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SCSL-04-15-A
(4521 – 4806)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – 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 Hon. Justice Shireen Fisher
Acting Registrar	Ms Binta Mansaray
Date filed:	26 June 2009

SPECIAL COURT FOR SIERRA LEONE
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THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-A

PUBLIC

PROSECUTION RESPONSE BRIEF

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1. Introduction

A. General matters

1.1 Pursuant to Rule 112 of the Rules of Procedure and Evidence, and the Pre-Hearing Judge's "Decision on 'Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit'" of 4 May 2009[1] and the "Corrigendum to 'Decision on Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit'" of 6 May 2009,[2] the Prosecution files this **Response Brief** containing the submissions of the Prosecution in response to:

(1) the "Grounds of Appeal" (the "**Sesay Appeal Brief**"), filed on behalf of Issa Hassan Sesay ("**Sesay**") on 1 June 2009;[3]

(2) the "Kallon Appeal Brief" (the "**Kallon Appeal Brief**"), filed on behalf of Morris Kallon ("**Kallon**") on 1 June 2009;[4] and

(3) the "Appeal Brief for Augustine Gbao" (the "**Gbao Appeal Brief**"), filed on behalf of Augustine Gbao ("**Gbao**") on 1 June 2009.[5]

These three documents are referred to collectively in this Response Brief as the "Defence Appeal Briefs".

1.2 The submissions made in this Response Brief are without prejudice to the submissions made in the "Prosecution Appeal Brief", filed confidentially by the Prosecution on 1 June 2009, with a public version filed on 2 June 2009 (the "**Prosecution Appeal Brief**"). The submissions in this Response Brief merely respond to the arguments in the Defence Appeal Briefs in the light of the Trial Chamber's Judgement, without taking into account the arguments raised by the Prosecution in its own appeal in this case.

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1 SCSL-04-15-A-1263.

2 SCSL-04-15-A-1266.

3 SCSL-04-15-A-1281; see also SCSL-04-15-A-1284, "Public Corrigendum to the Grounds of Appeal", 8 June 2009 ("**Sesay Appeal Brief Corrigendum**"), and SCSL-04-15-A-1285, "Public Corrected Redacted Grounds of Appeal", 15 June 2009 ("**Sesay Corrected Redacted Appeal Brief**").

4 SCSL-04-15-A-1280; see also SCSL-04-15-A-1287, "Corrigendum to Kallon Appeal Brief with Revised Table of Contents and Overview of Appellant's Appeal", 17 June 2009 ("**Kallon Appeal Brief Corrigendum**").

5 SCSL-04-15-A-1279, and SCSl-04-15-A-1283, "Public Appeal Brief for Augustine Gbao", 4 June 2009.

B. Structure of this Response Brief

1.3 A table of the contents of this Response Brief is eontained in Appendix A.

1.4 Some arguments and issues raised by the Defence are common to grounds of appeal of more than one of the Defence Appellants. In order to avoid repetition, this Response Brief does not deal in order with each of the grounds of appeal of each party. Instead, some sections of this Response Brief deal with multiple Defence grounds of appeal that raise similar issues. Furthermore, this Response Brief deals with the various Defence grounds of appeal grouped in a thematic order. The table in Appendix B indicates where each of the other parties' grounds of appeal is dealt with in this Response Brief. In the case of some grounds of appeal raised by an Appellant in his notice of appeal, no submissions have been made in that Appellant's appeal brief. The Prosecution submits that such grounds of appeal should be deemed to be abandoned. In any event, in the absence of any Defence arguments to which the Prosecution can respond, such grounds of appeal can not be addressed in this Response Brief. The table in Appendix B also identifies these Defence grounds of appeal.

1.5 Some authorities and documents are referred to in this Appeal Brief by abbreviated citations. The full references for these abbreviated citations are given in Appendix C to this Appeal Brief.

1.6 Before addressing the arguments in the Defence Appeal Briefs, the Prosecution makes the following preliminary submissions.

C. The standards of review on appeal

1.7 The standards of review on appeal are dealt with in paragraphs 1.5 to 1.20 of the Prosecution Appeal Brief.

D. The waiver principle

1.8 The Appeals Chamber of the ICTY has held that:

> The appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing.[6]

1.9 Consistently with this principle, it has been said that:

> The Appeals Chamber accepts that, as a general principle, a party should not be permitted to refrain from making an objection to a matter which was apparent during the course of the trial and to raise it only in the event of an adverse finding against that party.[7]

1.10 Thus, if a party fails to raise any objection to a particular issue before the Trial Chamber, in the absence of any special circumstances, the party is to be taken as having waived its right to adduce the issue as a valid ground of appeal. A concomitant of this principle is that the accused cannot raise a defence for the first time on appeal.[8] This principle is referred to below as the "waiver principle".

1.11 The waiver principle is based in part on judicial economy: if an issue is raised and dealt with at trial, an unnecessary appeal, with the ensuing possibility of a

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[6] *Prosecutor v. Erdemović*, IT-96-22, "Judgement", Appeals Chamber, 7 October 1997 ("***Erdemović* Appeal Judgement**"), para. 15; *Prosecutor v. Kupreškić et al.*, IT-95-16-A, " Judgement", Appeals Chamber, 23 October 2001, ("***Kupreškić* Appeal Judgement**), para. 408.

[7] *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 ("***Čelebići* Appeal Judgement**"), para. 640 (referring to earlier case law, and see also para. 351). See also *Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002 ("***Kunarac* Appeal Judgement**"), para. 61; *Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006 ("***Naletilić and Martinović* Appeal Judgement**"), paras 21-22; *Prosecutor v. Kambanda*, ICTR-97-23-A, "Judgement", Appeals Chamber, 19 October 2000 ("***Kambanda* Appeal Judgement**"), paras 25–28, 55; *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, "Judgement", Appeals Chamber, 1 June 2001 ("***Kayishema and Ruzindana* Appeal Judgement**"), para. 91; *Prosecutor v. Musema*, ICTR-96-13-A, "Judgement", Appeals Chamber, 16 November 2001 ("***Musema* Appeal Judgement**"), paras 127, 341; *Prosecutor v. Bagilishema*, ICTR-95-1A-A "Judgement (Reasons)", 3 July 2002 ("***Bagilishema* Appeal Judgement**"), para. 71. The waiver principle applies also to appeals against sentence: *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, "Judgment on Sentence Appeal", Appeals Chamber, 8 April 2003 ("***Čelebići* Sentencing Appeal Judgement**"), para. 15.

[8] *Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 ("***Aleksovski* Appeal Judgement**"), para. 51. Nevertheless, it appears that in exceptional cases the Appeals Chamber will not apply the waiver principle: see, for instance *Aleksovski* Appeal Judgement, paras 51-56; *Kambanda* Appeal Judgement, para. 55. It has been held that where a convicted person raises an alleged defect in the form of the indictment for the first time on appeal, he bears the burden of proving that his ability to prepare his defence was materially impaired, but that when an accused has previously raised the issue of lack of notice before the Trial Chamber, the burden rests on the Prosecution to prove on appeal that the ability of the accused to prepare a defence was not materially impaired: *Prosecutor v. Simić*, IT-95-9-A, "Judgement", Appeals Chamber, 28 November 2006 ("***Simić* Appeal Judgement**"), paras 25, 56-74; *Prosecutor v. Bagosora*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised By the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", 18 September 2006 ("***Bagosora* Exclusion of Evidence Appeal Decision**"), para. 42. See also *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgment", Appeals Chamber, 22 February 2008 ("***AFRC* Appeal Judgement**"), paras 44-45, 114-116.

subsequent retrial, may be avoided. The ICTY Appeals Chamber has also indicated that it may be difficult for it to determine precisely what prejudice has been caused to a party if the objection was not raised before the Trial Chamber.[9]

E. General requirements of appeal briefs

1.12 The Appeals Chamber of the ICTY and ICTR has made clear that the Appeals Chamber does not operate as a second Trial Chamber, and that an appeal does not involve a trial *de novo*.[10]

1.13 Consistently with this principle, and the waiver principle, and the standards of review on appeal set out in the Prosecution's Appeal Brief,[11] it is incumbent upon an appellant to demonstrate in his appeal brief how the Trial Chamber erred. It is not sufficient for an appellant simply to duplicate the submissions already raised before the Trial Chamber without seeking to clarify *how* these arguments support a legal error allegedly committed by the Trial Chamber.[12]

1.14 The ICTY Appeals Chamber has said that it cannot be expected to consider the parties' claims in detail if they are obscure, contradictory or vague, or if they are vitiated by other blatant formal defects, and that the party appealing must therefore set out the sub-grounds and submissions of its appeal clearly and provide the Appeals Chamber with precise references to relevant transcript pages or paragraphs in the judgment to which the challenge is being made, and exact references to the parts of the records on appeal invoked in its support.[13] The ICTY

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9 *Čelebići* Appeal Judgement, para. 641.

10 *Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence", Appeals Chamber, 15 October 1998 (**"*Tadić* Additional Evidence Appeal Decision"**), para. 41; *Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000 (**"*Furundžija* Appeal Judgement"**), para. 40; *Čelebići* Appeal Judgement, paras 203, 724; *Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004 (**"*Vasiljević* Appeal Judgement"**), para. 5.

11 See paragraphs 1.5 to 1.20 of the *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1278, "Prosecution Appeal Brief", 1 June 2009 (**"Prosecution Appeal Brief"**).

12 *Čelebići* Appeal Judgement, para. 371; *Kupreškić* Appeal Judgement, paras 26-27 (indicating that there is a possible exception "where the Trial Chamber has made a glaring mistake"); *Prosecutor v. Niyitegeka*, ICTR-96-14-A, "Judgement" Appeals Chamber, 9 July 2004 (**"*Niyitegeka* Appeal Judgement"**), para. 9 ("A party cannot merely repeat on appeal arguments that did not succeed at trial, unless that party can demonstrate that rejecting them constituted such error as to warrant the intervention of the Appeals Chamber").

13 *Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 (**"*Krnojelac* Appeal Judgement"**), para. 16; *Vasiljević* Appeal Judgement, paras 11-12; *Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004 (**"*Kordić and*

Appeals Chamber has added that it does not have to provide a detailed written explanation of its position with regard to arguments which are clearly without foundation, and that it will reject without detailed reasoning arguments raised by appellants in their briefs or at the appeal hearing if they are obviously ill-founded.[14]

1.15 It has further been held that an appellant who makes no submission to the effect that the Trial Chamber's findings were unreasonable but who merely challenges the Trial Chamber's findings and suggests an alternative assessment of the evidence, fails to discharge the burden of proof incumbent on it when alleging errors of fact.[15] The Appeals Chamber of the ICTY and ICTR has sometimes been quite strict, and has said that it may dismiss without detailed reasoning submissions that do not meet the formal requirements of the applicable rules and practice directions.[16]

F. The standard of review in an appeal against sentence

1.16 Sentencing, much like findings on credibility and assessment of evidence, is an area of adjudication in which an appellate court ought not lightly to interfere. It is an area in which a Trial Chamber enjoys a large measure of discretion. As this Appeals Chamber has held: "The determination of an appropriate sentence being at the discretion of the Trial Chamber, the Appeals Chamber will only revise a sentence where the Trial Chamber has committed a discernible error in exercising its discretion or has failed to follow the applicable law."[17]

1.17 The standard of review applicable in an appeal against sentence is well established in the case law of the ICTY and ICTR:

***Čerkez* Appeal Judgement"**), para. 22; *Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005 (*"**Kvočka* Appeal Judgement"**), para. 425.

14 *Ibid.*

15 *Krnojelac* Appeal Judgement, para. 20 (and see also at paras 21–27); *Vasiljević* Appeal Judgement, paras 13–21.

16 *Vasiljević Appeal Judgement*, para. 10; *Prosecutor v. Semanza*, ICTR-97-20-A, "Judgement", Appeals Chamber, 20 May 2005 (*"Semanza* Appeal Judgement"), paras 9-11. See also, *e.g. Kayishema and Ruzindana* Appeal Judgement, paras 15–49 (Prosecution appeal held to be inadmissible in its entirety, and Prosecution's respondent's briefs to be inadmissible, due to failure to file appeal brief and respondent's briefs in time); but *c. f. Bagilishema* Appeal Judgement, paras 15-23.

17 *AFRC* Appeal Judgement, para. 309.

> Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a *de novo* sentencing proceeding. A Trial Chamber has considerable though not unlimited discretion when determining a sentenee. As a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless "it believes that the Trial Chamber has committed an error in exercising its discretion, or has failed to follow applicable law." The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene.[18]

1.18 It is incumbent upon the appellant to establish the existence of such a "discernible error" in the exercise of the Trial Chamber's sentencing discretion.[19] An appellant cannot merely assert that a sentence was wrong, without demonstrating how the Trial Chamber either failed to follow the applicable law, or how it ventured outside its discretionary framework in imposing the sentence that it did.[20]

1.19 A Trial Chamber's decision may be disturbed on appeal if an appellant shows that the Trial Chamber either took into account what it ought not to have, or failed to take into account what it ought to have taken into account, in the weighing process involved in this exercise of the discretion.[21] However, it is insufficient to show that a different sentence was imposed in another case in which the circumstances were similar.[22] Rather, it must be shown, for instance, that the sentence imposed by the Trial Chamber "was so unreasonable and plainly unjust, in that it underestimated the gravity of the ... [convicted person's] criminal

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18 *Vasiljević* Appeal Judgement, para. 9 (footnotes omitted). See also *Kayishema and Ruzindana* Appeal Judgement, para. 337: "the weighing and assessing of the various aggravating and mitigating factors in sentencing is a matter primarily within the discretion of the Trial Chamber. Therefore, as long as a Trial Chamber does not venture outside its "discretionary framework" in imposing a sentence, the Appeals Chamber shall not intervene"; *Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 (*"**Blaškić** **Appeal Judgement**"), para. 680; see also *Kvočka* Appeal Judgement, para. 669.

19 See, e.g., *Kvočka* Appeal Judgement, para. 669.

20 *Čelebići* Appeal Judgement, para. 725. See also at para. 717: "Trial Chambers exercise a considerable amount of discretion (although it is not unlimited) in determining an appropriate sentencing. This is largely because of the over-riding obligation to individualise a penalty to fit the individual circumstances of the accused and the gravity of the crime."

21 *Ibid.*, para. 780. See also *Kupreškić* Appeal Judgement, para. 457 ("The burden rests on an accused to demonstrate that the Trial Chamber abused this discretion in failing to take a certain factor or circumstance into account"); *Semanza* Appeal Judgement, paras 312, 374.

22 *Vasiljević* Appeal Jndgement, para. 152.

conduct, that it [the Appeals Chamber] is able to infer that the Trial Chamber failed to exercise its discretion properly".[23]

1.20 It follows from the "corrective" nature of an appeal, and from the "waiver" principle, that an appellant cannot raise factors relevant to sentencing for the first time on appeal.[24]

2. Alleged defects in the Indictment and lack of notice

A. Alleged defective pleading of JCE

(i) Introduction

2.1 This section of this Response Brief responds to **Sesay's Ground 12**, **Kallon's Ground 3** in so far as it relates to the pleading of JCE, and **Gbao's Ground 8, Sub-grouud 8(a)**, all of which relate to alleged defects in the form of the Indictment.

2.2 This Appeals Chamber has affirmed that "The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case".[25] It is submitted that the question whether an Indictment has been pleaded with sufficient specificity cannot be determined simply by an application of the correct legal principles to the text of the indictment itself. Rather, the determination of this question requires an evaluation of the nature of the case and the circumstances as a whole. For this reason, it is submitted that where the Defence appeals against a decision of the Trial Chamber as to whether the Indictment has been pleaded with sufficient specificity, the applicable standard of review on appeal is not the error of law standard. Rather, it is the standard of review that applies to alleged errors in the exercise of a discretion by the Trial Chamber. The function of the Appeals Chamber in such a case is not to determine how the Appeals Chamber itself considers that the situation should have been handled, but rather, to determine whether the Trial Chamber was, in its discretion, entitled to handle the matter in the

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[23] *Prosecutor v. Galić*, IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006 ("***Galić* Appeal Judgement**"), para. 455.

[24] *Kupreškić* Appeal Judgement, paras 410-414; *Prosecutor v. Nikolic-Dragan*, IT-94-02-T, "Judgement on Sentencing Appeal", Appeals Chamber, 4 February 2005 ("***Nikolić-Dragan* Sentencing Appeal Judgement**"), para. 107.

[25] *AFRC* Appeal Judgement, para. 37, citing *Kupreškić* Appeal Judgment, para. 89.

way that it did. This is the standard of review on appeal referred to in paragraphs 1.17 to 1.20 of the Prosecution Appeal Brief.

(ii) Sesay's Ground 12

2.3 The Sesay Defence argues that the Trial Chamber erred in law and fact in finding that the pleading of the JCE provided sufficient notice and did not prejudice the Accused or prevent a fair trial.

2.4 The Trial Chamber gave detailed consideration to this issue[26] and concluded that the Indictment should be taken as the primary and determinative document and that the notice provided therein was adequate, notwithstanding the filing of a Prosecution "Notice Concerning JCE".[27] It is clear from the Trial Chamber's findings that the Notice Concerning JCE was never accepted for the purpose for which it was intended, namely to further articulate the JCE that had been alleged throughout.

2.5 The Trial Chamber found that the Indictment put the Accused on notice that the purpose of the alleged JCE was "to take control of Sierra Leone through criminal means, including through a campaign of terror and collective punishments".[28] The Trial Chamber further found that "[t]hroughout the trial, the Accused were on notice that they were alleged to have committed the crimes of collective punishment and acts of terrorism through their participation in a JCE"[29] and "of the fact that one of the alleged goals of their armed struggle was to gain control of Sierra Leone, and in particular, of the diamond mining areas".[30] Acts of terror and collective punishments were found to have always been part of the alleged means which, together with the objective, constituted the JCE.

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[26] *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-04-15-T-1234, "Judgement", Trial Chamber, 2 March 2009 ("**Trial Judgement**"), paras 355-357, 370-376.

[27] *Prosecutor v. Sesoy, Kallon, Gbao,* SCSL-04-15-T-812, "Proseeution Notice concerning Joint Criminal Enterprise and Raising Defects in the Indictment", Trial Chamber, 3 August 2007 ("**Prosecution Notice Concerning JCE**").

[28] Trial Judgement, para. 375.

[29] Trial Judgement, para. 375.

