, and in violation of orders of RUF Commanders. His crossing into Freetown therefore did not signal eooperation by the RUF with Gullit's forces, rather the converse. No reasonable Tribunal could have concludcd otherwise.

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[158] Judgment, Para. 2198.
[159] Judgment, Para. 2199.
[160] Sesay Defence Closing Brief, Paras. 1122-1138 and 1148-1150.

104. While the Trial Chamber found there had been sporadic communication between Bockarie and Gullit during the retreat, the Chamber noted that no RUF reinforcements ever arrived in Freetown and that it was unclear whether the RUF fighters who proceeded to Waterloo were unable or unwilling to break through the ECOMOG forces in order to move into Freetown.[162] Notwithstanding, as the Trial Chamber found, "Gullit contacted Bockarie and informed him that the AFRC had lost control of Freetown, that as yet no reinforcements had arrived from the RUF and that they were trying to retreat to Waterloo."[163] It was reasonable for the Chamber to conclude from this finding alone that one of the reasons that the AFRC failed in their mission to capture Freetown was due to the *lack* of concerted action of any kind between the AFRC and RUF senior commanders.

RUF not assisting the AFRC to retreat

105. The Prosecution's submissions – that the RUF's dispatch of Superman in order to open an escape route for the retreating fighters was "an evident cause of the AFRC retreat from Freetown being facilitated"[164] – appear to disregard the clearest finding of fact by the Chamber. The Trial Chamber found that it was not the RUF that opened the escape route for the trapped AFRC troops, but that the brief removal of the ECOMOG troops eventually led to a corridor that allowed the AFRC troops to eventually retreat to Waterloo.[165]

Unreasonable Reliance on the Testimony of Sesay

106. The Prosecution fails to pursue this argument and it is clearly irrelevant.[166] As it obvious from the points outlined above, there was powerful *Prosecution* evidence that demonstrated beyond a reasonable doubt that there was negligible coordination between the AFRC and RUF concerning the events surrounding the January 6 attack on Freetown. This argument ought not to be allowed to detract from the fact that the Prosecution's attempt to hold the Accused responsible for the Freetown and Western Area crimes relies first and foremost on denigrating the evidence that they chose to lead through their own insider witnesses and the reasonable conclusions reached upon that evidence.

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[161] Judgment, Paras. 855 and 2201.
[162] Judgment, Para. 884.
[163] Judgment, Para. 888.
[164] Appeal, Para. 2.85.
[165] Judgment, Para. 2204; *see also* Transcript/TF1-036, 28 July 2005, p. 65.
[166] Appeal, Para. 2.127 – 2.129.

The Alleged Continuing Pattern of Crimes

107. The Prosecution submissions concerning the "continuing pattern of crimes" are wholly lacking in merit. First, the submissions identifying a "pattern" in the crimes are misdirected. It is not sufficient to identify a pattern which merely establishes "that even after April 1998, the pattern of crimes eommitted by both AFRC and RUF forces continued to be the same"[167] or that the pattern demonstrates that the "means used to achieve the goal of capturing Freetown and eontrolling the seat of power continued to inelude the same criminal means."[168] The pattern must be such that it leads to the irresistible conclusion that the two rebel forces were implementing their actions according to a common plan,[169] and that these crimes could not have been the result of either the acts of violence of the AFRC committed at the direction of the senior eommanders, or individual aets of violence, or those that occurred randomly – that is, without any explieit or implicit agreement by the RUF.[170]

108. The Prosecution has to demonstrate that no reasonable trier of fact could have concluded that the AFRC eommanders and their troops were acting criminally as a result of *their* own plan, rather than a plan with the RUF, who had been ostensibly separate for nearly one year. This was clearly an alternative and the more reasonable inferenee.

109. Secondly, the Prosecution's attempt to identify any pattern is demonstrably weak and unconvincing. It is plainly insufficient to simply regurgitate findings that demonstrate that some members of the AFRC and the RUF were eommitting "all manner of crimes" from 1996 to 2000[171] and, thereafter, to claim that "all manner of crimes" committed by the AFRC in Freetown and the Western Area during the 6th January 1999 invasion illustrates a continuing pattern. The Proseeution analysis amounts to this: that the indietment eharges practically every single form of erime imaginable; that the evidence showed that some of the members of the AFRC and the RUF were committing this vast range of erimes and that members of the AFRC were equally as brutal in Freetown and the Western Area as some RUF and AFRC had been elsewhere.

110. Thc fact that the crimes committed by members of the AFRC and RUF were found to be "a

[167] Prosecution Appeal, Para. 2.40
[168] Prosecution Appeal, Para. 2.130.
[169] As argued in the Defence Grounds of Appeal, this plan must have been a plan to terrorise and collective punish in order to take power and control over the country: see Ground 24.
[170] *See, e.g.*, the analysis conducted by the *Milutinovic* TC, Volume 3.

fundamental feature of the war effort, utilised amongst other purposes to punish those who provided support for the CDF/ECOMOG" is reason enough for the Trial Chamber to be circumspect and not leap to eonelusions about it being direeted and instigated from a plan in the senior ranks. As argued in the Defence Appeal - see Ground 24 – terror is a weapon used by all warring parties and, it should be added, unfortunately, so is the (exeessive and unfair) punishment of suspected enemy supporters and collaborators. The reeording of these erimes do not amount to the identification of a pattern.

111. The paucity of the patterns identified by the Proseeution further undermines the suggestion that the Trial Chamber erred. Contrary to the Proseeution's submissions three incidents of burning of Koidu in February/March of 1998 and burning of key buildings in Freetown almost a year later do not make a pattern.[172] The fact that eombatants in a war regularly pillage would appear to be more probative of individual expedience and greed, rather than a plan. [173] The fact that looting and forced labour oceur during violent attacks on civilian populations is unsurprising and occurs in all wars: it is not without more probative of any pre-planning, explieit or otherwise.

112. Further, the reliance on the Fita Fatta Mission in August 1998 and the RUF attack to recapturc Kono District in December 1998, as contrasted with the crimes in Freetown in 1999, would appear, at best, to be evidence of the repctition of crimes against eivilians, rather than amounting to a pattern from which an inference of concerted aetion between the AFRC and the RUF could be discerned. Conversely, as the Trial Chamber found, the evidence contained multiple examples of operations staged by AFRC/RUF forces pursuant to pre-conceived plans or policies which were given particular names and directed at specific objectives, for example Operation Pay Yourself.[174] The faet that the Chamber did not find that the Freetown invasion (or any of the AFRC sole operations) was similarly named would appear to be further evidence of the lack of concerted action.