[30] Trial Judgement, para. 375.

2.6 It was consistently alleged that the crimes charged in Counts 1 through 14 of the indictment were within the JCE.[31] It was similarly consistently alleged in the alternative that these crimes were a reasonably foreseeable consequence of the JCE.[32] The Notice Concerning JCE merely provided further specificity as to which crimes, in the alternative scenario, might be found to be foreseeable consequences of the crimes agreed upon. The Accused were therefore at all times charged with Counts 1 through 14 under the basic category of JCE as the primary theory of responsibility.

2.7 The Sesay Appeal Brief incorrectly states that the Prosecution pleading at the Rule 98 stage as to the second category of JCE "removed forced mining and forced farming from the original JCE".[33] It has always been the Prosecution position[34] that the second category of JCE is a variant of the first category.[35] There was never a question of certain crimes being removed from the JCE as originally pleaded in the Indictment. Any subsequent attempt to further particularize the JCE pleading did not introduce changes resulting in fluctuating notice and consequent prejudice to the Defence.

2.8 The Prosecution relies further on its response to Sesay's Ground 24[36] concerning the relationship between objective and means within a JCE.

2.9 The Prosecution notes that the Appeals Chamber decided in the *AFRC* Appeal Judgement that the Trial Chamber in that case had erred in law when it concluded that JCE was not properly pleaded in the Indictment.[37] The pleading of the JCE in the Indictment in this case is materially similar to the pleading in the Indictment in the *AFRC* case, as set out in paragraph 81 of the *AFRC* Appeal Judgement. The pleading of JCE in the Indictment in the present case met all of the requirements set out in paragraphs 82-86 of the *AFRC* Appeal Judgement.

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31 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", Trial Chamber, 2 August 2006 ("***Indictment***"), para. 37, and see Prosecution Notice Concerning JCE, para. 7.

32 Indictment, para. 37.

33 Sesay Appeal Brief, para. 55.

34 Supported by jurisprudence such as *Krnojelac* Appeal Judgement, para. 89.

35 But see Trial Judgement, para. 383, stating that the mental element differs and that the second category must be pleaded clearly.

36 See paragraphs 5.4 to 5.14 below.

37 *AFRC* Appeal Judgement, para. 87.

(iii) Kallon's Ground 3[38]

2.10 In response to Kallon's Ground 3, the Prosecution relies on its submissions in relation to Sesay's Ground 12 above.

2.11 The Trial Chamber's statement as to the divisibility of the JCE is supported by the referenees cited in footnotes 685 and 686 of the Trial Judgement as well as the analysis of the applicable law at paragraphs 251 to 266. The Kallon Defence has not explained how the Trial Chamber's reasoning in this respect amounted to an error, merely stating it to be "troubling".[39] Further, it has clearly been established in the jurisprudence that pleading the basic and extended forms of JCE in the alternative is acceptable.[40]

2.12 With regard to Kallon's role in the JCE, the Kallon Defence is merely restating general arguments made at trial.[41] The Trial Chamber did not err in rejecting these arguments, and, in particular, in noting that similar objeetions were raised by other Accused and dealt with at the pre-trial stage where it was found that the Indictment was pleaded with sufficient specificity.[42] Kallon was clearly on notice of his alleged role in the JCE.

(iv) Gbao's Ground 8, sub-ground 8(a)

2.13 The Gbao Defence argues that Gbao's right to a fair trial has been violated because the Trial Chamber based its convictions under JCE on a fact that was not pleaded in the Indictment, namely Gbao's role as RUF ideologist.

2.14 Where JCE as a mode of liability is alleged, the Indictment must plead the nature and purpose of the enterprise and the nature of the accused's participation in the

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38 Kallon Appeal Brief, paras 70 and 71.

39 Kallon Appeal Brief, para. 70.

40 *AFRC* Appeal Judgement, para. 85, referring to *Prosecutor v. Karemera et al.*, ICTR-98-44-R72, "Amended Indictment" 23 February 2005, para. 7; *Prosecutor v. Mpambara*, ICTR-01-65, "Amended Indictment", 7 March 2005, para. 6; *Prosecutor v. Brđanin*, IT-99-36, "Sixth Amended Indictment", 9 December 2003, para. 27; *Prosecutor v. Milošević*, IT-02-54, "Amended Indictment (Bosnia)", paras 6, 8; *Prosecutor v. Krajišnik and Plavšić*, IT-00-39 & 40, "Amended Consolidated Indictment", 7 March 2002, para. 5.

41 See *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1270, "Kallon Final Trial Brief", 31 July 2008 ("**Kallon Final Trial Brief**"), para. 650.

42 Trial Judgement, para. 393.

enterprise.[43] It is the pleading of the nature of Gbao's participation in the enterprise that is at issue under this sub-ground of appeal.

2.15 The Prosecution submits that the Indictment adequately pleaded the nature of Gbao's participation in the JCE. Gbao's senior positions are set out at paragraphs 29 to 33 of the Indictment. Paragraph 34 provides that in these positions, Gbao acted in concert with others. Paragraphs 37 and 38 of the Indictment provide that Gbao, by his acts or omissions in relation to the crimes of unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers and looting and burning of civilian structures as alleged in the Indictment, participated in the JCE. It was not the Prosecution's theory that Gbao's function as RUF ideologist in itself constituted his substantial contribution to the JCE and hence this was not a material fact to be pleaded in the Indictment. It was also not the finding of the Trial Chamber that Gbao's function as RUF ideologist *in itself* constituted his substantial contribution to the JCE. On the contrary, this was one aspect of the *evidence* that the Trial Chamber was entitled to take into account as part of its findings. Therefore, Gbao's right to a fair trial was not violated through insufficient notice of the manner of his contribution to the JCE.

(v) Conclusiou

2.16 The Defence complaints relating to the pleading of JCE liability should therefore be dismissed.

B. Alleged defective pleading of other Article 6(1) modes of liability

(i) Introduction

2.17 This section of this Response Brief responds to **Sesay's Ground 6, Kallon's Grounds 5, 11, and 23 and Gbao's Ground 4** to the extent that they relate to alleged defective pleading of Artiele 6(1) responsibility.

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[43] *Prosecutor v. Taylor*, SCSL-2003-01-T-775, "Decision on 'Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment'", Trial Chamber, 1 May 2009 ("***Taylor* JCE Decision**"), para. 15; *Kvočka* Appeal Judgement, para. 28.

(ii) Sesay's Ground 6 and Gbao's Ground 4

2.18 The Sesay Defence argues that the Trial Chamber erred in finding that the charges and their alleged commission pursuant to Article 6(1) had been properly pleaded and/or could be cured by subsequent information, and contends that the "volume of defects" cumulatively undermined the trial and Sesay's Article 17 rights.

2.19 The Trial Judgement devoted a whole Part of the Trial Judgement (Part IV, paragraphs 318 to 472) that was some 55 pages in length, to challenges in the form of the Indictment. In this very lengthy analysis, the Trial Chamber gave careful consideration to the relevant legal principles as they applied to the Defence challenges to the Indictment in this ease. The Trial Chamber clearly exercised a very high degree of diligence in dealing with issues relating to the suffieiency of the Indictment. Contrary to the impression that the Sesay Appeal Brief seeks to eonvey, there was nothing arbitrary or irrational about the way that the Trial Chamber approached these issues.

2.20 Paragraph 29 of the Sesay Appeal Brief appears to argue that the Trial Chamber abused its discretion, or exereised its discretion on the basis of incorrect legal principles, when it declined in the Trial Judgement to revisit its pre-trial decision on defects in the form of the Indictment. The Sesay Appeal Brief appears to take the view that the Trial Chamber is under a "duty" to reconsider its own pre-trial decisions at the end of the case if called upon by the Defence to do so, and that in such circumstances the burden is on the Prosecution to show that the Indictment was not defectively pleaded.

2.21 The Proseeution submits that any such argument is premised on incorrect legal prineiples. The Rules of the Special Court (Rule 72), and corresponding provisions in the Rules of other international criminal tribunals, make clear that motions alleging defects in the form of the indictment are to be brought and determined at the pre-trial stage. This Appeals Chamber held in the *AFRC* Appeal Judgement,[44] citing the *Ntagerura* Appeal Judgement,[45] that "it falls *within the discretion* of a Trial Chamber to reconsider a previous decision if a clear error of reasoning has

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[44] See Sesay Appeal Brief, para. 29.

[45] *Prosecutor v. Ntagerura,* ICTR-96-10-A, "Judgement", Appeals Chamber, 7 July 2006 ("***Ntagerura* Appeal Jndgment**"), para. 55.

been demonstrated or if it is necessary to prevent an injustice".[46] There is no authority for the proposition that the Trial Chamber is under a *duty* to reopen pre-trial decisions at the end of the case if requested by the Defence to do so. The decision whether or not to redecide a pre-trial decision is a matter to be determined in the Trial Chamber's *discretion*, and the *Ntagerura* Appeal Judgement[47] indicates that the Trial Chamber should be cautious in exercising that discretion. It is readily apparent that trial proceedings could become unworkable if pre-trial decisions on the form of the indictment were routinely reopened at the end of trial.

2.22 In the present case, the Trial Chamber decided, in the exereise of its discretion, not to re-open its pre-trial decision on the form of the indictment. In exercising that discretion, the Trial Chamber clearly applied the test established in the *AFRC* Appeal Judgement and *Ntagerura* Appeal Judgement: it held that the pre-trial decision was clear, and that the Defence had not "demonstrated the existence of a clear error of reasoning in the Trial Chamber's pre-trial decision.[48]

2.23 Furthermore, contrary to what the Sesay Defence suggests, where the Defence alleges defects in the form of the Indictment, it is not the ease that the burden of proof is on the Prosecution to establish that the indictment is not defective. In aecordance with basic legal prineiples, where the Defence brings a motion alleging defects in the form of the indictment, it is the Defence, as the moving party, that must bear at the very least a burden of persuasion in satisfying the Trial Chamber that the indictment is defective. With all the more reason, where the Defence requests the Trial Chamber *at the end of the trial* to re-open a matter that was already deeided at the pre-trial stage, the burden is on the Defence as the moving party to persuade the Trial Chamber that there are good reasons for the Trial Chamber to exercise its discretionary power to do so.

2.24 As to paragraph 30 of the Sesay Defence Brief, the Prosecution does not understand the argument being made. In paragraph 472 of the Trial Judgement, the Trial Chamber said that it did "not consider that the volume of defects in the Indictment, taken cumulatively, has deprived any of the Accused of their right to a fair trial".

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46 Emphasis added.
47 *Ntagerura* Appeal Judgment, para. 55.
48 Trial Judgement, para. 422.

The Sesay Defence argues that the Trial Chamber thereby applied the wrong legal definition of what constitutes a "charge". However, in this part of the Trial Judgement, the Trial Chamber does not in any way deal with the definition of a "charge". The Sesay Defence seeks to rely on case law dealing with the circumstances in which an indictment can be *amended* to add a new charge.[49] However, the issue in this case is whether the *existing* charges were adequately pleaded (or if not, whether the defects were cured), rather than whether *new* charges could be added. The Prosecution submits that all of the crimes of which the Accused were convicted in this case were clearly encompassed within the wording of the charges contained in the Indictment. The only question is whether the Defence was given sufficiently specific notice of those charges, or whether the Defence was given insufficient notice on the ground that the wording of the Indictment was too vague and general. There is no question in this case of the Accused being convicted of any matter "that is factually and/or legally distinct from any already alleged in the indictment".

2.25 As to paragraph 31 of the Sesay Defence Brief, the Prosecution notes that this Appeals Chamber has affirmed in the *AFRC* Appeal Judgement, and the Sesay Defence does not appear to dispute, that:

> ... there is a narrow exception to the specificity requirement for indictments at international criminal tribunals. In some cases, the widespread nature and sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity.[50]

2.26 The Sesay Defence does appear to address expressly the question whether the present case was one in which the Trial Chamber was legitimately entitled to apply this exception, which the Trial Chamber *expressly* relied upon in its pre-trial decision.[51] The Prosecution submits that the "widespread nature" and "sheer scale" of the crimes in this case is manifest from a reading of the Trial Judgement. It is

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[49] Sesay Appeal Brief, para. 30, footnote 96.

[50] *AFRC* Appeal Judgement, para. 41. For this proposition, see also *Prosecutor v. Muhimana*, ICTR-95-1B-A, "Judgement", Appeals Chamber, 21 May 2007 ("***Muhimana* Appeal Judgement**"), para. 79; *Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006 ("***Gacumbitsi* Appeal Judgement**"), para. 50; *Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005, para. 434.

[51] *Prosecutor v. Sesay*, SCSL-2003-05-PT-80, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003 ("***Sesay* Indictment Decision**"), in particular paras 7(xi), 8(iii), 9, 20, 22-24.

submitted that it was a wholly appropriate exercise of the Trial Chamber's discretion to apply the exception at the pre-trial stage, and a wholly appropriate exercise of the Trial Chamber's discretion not to revisit that decision at the end of the trial. The Defence have certainly not established that it was not.

2.27 At paragraph 31 of the Sesay Appeal Brief, the Sesay Defence appears to argue however that it would be an "abuse of process" to apply this exception in circumstances where the Prosecution *could* have given more specificity than it did. The Sesay Defence cites no authority for this proposition, which the Prosecution submits has no basis in legal principle.

2.28 The rules on the pleading requirements for indictments exist to ensure that the trial of the accused is fair. These rules do not exist to enable an accused who has been convicted after a fair trial to be acquitted nonetheless because of failings on the part of the prosecution. The issue is whether the trial of the accused was fair, not whether the prosecution did everything that it could have, or even everything that it should have. Unless any failings on the part of the Prosecution have had the effect of rendering the trial as a whole unfair, any such failings provide no basis for quashing charges or convictions once the trial is over. The Trial Chamber expressly recognized this when it said, at paragraph 472 of the Trial Judgement, that "although the prosecution does not appear to have exercised the diligence which could have been expected with respect to the pleading of other material facts in the Indictment", nonetheless, "the ability of the Accused to prepare their defence was not materially prejudiced".

2.29 Even if it were the case that the Prosecution *could* have provided more specificity earlier than it did, there is no suggestion that its failure to do so was a deliberate attempt to gain an unfair advantage over the Defence or to deny the Accused their fair trial rights. If the Defence had sufficient notice of the charges in accordance with the established principles, it is submitted that the fact that the Prosecution might have provided greater specificity than it did would not in the circumstances

be "something so unfair and wrong that the court should not allow a Prosecutor to proceed" for purposes of the principles on abuse of process.[52]

2.30 Paragraph 32 of the Sesay Appeal Brief, and Gbao's Ground 4, suggest that the Trial Chamber found that there was another exception to the specificity requirements for indictments based on the fact that the Special Court "intended to proceed as expeditiously as possible in an immediate post-conflict environment". However, it is clear from paragraph 330 of the Trial Chamber's Judgement that the Trial Chamber did not consider this to be an *exception* to the specificity requirement for indictments (notwithstanding the heading above paragraph 329). Rather, the point made by the Trial Chamber in this paragraph of the Trial Judgement was that in the very determination of what *are* the specificity requirements for indictments, it is necessary to undertake a balancing exercise between "practical considerations" on the one hand, and the need "to allow an accused to fully present his defence on the other" (Trial Chamber's Judgement, para. 331). The Trial Chamber, in paragraph 330, in stating that the Special Court was "intended to proceed as expeditiously as possible in an immediate post-conflict environment", was merely identifying one of the practical considerations to be weighed in this balancing exercise. The Prosecution submits that there was nothing inappropriate in this observation.

2.31 Paragraph 33 of the Sesay Appeal Brief argues that the Trial Chamber "downgraded" what is an "absolute" requirement to plead direct participation, because the Trial Chamber said at paragraph 325 of the Trial Judgement that it was only necessary to plead direct participation "in as far it is possible". This Defence argument is inconsistent with the case law. For instance, the ICTR Appeals Chamber has said that "criminal acts that were physically committed by the accused personally must be set forth in the indictment specifically, including *where feasible* 'the identity of the victim, the time and place of the events and the means by which the acts were committed'".[53] In paragraph 325 of the Trial Judgement, the Trial

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[52] *Prosecutor v. Akayesu*, ICTR-96-1-A, "Judgement", Appeals Chamber, 1 June 2001 ("***Akayesu* Appeal Judgement**"), para. 339.

[53] *Muhimana* Appeal Judgement, para. 76 (emphasis added).

Chamber quoted from a decision in the *Brđanin* case[54] in which the ICTY Trial Chamber said that where the Prosecution is unable to plead all details of direct participation, "it cannot be obliged to perform the impossible". As the Trial Chamber noted, this paragraph from the decision in the *Brđanin* case was cited with approval by this Appeals Chamber in the *AFRC* Appeal Judgement.[55]

2.32 Paragraph 35 of the Sesay Appeal Brief argues that the Trial Chamber took a different approach to the specificity requirements in the *CDF* case. According to the Sesay Defence, in the RUF case, the Prosecution was permitted to adduce evidence in respect of locations not specifically pleaded in the Indictment, while in the *CDF* case it was not. This argument is dealt with in paragraphs 2.64 to 2.70 and 2.73 of this Response Brief.

2.33 Paragraph 36 of the Sesay Appeal Brief argues that it was inconsistent of the Trial Chamber to exclude acts of sexual violence in Kailahun District on the ground that Kailahun District had not been pleaded in the Indictment. This argument is dealt with in paragraphs 2.71 to 2.73 of this Response Brief.

2.34 Paragraph 37 of the Sesay Appeal Brief acknowledges that defects in the Indictment can be cured by subsequent notice to the Defence, but argues that "this does not include witness statements served throughout the Prosecution's case". The Prosecution submits that on the contrary, in certain circumstances witness statements can be relied upon as part of the timely, clear and consistent information curing the defect in an indictment.[56] However, that is beside the point, for the following reasons.

2.35 In relation to the Article 6(1) mode of liability of personal commission, the Trial Chamber found *in favour of the Defence*. The Trial Chamber held that it was "not satisfied that the Prosecution provided the best information that it could in the

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[54] Trial Judgement, para. 325, quoting *Prosecutor v. Brđanin and Talić*, IT-99-36-T, "Decision on Objections by Momir Talić to the Form of the Amended Indictment", Trial Chamber, 20 February 2001 ("***Brđanin and Talić* 20 February 2001 Decision on Form of Indictment**"), para. 22.

[55] *AFRC* Appeal Judgement, para. 38.

[56] *Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004 ("***Ntakirutimana* Appeal Judgement**"), para. 48 (holding that witness statements, when taken together with "unambiguous information" contained in a pre-trial brief and its annexes may be sufficient to cure a defect in an indictment).

Indictment",[57] and that it would therefore "consider whether the Prosecution has cured each allegation of personal commission by subsequent communications when the Chamber discusses the liability of the Accused for these crimes".[58] Ultimately, Sesay was not convicted of having personally committed *any crime at all*, and he therefore cannot claim to have been prejudiced by the Trial Chamber's findings as to defects in the Indictment relating to personal commission. The *only* conviction for personal commission of crimes was Kallon's conviction for *one* of the Count 15 incidents (attack on Salaheudin, Trial Judgement, paras 2242 to 2246).

2.36 As to Article 6(1) modes of liability other than personal commission, the Trial Chamber did not find that defects in the Indictment had been cured through the service of witness statements by the Prosecution. Rather, the Trial Chamber found that the Indictment was not defective, on the ground that the exception referred to in paragraph 2.25 above applied.[59] For the reasons given in paragraph 2.26 above, it was open to the Trial Chamber to so decide. Any principle that defects in the Indictment cannot be cured by the disclosure of witness statements to the defence is therefore immaterial, since the Trial Chamber found that there was no defect in the Indictment. However, the fact that more specific information was provided by the Prosecution to the Defence through disclosed witness statements does underline the fact that the Defence was not unfairly prejudiced by the manner in which the Indictment was pleaded.

2.37 Apart from very generalized assertions in paragraphs 27-28 of the Sesay Appeal Brief that the Defence suffered prejudice that was "extensive and incurable", the Sesay Defence has not provided any detailed argument to establish precisely how Sesay's trial was in all the circumstances rendered unfair. The lengthy annexes to the Sesay Appeal Brief do not of themselves establish this.

2.38 It is submitted that Sesay's Ground 6 should accordingly be dismissed.

(iii) Kallon's Grounds 5, 11 and 23

2.39 The Prosecution relies on the submissions above in relation to Sesay's Ground 6.

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57 Trial Judgement, para. 399.
58 Trial Judgement, para. 400.
59 Trial Judgement, paras 401-402.

2.40 As to paragraph 73 of the Kallon Appeal Brief, the Prosecution submits that there can be no suggestion that the charges in the Indictment were "changed". The Defence complaint was that the Indictment was insufficiently specific. In other words, the acts of which the Accused were convicted were within the generality of the wording of the Indictment, the only issue being whether or not that wording was sufficiently specific. The Prosecution submits that it is simply misleading to suggest that the Accused were convicted of conduct with which they were not charged in the Indictment. The Defence complaint is rather that they were given insufficient notice of what *was* pleaded in the Indictment.

2.41 For the same reason, as to paragraph 74 of the Kallon Brief, the Kallon Defence does not explain how the charges were "transformed" by the addition of "new" crimes.

2.42 As to paragraph 75 of the Kallon Appeal Brief, the Trial Chamber *accepted* this Defence submission that the Indictment was defective in not pleading with specificity the crimes that Kallon was alleged to have committed personally. However, the Trial Chamber found this defect to have been cured in relation to *one single incident*, namely *one* of the Count 15 incidents (attack on Salaheudin, Trial Judgement, paras 2242 and to 2246).

2.43 As to paragraphs 108, 109, 112, 113, 250, 252, 259-260 and 263-264 of the Kallon Appeal Brief, the Prosecution refers to its submissions in response to Sesay's Ground 6. Kallon was not convicted on the basis of having personally committed any of these crimes, other than the attack on Salaheudin (as to which, see below).

2.44 As to paragraphs 253 to 256 of the Kallon Appeal Brief, the Trial Chamber did not find that the defect in the Indictment (failure of the Indictment to specify the attack on Salaheudin as an act that Kallon was alleged to have personally committed) was cured by the "mere" service of a witness statement. As is clear from paragraphs 2243 to 2246 of the Trial Judgement, the Trial Chamber in fact found that the defect was cured by a Prosecution motion filed on 12 July 2004 seeking an order for the call of additional witnesses including TF1-314 and TF1-362, both of whom would

testify on the attacks on UNAMSIL personnel.[60] As the Trial Chamber further noted, the Trial Chamber granted that Prosecution request on 29 July 2004,[61] on the condition that the Prosecution would not call these witnesses before 1 January 2005, and in the event those witnesses testified in April and November 2005 respectively, "thereby giving the Defence ample opportunity to investigate the allegations".[62]

2.45 The ICTR Appeals Chamber has held that:

> The Appeals Chamber cannot exclude the possibility that a defect in the indictment could be cured through a Prosecution motion for addition of a witness, provided any possible prejudice to the Defence was alleviated by, for example, an adjournment to allow the Defence time to prepare for cross-examination of the witness. Accordingly, the Appeals Chamber is not convinced that the Trial Chamber erred in stating that although disclosure of witness statements or potential exhibits are generally insufficient to put an accused on reasonable notice, a defect in the indictment could be cured by the information conveyed in a Prosecution motion to add a witness, which clearly states the material facts on which the witness would testify.[63]

2.46 The decision of the Trial Chamber in this case was consistent with these principles.

2.47 It is therefore submitted that Kallon's Grounds 5, 11 and 23, to the extent that they allege defective pleading of Article 6(1) liability, should be dismissed.

C. Alleged defective pleading of Article 6(3) responsibility

(i) Introduction

2.48 The Sesay Notice of Appeal claims that the relationship of Sesay to his subordinates, and his knowledge or reason to know of the crimes, was not pleaded with a sufficient specificity, causing incurable prejudice.[64]

2.49 The Trial Chamber recalled that a lower degree of specificity is required in the Indictment when the Prosecution alleges liability under a theory of superior

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60 *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-T-191, "Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", 12 July 2004 ("**Prosecution Additional Witness Request**").

61 *Prosecutor v. Sesay, Kallon, Gbao,* SCSL-2004-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", Trial Chamber, 29 July 2004 ("**Decision on Prosecution Additional Witness Request**").

62 Trial Judgement, para. 2245.

63 *Bagosora* Exclusion of Evidence Appeal Decision, para. 35.

64 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1255, "Notice of Appeal", 28 April 2009 ("**Sesay Notice of Appeal**"), para. 93(ii).

responsibility.[65] The Trial Chamber found that it sufficed to describe the nature of the relationship between an accused and his subordinate by referenee to the eommand position of the accused.[66] All authorities cited in support of the Sesay Defence's contention that the Trial Chamber misapplied the requisite legal elements merely outline the elements that must be proved beyond a reasonable doubt in order to establish superior responsibility.[67] The Prosecution submits that the details of the acts of the accused in failing to prevent or punish crimes are pleaded indirectly in the Indictment, sincc this clement refcrs to the Statutc which refers to the (codified) norms of International Humanitarian Law, setting out the precise responsibilities of a superior in various contexts of armed conflict.[68]

2.50 It is difficult if not impossible to plead in detail an allegation that something did not occur. If it is alleged that something never occurred, it is illogical to suggest that the Prosecution should plcad precisely when it never occurred, or the details of how it never occurred. In pleading alleged criminal responsibility under Article 6(3) of the Statute, it is submitted that it is sufficicnt to plead that the accused nevcr took steps to prevent subordinates from committing the crime, and/or never took steps to punish subordinates for having committed the crime.

[redacted]

2.51 This section of this Response Brief responds to **Kallon's Ground 13**, to the extent that this ground contends that Article 6(3) liability was not adequately pleaded in the Indietment.

2.52 The Kallon Defencc relies on the *Blaškić* case which scts forth standards for pleading command responsibility. It is submitted that the Kallon Defence generally

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65 Trial Judgement, para. 407.

66 Trial Judgement, para. 408 citing, *Prosecutor v. Krnojelac*, IT-97-25-T, "Decision on the Defence Motion on the Form of Indictment", Trial Chamber, 24 February 1999 ("***Krnojelac* 24 February 1999 Deeision on Form of Indictment**"), para. 19. The RUF Indictmcnt sets out the command position of Sesay at paras 20-23, of Kallon at paras 24-28 and of Gbao at paras 30-33.

67 Sesay Appeal Brief, para. 337, referring to authorities cited in footnote 1059.

68 *Prosecutor v. Hadžihasanović et al*, IT-01-47-AR72, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", Appeals Chamber, 16 July 2003 ("***Hadžihasanović* Appeal Deeision**"), paras 23 and 47, citing *Yamashita v. Styer*, Supreme Court of the United States of America, 4 February 1996, which refers to the IV Hague Convention 1907 and Additional Protocol I to the Geneva Conventions of 1949.

misapplies these standards to support its contentions.[69] According to *Blaškić*, the relationship between the appellant and the direct perpetrators must be pleaded (i.e. that the accused is a superior who exercised effective control over sufficiently identified subordinates).[70] In respect of these material facts it is sufficient to describe the appellant as a "commander"[71] while referring to his particular military duties to establish his control;[72] and "if the [P]rosecution is unable to identify [the direct perpetrators] by name, it will be sufficient [...] to identify them at least by reference to their 'category' (or their official position) as a group."[73] Furthermore, it is clear and logical that the Prosecution is not required to plead that particular "necessary and reasonable measures" were not taken by the appellant.[74] It is "the *conduct* [...] *by which* [the Appellant] may be found to have failed" in this duty that must be pleaded.[75] Thus, it is sufficient to plead, as the basis of any such failure, that he acted in a way which did not prevent or punish or that he omitted to act

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69 Kallon Appeal Brief, para. 139.

70 *Blaškić* Appeal Judgement, para. 218; *Prosecutor v. Krnojelac*, IT-97-25-T, "Decision on Preliminary Motion on form of Amended Indictment", Trial Chamber, 11 February 2000 ("***Krnojelac* 11 February 2000 Decision on Form of Indictment**"), para. 18; *Brđanin and Talić* 20 February 2001 Decision on Form of Indictment, para. 19; *Prosecutor v. Krajišnik*, IT-00-39-T, "Decision Concerning Priliminary Motion on the Form of The Indictment", Trial Chamber, 1 August 2000 ("***Krajišnik* 1 August 2000 Decision on Form of Indictment**"), para. 9; *Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, "Decision on Form of Indictment", Trial Chamber, 7 December 2001 ("***Hadžihasanović* 7 December 2001 Decision on Form of Indictment**"), paras 11 and 17; *Prosecutor v. Mrskić et al.*, IT-95-13/1, "Decision on Form of Indictment", Trial Chamber, 19 June 2003 ("***Mrksić* 19 June 2003 Decision on Form of Indictment**"), para. 10.

71 *Krnojelac* 24 February 1999 Decision on Form of Indictment, para. 19, cited approvingly in *Blaskić* Appeal Judgement, para. 217.

72 *Prosecutor v. Brđanin and Talić*, IT-99-36-T, "Decision on form of Further Amended Indictment and Prosecution Application to Amend", Trial Chamber, 26 June 2001 ("***Brđanin and Talić* 26 June 2001 Decision on Form of Indictment**"), para. 19, cited approvingly in *Blaškić* Appeal Judgement, para. 217. See also *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Decision on Motion by the Accused Zejlic Delalić based on Defects in the Form of the Indictment", Trial Chamber, 2 October 2006 ("***Čelebići* 2 October 1996 Decision on Form of Indictment**"), para. 19, where it is held that "the indictment [...] which names the accused as Commander of the First Tactical Group of the Bosnian Muslim forces with authority over the Čelebići camp and its personnel is not deficient." See also *Prosecutor v. Orić*, IT-03-68-T, "Judgement", Trial Chamber, 30 June 2006 ("***Orić* Trial Judgement**"), para. 312, where the Trial Chamber stated that "an accused's high public profile [or high-profile participation ...] is an additional indicator of effective control."

73 *Krnojelac* 24 February 1999 Decision on Form of Indictment, para. 46. And see paragraph 2.56 below.

74 *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, paras 24-25.

75 *Blaškić* Appeal Judgement, para. 218 (emphasis added); *Brđanin and Talić* 20 February 2001 Decision on Form of Indictment, para. 19; *Krnojelac* 11 February 2000 Decision on Form of Indictment, para. 18; *Krajišnik* 1 August 2000 Decision on Form of Indictment, para. 9; *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, para. 11; *Mrskić* 19 June 2003 Decision on Form of Indictment, para. 10.

altogether. Similarly, it is the "conduct by which the Appellant may be found" to have known or had reason to know of the crimes,[76] and the related conduct of the subordinates[77] which must be pleaded. Furthermore, the relevant facts of the acts of subordinates will usually be stated with less precision because the details of those acts (by whom and against whom they are done) are often unknown.[78] Therefore, details of the numbers and names of victims and subordinates as well as the measures which ought to have been taken to prevent or punish are not required.[79] These are the *evidence* that is intended to prove the material facts and this distinction is important.[80]

2.53 Paragraph 140 of the Kallon Defence Brief claims that the elements of superior responsibility were not met in respect of the commission of forced marriage at Kissi Town and that these defects were never cured. It asserts that Kissi Town was not pleaded as a particular location at which Kallon exercised command authority in respect of Counts 6-9. However, paragraph 55 of the Indictment and paragraph 368

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[76] *Blaškić* Appeal Judgement, para. 218; *Krnojelac* 11 February 2000 Decision on Form of Indictment, para. 18; *Brđanin and Talić* 20 February 2001 Decision on Form of Indictment, para. 19; *Krajišnik* 1 August 2000 Decision on Form of Indictment, para. 9; *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, para. 11; *Mrkšić* 19 June 2003 Decision on Form of Indictment, para. 10.

[77] *Blaškić* Appeal Judgement, para. 218; *Krnojelac* 24 February 1999 Decision on Form of Indictment, para. 38; *Brđanin and Talić* 20 February 2001 Decision on Form of Indictment, para. 19; *Krajišnik* 1 August 2000 Decision on Form of Indictment, para. 9; *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, para. 11; *Mrkšić* 19 June 2003 Decision on Form of Indictment, para. 10.

[78] *Blaškić* Appeal Judgement, para. 218; *Krnojelac* 11 February 2000 Decision on Form of Indictment, para. 18; *Brđanin and Talić* 20 February 2001 Decision on Form of Indictment, para. 19; *Krajišnik* 1 August 2000 Decision on Form of Indictment, para. 9; *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, para. 11; *Mrkšić* 19 June 2003 Decision on Form of Indictment, para. 10; *Prosecutor v. Kvočka et al.*, IT-98-30/1 "Decision on Defence Preliminary Motions on the Form of the Indictment", Trial Chamber, 12 April 1999 ("***Kvočka* 12 April 1999 Decision on Form of Indictment**"), para. 17.

[79] See *Prosecutor v. Nasser Orić*, IT-03-68-T, "Trial Judgement", 30 June 2006, para. 311, footnote 878, where the Trial Chamber stated that: "As may be concluded from the unchallenged reference to [the *Krnojelac* 24 February 1999 Decision on Form of Indictment, para. 46] by the Appeals Chamber in the [*Blaškić* Appeal Judgement, para. 217], to establish superior responsibility, the direct perpetrators of the relevant crimes need not be identified by name, nor must it be shown that the superior knew the identity of those individuals if it is at least proven that they belong to a category or group of people over whom the accused has effective control. See also *Prosecutor v. Hadžihasanović and Kubura*, IT-01-47-T, "Judgement", Trial Chamber, 15 March 2006 ("***Hadžihasanović and Kubura* Trial Judgement**"), para. 90. See the Sesay Defence's false contentions: Sesay Appeal Brief, paras 281-282. In paragraph 281 of the Sesay Appeal Brief the Sesay Defence also suggests that it is unknown "who was enslaved; who were the perpetrators and therefore who the Appellant was expected to punish and prevent"; also see paragraph 282, where the Sesay Defence again emphasises that it was not specified "how many captives there were, where they came from, for how long they were captive [and] not a single victim was named."

[80] *Krnojelac* 11 February 2000 on Form of Indictment, para. 17.

of the Supplemental Pre-trial Brief explicitly list Kissi Town as one of the locations where crimes charged in Counts 6 to 9 were committed. It was always the case of the Prosecution that Kissi Town was a location where Kallon was to be held liable pursuant to Article 6(1) and, or alternatively, pursuant to Article 6(3).[81] The Kallon Defence also contends that Kallon's alleged subordinates at Kissi Town were never sufficiently or at all particularized,[82] whereas the subordinates were clearly identified as a large number of AFRC/RUF forced present in Kissi Town Camp between February 1998 and June 1998.[83] The Prosecution submits that this information was sufficient for the Defence to prepare its case adequately with respect to this location.

(iii) Alleged errors regarding the liability of the Accused on Counts 15 and 17: UNAMSIL attacks

2.54 This section of this Response Brief responds to **Sesay's Ground 44** and **Kallon's Grounds 23 and 24**, to the extent that these grounds of appeal contend that Article 6(3) liability was not adequately pleaded in the Indictment.

2.55 The Sesay Defence contends that the Article 6(3) liability for the acts charged under Counts 15 and 17 were not adequately pleaded, in particular in that the Indictment did not plead the "reasonable and practicable measures which ought to have been taken" by Sesay but which he was alleged to have failed to take.[84]

2.56 As to the specific complaint of the Sesay Defence, the Prosecution notes that in the *Hadžihasanovic* case, the ICTY Trial Chamber rejected a defence argument that "in relation to counts alleging that the accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof, it he

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81 See Indictment, para. 55 read together with p. 14 *in fine*. See also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-82, "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time For Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004", 21 April 2004 ("**Prosecution Supplemental Pre-Trial Brief**"), paras 365-373.

82 Kallon Appeal Brief, para. 140.

83 Prosecution Supplemental Pre-Trial Brief, para. 369: "The presence of military training camps in Kono District, such as "Superman Camp" and Kissi-town (or Kissi Town) camp where large numbers of AFRC/RUF forces were present".