Alleged Incorrect Application of Legal Principles

113. The Prosecution's submissions are misconceived. As is obvious from the above submissions, thc Trial Chamber did not appear "to base its conelusion that the Aecused could not be held

[171] Prosecution Appeal, Para. 2.131-2.132.
[172] Prosecution Appeal, Paras. 2.135-2.137.
[173] Prosecution Appeal, Para. 2.138.

liable for crimes committed by AFRC forces in Freetown on its findings as to the absence of control."[175]

114. First, it is clear that the Chamber had to consider both Article 6(1) and 6(3) liability. In both instances the concept of control is important, even though the findings will have differing significance and the final assessment will be more critical to the application of Article 6(3) liability. At no stage in the Judgment did the Trial Chamber appear to confuse the two assessments. For example: as noted by the Trial Chamber: "The Chamber finds that the RUF had no control over the AFRC forces in Freetown during the attack *and further* finds that the RUF did not form part of a common operation with the AFRC forces for this attack on 6 January 1999."[176] Further the Chamber noted that: "The Chamber has found that at that time no joint criminal enterprise existed between the leaders of the RUF and those AFRC/RUF Commanders in Koinadugu District. *Furthermore,* the Chamber finds that the RUF High Command had no effective control over those fighters in Koinadugu and Bombali."[177] The submission is therefore wholly without merit.

Conclusion on Ground 1

115. The Prosecution's submissions fail to deal with the central issue, namely upon what basis was the Trial Chamber to conclude that Sesay intended the hundreds of crimes committed by the AFRC. Ground One represents an attempt to implicate without barely a mention concerning how any reasonable trier of fact could have properly inferred that Sesay intended the crimes committed by thousands of combatants that he had never met and who were not under his command. It would appear that the Prosecution intentionally neglect to address this central issue in their submissions, preferring instead to convict the Accused on the basis of guilt by association. Ground One is an invitation to create outdated and bad law and should, accordingly, be dismissed.

Reponses to Prosecution's Third Ground of Appeal

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[174] Judgment, Para. 961.
[175] Prosecution Appeal, Para. 2.145.
[176] Judgment, Para. 893; emphasis added.
[177] Judgment, Para. 1499; emphasis added.

INTRODUCTION

Trial Chamber: legal requirements – Hostage Taking

116. The Chamber found that Count 18 was not established beyond reasonable doubt. The Chamber found that the Prosecution failed to prove an essential element of the crime of hostage-taking, namely, the use of a threat against the detainees so as to obtain a concession or gain an advantage.[178]

117. The Trial Chamber held that the elements of the offence of hostage-taking (in addition to the chapeau requirements for establishing a war crime) are:[179]

a. The Accused seized, detained, or otherwise held hostage one or more persons;[180]
b. The Accused threatened to kill, injure or continue to detain such person(s);[181] and
c. The Accused intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implieit condition for the safety or the release of such person(s).[182]

Prosecution submission: Third element ((c) above) was fulfilled

118. The Prosecution submit that the Trial Chamber erred in its assessment of whether the Accused intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s)[183] (hereinafter "the third requirement"). The Prosecution seek to argue that:

a. The Trial Chamber erred in finding that the Accused did not possess the intention to compel third parties;[184] and
b. The Trial Chamber erred in law in requiring an additional legal element – the communication of a threat to a third party – as an aspect of the third requirement.[185]

Prosecution submission: No reasonable trier of fact could have concluded that the

[178] Judgment, Para. 1969.
[179] Judgment, Para. 240.
[180] ICC Elements of Crime for Article 8(2)(a)(viii).
[181] Judgment, para. 240.
[182] Judgment, pura. 240.
[183] Judgment, para. 240.
[184] Prosecution Appeal, Para. 4.9.
[185] Proseeution Appeal, Para. 4.8

Accused did not have an intention to compel third parties

119. The Prosecution assert that, on the basis of the findings of the Trial Chamber and the evidence before it, the only conclusion open to a reasonable trier of fact is that the RUF in general and the Accused in partieular intended to compel third parties and that this intent can be implied from their acts and behaviour prior to and during the attacks.[186] This argument is based upon two goals, the achievement of which, the Prosecution assert, was intended to be realised through the detentions:

a. To compel the Sierra Leonean government and the UN to stop, or to modify, the DDR process;[187] and

b. To compel the Sierra Leonean government to release Sankoh;[188]

Prosecution submission: the RUF intended to compel UN/government of Sierra Leone to stop/alter the DDR process

120. Despite referring to a range of issues and evidence at paragraphs 4.56 to 4.75 of the Appeal, the Prosecution fails to provide any proper basis for the assertion that the Trial Chamber's findings of fact were unreasonable in light of the evidenee presented. The submissions are intended to demonstrate that many combatants within the RUF had grievances concerning the conduct of the disarmament ("*a build up of mistrust and grievances within the RUF*"[189]) and that "in partieular in Mareh and April 2000, there was a build up of threats and aggression from the RUF towards UNAMSIL"[190] and therefore it follows that the RUF Commanders, including the Accused, must have intended to realise the first goal (3(a) above) through detention of the peacekeepers.

121. It is submitted that the submissions referred to above are of minimum relevance to proof of an actual intention to compel a third party. As is plain evidence of a mere reason (e.g., "mistrust") for a grievancc is of little probative value. Further, evidence of the existence of a grievance can not be dispositive of an intention to compel.

122. In this instances the findings relied upon by the Prosecution to prove this specifie intention demonstrate little other than: that there were some RUF who were agitating against

[186] Prosecution Appeal, Para. 4.9.
[187] Prosecution Appeal, Para. 4.58.
[188] Prosecution Appeal, Para. 4.71.
[189] Prosecution Appeal, Paras. 4.60-4.62, rcferring to Judgment, Paras. 1764 and 1769.
[190] Prosecution Appeal, Para. 4.61 (referring to Exhibit 381 and Trial Judgment, para. 1768) and Para. 4.62.

disarmament;[191] some who were frightened of it;[192] some who were for it but wanted greater "concessions";[193] and some who "were willing to participate in the programme even though they were prevented from doing so through fear and intimidation by their RUF local commanders."[194] That there were many in the RUF whose general criminal conduct was predicated upon grievances is obvious. That it led to hostage taking and a corresponding and specific intention to compel a third party to act is quite another question.