84 Sesay Ground 44; Sesay Appeal Brief, paras 336, 338.

pleaded what specific measures the accused should have taken and failed to take".[85]

The Trial Chamber said that:

> It is unclear what exactly the Defence objection is. It seems to be a concern that, as it is, the indictment may leave the door open to the Prosecution to lead a case of strict liability against the accused. The indictment and the jurisprudence of the Tribunal leave no room for the Prosecution to lead and establish such a case. The *Celebici* Appeals Chamber has rejected any notion of command responsibility being a form of strict liability, as pointed out by the Defence. The Defence submission mainly aims at pleading the evidence by which the material facts are to be proven by the Prosecution. This objection is therefore rejected.[86]

2.57 Kallon argues[87] that the Trial Chamber erred in law and in fact by convicting him under Article 6(3) for the killing of four UNAMSIL personnel,[88] as he had no notice of the particulars underlying the his responsibility for the murders and as they were not part of the Prosecution case during presentation of his case. However, the Indictment clearly alleged attacks against UNAMSIL peacekeepers by the AFRC/RUF, which included "unlawful killings of UNAMSIL peacekeepers".[89] The allegation was also addressed in the Prosecution's Pre-Trial Brief,[90] and its Supplemental Pre-trial Brief.[91] Material facts concerning the killing of UNAMSIL

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85 *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, paras 24-25. See also *Prosecutor v. Boškoski et al.*, IT-04-82-PT, "Decision on Ljube Boškoski's Motion Challenging the Form of the Indictment", Trial Chamber, 22 August 2005 ("***Boškoski* 22 August 2005 Decision on Form of Indictment**"), paras 24-26.

86 *Hadžihasanović* 7 December 2001 Decision on Form of Indictment, para. 25.

87 Kallon Ground 24; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1254, "Kallon's Notice and Grounds of Appeal", 28 April 2009 ("**Kallon Notice of Appeal**"), paras 24.1 and 24.2; Kallon Appeal Brief, para. 287.

88 Trial Judgement, paras 1823-1825 (on 2 May, during the RUF attack on Makump DDR Camp, an RUF fighter shot a KENBATT peacekeeper named Private Yusif at point blank range in the chest and that Private Yusif died); Trial Judgement, para. 1826 (Kenyan Peacekeepers escaped through the bush towards Makeni, and a peacekeeper by the name of Wanyama, was shot in the hip by RUF fighters and later died of the wound); Trial Judgment, para. 1828 (on 2 May 2000, as Kenyan peacekeepers were travelling over a bridge towards Magburaka, rebels fired an RPG at them and the vehicle fell from the bridge, killing two peacekeepers). See also Trial Judgment, paras 1892-1893, 1901 and 1928.

89 Indictment, para. 83.

90 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-39, "Prosecution's Pre-Trial Brief Pursuant to Order For filing Pre-Trial Briefs (Under Rules 54 and 73*bis*) of 13 February 2004", 1 March 2004 ("**Prosecution Pre-Trial Brief**"), para. 65(p), relating to charges for violence to life, health, physical and mental well being of persons in particular murder, as Count 16. At para. 82, the allegations of the RUF attacks on UNAMSIL personnel, at locations in Makeni and Magburaka area, including killings, are set out.

91 Prosecution Supplemental Pre-Trial Brief, paras 569-576, notably 570(c) and 574-576.

personnel were also made known to the Accused through disclosure of witness statements.[92]

2.58 Apart from these specific complaints, the Sesay Defence does not specify any other alleged defect in the pleading of Article 6(3) responsibility in relation to Counts 15 and 17. The Kallon Defence also merely states, without any substantiating argument at all, that the Indictment did not "plead any of the elements of 6.3 responsibility".[93] The Prosecution cannot respond to unspecified allegations of defects in the Indictment.

2.59 The Prosecution submits therefore that Sesay and Kallon's contentions relating to the defective pleading of their superior responsibility for Counts 15 and 17 should be dismissed.

(iv) Kallon Ground 14

2.60 **Kallon's Ground 14** contends, *inter alia*,[94] that the Indictment did not plead the essential elements of Kallon's alleged superior responsibility in respect of Count 13 for Kono District, that this defect was not cured. The Kallon Defence argues that the Supplemental Pre-Trial Brief of the Prosecution stated that the crime of enslavement occurred between 14 February 1998 and 30 June 1998, in contradiction to the Indictment which specified the relevant period from 14 February to January 2000. However, the Kallon Defence does not show how it was prejudiced by this. Nor does the Kallon Defence show how the fact that the Trial Chamber allegedly "compounded this confusion by finding that Kallon was only found to be in a superior-subordinate relationship with RUF fighters in Kono District until August 1998" caused any prejudice to Kallon.[95]

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92 Leonard Ngondi, statement of 28 February 2003, disclosed on 13 January 2006, statement of 6-7 February 2006 disclosed on 13 February 2006; TF1-366 statements of 30 August 2004 disclosed on 13 September 2005 and of 29 October 2005 disclosed on 31 October 2005; Leonard Ngondi statement dated February 2006 disclosed on 13 February 2006, and TF1-360 statement of 25 June 2004 disclosed on 1 July 2004.

93 Kallon Appeal Brief, para. 250.

94 Substantial issues regarding this ground of appeal are dealt with below in Section 7.H.

95 Kallon Appeal Brief, para. 144.

D. Alleged errors relating to locations not pleaded in the Indictment

2.61 This section of this Response Brief responds to **Sesay's Ground 6** (in part), **Kallon's Ground 4** (in part) and **Kallon's Ground 28** (in part).

2.62 The Kallon Notice of Appeal stated, at paragraph 5.2, that the Trial Chamber erred in convicting Kallon for alleged crimes committed in locations that were not pleaded or were withdrawn at the Rule 98 stage. However, the Kallon Appeal Brief did not present arguments in support of this contention. The Prosecution submits that if no arguments are presented in support of a contention in a Notice of Appeal, the contention should be summarily rejected. The Prosecution should not be required to speculate as to what the Defence arguments might be, in order to respond to them.

2.63 The Sesay Appeal Brief, at paragraphs 35-36, obliquely raises an issue concerning the fact that the Indictment did not specify every location in which crimes were committed, but referred, for instance, to "various locations", "including" certain specified locations.

2.64 The Sesay Appeal Brief does not specifically argue that the Indictment is defective for failing to specify each individual location in which crimes were committed. Rather, the Sesay Defence appears to suggest that the Trial Chamber in this case adopted an approach that was inconsistent with the approach that it adopted in the *CDF* case. The Sesay Defence suggests that in the *CDF* case, the Trial Chamber "recognized that it was unfair to allow the Prosecution to adduce factual allegations of crime within villages and towns not specified in the Indictment".[96] The Prosecution submits that this is not an accurate statement of what occurred in the *CDF* case. Contrary to what the Sesay Defence claims, the Trial Chamber did not take inconsistent approaches in the two cases.

2.65 In the present case, on 13 October 2003, the Trial Chamber gave a decision on a preliminary motion filed by the Sesay Defence on defects in the form of the

[96] Sesay Appeal Brief, para. 35.

Indictment.[97] One of the complaints of the Sesay Defence was that the Indictment did not specify all of the locations in which crimes were committed, but used non-exclusive language such as "including". The Trial Chamber rejected this complaint, stating that:

> The pith of the Defence submission is that these phrases are imprecise and non-restrictive. The Chamber's response to this submission is that it is inaccurate to suggest that the phrases "*various locations*" and "*various areas including*" in the relevant counts are completely devoid of details as to what is being alleged. Whether they are permissible or not depends primarily upon the context. For example, paragraphs 41, 44, 45 and 51 allege that the acts took place in various locations within those districts, a much narrower geographical unit than, for example "*within the Southern or Eastern Province*" or "*within Sierra Leone*". This clearly is permissible in situations where the alleged criminality was of what seems to be cataclysmic dimensions. By parity of reasoning, the phrases "*such as*" and "*including but not limited to*" would, in similar situations, be acceptable if the reference is, likewise, to locations but not otherwise. It is, therefore, the Chamber's thinking that taking the Indictment in its entirety, it is difficult to fathom how the Accused is unfairly prejudiced by the use of the said phrases in the context herein.[98]

2.66 The following month, in the *CDF* case, the same Trial Chamber gave a decision on a preliminary motion on defects in the form of the Indictment, in which it decided exactly the same thing.[99] In this decision, the Trial Chamber referred to the *Sesay* Indictment Decision as "a seminal Decision",[100] and held that "consistent with the principle in *Sesay*", expressions such as "included but not limited to" were impermissibly broad, except is so far as they relate only to *dates* and *locations*.[101] The approach in the two cases was therefore identical.

2.67 Contrary to what paragraph 35 of the Sesay Appeal Brief suggests, the Trial Chamber did not subsequently reverse this position at the Rule 98 stage in the *CDF* case. In the *CDF* case, paragraph 25(g) of the Indictment pleaded that:

> ... between about 1 November 1997 and about 1 February 1998, as part of Operation Black December in the southern and eastern Provinces of

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97 *Prosecutor v. Sesay*, SCSL-2003-05-PT-80, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003 ("**_Sesay_ Indictment Decision**").

98 *Sesay* Indictment Decision, para. 23.

99 *Prosecutor v. Kondewa*, SCSL-2003-12-PT-50, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 27 November 2003 ("**_Kondewa_ Indictment Decision**").

100 *Kondewa* Indictment Decision, para. 5.

101 *Kondewa* Indictment Decision, para. 11.

> Sierra Leone, the CDF unlawfully killed an unknown number of civilians and captured enemy combatants in road ambushes at Gumahun, Gerihun, Jambeh and the Bo-Matotoka Highway.

2.68 After the Trial Chamber had given its Rule 98 Decision in that case, the Trial Chamber issued a decision clarifying the Rule 98 Decision, in which it said:

> In its Decision, The Chamber ruled decisively that there is no evidence capable of supporting a conviction against the Accused in respect of unlawful killings committed as part of "Operation Black December" in the four specified geographic locations listed in sub-paragraph 25(g) of the Indictment, because no evidence was adduced to sustain those allegations as contained in the Indictment. This ruling of The Chamber effectively strikes out sub-paragraph 25(g) of the Indictment. The Chamber in this regard recalls its oral ruling to this effect made during court proceeding on the 26th of January, 2006.
>
> ... The Chamber recalls that the Indictment was particularised by the Prosecution to include specific geographic locations within southern and eastern Provinces of Sierra Leone in which the alleged unlawful killings were committed as part of "Operation Black December". We therefore consider that the Prosecution is now estopped from expanding these particulars to include all other unspecified geographic locations on the major highways in the southern and eastern Provinces of Sierra Leone, as the Indictment in this respect is unspecific and vague.[102]

2.69 It is noted that in paragraph 25(g) of the *CDF* Indictment, apart from the four specified geographic locations, the only location particularized for the crimes was "in the southern and eastern Provinces of Sierra Leone". In the passage from the *Sesay* Indictment Decision quoted above, the Trial Chamber expressly stated that an expression such as this is much more vague than a pleading which specifies a particular District and then gives a non-exhaustive list of locations within that one District. The Trial Chamber's finding that the expression "in the southern and eastern Provinces of Sierra Leone" was "unspecific and vague" is entirely consistent with the passage from the *Sesay* Indictment Decision quoted above. It is submitted that no relevant inconsistency in approach by the Trial Chamber in the *CDF* and *RUF* cases has been established.

2.70 In both cases, the Trial Chamber was of the view that "where the alleged criminality was of what seems to be cataclysmic dimensions", the location of crimes is pleaded with sufficient specificity if the indictment pleads that crimes

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[102] *Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T-550, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgement of Acquittal Pursuant to Rule 98", Trial Chamber, 3 February 2006 ("***CDF* Rule 98 Decision**"), paras 7-8.

were committed within a specified timeframe within a specified District, and then gives a non-exhaustive list of locations within that District. The Defence has cited no authority to establish that as a matter of law, it was not open to the Trial Chamber to so find.

2.71 Paragraph 36 of the Sesay Appeal Brief appears to suggest that the Trial Chamber inconsistently departed from this approach in paragraph 1405 of the Trial Judgement. In that paragraph, the Trial Chamber noted that it had heard evidence of widespread rapes and sexual crimes in Kailahun District. However, it said that as "the Prosecution did not plead these crimes in respect of Kailahun District", these acts would be limited in the Trial Chamber's consideration to their occurrence within the context of "forces marriages" and sexual slavery.

2.72 The Prosecution submits that this paragraph was not inconsistent with the Trial Chamber's general approach. The Indictment pleaded that rapes had occurred in Kono District,[103] Koinadugu District,[104] Bombali District,[105] Freetown and the Western Area[106] and Port Loko District.[107] In paragraph 58 of the Indictment, in respect of Kailahun District, there was no mention of rape. Rather it was alleged that women and girls were "subjected to sexual violence" and "used as sex slaves and/or forced into 'marriages'". In paragraph 1405 of the Trial Judgement, the Trial Chamber determined that in the circumstances it would not convict the Accused of rape in Kailahun District, which was not pleaded in relation to Kailahun District, but would consider the evidence within the context of "foreed marriages" and sexual slavery, which was pleaded in relation to Kailahun District.

2.73 Thus, it is submitted that no inconsistency has been demonstrated within the Trial Judgement, or between the present case and the *CDF* case. It has furthermore not been established that the Trial Chamber erred in taking the consistent approach that it did.

2.74 The Defence complaints concerning locations not specifically pleaded in the Indictment should therefore be rejected.

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103 *Indictment*, para. 55.
104 *Indictment*, para. 56.
105 *Indictment*, para. 57.
106 *Indictment*, para. 59.
107 *Indictment*, para. 60.

E. Alleged defective pleading of Counts 1 and 2 (acts of terror and collective punishment)

2.75 This section of this Response Brief responds to **Sesay's Grounds 7 and 8** and **Kallon's Ground 16.**

2.76 The Sesay Defence argues[108] that the Trial Chamber erred in law and fact in concluding that the Indictment provided adequate notice that acts of terror and collective punishment as pleaded in Counts 1 and 2 included "acts or threats independent of whether such acts or threats of violence satisfy the elements of any other criminal offence."[109] The Kallon Defence makes the same argument,[110] claiming that burning was never pleaded as a crime in and of itself.[111]

2.77 The Trial Chamber dealt with these Defence arguments clearly and comprehensively in paragraphs 450 to 455 of the Trial Judgement. It is submitted that the Defence has not established any error in the Trial Chamber's reasoning. The Prosecution submits that it is clear from the wording of paragraph 44 of the Indictment that the conduct alleged in relation to Counts 1 and 2 was the Accused's "acts or omissions in relation to ... [the] events" as set forth in paragraphs 45 to 82 of the Indictment and *charged* in Counts 3 to 14. That is to say, if conduct was *charged* in paragraphs 45 to 82 of the Indictment as constituting the crimes in Counts 3 to 14, it was also *charged* as conduct on which Counts 1 and 2 were based. Even if the conduct was ultimately held not to constitute any of the crimes charged in Counts 3 to 14, that did not alter the fact that it remained conduct *charged* in relation to Counts 1 and 2. The question whether given conduct amounted to one or more of the crimes charged in Counts 3 to 14, and the question whether given conduct amounted to one or more of the crimes charged in Counts 3 to 14, were two separate questions that had to be decided independently. A negative answer to the former question did not preclude a positive answer to the latter question. The Prosecution refers by way of analogy to paragraph 1438 of the *AFRC* Trial Judgement, in which the burning of buildings and property alleged in relation

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108 Sesay Notice of Appeal, paras 25- 26, Sesay Appeal Brief, paras 39-45.
109 Trial Judgment, paras 115, 128.
110 Kallon Notice of Appeal, para. 17.4; Kallon Appeal Brief, paras 170-171.
111 The same point is made in the Sesay Final Trial Brief, para. 113.

to a count of pillage was held not to satisfy the elements of pillage, but was taken into account in relation to the *actus reus* of the crime of terror. The Trial Chamber expressly referred to another analogous finding in the *CDF* Appeal Judgement.[112]

2.78 The Prosecution therefore submits that acts of burning, for instance, which were expressly charged in paragraphs 77 to 82 of the Indictment, were adequately pleaded in relation to Counts 1 and 2.

2.79 The Sesay Defence appears to complain, however, that while acts of violence are pleaded in paragraphs 62 to 67 of the Indictment relation to Counts 10-11, there is no specific allegation in the Indictment of mere *threats* of physical violence. The Defence argument appears to be that it was therefore wrong of the Trial Chamber to take *threats* of physical violence into account in relation to Counts 1 and 2.

2.80 The Prosecution submits that the principal allegation in relation to Counts 10 and 11 was of "Widespread physical violence" (see the opening words to paragraph 61 of the Indictment), and that this concept on its ordinary meaning would include threats to inflict serious physical harm as well as the physical infliction of harm.

2.81 In any event, even if this Defence argument were correct, the Trial Chamber, in finding that the *actus reus* of acts of terror and collective punishments were satisfied, based this conclusion on many acts in addition to acts of threats of physical violence. Even if acts of mere threats of physical violence were excluded from consideration, the convictions on Counts 1 and 2 would not be affected. Furthermore, the relative extent to which the convictions on Counts 1 and 2 were based on threats of violence as opposed to other acts was sufficiently minimal such that, even if the Trial Chamber's findings of *threats* of violence were excluded from the findings in relation to Counts 1 and 2, this would not affect the sentence.

2.82 These grounds of appeal should therefore be dismissed.

F. Alleged defective pleading of Counts 6–9 (forced marriage and other sexual crimes)

2.83 This section of this Response Brief responds to **Sesay's Grounds 9 and 10, and 39** and **Kallon's Ground 18**.

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[112] Trial Judgement, paras 450-453, quoting *Prosecutor v. Fofana, Kandewa*, SCSL-04-14-A-829, "Judgment", Appeals Chamber, 28 May 2008 ("***CDF* Appeal Judgement**"), paras 359, 362-364.

2.84 The Sesay Defence contends that the Trial Chamber erred in law and fact in concluding that these charges provided sufficient notice and did not prejudice the Defence.[113] The Sesay Defence contends that the Prosecution created confusion in its characterization of the offence of forced marriage "as predominantly sexual in nature."[114] The Sesay Defence argues that the crimes of sexual violence; notably Counts 7-9 were not properly pleaded,[115] and that the Trial Chamber failed to assess the charges in light of the arguments concerning defects in the Sesay Final Trial Brief.[116]

2.85 The Prosecution submits that the arguments in the Sesay Final Trial Brief were carefully considered by the Trial Chamber.[117] Apart from the argument relating to forced marriage, Count 8, no substantive arguments are presented regarding the alleged defective pleading of Counts 6, 7 and 9. The argument regarding the fact that forced marriage was initially defined primarily as a sexual crime was raised in the Sesay Final Trial Brief and Kallon Final Trial Brief,[118] and was addressed in the Trial Judgment.[119] Although the Trial Chamber found that the Prosecution may have created confusion by its initial characterisation of the offence as predominantly sexual in nature, it did not find the offence of forced marriage defective on this basis,[120] because there is no requirement that an indictment plead the legal characterization of a crime, as long as it pleads material facts underlying the offence.[121] The Trial Chamber found that material facts underlying the offence

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113 Sesay Appeal Brief, paras 46-48.

114 Trial Judgement, para. 467.

115 The argument at paragraph 294 of the Sesay Appeal Brief in relation to Sesay's Ground 39.

116 Sesay Appeal Brief, para. 47. In regard to this argument, the Sesay Defence refers to Annex A of the Sesay Appeal Brief and the associated submissions in relation to Sesay's Ground 39; Sesay Appeal Brief, para. 48.

117 Trial Judgement, para. 466.

118 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1210, "Sesay Defence Final Trial Brief", 31 July 2008 ("**Sesay Final Trial Brief**"), paras 95-100, arguing that the Defence was misled as to the material elements of the "forced marriage" count and that the defect was not cured.

119 Trial Judgement, para. 467.

120 *Ibid*. The Trial Chamber referred to the *AFRC* Appeal Judgement, paras 181 and 196, where although the Appeals Chamber noted the confusion caused by the Prosecution's placement of the offence of "forced marriage" under the sexual violence section of the indictment, it ultimately held the Trial Chamber should have considered the crime of forced marriage as a *non*-sexual offence.

121 *Ibid*. See also Trial Chamber, para. 405, where the Trial Chamber repeats this principle.

were sufficiently pleaded in the Prosecution Request for Leave to Amend the Indictment.[122]

2.86 Sesay's Ground 39 argues that the pleading of forced marriages in Kailahun District[123] lacked the requisite specificity.[124] He argues that the Prosecution was obliged to plead a small number of individual incidents, representative of a course of conduct,[125] and that the prejudice was exacerbated by late disclosure of charges through evidence.[126] The Prosecution submits that this argument of the Sesay Defence is not supported by authority or principle, or even any developed argument by the Sesay Defence. The Prosecution submits that the argument should be rejected.

2.87 Kallon's Ground 18 entitled "Errors Relating to Counts 6-9" states that arguments in Kallon's Grounds 2, 8, 6, 11, 13 and 15 are adopted in this regard in their entirety. However, only Kallon's Ground 15,[127] at paragraph 155 of the Kallon Appeal Brief, claims that the Trial Chamber erred in law and fact by convicting Kallon for crimes not specifically pleaded in the Indictment, no further elaboration being made on this point. Kallon's Ground 18 as set out in the Kallon Appeal Brief presents no substantial arguments for the Prosecution to respond to.

2.88 The Prosecution therefore submits that the arguments raised in Sesay's Grounds 9 and 10, 39 and Kallon's Ground 18 are insubstantial, fail to demonstrate any error of fact or law, and should be dismissed.

G. Alleged defective pleading of Count 13 (enslavement)

2.89 This section of this Response Brief responds to **Sesay's Grounds 11 and 36** (in part)[128] and **Kallon's Ground 14** (in part). The Sesay Defence argues that Sesay had no notice of his alleged liability under Article 6(3) of the Statute for acts of enslavement other than "domestic labour and use as diamond miners". The Sesay

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122 Trial Judgement, para. 467, citing the Prosecution Request for Leave to Amend the Indictment.
123 Sesay Appeal Brief, para. 294.
124 Sesay Appeal Brief, para. 294, citing *Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Judgement", Trial Chamber, 14 January 2000 ("***Kupreškić* Trial Judgement**"), para. 626.
125 Sesay Appeal Brief, para. 294, citing *Prosecutor v. Galić*, IT-98-29-T, "Indictment", 26 March 1999 ("***Galić* Indictment**"), para. 15.
126 Sesay Appeal Brief, para. 294.
127 Kallon Appeal Brief, para. 155, refering to para. 152.
128 Sesay Appeal Brief, para. 281.

Defence argues in particular that the Defence had no notice that acts of alleged enslavement included forced military training, forced farming or forced carrying of loads. The Sesay Defence also claims that the pleading lacked specificity as to who was alleged to have been enslaved.

2.90 In relation to the first point, the Prosecution submits that it did not give an "unequivocal notice"[129] that the only alleged acts of forced enslavement were domestic labour and use as diamond miners. In relation to Koinadugu District, Bombali District, Kailahun District, Freetown and the Western Area and Port Loko District, it was alleged merely that civilians were used "as forced labour", without the nature of the forced labour in those Districts being specified.[130] In relation to Kono District, the Indictment alleged that civilians were used as "forced labour, *including* domestic labour and as diamond miners in the Tombudu area.[131] The use of the word "including" in this paragraph makes clear that the alleged acts of forced labour in Kono District were not limited to those specified in that paragraph. It was only in relation to Kenema District that the allegation of forced labour referred only to civilians being required "to mine for diamonds at Cyborg Pit in Tongo Field".[132] Accordingly, the only acts of enslavement which the Trial Chamber found to have been committed in Kenema District was the forced mining at Cyborg Pit.[133] Thus, the Accused were not convicted of any crime of enslavement that was not within the wording of the Indictment.

2.91 The Trial Chamber found that captured civilians were used for a variety of different forms of forced labour, including forced farming, forced carrying of loads, forced diamond mining and forced work on the construction of an airfield, in addition to forced military training.[134] It is submitted that it was not required for the Indictment to plead in the Indictment all of the different tasks for which forced labour was used. In any event, the Defence did not at the pre-trial stage complain that the Indictment failed to plead with sufficient specificity the types of forced labour

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129 Sesay Appeal Brief, para. 49.
130 *Indictment*, paras 72-76.
131 *Indictment*, para. 71 (emphasis added).
132 *Indictment*, para. 70.
133 Trial Judgement, paras 1118-1121, 2051.
134 Trial Judgement, paras 1478-1489.

alleged. It is therefore submitted that in the absence of any showing by the Defence of actual prejudice suffered, even if the Appeals Chamber were to find the Indictment defective in this respect, which is denied, it should find that the Accused waived the right to challenge indictment on this ground, or find that no miscarriage of justice had resulted notwithstanding the defect.[135]

2.92 In relation to the second point, it is submitted that the Defence was not prejudiced by the unavailability of the names or numbers of victims. The Defence was on notice that the victims were numerous and that they were civilians. There is no apparent contradiction in the Trial Judgement between paragraphs 1262 and 1646. The Trial Chamber clearly found that the RUF training base was moved from Bunumbu to Yengema and that from December 1998, civilians from both Bunumbu in Kailahun and from Kono were trained at Yengema.

H. Alleged defective pleading of Count 12 (child soldiers)

2.93 In response to **Kallon's Ground 20** alleging defective pleading of Count 12, the Prosecution relies on the submissions above.

I. Alleged defective pleading of Counts 15 and 17 (UNAMSIL attacks)

2.94 This section of this Response Brief responds to parts of **Sesay's Grounds 13, 36 and 44** and **Kallon's Grounds 23 and 24**.

2.95 To the extent that these grounds of appeal contend that Counts 15 and 17 were defectively pleaded, the Prosecution relies on the submissions above. The substance of these grounds of appeal is dealt with in the relevant sections below.

3. Alleged violations of fair trial guarantees

A. Alleged failure to provide a reasoned opinion

3.1 This section of this Response Brief responds to **Sesay's Ground 3**,[136] **Kallon's Ground 7**[137] and **Gbao's Ground 3**,[138] as they relate to the speeific contention that the Trial Chamber failed to provide a reasoned opinion.

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[135] *AFRC* Appeal Judgement, paras 42-45.
[136] Sesay Notice of Appeal, paras 13-18; Sesay Appeal Brief, paras 15-18.

3.2 It is submitted, as acknowledged by the Sesay Defence,[139] that the Trial Chamber was not obliged to comment on every piece of evidence and enjoyed the presumption that it "evaluated all the evidence presented to it."[140] The Trial Chamber was not obliged to "articulate every step of its reasoning for each particular finding it makes" nor "required to set out in detail why it accepted or rejected a particular testimony."[141] The Trial Judgement is some 680 pages long, and reasons are given in it for every significant finding by the Trial Chamber. It is submitted that this is sufficient. It was unnecessary, and would have been impracticable or impossible, for the Trial Chamber to refer specifically to every relevant detail of every individual item of evidence in relation to each individual issue to which it was relevant. It is submitted that in the present case, there is "no indication that the Trial Chamber completely disregarded any particular piece of evidence."[142] On the contrary, the Trial Chamber made clear that it had "fully considered the evidence of each and every witness in light of the evidence of the case as a whole."[143]

B. Alleged reversal of the burden of proof

3.3 This section of this Response Brief responds to **Sesay's Ground 1**[144] and **Kallon's Ground 1** in part.[145]

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137 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1275, "Amended Kallon's Notice and Grounds of Appeal", 13 May 2009 ("**Kallon Amended Notice of Appeal**"), para. 8.1: Other than the mere assertion in his Amended Notice of Appeal that the Trial Chamber erred by failing to give a reasoned opinion, Kallon in his Appeal Brief makes no further submission on this point. In Kallon Appeal Brief, para. 19, Kallon states that his Sub-Ground 2.25 (see Kallon Amended Notice of Appeal, para. 2.25) is argued together with Ground 7.

138 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1253, "Notice of Appeal for Augustine Gbao", 28 April 2009 ("**Gbao Notice of Appeal**"), paras 14-19; Gbao Appeal Brief, para. 15: Gbao made no submission on this Ground of Appeal.

139 Sesay Appeal Brief, para. 16.

140 Trial Judgment, para. 478, quoting *Kvočka* Appeal Judgement, para. 23 (footnotes omitted).

141 *Prosecutor v Krajišnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009 ("***Krajišnik* Appeal Judgement**"), para. 139, quoting *Musema* Appeal Judgement, para. 20.

142 *Prosecutor v. Strugor*, IT-01-42-A, "Judgement", Appeals Chamber, 17 July 2008 ("***Strugar* Appeal Judgement**"), para. 24, referring to *Prosecutor v. Limaj et al.*, IT-03-66-A, "Judgement", Appeals Chamber, 27 September 2007 ("***Limaj* Appeal Judgement**"), para. 86.

143 Trial Judgement, para. 485. See generally, Trial Judgement, paras 478-485.

144 Sesay Notice of Appeal, paras 6-9; Sesay Appeal Brief, paras 2 and 4.

145 Kallon Amended Notice of Appeal, para. 2.11. Kallon Appeal Brief para. 19 states that sub-ground (para.) 2.11 of the Notice of Appeal is argued together with Ground 18. However, Kallon makes no submissions under Ground 18 and instead relies for Ground 18 on his arguments for Grounds 2, 6, 8,

3.4 It is submitted that there is no basis for the Sesay Defence's contention that there was a reversal of the burden of proof or presumption of guilt by the Trial Chamber based on the Accused's RUF membership. The trial was against the individual Accused and not the RUF organization.[146] The Trial Chamber considered the specific charges against each Accused.[147] The Trial Chamber proceeded on the basis that the accused is presumed innocent until proven guilty and that the Prosecution alone bears the burden of establishing the guilt of the accused; and that each fact on which a conviction is based must be proven beyond reasonable doubt.[148] There were many instances where the Trial Chamber concluded that facts against Sesay were not proven beyond reasonable doubt.[149]

C. Alleged rejection and disregard of Defence evidence

3.5 This section of this Response Brief responds to **Sesay's Grounds 2** and **Kallon's Ground 7**.

3.6 It is submitted that there is no basis for the Defence suggestion that the Trial Chamber simply rejected and disregarded without consideration the "totality of defence evidence, including Sesay's testimony"[150] and that it "exhibit[ed] a bias in favour of the prosecution in its assessment of testimony presented".[151] It was after considering the testimony of Defence witnesses and comparing it to the testimony of other witnesses and the facts known and accepted to be true that the Trial Chamber came to a conscious and considered conclusion[152] that the evidence of certain defence witnesses was simply not credible and could not be accepted.

3.7 A Trial Chamber, after considering the evidence in a case as a whole, is entitled to reject the evidence of a witness in part, or in whole. That is true even where the witness is an accused. The fact that a Trial Chamber rejects the evidence of an accused as a whole does not in itself mean that the Trial Chamber is "biased"

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13 and 15: Kallon Appeal Brief, para. 173. Kallon's Grounds 2, 6, 8, 13 and 15 are addressed elsewhere in this Response Brief.

146 Trial Judgement, para. 4.

147 Trial Judgement, para. 6.

148 Trial Judgement, para. 475; see also for example, paras 324, 419 and 647.

149 See, for example, Trial Judgement, paras 1281-1282, 1742, 2052, 2241, 2066.

150 Sesay Notice of Appeal, para. 10.

151 Kallon Notice of Appeal, para. 8.2.

152 Trial Judgement, para. 522.

against the accused. Indeed, if the Trial Chamber finds the whole of an accused's evidence incredible or implausible, the Trial Chamber is bound to reject it.

3.8 However, and in any event, the Defence submission that Sesay's testimony was rejected in totality is in fact incorrect. Even though a Trial Chamber *is* entitled on its overall assessment to reject the whole of a witness's testimony, and even though the Trial Chamber found that "portions of Sesay's recounting of events were simply implausible" and "unlikely when compared with the overwhelming weight of the evidence to the contrary",[153] the Trial Chamber did not simply reject the whole of Sesay's testimony. The Trial Chamber considered Sesay's version that there were no child combatants in Kono "entirely unrealistic", but still the Trial Chamber "accepted parts of Sesay's evidence when ... [it was deemed to be] relevant and credible ... and not a deliberate manipulation to distort the truth".[154] The Trial Chamber considered Sesay's evidence before concluding that "Sesay's credibility is at issue and his version of events has not been generally accepted ...".[155]

3.9 Where the Trial Chamber did not accept testimony of the Appellants or of Defence witnesses, it gave appropriate reasons, such as that their evidence presented a picture that was contrary to that presented by the overwhelming evidence before the Trial Chamber, or the loyalty of the witness to the RUF, the RUF ideology and their declared intention to support Sesay and or Kallon rather than help the court.[156] In some cases, the Trial Chamber did not reject the testimony of Defence witnesses, but merely found that it did not take matters very far. For instance, the Trial Chamber found that the fact that a witness may not have heard about a crime does not mean the crime was not in fact committed.[157] In making such a finding, the Trial Chamber did not *reject* the testimony of the witness who said that he had not heard about a crime. It merely held that the fact that the witness had not heard of a crime was not determinative or even especially probative of the question whether or not a crime had in fact been committed. The Defence submission that "the chamber

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153 Trial Judgement, para. 605.
154 Trial Judgement, para. 607.
155 Trial Judgement, para. 608.
156 Trial Judgement para. 531.
157 Trial Judgement, para. 528.

adopted a general dismissive attitude"[158] towards Defence witnesses is therefore untenable.

3.10 The Sesay Defence submits that the "Trial Chamber was required to assess the witnesses on a witness-by-witness and allegation-by-allegation basis",[159] suggesting that the Trial Chamber did not do this before preferring the testimony of Prosecution witnesses. The Prosecution submits that this is clearly not the case. In Part V (paragraphs 473 to 647) the Trial Chamber set out a great length and in great detail its multitudinous considerations in evaluating the very large amount of evidence before it, including its approach to the evaluation of witness evidence generally, its approach to the evaluation of the evidence of particular categories of witnesses, and of certain specific witnesses. This section of the Trial Judgement was some 50 pages long. It is submitted that it is very clear from this that the Trial Chamber gave very careful consideration to its evaluation of all of the evidence in the case. There is no basis for suggesting that the Trial Chamber simply dismissed certain evidence out of hand. It would be unreasonable to expect the Trial Chamber to have set out its reasoning on the evaluation of the evidence of certain witnesses in even more detail than it did.[160] It is established jurisprudence that the Trial Chamber is "not required to articulate every step of its reasoning in reaching particular findings."[161] The Trial Chamber is only required to make findings of those facts which are essential to the determination of guilt on a particular count.[162]

3.11 Furthermore, the Trial Chamber did not simply prefer Prosecution evidence over Defence evidence. The Trial Chamber also found portions of testimony by some Prosecution witnesses to be "fanciful and implausible",[163] or "unreliable inconsistent vague and contradictory".[164] In respect of Prosecution evidence also, the Trial Chamber directed itself to approach such evidence with necessary caution and or only to rely on it if it is corroborated.[165] A similar approach was adopted by

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158 Kallon Notice of Appeal, para. 8.2.
159 Sesay Appeal Brief, para. 12.
160 A point which the Sesay Defence concedes (Sesay Appeal Brief, para. 16).
161 *Kupreškić* Appeal Judgement, para. 458, *Čelibići* Appeal Judgement, para. 481.
162 *Kvočka* Appeal Judgement, para. 23.
163 Trial Judgement, para. 582.
164 Trial Judgement, para. 590.
165 Trial Judgement paras 583,594, 597, 600, 603.

the Trial Chamber in respect of Defence witnesses it found to be unreliable.[166] DIS-069's testimony was found to be "implausible and unreliable" and was generally not accepted unless corroborated.[167]

3.12 The Prosecution submits that it is evident from the above that the Trial Chamber individually evaluated the reliability and credibility of each witness, whether the witness was a Prosecution witness or a Defence witness. The Trial Chamber considered all the evidence before it. It found that some witnesses "were credible ... and genuinely seeking to assist" whilst others were "unreliable having given materially inconsistent testimony or having displayed ulterior partisan motives for testifying".[168] The Prosecution submits that when faced with an otherwise unreliable witness the Trial Chamber advised itself to be cautious as to the use of that witness's testimony, and in some cases rejected that witness's testimony, or parts of it, whilst on other occasions the Trial Chamber advised itself to only accept the testimony of a particular witness if it was corroborated.

3.13 The fact that the Trial Chamber disbelieves some aspects of a witness' testimony does not preclude it from using other portions of that same witness' testimony.[169] It is open to the Trial Chamber to decide how it will treat such a witness's testimony taking into account the whole of the circumstances. It has been held that it "is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable."[170]

3.14 The Defence submission that the Defence case was dismissed without consideration and that the burden of proof was reversed should therefore be dismissed in its entirety.