123. In this instance the mistrust, hostilities, and grievances of many of the RUF – that undoubtedly existed for a variety of individual and collective reasons – might be a link in the evidential chain and a step towards criminal conduct. However, it does not provide more than a preliminary indication of a general collective *mens rea*, rather than the essential *mens rea* of the direct perpetrators of the abductions.

124. Hostage-taking is a crime of specific intention, as has been clearly established in the jurisprudence.[195] Clearly, as an examination of domestic criminal law in several jurisdictions shows, even if a particular act is based upon sympathy with a cause, there is no intention to compel unless a link is made between the sympathy and the act concerned:[196] the mental element is not simply an intention to act, but is, rather, an intention *to compel by acting*.

125. The Prosecution also formulate arguments to assert the following:

a. Those who carried out the abductions were RUF units who had not disarmed;[197]

b. Use of the word "hostage" by witnesses;[198]

c. A relatively good standard of treatment of those detained.[199]

126. Putting aside the fact that this is the first occasion that the Prosecution allege that the detention of the peacekeepers kept them safe – a matter relevant to Sesay's conviction and

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[191] Prosecution Appeal, Para. 4.63.
[192] Prosecution Appeal, Para. 4.63.
[193] Prosecution Appeal, Para. 4.60.
[194] Prosecution Appeal, Para. 4.62.
[195] R. S. Lee (Ed), *The International Criminal Court. Elements of Crimes and Rules of Procedure and Evidence*, Transnational: 2001, p. 139
[196] For example in *Price v. Socialist People's Libyan Arab Jamahiriya*, 294 F.3d 82 (D.C. Cir. 2002): "Accordingly, detention for the goal of expressing support for illegal behaviour - even for behaviour that would itself qualify as "hostage taking" - does not constitute the taking of hostages within the meaning of the FSIA."
[197] Prosecution Appeal, Para. 4.59, referring to Judgment, para. 44.
[198] Prosecution Appeal, Para. 4.66.
[199] Prosecution Appeal, Para. 4.67.

sentence – it will be immediately clear that the matters relied upon are irrelevant to the key issue: whether those within the RUF ultimately responsible for the detention intended to compel a third party. Even if one accepts thc Prosecution's contention that the third element of the crime of hostage-taking eontains only a *mens rea* element,[200] the Prosecution has not provided any adequate basis for the view that the Trial Chamber's findings are unreasonable. None of the additional arguments directly address the key question: was there a link between the direct perpetrators grievances with the DDR process and the detentions. This requires that the Prosecution demonstrate the required link, *inter alia* proof that a reasonable tricr of fact could not have concluded that the grievances were relcvant to the attacks, was also relevant to the consequential detentions.

127. The Proseeution also refers to the fact that some of those detained were of a high rank, with reference to Paragraphs 1848 and 1849 of the Trial Judgment, alleging that some of the Pcacekeepers "seemed to have been specifically targeted due to their rank." The Trial Chamber made no such finding and none can reasonable be inferred. This prosecutorial assertion designed to bolster the submission is devoid of merit and should be disregarded.

128. The relevant matter – whether there was a link between the RUF's grievances in relation to the DDR process and the abductions – is addressed in remarkably few paragraphs: 4.64, 4.65, and 4.69. The submissions, even if accepted as providing some evidence of the required link, nonetheless cannot demonstrate that the Chamber could not reasonably reach the contrary conclusion.

129. First, the sole pieee of probative evidence to which the Prosecution refers at paragraph 4.64 is that provided by TF1-071.[201] Clearly the subjective perception of one witness takcs the matter no further. The fact that the Prosecution rely upon it provides an illustration of the paucity of evidenee in support of the Appeal.

130. Second, the fact that the Prosecution also rely upon the evidence of Ngondi – *see* paragraph 4.64 – concerning threats to close down the DDR camp, provides a further illustration of the weakness of the claim that the Chamber erred. Equally, it was more than reasonable for the Trial Chamber to conclude that the fact that Ngondi sent a delegation to the

[200] This argument is disputed below.
[201] Prosecution Appeal, Para. 4.64.

High Command in order to plead for the unconditional release of the detained peacekeepers was of little probative value to this issue.[202] Conversely, the fact that Ngondi appeared to believe that the next step was to discuss with the RUF the issues concerning disarmament, issues that "the RUF did not understand," rather than considering that a substantive *quid pro quo* was required appears to support the Trial Chamber's implied conclusion.

131. As to the threats made by Gbao at the Reception Centre in Makeni on 17 April 2000,[203] these were not addressed to abduetees. In fact, the actual abductions took place two weeks later. Similarly paragraphs 4.69(ii) and 4.69(iv) provide no obvious link between the eventual abductions and the events. The fact that each event concerned threats to commit other crimes or act in ways unconnected to hostage taking (killing the peacekeepers, destroying property, and refusing to leave) would appear to offer a degree of support for the Trial Chamber's findings and none for the errors alleged.

132. At paragraph 4.69(vi) of the Appeal, the Prosecution refers to the potential usefulness of the capture of a peacekeeper in relation to the UN attack – *not* in relation to the DDR process. As acknowledged by the Prosecution this event, if probative of anything, "implies that the captured UN peaeekeeper was envisaged as being useful in addressing the fact of the UN attack."[204] Similarly, the reference, at 4.69(v) to the finding that "Kallon repeatedly threatened Jaganathan asserting that the UN peaeekeepers were causing trouble" provides no link whatsoever to an aim to alter or stop the DDR proeess through abduction and detention.