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[166] DAG 048: *Trial Judgement*, para. 572; DAG 157: *Trial Judgement*, para. 570; DIS 188: *Trial Judgement*, para. 568.
[167] Trial Judgement, para. 566.
[168] Trial Judgement, para. 522.
[169] Trial Judgement, para. 490.
[170] *Kupreškić* Appeal Judgement, paras 30–32.

D. Alleged refusal to allow Kallon to plead to Amended Indictment

3.15 In **Kallon's Ground 1**, one of the Kallon Defence's grievances is that Kallon was not permitted to plead to the Amended Indictment. The Kallon Defence argues that this occasioned prejudice and that the Amended Indictment on which he was convicted is a nullity.[171] The Kallon Defence does not explain the nature of the alleged prejudice caused or how it invalidates the Trial Judgement, and does not cite any authority for the assertion that the Amended Indictment was a nullity.

3.16 Annex B of the Trial Judgement sets out the history of the RUF Indictment.[172] The present Defence grievances were addressed by the Trial Chamber in motions at trial and in the Trial Judgement.[173] The Kallon Defence merely repeats its arguments at trial without demonstrating how any alleged error invalidates the decision or caused a miscarriage of justice, warranting the intervention of the Appeals Chamber.

E. Expunging of Kallon's motion on defects in the Indictment

3.17 The filing of the Motion complained of[174] was rejected for violation of the Practice Direction and an Order of the Trial Chamber.[175] The Trial Chamber's Decision did not stop Kallon from refiling his Motion in compliance with the Practice Direction or the Order of the Trial Chamber. In these circumstances, there can be no error, let alone one that "invalidates the Appellant's conviction".[176]

F. Alleged use of testimony of a co-accused's witness against Kallon

3.18 The Kallon Defence submits that the Trial Chamber used the testimony of DAG-111, a witness called by Gbao, against Kallon, contrary to Rule 82 of the Rules.[177]

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171 Kallon Appeal Brief, paras 1-2 (numbered in the Kallon Appeal Brief as 2, 1, 2).
172 Annex B of the Trial Judgement, paras 18-22.
173 Trial Judgement, paras 433-435. The Trial Judgement referred to the Motions and Decisions at trial.
174 Kallon Appeal Brief, para. 3.
175 *Prosecutor v. Sesay, Kallon,* Gbao, SCSL-04-15-T-965, "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C", Trial Chamber, 31 January 2008.
176 Kallon Appeal Brief, para. 3.
177 Kallon Appeal Brief, para. 3.

3.19 It is submitted that the right of an accused to be tried without incriminating evidence being given against him by his co-accused is not ordinarily the type of serious prejudice to which Rule 82 relates.[178] As a general principle, the Trial Chamber should consider all of the evidence in a case in relation to all of the accused in the case, so far as it is relevant. It is quite common in a joint trial for the evidence of one accused to be prejudicial to another accused. This does not mean that the evidence of each accused cannot be taken into account in relation to each of the other accused. The ability of the Trial Chamber in such cases to consider the evidence as a whole in relation to all of the accused enables it to get to the truth of the matter in relation to all of the accused.[179] Thus, a witness presented by one accused can give evidence against a co-accused.[180] Similarly, evidence brought to light in the cross-examination of a witness by one accused can be taken into account to the prejudice of another accused.[181]

3.20 In any event, the Trial Chamber held that it would not rely on the testimony of DAG-111 in its findings on the incident at Makump DDR Camp.[182] In its findings regarding Kallon's presence at Makump DDR Camp, the Trial Chamber does not refer to the evidence of DAG-111.[183] Therefore, regardless of the finding made at paragraph 609 with regard to DAG-111, the Trial Chamber would have made the findings that it made in paragraphs 1789-1794 of the Trial Judgement.

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178 *Prosecutor v. Nyiramashuko*, ICTR-97-21-T, "Decision on Nyiramashuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings", Trial Chamber, 7 April 200 ("***Nyiramashuko* Motion for Separate Proceedings Decision**"), para. 67; referring to *Prosecutor v. Brđanin*, "Decisions on Motions by Momir Talic for a separate Trial and for Leave to File a Reply", Trial Chamber, 9 March 2000 ("***Brđanin* Motion for Separate Trial Decision**"), para. 29.

179 See, for instance, *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Request for Severance of Three Accused", Trial Chamber, 27 March 2006 ("***Bagosora* Severance Decision**"), para. 5, referring to earlier relevant case law of the ICTY and ICTR.

180 See *Prosecutor v. Kvočka et al.*, IT-98-30-PT, "Decision on the 'Request to the Trial Chamber to Issue a Decision on Use of Rule 90 H'", Trial Chamber, 11 January 2001 ("***Kvočka* Rule 90 H Decision**"), p. 3, in which the Trial Chamber rejected a defence motion seeking to limit Prosecution cross-examination of Defence witnesses to questions relating to the accused who called that witness. The Trial Chamber considered "that a witness presented by an accused may give evidence against one of his co-accused, so that the co-accused has a right to cross-examine that witness, and further that to prohibit all cross-examination by a co-accused as requested in the Motion could exclude relevant evidence".

181 *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Decision on the Defence Motion for the Re-Examination of Witness DE", Trial Chamber, 19 August 1998 ("***Kayishema and Ruzindana* Decision**"), para. 15.

182 Trial Judgement, paras 573-578, especially para. 578.

183 Trial Judgement, paras 1789-1794

G. Rejection of Kallon's alibi

3.21 Contrary to what the Kallon Defence claims,[184] the Trial Chamber properly considered the alibi evidence and rejected Kallon's alibi.[185] There was no requirement on the Trial Chamber to accept the alibi evidence which it found not to be credible,[186] merely because the Trial Chamber had found that the presence of Kallon in locations in which certain crimes were committed was not established[187] or proven beyond reasonable doubt; or merely because some Proseeution witnesses had testified that Kallon was not based in Kenema District, one of the locations to which the alibi evidence related;[188] or because the Trial Chamber had found that Kallon at a certain time was *based* in a location other than one to which the alibi evidence related.[189] The Trial Chamber must decide whether on the evidence in the case as a whole, the guilt of the accused has been proved beyond a reasonable doubt. It is not the case that an accused who raises an alibi defence becomes immune to conviction unless the alibi is disproved beyond a reasonable doubt.

3.22 Contrary to the Kallon Defence's claim, the findings at paragraph 631 of the Trial Judgement do not "shift the burden of proof to the Appellant"[190] to establish an alibi claim. This paragraph of the Trial Judgement is consistent with the general legal principles. The burden of proof is on the prosecution to establish the guilt of the accused beyond reasonable doubt. An alibi "is intended to raise reasonable doubt about the presence of the accused at the crime site, this being an element of the prosecution's case",[191] and therefore "it is incumbent on the Prosecution to establish beyond reasonable doubt that, despite the alibi, the facts alleged are nevertheless true".[192] However, as the ICTY Appeals Chamber has observed: "This does not, however, require the Prosecution to specifically disprove each alibi witness's testimony beyond reasonable doubt. Rather, the Prosecution's burden is to prove

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184 Kallon Appeal Brief, paras 7-18.
185 Trial Judgement, paras 611-647.
186 Trial Judgement, paras 631-645.
187 Kallon Appeal Brief, para. 7.
188 Kallon Appeal Brief, para. 13.
189 Kallon Appeal Brief, paras 15-16.
190 Kallon Appeal Brief, para. 7.
191 *Limaj* Appeal Judgement, para. 63, quoting *Prosecutor v. Kamuhanda*, ICTR-95-54-A, "Judgement", Appeals Chamber, 19 September 2005 ("***Kamuhanda* Appeal Judgement**").
192 *Limaj* Appeal Judgement, para. 63, quoting *Niyitegeka* Appeal Judgement, para. 60.

the accused's guilt as to the alleged crimes beyond reasonable doubt in spite of the proffered alibi."[193] The Trial Chamber's finding at paragraph 631 of the Trial Judgement that Kallon's alibi was not established was akin to the finding in the *Limaj* Trial Judgement that the alibi evidence did not "negate the evidence" of the Prosecution. As the Appeals Chamber said in the *Limaj* Appeal Judgement, the Trial Chamber did not thereby state a legal requirement, but merely explained the reasons why it did not find the alibi to raise a reasonable doubt in the Prosecution's case.[194]

3.23 The Trial Chamber did not repudiate "wholesale" Kallon's evidence.[195] The Trial Chamber rejected most of Kallon's testimony, except in instances where it was corroborated.[196] This is different from a "wholesale" rejection. Further, the Trial Chamber did not use Kallon's evidence in support of findings of his guilt.[197] There is no indication and it has not been demonstrated that the Trial Judgement relied on the factual findings referred to at footnote 21 of the Kallon Appeal Brief for Kallon's conviction.

3.24 The Trial Chamber's basis for repudiating Kallon's testimony was that "Kallon failed to impress the Chamber as a truthful witness and the Chamber repudiates his testimony".[198] The Trial Chamber found that "In many instances, the evidence that Kallon gives contradicts the weight of credible evidence presented by reliable witnesses".[199] The Kallon Defence does not challenge these particular findings. While the Kallon Defence challenges two of the Trial Chamber's "bases" for these findings,[200] it fails to demonstrate that these findings were not reasonably open to the Trial Chamber.

3.25 In response to the Kallon Defence's grievance that the Trial Chamber used Ghao's witness DAG-111 to disprove his alibi,[201] the Prosecution relies on its submissions

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193 *Limaj* Appeal Judgement, para. 63.
194 *Limaj* Appeal Judgement, para. 65.
195 *Kallon* Appeal Brief, paras 8-9.
196 Trial Judgement, para. 609.
197 Kallon Appeal Brief, paras 8-9.
198 Trial Judgement, para. 609.
199 Trial Judgement, para. 609.
200 Kallon Appeal Brief, pars. 10-11.
201 *Kallon* Appeal Brief, pars. 12.

in Section 3 F. above. Additionally, it is submitted that there were other witnesses who placed Kallon at Makump DDR Camp, thereby disproving his alibi.[202]

3.26 The Kallon Defence claims that the Trial Chamber's conclusion that TF1-041's account occurred on 28 April 2000 rather than on the 1 May 2000 was based on "unknown and unsubstantiated" evidence.[203] However, the Trial Chamber discussed the incident and referred to the relevant evidence at paragraph 1781 of the Trial Judgement. The evaluation of the evidence was within the Trial Chamber's discretion.

H. Statement of agreed facts

3.27 The Trial Chamber made no error regarding its treatment of the statement of agreed facts.[204] A Trial Chamber is not obliged to make specific findings on facts agreed upon by the parties or on undisputed facts.[205] Each piece of evidence must be assessed in terms of the totality of the evidence in the case. The Trial Chamber made no error in following the approach it did.[206]

I. Consistent pattern of conduct[207]

3.28 The Kallon Defence's grievance that the Trial Chamber's reliance on evidence of a consistent pattern of conduct amounted to relying on presumptions and that such evidence was never disclosed to Kallon lacks merit.[208] Of all the evidence and findings that the Trial Chamber relied upon in arriving at the conclusion that there was a consistent pattern of conduct,[209] the Kallon Defence does not identify the specific evidence of which it claims not to have had notice.

3.29 In several instances the Trial Chamber concluded, from the evidence before it as a whole,[210] that a consistent pattern of conduct existed in relation to certain crimes.[211]

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202 See Trial Judgement, paras 1789-1794 for witnesses who testified about the presence of Kallon at Makump DDR Camp.
203 Kallon Appeal Brief, para. 14, referring to Trial Judgement, para. 618.
204 Kallon Appeal Brief, para. 18.
205 *Prosecutor v. Babić*, IT-03-72, "Judgement on Sentencing Appeal", Appeals Chamber, 18 July 2005 ("***Babić* Judgement on Sentencing Appeal**"), para. 21.
206 Trial Judgement, paras 520-521.
207 Kallon Appeal Brief, para. 19 and Sesay Appeal Brief, para. 203.
208 Kallon Appeal Brief, para. 19.
209 Trial Judgement, paras 1293, 1354, 1356, 1493, 1615, 1707, 1745.
210 Trial Judgement, para. 482.
211 Trial Judgement, paras 1293, 1354, 1356, 1493, 1615, 1707, 1745.

This finding of a "consistent pattern of conduct" was an inference that the Trial Chamber drew from the evidence as a whole. The Trial Chamber is entitled to draw inferences from the evidence.

3.30 The notion of a consistent pattern of conduct has been applied in various ways by international criminal tribunals. Notably, the equivalent of Rule 93 in the ICTY Rules has been said to originate from the requirement to prove the existence of a systematic practice in relation to crimes against humanity.[212] This was the context in which Rule 93 was cited in the Trial Judgement.[213]

3.31 Evidence of a consistent pattern of conduct has been found to be similar to circumstantial evidence. "A circumstantial case consists of evidence of a number of different circumstances which, taken in combination, point to the existence of a particular fact upon which the guilt of the accused person depends because they would usually exist in combination only because a particular fact did exist."[214]

3.32 Rule 93 has also been invoked to admit "similar fact evidence", i.e. evidence of crimes or wrongful acts other than those charged in the indictment that suggest it would be more likely that the accused committed the charged crimes.[215]

3.33 It has been noted, however, that "pattern of conduct" has generally "not been used to introduce evidence of crimes not alleged in the indictment, but has rather been used as the basis for inferences of intent from actions which *are* alleged in the indictment".[216] A Trial Chamber is not required to base findings as to a consistent pattern of conduct on Rule 93. For example in the *Kayishema* case, the Trial Chamber found compelling evidence that the attacks were carried out in a

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212 *Prosecutor v. Kupreškić*, IT-95-16-T, Trial Transcript, 15 February 1999, pp. 6889-6890: "this rule was conceived of as relating to crimes against humanity. When you may have to prove the existence of a consistent practice or systematic practice."

213 Trial Judgement, para. 482.

214 *Prosecutor v. Krnojelac*, IT-97-25-T, "Judgement", Trial Chamber, 15 March 2002 ("***Krnojelac* Trial Judgement**"), para. 67. Such a conclusion must be the only reasonable conclusion available. See also *Galić* Appeal Judgement, para. 218.

215 *Kupreškić* Appeal Judgement, para. 321; *Kvočka* Appeal Judgement, paras 357-360.

216 *Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", Trial Chamber, 18 September 2003 ("***Bagosora* Testimony Admissibility Decision**"), para. 37.

methodical manner and that the consistent and methodical pattern of killing was further evidence of the specific intent.[217]

3.34 Therefore, the Trial Chamber did not err in the manner in which it made findings as to consistent patterns of conduct. The Kallon Defence has not demonstrated that any of the evidence relied upon had not been disclosed.

J. Alleged irreparable prejudice arising from defective Indictment

3.35 As to paragraphs 4-5 of the Kallon Appeal Brief (part of **Kallon's Ground 1**),[218] the Prosecution submits as follows.

3.36 The Trial Chamber found that the Indictment was defective in form in that it failed to plead the material facts underlying allegations of personal commission by the accused.[219] However, the Trial Chamber also found, and Kallon does not dispute,[220] that a defective Indictment can be cured.[221]

3.37 The Trial Chamber found that the Indictment was defective in form in that it failed to plead the material facts underlying allegations of individual responsibility where the acts of the accused victimised a specifically identified person or persons, and the identity of specifically identified combatant or combatants involved in the commission of these crimes, which defects may also be cured.[222]

3.38 The Trial Chamber held that in determining whether the Indictment was cured, it would consider whether the accused received sufficient notice of the allegations through disclosures, and that it would take account of the timing of the communications, the importance of the information to the ability of the accused to prepare his defence and the impact of the newly disclosed material facts on the

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217 *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement", Trial Chamber, 21 May 1999 ("***Kayishema and Ruzindana* Trial Judgement**"), paras 534-537. See also *Prosecutor v. Bagilishema*, ICTR-95-1A-T, "Judgement", Trial Chamber, 7 June 2001 ("***Bagilishema* Trial Judgement**"), para. 50: "command responsibility for failure to punish may be triggered by a broadly based pattern of conduct by a superior, which in effect encourages the commission of atrocities by his or her subordinates."

218 In support of his submissions, Kallon relies on the *Kupreškić* Appeal Judgement, para. 114. Kallon made similar arguments in his Final Trial Brief, which the Trial Judgement addressed: see Trial Judgement, para. 396, footnote 759 referring to Kallon Final Trial Brief, paras 105-108, 111-112, 737, 795, 977, 1207-1209, 1257, 1279, 1306, 1335.

219 Trial Judgement, para. 399.

220 Kallon Appeal Brief, para. 4.

221 Trial Judgement, paras 400, 471(ii).

222 Trial Judgement, para. 471 (iii).

Prosecution's case.[223] In this regard, the Trial Chamber noted that the trial proceedings did not run continuously during the presentation of the Prosecution case; rather, the trial proceeded in six to eight week sessions with a six to eight week break in between each session, and the Defence case began eight months after the Prosecution closed its case.[224]

3.39 The Trial Chamber considered several specific instances of defects in the Indictment and found that the defects were cured by clear, timely and consistent notice to the Defence.[225] It is submitted that in all these instances and in all the circumstances of this case, what obtained is not comparable to *Kupreškić* where it was found that there had been a drastic change of the Prosecution case as presented at trial, ambiguity as to the pertinence of witness' evidence to the Prosecution case, and late disclosure of the evidence.[226] It is submitted that in the circumstances of this case, unlike in *Kupreškić*, the Trial Chamber made no error in finding that the defects in this case were cured and that the Accused's ability to prepare his defence was never materially prejudiced.[227]

3.40 As to paragraphs 122 and 125-127 of the Kallon Appeal Brief (part of **Kallon's Ground 11(A)**), the Prosecution submits as follows.

3.41 This is the first time that the Kallon Defence alleges lack of notice due to a failure to plead in the Indictment the facts referred to.[228] Accordingly, the burden is on the Kallon Defence to demonstrate how Kallon's ability to prepare his defence was materially prejudiced. Notably, it is not contended that these facts were never disclosed in pre-trial disclosures. It is submitted that these facts were a matter of evidence that did not have to be specifically pleaded in the indictment and in any event no prejudice was caused as the facts were communicated through disclosures well in advance, in witness summaries contained in the Prosecution Supplemental Pre-trial Brief, witness statements and *AFRC* trial transcripts where they were relied upon by the prosecution.

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223 Trial Judgement, para. 333.
224 Trial Judgement, para. 333.
225 Trial Judgement, paras 1303-1304, 1732-1734, 2243-2246.
226 *Kupreškić* Appeal Judgement, para. 121.
227 Trial Judgement, paras 1303-1304, 1732-1734, 2243-2246.
228 Kallon Appeal Brief, paras 122, 125, 127.

3.42 The Trial Chamber made no error in relying on the uncorroborated testimony of TF1-141 to conclude that Kallon enjoyed privileges afforded only to senior RUF Commanders such as personal bodyguards.[229] In any event there was no prejudice as the trial record contained evidenee of other witnesses to that effect.[230]

3.43 Although the Trial Chamber's finding that "Kallon would instruct commanders to undertake ambush laying missions on the basis of orders from Superman" makes no reference to evidence in the trial record,[231] there is no prejudice as there was evidence in the trial record to support this finding.[232]

3.44 Paragraphs 124 and 126 of the Kallon Appeal Brief complain about the Trial Chamber's reliance on the testimony of TF1-141 and TF1-361 which were allegedly contradictory and lacked credit. The Prosecution submits that the evaluation of the evidence is a matter within the Trial Chamber's discretion, and the Kallon Defence has not established that no reasonable trier of fact could have relied on this evidence. The appellate standard of review has not been met.

4. Alleged errors of fact: general matters

A. The Trial Chamber's evaluation of the evidence generally

4.1 This section of this Response Brief responds to **Sesay's Grounds 1, 2, 3, 14, 15, 16, 20 and 31** in as far as they relate to the evaluation of evidence,[233] to **Kallon's Grounds 1 and Ground 7** as they relate generally to credibility of witnesses and evaluation of evidence,[234] corroboration[235] and alleged use of single witness accounts.[236]

229 Kallon Appeal Brief, para. 123, referring to Trial Judgement, para. 838.
230 See for example, TF1-041, Transcript 17 July 2006, pp. 46-47.
231 Kallon Appeal Brief, para. 125, referring to Trial Judgement, para. 835.
232 See for example, TF1-361, Transcript 18 July 2005, pp. 101-104.
233 Sesay Appeal Brief, paras 156-161.
234 Kallon Appeal Brief, para. 19: Kallon states that his arguments relating to Sub-Ground (para. 2.25) of the Kallon Amended Notice of Appeal (credibility of witnesses) are presented under arguments for Ground 7. This Section of the Response Brief responds specifically to the Kallon Appeal Brief, paras 77-79.
235 Kallon Amended Notice of Appeal, paras 8.1-8.6; Kallon Appeal Brief, paras 77-79 and 85.
236 Kallon Amended Notice of Appeal, para. 8.10; Kallon Appeal Brief, para. 83.

(i) Evidence generally

4.2 The Kallon Defence submits that the Trial Chamber relied on uncorroborated testimony of Prosecution witnesses who the Trial Chamber had indicated required corroboration, that the Trial Chamber relied on discredited Prosecution testimony, and that the Trial Chamber ignored corroborated or credible Defence testimony.[237] The Kallon Defence further claims that the Trial Chamber relied on single witness accounts without considering all evidence on record.[238]

4.3 It is for the Trial Chamber to make findings of fact on the basis of the evidence of witnesses whom the Trial Chamber finds credible. The Appeals Chamber may not lightly disturb the findings of the Trial Chamber so made.[239] The Trial Chamber is entitled to prefer the evidence which it finds more credible. It is submitted that it is never of itself an error (of law or fact) for the Trial Chamber to prefer the evidence of Prosecution witnesses whom the Trial Chamber found more credible on a point on which Defence witnesses had given contrary testimony, or to rely on a Defence witness found credible on a point that supports the Prosecution case. The Trial Chamber considers the totality of the evidence.[240] There is no indication and it has not been demonstrated that the findings referred to by the Kallon Defence[241] were made by the Trial Chamber without looking at the totality of the evidence on record. Also, the Kallon Defence does not say whether and how any such alleged error caused a miscarriage of justice.

(ii) Alleged bias of the Trial Chamber in the evaluation of the evidence

4.4 In response to paragraphs 156-161 of the Sesay Appeal Brief, the Prosecution submits that there is no requirement for a Trial Chamber to accept evidence merely because it is supported by both Prosecution and Defence witnesses,[242] to accept that crimes were not committed in a particular locality merely because witnesses said

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237 Kallon Amended Notice of Appeal, paras 8.1-8.6; Kallon Appeal Brief, paras 77-79 and 85.
238 Kallon Amended Notice of Appeal, para. 8.10; Kallon Appeal Brief, para. 83.
239 *Niyitegeka* Appeal Judgement, para. 95; *Kvočka* Appeal Judgement, para. 19.
240 *AFRC* Appeal Judgement, para. 146.
241 Kallon Amended Notice of Appeal, para. 8.10.
242 Sesay Appeal Brief, paras 5, 7.

that they did not hear about crimes in that locality,[243] to adopt a particular approach to evidence for the Prosecution or Defence,[244] to accept or reject evidence of a number of witnesses for the same reason,[245] or not to dismiss the totality of a witness's testimony.[246] "A Trial Chamber must look at the totality of the evidence on record in evaluating the credibility of a witness."[247] Further, "there is no bar to the Trial Chamber relying on a limited number of witnesses or even a single witness, provided it took into consideration all the evidence on record."[248]

4.5 It is undemonstrated and incorrect to allege that the Trial Chamber dismissed *all* Prosecution and Defence evidence in support of Sesay's innocence.[249] Further, the Sesay Defence does not explain how, if at all, such an error invalidates the Trial Chamber's decision or resulted in a miscarriage of justice.

4.6 Contrary to the Sesay Defence's claim,[250] the Trial Chamber's finding at paragraph 608 of the Trial Judgement was based on the "totality of the evidence".[251] Further, the Trial Chamber, after it had "fully considered the evidence of each and every witness in light of the evidence of the case as a whole"[252] was entitled to arrive at the findings made in paragraphs 527-531 of the Trial Judgement, with regard to certain Defence evidence.[253] (See also paragraph 4.3 above.)

4.7 For the same reasons as above, the Sesay Defence's submissions that the Trial Chamber failed to weigh evidence and only selected the most incriminating Prosecution evidence,[254] excluded or failed to consider relevant evidence,[255] and relied upon a single witness,[256] should be rejected. The Sesay Defence's submission alleging "triple hearsay" regarding TF1-035's evidence regarding the death of 25

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243 Sesay Appeal Brief, para. 6.
244 Sesay Appeal Brief, para. 11.
245 Sesay Appeal Brief, para. 12.
246 Sesay Appeal Brief, para. 10.
247 *AFRC* Appeal Judgement, para. 146.
248 *AFRC* Appeal Judgement, para. 147.
249 Sesay Appeal Brief, para. 5.
250 Sesay Appeal Brief, para. 5.
251 Trial Judgement, para. 608.
252 Trial Judgement, para. 485. See generally, Trial Judgement, paras 478-485.
253 Sesay Appeal Brief, paras 6.
254 Sesay Appeal Brief, para. 156.
255 Sesay Appeal Brief, paras 157 and 159.
256 Sesay Appeal Brief, paras 158 and 161.

eivilians[257] also lacks merit. It is submitted that the evidence is confirmed or corroborated by [redacted]

4.8 Similarly, it is submitted that the Kallon Defence's criticisms of the Trial Chamber's alleged reliance on certain Prosecution witnesses and alleged disregard for Defence evidence[259] have no merit and should be dismissed.

(iii) Dismissal of Sesay's Rule 92*bis* motion

4.9 In **Sesay's Ground 20**, the Sesay Defence claims that the Trial Chamber erred in dismissing Sesay's Rule 92*bis* applications to admit witness statements.[260] However, apart from merely asserting that "[t]he admission of this evidence would not have been repetitive; would not have resulted in an unnecessary eonsumption of valuable Court time,"[261] Sesay presents no arguments in support of his claim to demonstrate that the Trial Chamber abused its diseretion in deciding Sesay's Rule 92*bis* motion in the way that it did, or how the alleged error invalidates the Trial Judgement.

B. Alleged error of the Trial Chamber in relying on certain evidence

(i) Accomplices

4.10 **Sesay's Grounds 14 and 15** contend that the Trial Chamber did not treat accomplices with due caution nor explain why it accepted the evidence of such witnesses.[262] The Sesay Defence also refers to certain witnesses[263] in respect of whose testimony it is claimed the Trial Chamber should have required corroboration.

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257 Sesay Appeal Brief, para. 160.
258 TF1-035, Transcript 5 July 2005, p. 97.
259 Kallon Appeal Brief, paras 77-79.
260 Sesay Appeal Brief, paras 72-74. See *Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-04-15-1125, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*", Trial Chamber, 15 May 2008 ("***Sesay* Rule *92bis* Decision**").
261 Sesay Appeal Brief, para. 73.
262 Sesay Appeal Brief, para. 17.
263 Sesay Appeal Brief, para. 58 and Annex C mentions TFI-OI2, TFI-035, TFI-044, TFI-045, TFI-1I4, TFI-139, TFI-304, TFI-360, TFI-361, and TFI-362.

4.11 The Prosecution relies on the general legal principles applicable to corroboration which are discussed in paragraphs 4.38 and 4.39 of this Response Brief, and submits that those principles apply to the witnesses mentioned in this ground of appeal. The Sesay Defence has failed to reach the appellate threshold for review. The Trial Chamber devoted a whole section of the Trial Judgement that was some 75 pages long (Trial Judgement, Part V, paragraphs 473 to 647) to the evaluation of evidence generally, in which it directed itself in considerable detail on the applicable legal principles. In this section, the Trial Chamber gave specific consideration to the issue of accomplice evidence (paragraphs 497-498), as well as to issues of corroboration (paragraphs 500-501) and inconsistencies in the evidence (paragraphs 489-491).

4.12 There is nothing to prevent a Trial Chamber from admitting or relying on evidence of aecomplices or "insiders". The evaluation of the evidence as a whole is always a matter for the Trial Chamber. The testimony of such witnesses is not "per se unreliable, espeeially where an accomplice may be thoroughly cross examined"[264] (as they were in the present case). The Trial Chamber when weighing the probative value of an accomplice witness may be "bound to carefully consider the circumstances in which it was tendered",[265] and to assess it within the compass of the whole of the testimony before the court. The Trial Chamber did so in this case. At paragraph 498 of the Trial Judgement, it stated that it "approached the assessment of the reliability of the evidence of accomplice witnesses with caution", that it "always considered whether or not an accomplice has an ulterior motive to testify such as assurances of a quid pro quo from the Prosecution that they will not be prosecuted", and that the Trial Chamber, "where possible, ... looked for corroboration of the evidence of accomplice witnesses".[266] The Trial Chamber's approach was not inconsistent with that taken in other cases.[267]

4.13 The Prosecution submits that the testimony of accomplices and insiders was not used in isolation but was assessed and considered within the framework of the

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264 *Niyitegeka* Appeal Judgement, para. 98.
265 *Niyitegeka* Appeal Judgement, para. 98.
266 Trial Judgement, para. 498.
267 See, for instance, *Prosecutor v Blagojević and Jokić*, IT-02-60-T, "Judgement", Trial Chamber, 17 January 2005 ("***Blagojević and Jokić* Trial Judgement**"), para. 24.

whole of the evidence before the Trial Chamber, in accordance with the above principles articulated by the Trial Chamber. These grounds of appeal should be rejected.

(ii) Documentary evidence

4.14 This section of this Response Brief responds to **Kallon's Ground 7** as it relates to the use of documentary evidence.[268]

4.15 The Kallon Defence claim that the Trial Chamber relied on documentary evidence with little or no probative value[269] has no merit. The impugned findings[270] as they related to facts did not rely solely on documentary evidence but also or only on witness testimony in the great majority of instances.[271] There is no indication that Kallon's conviction relied on any findings referred to[272] that were based only on documentary evidence. In any event, the Trial Chamber is clearly entitled to take documentary evidence into account. As its decision is based on all of the evidence in the case as a whole, it would be open to the Trial Chamber to prefer documentary evidence over oral testimony if it considered the former more reliable, plausible and credible.

(iii) Hearsay evidence

4.16 This section of this Response Brief responds to **Kallon's Ground 7** in part as it relates to the use of hearsay evidence[273] and to **Kallon's Ground 8**.

4.17 Contrary to the Kallon Defence's claim,[274] the finding at paragraph 1228 of the Trial Judgement is not based on mere hearsay. The Trial Chamber found that after TF1-078 was told that the only person with the authority to issue a pass was Kallon, Rocky's security guards took TF1-078 to Kallon who ordered his secretary to write the pass for the witness.[275] The Trial Chamber's finding at paragraph 2098 of the Trial Judgement that Kallon "organized camps for civilians and was a senior

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[268] Kallon Amended Notice of Appeal, para. 8.11; Kallon Appeal Brief, para. 84.
[269] Kallon Amended Notice of Appeal, para. 8.11; Kallon Appeal Brief, para. 84.
[270] See Kallon Amended Notice of Appeal, para. 8.11.
[271] See for example, Trial Judgement, paras 23, 24, 26-28, 44, 157, 161-162, 216-223, 959-960, 1014, 1042, 1078, 1806.
[272] Kallon Amended Notice of appeal, para. 8.11.
[273] Kallon Appeal Brief, para. 81.
[274] Kallon Appeal Brief, para. 81.
[275] Trial Judgement, para. 1228.

commander authorized to issue passes to civilians" must be viewed in terms of the Trial Chamber's other findings.[276] In any event, subject to its findings at paragraphs 495-496 of the Trial Judgement, the Trial Chamber was clearly entitled to take hearsay evidence into account.

(iv) Circumstantial evidence

4.18 This seetion of this Response Brief responds in part to **Kallon's Ground 7** as it relates to the use of circumstantial evidence.[277] Under this Ground of Appeal, the Kallon Defence makes no submissions and merely states that it relies on Kallon's Amended Notice of Appeal and the arguments in the Kallon Appeal Brief on the subject under UNAMSIL attacks.[278] There are therefore no Defence arguments to which the Prosecution can respond.

(v) Evidence of identifieation relating to Kallon

4.19 This section of this Response Brief responds in part to **Kallons's Grounds 7 and 23.**

4.20 The Kallon Appeal Brief[279] makes no submissions on the issue of the identification evidence relating to Kallon (forming part of his Ground 7) but merely relies on Kallon's Amended Notice of Appeal[280] where no submissions are made in support of the claim or in respect of how the alleged error invalidates the decision. There are therefore no Defence arguments to which the Prosecution can respond.

(vi) Alleged failure to address inconsistencies

4.21 This section responds to Sesay's arguments presented under **Sesay's Grounds 1, 2, 3 and 14** as they relate specifically to the alleged failure on the part of the Trial Chamber to address inconsistencies.[281] In response, it is submitted as follows.

4.22 The Sesay Defence alleges that the Trial Chamber's assessment of witness testimony, especially with regard to inconsistencies, was inadequate and

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276 See Trial Judgement, paras 1225-1231, especially paras 1227-1228 and 1231.
277 Kallon Amended Notice of Appeal, para. 8.9; Kallon Appeal Brief, para. 82.
278 Kallon Appeal Brief, para. 82.
279 Kallon Appeal Brief, para. 80.
280 Kallon Amended Notice of Appeal, para. 8.7.
281 Sesay Appeal Brief, paras 19-22.

unreasoned.[282] Annex C of the Sesay Appeal Brief purports to identify alleged inconsistencies that the Trial Chamber failed to address. The Prosecution refers to the submissions in Section 3 A. Just as the Trial Chamber is not required to refer expressly to every item of evidence in its judgement, it cannot be required to address every inconsistency between different items of evidence. The Trial Chamber is presumed to have considered all of the evidence in the case as a whole, including the contradictions and inconsistencies in the body of evidence as a whole. The Trial Chamber in this case was clearly alive to the relevant issues and adequately dealt with the evidence and addressed any inconsistencies.[283]

4.23 In any event, the Sesay Defence fails to explain how the alleged error invalidates the convictions or causes a miscarriage of justice. It is settled jurisprudence that the mere existence of inconsistencies does not nullify the testimony of a witness. As the ICTY Appeals Chamber observed in *Kupreškić*:

> The presence of inconsistencies in the evidence does not, *per se*, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence.[284]

4.24 It lies in the nature of criminal proceedings that a witness may be asked different questions at trial to those he or she was asked in prior interviews, and that he or she may remember additional details when specifically asked particular questions in court. It is also accepted that a witness on the stand may simply momentarily suffer the very ordinary human experience of forgetfulness or confusion.[285]

4.25 For inconsistencies to have a nullifying effect, the appellant must show that the inconsistencies in question do truly unsettle the "fundamental features" of the case.[286] The Sesay Defence has made no such showing. This argument of the Sesay Defence should therefore be rejected.

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[282] Sesay Appeal Brief, paras 19-22.
[283] Trial Judgement, paras 478-491, 522-536, 539-603.
[284] *Kupreškić* Appeal Judgement, para. 31.
[285] *Prosecutor v. Strugar*, IT-01-42-T, "Judgement", Trial Chamber, 31 January 2005 ("***Strugar* Trial Judgement**"), para. 8. See also *Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005 ("***Limaj* Trial Judgement**"), paras 12 and 543.
[286] *Kupreškić* Appeal Judgement, para. 31.

(vii) Victim and child combatant witnesses

4.26 This section responds to Sesay's **Grounds 21 and 22**. The Sesay Defence complains that the Trial Chamber created "an inviolable class" of witnesses.[287] The Sesay Defence submits that the testimony of those witnesses in this class was given preferential treatment by the Trial Chamber and was accepted and used by the Trial Chamber to support its findings without being tested and tried for reliability.

4.27 The Prosecution submits that the testimony of victims and of child combatant witnesses, who the Sesay Defence claims were part of this "inviolable class",[288] was individually evaluated in the same way as the testimony of all other witnesses, in the exercise of the Trial Chamber's discretion in assessing the evidence, in accordance with established principles of law. The Trial Chamber gave specific consideration to the evaluation of the testimony of former child soldiers in Part V.5.6 (paragraphs 579-594) of the Trial Judgement. There is no legal principle or authority to support the proposition that extra caution should be employed when evaluating the testimony of these witnesses. There is no legal presumption that such witnesses should be disbelieved merely because such witnesses were victims of the crimes for which the accused were being tried.