133. In these circumstances, there is no reason to disturb the Trial Chamber's clear findings that there was no such link,[205] that there was no evidence sufficient to demonstrate that the release of the detainees was contingent upon any intention to compel,[206] and that there was no evidenee sufficient to conclude that a threat was, in fact, made to a third party.[207]

Prosecution submission: the RUF intended to compel government of Sierra Leone to release Sankoh

134. First, as a preliminary matter, it is submitted that the notion of "using as leverage" is not within the definition of "compelling." It is submitted that, even if the RUF did intend to use

[202] Prosecution Appeal, Para. 4.65.
[203] Prosecution Appeal, Para. 4.69(i), citing Judgment, Para. 1778.
[204] Prosecution Appeal, Para. 4.69(vi).
[205] Judgment, Para. 1968.
[206] Judgment, Para. 1965.

the detentions of UN military personnel as "leverage," this would not equate to an intention to compel. Such an intention would, more properly be described as an "intention to persuade on unfair grounds." An intention to compel, by contrast, clearly signifies the overbearing of the third party's will.

135. Second, the Prosecution have not raised any issue which demonstrates that the Trial Chamber's findings of fact are unreasonable. The Appeal Chamber "will not lightly disturb findings of fact by a Trial Chamber."[208]

136. The mere assertion that the release of 40-50 peacekeepers after Sankoh's arrest, and even more a week later,[209] does not "explain away"[210] the intention to use the remaining peacekeepers as leverage is patently wrong and indicative of a misconception about the burden and standard of proof. It is clear that the release of 40-50 peacekeepers so soon after the arrest of the almost deified leader of the RUF, Sankoh, was the most significant event and hugely probative of the intention underlying the detention of the peacekeepers. The Trial Chamber was correct to place a great deal of weight upon it in its evaluation.

137. Further, there was no need for the Defence to "explain away" anything other than that which has been proven beyond reasonable doubt by the Prosecution. It is clear from the Trial Judgment, and from an assessment of the evidence, that this burden was not satisfied. The fact that one person, Monica Pearson, left in charge of the peacekeepers and related by marriage to Sankoh,[211] reacted unreasonably and threateningly upon hearing that he had been detained was probative of little. That this led to those under her control continuing this threatening conduct for a short period of time would appear to add little to the issue and the Chamber was correct to attach little weight to it.[212] It is clearly far less useful than the evidence upon which the Trial Chamber chose to rely upon – the clearest repudiation of any link between the detention and any compulsion – the release, by Sesay, of the peacekeepers within days of Sankoh's arrest.[213]

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[207] Judgment, Para. 1965.
[208] *Blagojevic and Jokic* Appeal Judgment, Para. 226; *Brdanin* Appeal Judgment, para. 13; *Galic* Appeal Judgment, Para. 9.
[209] As found by the Trial Chamber, at Judgment, Para. 1967.
[210] Prosecution Appeal, Para. 4.75.
[211] Transcript, 22 April 2005, pp. 60-62.
[212] Prosecution Appeal, Paras. 4.72 & 4.73.
[213] Judgment, Para. 1967.

138. This evidence – as recognised by the Trial Chamber – very clearly indieates that there was reasonable doubt as to the existence of intention to compel at the time of the initial detention or later.[214] As to the issue of the later development of the *mens rea* – its development would mark the commencement of the hostage taking. As a corollary of this (and on the contested assumption that the third element of the crime relates only to *mens rea)*, the materialisation (or development) of this speeified *mens rea* at this later stage changes the eharacter of the aet to one which is within the definition of "hostage-taking."

139. It is submitted that the emergence of a new *mens rea* at a time later than initial abduction and detention must, in light of the burden and standard of proof, be marked by cogent evidence of this new scenario. A ehange in the attitude of the perpetrator alone gives rise, in this situation, to criminal liability within an entirely different category, with the potential for enlarged criminal punishment on this basis alone. In light of the ease with whieh sueh a change can be alleged, and the obvious difficulties faced by an Aceused (already implicated in serious crime), in denying such allegations – if the Prosecution is to meet the burden of proof – tribunals must be particularly exigent in their demand for clear evidencc of this change.

140. In situations where the *mens rea* existed at the time of abduction or initial detention, it may well be the case that evidence of the *mens rea* is provided by the circumstances or the nature of the act of abduction. No such inference would be available when the *mens rea* is formed at the later stage. To suggest otherwise would lead to a situation where an Accused would be eonvicted automatieally for hostage taking – there being no meaningful evidential differenee between hostage taking and intentionally directing attacks against personnel involved in a humanitarian assistance or peaeekeeping mission.

141. As argued below, the obvious – and perhaps the only – approach to such distinct proof would be that which might arise upon proof of a threat to the relevant third party, in this case the government of Sierra Leone.

142. It is submitted that these considerations are relevant to the Proseeution's appeal. The Trial Chamber's findings of fact ought not to be disturbed unless the Prosecution's submissions are

[214] Proseeution Appeal, Paras. 4.51, 4.55, and 4.71. It should be noted that, for present purposes it is assumed that the third element of the erime of hostage-taking relates only to *mens rea*. This view is disputed, as set out below.

partieularly eogent and the error in assessing evidence particularly stark and irresistible. The arguments, even if aecepted, cannot be eategorised as demonstrable of such an error.

Prosecution submission: Trial Chamber erred in adding a legal requirement

143. In relation to the third element of the crime of hostage taking, the Proseeution argue that all that is required is an intention to compel a third party.[215] The Prosecution assert that the Trial Chamber erred in referring to a requirement that a threat be communicated to the relevant third party and that invocation of this requirement invalidated the Trial Chamber's aequittal of Sesay for hostage-taking.[216]

144. The Defence submits that the Trial Chamber's relianee upon the issue of eommunieation of threat does not invalidate its decision in relation to liability for hostage-taking. In partieular, the following is submitted:

a. Consistent with the Trial Chamber's finding, the third part of the requirements of the crime of hostage-taking addresses both *mens rea* and an element of *actus reus*, which is fulfilled by the communication of the threat to the third party eoncerned;
b. Further, and in the alternative, even in the absence of an *actus reus* aspect to the third requirement, proof of fulfilment of the *mens rea* of the crime can only be made out through evidence of the communication of the threat;
c. Further, and in the alternative, even if there may exist (unlikely) scenarios in which the *mens rea* requirement could be made out in the absence of proof of eommunication of the threat, the facts of the present case are such that, in the absence of proof of such communication, the *mens rea* requirement eould not have been proven.

145. Although the Prosecution assert that the Trial Chamber erred in its treatment of the issue of communication such as to negate the acquittal on this basis, they fail to address the latter two alternative arguments. The failure to advance these arguments is fatal to the appeal inasmuch as, even if the Trial Chamber's addition of a legal element was *erroneous*, this "error" did not invalidate the decision.

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[215] Trial Judgment, para. 240: "The Accused intended to compel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an explicit or implicit condition for the safety or the release of such person(s)".
[216] Prosecution Appeal, Para. 4.8.

Defence submission: communication of threat as an element of the crime of hostage-taking

146. The Trial Chamber held that the crime of hostage-taking requires the threat to be communicated (implicitly or cxplicitly) to the relevant third party.[217] Applying this legal requirement, the Trial Chamber found no evidence that the RUF communicated that the release of those detained was contingent upon either the release of Sankoh, modification of the DDR process or, indeed, any other condition.[218] The Defence submit that this was the eorrect view of both law and fact.

147. The Proseeution's arguments are three fold:[219]

a. Concern over subversion of the protective purpose of international humanitarian law caused by the pereeived creation of a lacunae within the definition of "hostage-taking" of the situation, based upon the scenario where a vietim escapes before the threat is communicated;[220]
b. An argument that the legal texts, whieh constitute sources of law for the Special Court for Sierra Leone, do not explicitly includc the requirement of the communication of a threat within the definition of "hostage-taking";[221] and
c. An assertion that the importance of the specific *mens rea* requirement in the third element "somehow" precludes that third element from including any *actus reus* requirements.[222]

Prosecution submission re situation in which victim eseapes before communication of threat

148. The Prosecution's submissions imply that the Trial Chamber's legal finding leaves a gaping hole in the protcction envisaged under international humanitarian law. The Prosecution's argument that recognition of the requirement of eommunication of the threat would subvert the protection of international humanitarian law to persons *hors de combat*[223] is illusory and entirely misconceived.

149. First, as indicatcd by the faet that it is possible to have cumulative convictions – the acts

[217] Judgment, Para. 1964.
[218] Judgment, Para. 1965.
[219] Prosecution Appeal, Para. 4.21.
[220] Prosecution Appeal, Paras. 4.23-4.25.
[221] Prosecution Appeal, Paras. 4.25-4.44.
[222] Prosecution Appeal, Paras. 4.29 & 4.44.
[223] Proscction Appeal Brief, paras. 4.24-4.25.

of abduction and detention of persons give rise to two separate eharges. The situation envisaged by the Prosecution example of an eseaped prisoner does not prevent the suecessful proseeution under international criminal law for intentionally directing attaeks against persons *hors de combat*. The situation is akin to that of any set of acts in which an intervening aet prevents occurrence of the *actus reus* (such as, for example, an allegation of murder in which the person accused never actually caused a death, and is therefore properly eonvicted of attempted murder or physical violence of the relevant kind). There is, in other words, no liability for the more serious offence that did not arise on the facts.

Prosecution submission: no explicit reference to "communication" in relevant texts

150. While accepting that the ICTY has repeatedly aeeepted the need for the Prosecution to prove communication of threat as the basis for hostage taking,[224] the Prosecution argues that communication of threat is not an element of the crime of hostage-taking. In order to provide a basis for the argument, the Proseeution describes well-established jurisprudence of the ICTY in a way that erroneously suggests that it is in contradiction with the Convention Against the Taking of Hostages.[225] However, and significantly, despite citing international humanitarian law treaties, such as the Geneva Conventions, and the Second Additional Protoeol thereto, the Prosecution does not assert that the ICTY's jurisprudence is incompatible with *these* provisions.

151. Consequently, the Prosecution's approach to the (aforementioned) sources of law applicable in the context of prosecution's at the Speeial Court for Sierra Leone, is illogical in several ways:

152. First, as to the Hostage Convention, the Proseeution focus upon the absenee therein of the communication of threat requirement. It is submitted that this argument – that of its incompatibility with the jurisprudence of the ICTY and the Trial Chamber's interpretation of hostage taking – is, even if accepted, of little consequence. Plainly it is absurd to suggest that decisions in criminal law are invalid to the extent that they elucidate, expand and build upon the legal requirements present in statutes or treaties.

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[224] Prosecution Appeal Brief, paras. 4.35 & 4.39, citing *Blaskic, Karadzic* and *Kordic & Cerkez*.
[225] GA res. 34/146 (XXXIV), 34 UN GAOR Supp. (No. 46) at 245, UN Doc. A/34/46 (1979); 1316 UNTS 205; TIAS No. 11081; 18 ILM 1456 (1979).

153. Seeond, the Proseeution seek to suggest that there is a confliet between international eriminal jurisprudenee, whieh supports the existenee of a legal requirement of communieation of threat, and the provisions of certain treaties – most notably the Hostage Convention. To the extent that there might exist any differenee between humanitarian law provision and international eriminal law, this merely mirrors the faet that international criminal law exists only to perform a criminal enforeement funetion over the most serious breaches of humanitarian law. It is entirely normal – indeed preferable – for the requirements for a finding of criminal liability to be more exigent than, for example, eivil liability. Aecordingly, it is noteworthy that the only direct judicial enforeement mechanism for the Hostage Convention would be the International Court of Justice, a eourt which is best described as rooted in civil and not criminal law and procedure.

154. Second, notwithstanding the above, the Prosecution significantly overstate the difference between the international criminal jurisprudence and texts such as the Hostage Convention (as well as the myriad domestic laws to which it refers). As noted by the Prosecution, the ICTY Appeals Chamber in the *Blaškić* easc held: "the essential element in the crime of hostage-taking is the use of a threat concerning detainees *so as to* obtain a coneession or gain an advantage [...]." [226] Similarly, the *Blaškić* Trial Chamber held that "the Prosecution must establish that, at the time of the supposed detention, the allegedly censurable act was perpetrated *in order to* obtain a concession or gain an advantage."[227]

155. Likewise, the material part of the Hostage Convention states as follows:

> Any person who seizes or detains and threatens to kill, to injure or to continue to detain another person (hereinafter referred to as the "hostage") *in order to compel a third party*, namely, a State, an international intergovernmental organization, a natural or juridical person, or a group of persons, to do or abstain from doing any act as an explicit or implicit condition for the release of the hostage commits the offence of taking of hostages ("hostage-taking") within the meaning of this Convention. [228]

[226] *Blaškić* Appeal Judgement, para. 639, cited in Judgement, Para. 242; emphasis added.
[227] *Blaškić* Trial Judgement, Para. 158; emphasis added.

156. It is submitted that the use of phrases sueh as "so as to" and "in order to" eannot simply refer to matters of intention. Instead, they refer to the wider concept of *purpose* – an issue whieh relates to *mens rea* but also to an element of *actus reus*; that is, eommensurate with the degree of participation implieit in the ICRC eommentary, that "to be eategorized as hostages the detainees must have been *used* to obtain some advantage or to ensure that a belligerent, other person or group of persons enter some undertaking".[229] The purported inconsistency between the Hostage Convention and the Trial Chamber's approach to the crime of hostage-taking does not exist.

Prosecution's eomparative law analysis (annex B and referenee thereto)

157. The Prosecution submits that Appendix B – the analysis of the domestic jurisdictions – indicates that the vast majority (28 out of 29) do not requirc eommunieation of the threat to the relevant third party as a legal requirement in the crime of hostage-taking,[230] the exception being Canadian law.[231] It is submitted that the assertion that the vast majority of the jurisdictions referred to support the Prosecution's position misrepresents the legal position of many of the domestic provisions cited and properly understood. The following examples suffice to illustrate the point.

158. The approaches that are apparent in the domestic jurisdictions cited, can be categorised in the following way:

a. Jurisdictions which explicitly state the required reeipient of the threat. This could be:
   (i) either, the detained person – in which case, the jurisdiction concernod does not providc morc than a illusory basis for the Prosecution's position;[232]
   (ii) or, the third party – in which case, the jurisdiction concerned contradicts the Prosecution's assertions;[233]
b. Jurisdictions whose laws do not explicitly state any audicnce for the threat, but do

[228] Hostage Convention, Article 1(1); emphasis added.
[229] Blaskic Trial Judgment, Para. 187; emphasis added.
[230] Prosecution Appeal, Para. 4.54.
[231] Article 279.1 of the Canadian Criminal Code reads: "Every one takes a person hostage who (a) confines, imprisons, forcibly seizes or detains that person, and (b) in any manner utters, conveys or causes any person to receive a threat that the death of, or bodily harm to, the hostage will be caused or that the confinement, imprisonment or detention of the hostage will be continued with intent to induce any person, other than the hostage, or any group of persons or any state or international or intergovernmental organization to commit or cause to be committed any act or omission as a condition, whether express or implied, of the release of the hostage." Emphasis added.
[232] Example given below .
[233] Examples given below.

provide a *purpose* for the threat, examples of which are provided below. Most the references in the Prosecution's annex B are within this category. It is submitted, given the additional requirement that the threat is made with an intention to coerce, the threat must be actually made – i.e., communieated to the third party. The laws which fall within this eategory are best viewed as demanding communication of the threat to thc third party. The fact that "intention" may, in these provisions, be explicitly mentioned does not preclude this interpretation: on the contrary, it ensures that this *fuller* intention requirement is properly met as well as the requirement that it is communicated.

159. The Proseeution fail to recognise that very few of the jurisdictions they cite fall within category a(ii). For example: Austria's provision, which states that "Whoever abducts or seizes another [person]...after he/*she obtained the victim's consent through dangerous threat* ... in order to coerce a third [person] to act...shall be punishablc...".

160. On the other hand, as the Prosecution is correct to point out, the only jurisdiction which explicitly requires the communieation of the threat to the third party – i.e., is within category a(ii) – is Canada. However, it is submitted that there can be no real difference between Canada's approach and those countries (category b.) whose laws state: (a) that a threat must be made; (b) that thc purpose of the threat must be to coerce a third party; and (c) but which do not name the audience of the threat explicitly.

161. It is submitted that those jurisdictions which fall within this description support the position adopted by the Trial Chamber, rather than supporting the Prosecution's contention that hostagc-taking does not include a requirement of communication of threat to the relevant third party. They include, for example, Australia, where "[A] person commits an act of hostage taking if the person (a) seizes or detains another person ... and (b) threatens to kill, to injure, or to continue to detain the hostage with the intention of compelling [a third party] to do or abstain from doing any act...." Likewisc, in Finland, "A person who deprives another of his/her liberty in order to have a third person do, endure, or omit to do something, under the threat that the hostage will otherwise not be released ... shall be sentenced." Another example is provided by Ireland, whose relevant law states that "[A] person is guilty of the offence of hostage-taking if he or she ... (a) seizes or detains another person ... and (b) *threatens to kill*, to injure, or to continue to detain the hostage with the intention of

compelling [a third party] to do or abstain from doing any act."

162. Also fitting the above tripartite description are the domestic laws of Colombia, Angola, Mexico, Serbia and South Africa. This list is illustrative, but not exhaustive of the jurisdictions which are cited by the Prosecution but, for the reasons stated, do not support the Proseeution's third ground of appeal. For the reason described above. These are the laws which fall within eategory b.

163. Similarly, in the UK, as the Proseeution points out, seetion 1 of the Taking of Hostages Act 1982 states that "A person, [...] who, [...] detains any other person ("the hostage"), and in order to compel a State, international governmental organisation or person to do or abstain from doing any act, threatens to kill, injure or continue to detain the hostage, commits an offence." In *Commissioner of Police for the Metropolis and Others, Ex Parte Pinochet*,[234] the Prosecution alleged that Pinochet took the hostages so as to generally frighten and eoeree the opponents of the Pinochet regime into suppressing their criticism of it but alleged no direct evidence of eommunication of this objeet. The charge of hostage-taking was deemed inapplicable. According to Lord Browne Wilkinson,

> "the only eonduet relating to hostages which is charged alleges that the person detained (the so-called hostage) was to be forced to do something by reason of threats to injure other non-hostages which is the exact converse of the offenee. The hostage eharges therefore are bad and do not constitute extradition crimes."

164. Similarly, Lord Hope of Craighead held that

> "Those who were not detained were to be intimidated, through the accounts of survivors and by rumour, by fear that they might suffer the same fate. Those who had been detained were to be compelled to divulge information to the conspirators by the threatened injury and detention of others known to the abducted persons by the conspirators. But there is no allegation that the conspiracy was to threaten to kill, injure or detain those who were being detained in order to compel others to do or to abstain from doing any act. [...] This does not seem to me to amount to a eonspiracy to take hostages within the meaning of section 1 of the [Taking of Hostages] Act of 1982."

[234] [1999] UKHL 17

Prosecution submission: third requirement as *mens rea* only

165. The Proseeution's submissions are erroneous in the sense that they fail to recognize the dual nature of the third requirement of hostage-taking. The view that the third element of hostage-taking involves an *actus reus* aspeet, as well as a *mens rea* aspeet, is underlined by the language of the third element itself: "The Aecused intended to eompel a State, an international organisation, a natural or legal person or a group of persons to act or refrain from acting as an *explicit or implicit* condition for the safety or the release of sueh person(s)."[235] It is submitted that, if the quoted text referred only to *mens rea*, it would say eonsiderably less than it does. The meaning could be conveyed by the mere statement that the Accused intended to compel the third party to act or refrain from acting. It would be wholly superfluous to include, within this *mens rea* statement, the possibility that such an intention could be done implicitly or explicitly.

166. The Lambert Commentary on the Hostage Convention, cited by the Prosecution, indicates that the communication of threat *is a vital element* of the crime of hostage-taking. In the Prosecution's reference to the author's observation that the compulsion must be directed towards a third party,[236] the Prosecution's error becomes clear: namely the confusion between the requirement that a threat be communicatcd with the question of whether this communication has to be explicit, or can be implicit. As indicated by Lambert there is no need for the communication to be explicit providing there is an implicit communication directed towards a third party.[237] This is consistent with the finding of the Trial Chamber and consistent with the reasonable finding that on these facts there was no evidence or insufficient evidence of any threat directed to a third party, whether implieit or explicit.

167. As Lambert states, "while the seizure and thrcat will usually be aceompanied or followed by a demand that a third party act in a certain way, there is no actual requirement that a demand be *uttered*. Thus, if there is a detention and threat, yet no demands, there will still be a hostage-taking if the offender is seeking to compel a third party."[238] It is vital to note that the focus here is upon the *mode* of expression of the threat, whieh, need not be "uttered." Rather than indieating the lack of legal requirement of eommunication of threat, it is clear

[235] Judgment, Para. 240; emphasis added.
[236] K. Dörmann *et al*, Elements of war crimes under the Rome Statute of the International Criminal Court: sourees and commentary, Cambridge University Press, 2003, p. 85.
[237] Prosecution Appeal, Para. 4.32.

from these comments that the requirement for communication of some kind is assumed. Lambert's examples of the situations in which there need not be any utterance cover situations in which the political context is such that no *explicit* utterance is needed for the threat to be communicated.[239]

168. That an element of a crime which relates to a purpose is more than merely a *mens rea* requirement is indicated throughout the criminal law – both international and domestic. The purpose requirement of genocide, for example, is not simply a matter of ensuring that responsibility is attributed to the appropriate person/s due to their *mens rea*. The purpose requirement also changes the character of the acts – the *actus reus* – from mass murder to genocide. The dual nature of elements of crimes which describe purpose is also apparent in domestic law. In UK criminal law, for example, an offence under section 29(1) of the Crime & Disorder Act 1998 is committed only where another offence[240] is committed, "motivated (wholly or partly) by hostility towards members of a racial group based on their membership of that group."[241] It is clear that, in all elements other than the purpose, the crime is identical to the "other" crime.[242]

169. The fact that the third element of the crime of hostage-taking is described by reference to a purpose indicates that this requirement does not refer only to *mens rea*. The requirement that the acts were carried out in order to compel means that some act is required as evidence of this purpose. It would be implausible to suggest that an act was carried out with the required purpose if there is no evidence of any attempt to realise this purpose. That this evidence could be as little as implicit communication of threat is already a very low test and must not be diminished further as this would fundamentally change the character of the crime, removing the very characteristic that distinguishes it from other charges.

Defence alternative submission: communication of threat as essential evidence

170. The following submissions are made without prejudice to the above observations on the

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[238] Lambert Commentary, p. 85 (emphasis added).

[239] "... it might be noted that many kidnappings and hostage –takings do not involve any demands. One author notes that 54 out of 146 kidnappings and seizures in Western Europe between 1970 and 1982 did not result in demands upon a third party."

[240] Either an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm); an offence under section 47 of that Act (actual bodily harm); or common assault, (section 29(1)(a), (b) & (c))

[241] Section 28(1)(b) of the Crime & Disorder Act 1998.

[242] Either an offence under section 20 of the Offences Against the Person Act 1861 (malicious wounding or grievous bodily harm); an offence under section 47 of that Act (actual bodily harm); or common assault,

legal requirement of communication of threat. Considering only the language of some of the international treaties that cover the issue of hostage-taking, a requirement of communication of threat is not mentioned. However, where these treaties – such as the Hostage Convention – are pressed into service in criminal law, the approach taken to the vital element that the relevant seizure, detention or threat is carried out "in order to compel a third party [...] to do or abstain from doing any act as an explicit condition for the release of the hostage" must adapt to the higher burden of proof.

171. Even if one accepts that this third element of the crime of hostage-taking relates only to *mens rea*, this element must, of course, be proved. While a definition of hostage-taking may be necessary in other contexts (such as prescriptive legal guidance for the behaviour of armed forced), we are concerned at present with criminal prosecution, and hence, this *mens rea* element must be proved *beyond reasonable doubt*.

172. While some of the international texts and the relevant domestic law do not mention communication of threat as an absolute requirement, it is submitted that the application of these laws indicates that it is impossible for the Prosecution to reach the standard of criminal proof in the absence of the requirement of communication of threat. In the present case - whereby contradictory conduct (the return of the detainees only days after the arrest of Sankoh) was clear to the Trial Chamber this was an absolute requirement. The Prosecution have not demonstrated an error in the Trial Chamber so holding.

173. The Sesay Defence will not respond to the Prosecutions submissions at Paragraph 4.83 to 4.90. The Chamber did not find that Sesay was directly involved in planning, orchestrating and assaulting the peacekeepers as alleged and accordingly dismissed the Prosecution case pursuant to Article 6(1).

Dated 24 June 2009

Wayne Jordash
Sareta Ashraph
Jared Kneitel

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ANNEX A

Lack of evidence connecting Sesay to the crimes committed by the AFRC from their withdrawal from Kono District until the January 1999 Freetown invasion

Samples of key findings

No communications with Sesay as Gullit and his men leave Kono until they arrive in Rosos

1. The Prosecution addueed no evidenec of any communieation between Sesay and any senior AFRC commander after thc point when Gullit withdrew his forees from Koinadugu until the time that Gullit arrived in Rosos, Bombali, in July or August 1998.

2. No evidence was adduced by the Prosecution during this period of any eommunications to or from Sesay with any other member of the RUF concerning the activities of the AFRC fighters, including their movements, attacks and any crimes they may have bcen committing.

Rosos until the arrival of SAJ Musa in Major Eddie town

3. The Trial Chamber held that, while Gullit's group was based at Rosos, there was one radio communieation between Gullit and Sesay in which Gullit told Sesay to have eonfidence in him and that they needed to coopcrate.[243] No evidence was adduced concerning Sesay's response. No evidence was addueed of Sesay being informed of the aetivities of Gullit's group while it was based in Rosos.

4. While the Trial Chamber held that thcre was another communieation from Gullit in Rosos to Bockarie in whieh Gullit explained why he had not been in contact and Bockarie indicated that "he was very happy ... that the two sides, both the RUF and SLA, were brothers,"[244] no evidenee was given of Gullit providing any information to Bockarie about the aetivities of the AFRC in Rosos. No evidence was adduced of any substantial assistance being received from the RUF during this time.[245]

5. On the basis of evidence from TF1-360, thc Trial Chamber found that Gullit, while at Major Eddie town, eommunicated with SAJ Musa, Bockarie and Superman.[246] No evidence was given about the content of these communications.

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[243] Jndgment, Para. 849.
[244] Judgment, Para. 849.
[245] As found by the Trial Chamber; Judgment, Para. 1508.
[246] Jndgment, Para. 850.

6. Additionally, there was no evidence before Trial Chamber I of (i) any member of the AFRC informing Sesay; (ii) any member of AFRC informing the RUF High Command; and (iii) any member of the RUF communicating with Sesay about the activities of the AFRC in Rosos and Major Eddie town.

No communication with the AFRC forces in Koinadugu

7. Following SAJ Musa's withdrawal from Makeni to Koinadugu during the time of the Intervention in February 1998, no evidence was adduced of any communications between Sesay and the group in Koinadugu under SAJ Musa (or any other group in Koinadugu).

8. Similarly no evidence was placed before the Trial Chamber of any communications between any member of the RUF and Sesay as to the activities of the AFRC and STF forces based in Koinadugu.

No communication with Superman while Superman is based in Koinadugu

9. Superman moved to Koinadugu following the failed Operation Fiti Fata on Koidu in mid-1998. The Prosecution adduced no evidence of any communieations between Superman or any of Superman's men and Sesay during the time Superman was in Koinadugu. The sole evidenee of communication from Superman – which emerged through the testimony of TF1-361 – was to Bockarie. As set out below, TF1-361's evidence at its highest was that Superman and Bockarie were in communication for one week (in which the first attack on Kabala took plaee) after whieh there was a falling out and Bockarie sent a message to all RUF stations ordering that there be no contact with Superman on pain of death.[247]

10. There was no evidence before the Trial Chamber of Bockarie communicating with Sesay about the activities of Superman in Koinadugu or about any information that may or may not have been given to Bockarie by Superman in the first week concerning the activities of other groups in Koinadugu.

No communications with AFRC group from the time of SAJ Musa's arrival in Major Eddie Town until his death in the Western Area in late December 1998

[247] Transcript/TF1-361, 18 July 2005, pp. 39, lines 4-27.

11. The Prosecution adduced no evidenee of the contents of any communication between Sesay and any member of the AFRC forces from the time of SAJ Musa's arrival in Major Eddie town until the time of SAJ Musa's death. While the Trial Chamber found that there were two occasions when Gullit communicated – contrary to Musa's orders – with Boekarie after Musa took eontrol of the AFRC forces at Major Eddie Town, no evidence was adduced as to thc contents of these conversations. Further no evidence was adduced of any communication from Bockarie or any other member of the RUF command informing Sesay of thc communications between Bockaric and Gullit.

12. No cvidence was adduced by the Prosecution of Sesay supplying support in any form to the AFRC groups either under Gullit or under SAJ Musa nor of Scsay being informed of any such supply of support taking place.

Communication immediately before, during and after the Freetown invasion

13. Thc Prosecution adduced no evidence of any communications between senior members of the AFRC and Sesay either before or during the January 1999 Frcetown invasion.

14. The Trial Chamber found that there was sporadic communication between Gullit and Bockarie immediately prior to Gullit's forces entering Freetown and during the time that they wcrc in Freetown. The evidence adduced was of Gullit requesting reinforcements from Boekarie and, aside from a communication about burning key areas in Freetown when the ECOMOG forces began to push the AFRC out, no evidence was adduced concerning the activities of the AFRC in Freetown.

15. No evidenee was adduced by the Prosecution of any communication between Bockarie and any member of the RUF detailing the activities of the AFRC in Freetown. The Trial Chamber found that, following a request for reinforcements from Gullit to Bockarie in late December 1998, Boekarie communieated with Sesay. The content of this communication was that SAJ Musa has died but that Bockarie was unsure whether this was true or was rather an attempt by the AFRC to mislead the RUF.[248]

16. The Trial Chamber found that aftcr the AFRC forces had retreated from Freetown to Waterloo, Sesay chaired a meeting in which the two groups planned to cooperate in a second

[248] Judgment, Para. 889.

attack on Freetown but that animosity resulting from the RUF fighters seizing property from the AFRC fighters led to the mission being unsuecessful.[249] Prosecution witness TF1-366 testified, before the Trial Chamber, that the SLAs who had come out of Freetown did not take orders from Sesay from the time their property was taken from them and that there was no further eordiality between the RUF under Sesay and the SLA under Gullit from that time.[250]

17. This meeting takes place after the AFRC retreated from Freetown and after the crimes were found to have taken plaee by the Trial Chamber. No evidence of crimes being committed in the unsuccessful second attack on Freetown was adduced before the Trial Chamber.

[249] Judgment, Para. 894.
[250] Transcript/TF1-366, 15 November 2005, pp. 27.