4.28 The Trial Chamber has discretion as to the weight it attaches to the testimony of any particular witness, and this includes victims and child soldiers. There may be issues that are common to the evaluation of the testimony of different witnesses in a particular class, and these issues may be discussed in respect of a "class" of witnesses. However, the ultimate evaluation of each witness's testimony is individual to that witness regardless of whether it is "general" or goes to "acts and conduct". There is no basis for suggesting that the Trial Chamber did not approach the evaluation of the evidence on this basis. There is no basis for suggesting that the Trial Chamber evaluated the evidence given by particular victim witnesses merely on the basis of their characterization as witnesses falling within a particular class.

4.29 In its discussion of "victim witnesses", the Trial Chamber directed itself to the possibility of the testimony of such witnesses containing discrepancies and

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[287] Sesay Appeal Brief, para. 75.
[288] Sesay Appeal Brief, para. 25.

inaccuracies. The Trial Chamber cited an example of such inaccuracy in the testimony of TF1-253.[289] The Trial Chamber in its evaluation of the testimony of "victim and child combatant witnesses" exercised its discretion to determine whether to reject or accept the testimony of that particular witness in spite of its being inaccurate and then attached such weight to it as the Trial Chamber deemed appropriate in the circumstances. The defence submission that a different standard was used to evaluate evidence on "acts and conduct" from that used to evaluate "general evidence"[290] is similarly incorrect and should be disregarded.

4.30 The Defence submission that the Trial Chamber failed to assess Defence evidence or that a different standard was used to evaluate Defence witnesses as opposed to Prosecution witnesses is without any foundation at all and should be dismissed. The Defence submission that the Trial Chamber failed to evaluate Defence arguments at all is similarly without merit and should be dismissed

(viii) Prosecution Witnesses TF1-108 and TF1-366

(a) Evaluation of evidence of TFI-108

4.31 This section of this Response Brief responds to **Sesay's Grounds 17 and 18.**

4.32 It is submitted that the grievances raised by the Sesay Defence[291] were properly disposed of at trial and that there is no basis for the Appeals Chamber's intervention.[292] The Trial Chamber properly dealt with the credibility of TF1-108[293] and was entitled to rely on his evidence regarding forced labour on RUF farms.[294] Further,[295] there were other witnesses apart from TF1-108 who gave evidence regarding forced labour on RUF farms.[296] Any alleged error in regard to the use of the evidence of TF1-108 would therefore not unsettle the Trial Chamber's findings.

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289 Trial Judgement, para. 533.
290 Sesay Notice of Appeal, para. 43.
291 Sesay Appeal Brief, paras 65-68, 70.
292 *Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-04-15-1147, "Decision on Sesay Defenee Motion for Various Relief Dated 6 February 2008", Trial Chamber, 26 May 2008 ("***Sesay* Decision on Various Relief**").
293 Trial Judgement, paras 595-597.
294 In response to Sesay Appeal Brief, paras 69-70.
295 In response to Sesay Appeal Brief, paras 69-70.
296 See for example the witnesses referred to in the Trial Chamber's findings relating to forced farming: Trial Judgement, paras 1417-1425.

(b) Dismissal of Sesay motion relating to alleged false testimony of TFI-366

4.33 It is submitted that Sesay's Ground 17[297] has no merit as the Trial Chamber properly dealt with the matter. The Trial Chamber, having found no "strong grounds" for believing that TF1-366 may have knowingly and wilfully given false testimony,[298] had however found that his testimony appeared to contain inconsistencies and contradictions which would be considered at the end in terms of credibility, reliability and probative value, during the Trial Chamber's evaluation of the entire evidence in the case.[299] This is what the Trial Chamber did, in arriving at the categorisation of the evidence of TF1-366 as "problematic" or the witness as someone who "tended to over implicate the Accused".[300] The Trial Chamber was not required to dismiss the evidence of TF1-366 in totality.[301]

(ix) Witnesses who admitted to lying under oath

4.34 This section of this Response Brief responds to **Ghao's Grounds 6 and 7**.

4.35 The Gbao Defence complains that the Trial Chamber erred in law by using a lower standard for the evaluation of Prosecution witnesses who lied under oath.[302] The Prosecution relies on the submissions in 4.A of this Response Brief with respect to the law on the standards used to evaluate evidence generally.

4.36 Contrary to the submissions of the Gbao Defence, the testimony of a witness who lies need not necessarily be discarded in its entirety. It is a matter for the Trial Chamber, in its general discretion in evaluating evidence, to accept parts of a witness's evidence, even though the Trial Chamber knows that the witness has been untruthful in other parts of the witness's evidence. Conversely, it is also within the

297 Sesay Appeal Brief, paras 62-64.

298 *Prosecutor* v. *Sesay, Kollon, Gbao*, SCSL-04-15-610, "Decision on Sesay Defenee Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TF1-366," 25 July 2006 ("***Sesay* Decision on False Testimony**"), para. 50.

299 *Sesay* Decision on False Testimony, paras 42, 44, 48.

300 Trial Judgement, para. 546: The evidence of the witnesses contained at footnote 165 of the Sesay Appeal Brief and in Annex C, was part of the totality of the evidence considered by the Trial Chamber in arriving at this finding. In the absence of all the evidence, it would have been improper for the Trial Chamber to evaluate the credibility of TF1-366 as against the witnesses in Annex C at the time of considering its Decision in *Prosecutor* v. *Sesay et al.*, SCSL-04-15-610, "Decision on Sesay Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TF1-366," 25 July 2006.

301 Sesay Appeal Brief, para. 64.

302 Gbao Appeal Brief, para. 10.

Trial Chamber's discretion, if the Trial Chamber considers it to be justified, to reject as a whole the testimony of a witness that the Trial Chamber finds has been untruthful by lying on oath to the Trial Chamber.

4.37 It is not the case, as the Gbao Defence erroneously submits, that a Trial Chamber *must* require corroboration of otherwise unreliable witnesses.[303] Corroboration is not a legal requirement. It is open to the Trial Chamber, in its discretion, to decide that it will only accept such parts of such a witness's testimony if it is corroborated by other evidence. However, it is equally within the discretion of the Trial Chamber, if it is so satisfied, to accept portions of sueh a witness's testimony as reliable even in the absence of corroboration. Indeed, it would also be open to the Trial Chamber to reject the evidenee of such a witness even where it *is* corroborated, if the Trial Chamber was satisfied that both the evidence of the witness in question and the corroborating evidence, taken together, were not sufficiently reliable or persuasive. In short, the evaluation of evidence is always a matter within the discretion of the Trial Chamber, in the light of the evidence and the circumstances as a whole. Corroboration merely goes to the weight to be attached to the uncorroborated evidence.[304] It is trite law that a finding of a material fact can be based on the testimony of a single witness, provided that the Trial Chamber assesses such testimony with caution.[305]

4.38 Corroboration may come from sources other than credible witnesses. It has been accepted that when a Trial Chamber considers that corroboration is required, even circumstantial evidence may provide such corroboration.[306] The Prosecution submits that it was open to the Trial Chamber on the evidence as a whole, after it concluded that it would require corroboration for certain witnesses, to be satisfied that such corroboration was found.

4.39 Witness TF1-366 is singled out by the Gbao Defence to have lied significantly. The Prosecution relies on the submissions made specifically on this witness' testimony in Section 4.B(viii) of this Response Brief.

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303 Gbao Appeal Brief, para. 24.
304 *Kordić and Čerkez* Appeal Judgement, para. 274; *Čelebići* Appeal Judgement, para. 506.
305 *Kordić and Čerkez* Appeal Judgement, para. 274-275; *Kupreškić* Appeal Judgement, para. 33.
306 *Kordić and Čerkez* Appeal Judgement, para. 276.

4.40 In paragraphs 500 and 501 of the Trial Judgement, the Trial Chamber advised itself correctly on the legal principles that govern corroboration, and at paragraphs 497 and 498 of the Trial Judgement, the Trial Chamber advised itself correctly on the principles that guide the approach to the testimony of accomplices. The Trial Chamber "cautioned itself on the risk and danger in accepting uncorroborated evidence from insider witness as credible but at the same time acknowledge[d] its authority to accept such evidence".[307]

4.41 The Prosecution submits that the Trial Chamber was well placed to evaluate the witnesses before it and to decide how any lies or inconsistencies in a witness's testimony may affect the probative value of such testimony. The Trial Chamber considered this matter and properly advised itself before consciously coming to conclusions which were open to a reasonable trier of fact confronted with the whole of the evidence in this case. The Defence has not established that the Trial Chamber abused its discretion in the evaluation of evidence or applied any incorrect legal principles. This ground of appeal should accordingly be dismissed.

(x) Alleged economic motivation of witnesses

4.42 The issue of alleged unjustified payments of witnesses by the Prosecution is raised in **Sesay's Ground 16**[308] and **Kallon's Ground 20** (in parts).

4.43 Sesay's Ground 16 contends that the Trial Chamber erred in law, fact and/or procedure in dismissing the Sesay Defence's "Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses" ("**Payment to Witnesses Motion**").[309]

4.44 Although the Trial Chamber thoroughly examined payments to witnesses and came to the conclusion that there was no evidence that the witnesses had been motivated by payments,[310] the Sesay Defence nevertheless argued that the Trial Chamber erred in limiting "its consideration of payments generally to an examination of the payments, rather than an examination of the payments in conjunction with the

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307 Trial Judgement, para. 540.

308 Sesay Appeal Brief, paras 59-61.

309 *Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-04-15-1161, "Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses", Trial Chamber, 30 May 2008 ("**Payment to Witnesses Motion**").

310 Trial Judgement, paras 525 and 526.

relevant witness", respectively, in relation to the testimony of these witnesses allegedly motivated by payments made to them.[311] The Sesay Defence argues that the "blanket conclusion drawn by the Chamber concerning both Prosecution and Defence witnesses is impermissible"[312] and that the Trial Chamber "wrongly disregarded" payments made by the Proseeution to witnesses when assessing their credibility and in doing so "abused its discretion by refusing to accept clear evidence of improper and unregulated payments to Prosecution witnesses."[313] Further, the Sesay Defence argues that the Prosecution had a duty to initiate an enquiry about false testimony[314] and the Trial Chamber had "an irrevocable duty to have regard to the payments, which provided a reason why witnesses would testify falsely against the Appellant."[315]

4.45 The Sesay Defenee does not substantiate how the Trial Chamber abused its discretion.[316] The randomly chosen single sentences from the testimony of TF1-366,[317] and the mere assertion that TF1-362 and TF1-334 may have testified against Sesay only because they received some money, does not prove such abuse of diseretion by the Trial Chamber. In effect, the Sesay Defence is simply seeking a *de novo* consideration by the Appeals Chamber of the Sesay Defence's Payment to Witnesses Motion. The standard of review on appeal has not been met.

4.46 The Sesay Defencc's Payment to Witnesses Motion was dismissed by the Trial Chamber as "meretricious" because the objection was not raised at the earliest opportunity and because no material prejudice had been caused to Sesay.[318] The

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311 Sesay Appeal Brief, para. 59, referring in particular to witnesses TF1-263, TF1-367 and TF1-334.

312 Sesay Appeal Brief, para. 59, referring to Trial Judgement, para. 526.

313 Sesay Appeal Brief, para. 60, referriug to Trial Judgement paras 523-526 and the *Prosecutor* v. *Sesay, Kallon and Gbao*, SCSL-04-15-T, "Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses," 30 May 2008 ("**Payment to Witnesses Motion**").

314 Sesay Appeal Brief, para. 60. It is not clear why the Sesay Defence refers here to *Prosecutor v. Tadić*, IT-94-1-A-R77, "Judgemeut on allegations of eontempt agaiust prior eounsel, Milan Vujin", Appeals Chamber, 27 February 2001. This ease has nothing to do with payment of witnesses, and the Defence does not cite any speeific paragraph of this decision.

315 Sesay Appeal Brief, para. 60.

316 Sesay Appeal Brief, para. 61, where the Defence simply states that a "reasonable Tribunal could not have eoneluded that these payments were irrelevant".

317 TF1-366, Transcript, 10 Novembcr 2005, p. 79.

318 *Prosecutor* v. *Sesay, Kallan and Gbao*, SCSL-15-1185, "Public Decision on Sesay Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses," Trial Chamber, 25 June 2008 ("**Payment to Witnesses Decision**"), p. 3.

Sesay Defence has not explained why the objection was not made earlier. Accordingly, the Prosecution requests that this ground of appeal is dismissed for lack of substantiation. Should the Appeal Chamber decide to consider the merits of this ground of appeal, the Prosecution refers to its arguments made in its Response to the Payment to Witnesses Motion.[319]

4.47 Kallon's Ground 20 similarly argues that "TF1-263 received a total of Le 1,456,000 between September 2004 and April 2005" and submits "that this huge sum of money, ... create[s a] reasonable inference that the testimony of this witness was motivated more by economic gain as opposed to giving truthful testimony."[320] The Prosecution submits that the Trial Chamber carefully evaluated both the issue of "incentives" to testify and the credibility of witness TF1-263. The Trial Chamber drew "no adverse inferences about the credibility of any witnesses called by either the Prosecution or the Defence based on any of the allowances provided to witnesses who testified before"[321] after they had examined such payments. With regard to witness TF1-263 the Trial Chamber, although finding this witness "problematic in some respects" and thus requiring "corroboration of any evidence of this witness that relates to the acts and conduct of any of the three Accused"[322], ultimately largely accepted "this witness' testimony, partieularly as it relates to his own experiences."[323] The assessment of the witness's credibility, ineluding in the light of any payments received, was a matter for the Trial Chamber. The Defence does not establish that the Trial Chamber's conclusion was one which no reasonable trier of fact could have reached.

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319 *Prosecutor* v. *Sesay, Kallon and Gbao*, SCSL-15-1169, "Public Proseeution Response to Sesay Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses," Trial Chamber, 5 June 2008 ("**Payment to Witnesses Response**").

320 Kallou Appeal Brief, para. 199.

321 Trial Judgement, para. 526. The Trial Chamber found that there was "no evidence to justify the conclusion that witnesses came to testify due to the financial ineentives paid by the Court nor does this, in any way, negate their credibility": Trial Judgement, para. 525.

322 Trial Judgement, para. 586.

323 Trial Jndgement, para. 587.

C. Other evidence issues

(i) Requested reconsideration of Appeal Chamber's Protective Measures Appeal Decision

4.48 **Sesay's Ground 45** requests the reconsideration of the Appeal Chamber's "Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses"[324] ("**Protective Measures Appeal Decision**").

4.49 The Sesay Defence submits that this decision constituted a substantial departure from settled law and a breach of Appellant's Article 17 rights, but does not support its argument that it was "standard practice for the ICTR and the ICTY to have access to confidential material ... once the forensic nexus has been shown".[325] The two interlocutory decision of the ICTY[326] and the ICTR[327] are about confidential *inter partes* evidentiary material.

4.50 The standard for the reconsideration of an Appeals Chamber decision in an interlocutory appeal is extremely high. In *Kajelijeli*, the Appeals Chamber found that:

> ... [an] Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.[328]

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[324] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1146, "Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", Appeals Chamber, 23 May 2008 ("**Protective Measures Appeal Decision**").

[325] Sesay Appeal Brief, para. 352.

[326] *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Decision on Momcilo Perisić's Motion Seeking Access to Confidential Material in the Blagojević and Jokić Cases", Appeals Chamber, 18 January 2006 ("***Blagojević and Jokić* Confidential Material Decision**"), paras 4-7. The issue under consideration in this case was, whether "an accused in a case before the International Tribunal may be granted access to confidential material in another case if he shows a legitimate forensic purpose for such access", thus an issue which has nothing to do with the present case.

[327] *Prosecutor v. Augustin Ndindiliyimana et al.*, ICTR-00-56-T, "Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony OX and the Witness' Unredacted Statements and Exhibits," Trial Chamber, 23 August 2006 ("***Ndindiliyimana* Disclosure of Closed Session Testimony Decision**").

[328] *Prosecutor v. Kajelijeli*, ICTR-98-44A-A, "Judgement", Appeals Chamber, 23 May 2005 ("***Kajelijeli* Appeal Judgement**"), para. 202.

4.51 The Appeals Chamber held that there was one exception to this principle, "if a clear error of reasoning has been demonstrated or if it is necessary to do so to prevent an injustice."[329] It is submitted that the Appellant has not shown that a very exceptional case meriting discretionary reconsideration exists: Sesay has not demonstrated a "clear error" in the Appeals Chamber's reasoning, nor the necessity of reeonsideration to prevent an injustice.[330] The Prosecution submits that therc is no clear error in the Appeals Chamber's reasoning, nor is reconsideration necessary to prevent an injusticc. This ground of appeal should therefore be dismissed.[331]

(ii) Alleged violations of Rule 68

(a) General matters

4.52 This section of this Response Brief responds to **Sesay's Grounds 4 and 5** and **Gbao's Ground 14.**

4.53 The Prosecution acknowlcdges that the disclosure of exculpatory material is fundamental to a fair trial.[332] The Prosecution is also is aware of its on-going obligation under Rule 68 and maintains that it has acted in good faith at all times in complying with this obligation.

4.54 The Sesay Defence and Gbao Dcfence claim that the Prosecution has not disclosed material subject to its Rule 68 obligations,[333] and seeks remedies which, it is submitted, are extra-ordinary and unjustified.[334]

4.55 The case law of international criminal tribunals establishes the prerequisites for the grant of a remedy for an alleged breaeh of this diselosure obligation. An appellant must satisfy the Appeals Chambcr: (i) that the Prosecution violated its obligations

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329 *Kajelijeli* Appeal Judgement, para. 203, citing *Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005", Appeals Chamber, 4 February 2005 ("***Nahimana* Appeal Decision**").

330 *Kajelijeli* Appeal Judgement, para. 204.

331 *Ibid.* para. 205.

332 *Prosecutor v. Krstić*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004 ("***Krstić* Appeal Judgemeut**"), para. 180.

333 Sesay Appeal Brief, paras 24 and 26; Gbao Appeal Brief, paras 292 and 309.

334 Sesay Appeal Brief, para. 24, referring to a list of remedies listed in the Sesay Notiee of Appeal; Sesay Appeal Brief, para. 26; Gbao Appeal Brief, para. 311.

under Rule 68; and (ii) that the appellant's case suffered *material* prejudice as a result.[335] Proof of material prejudice is required.[336]

4.56 The test to establish a Rule 68 violation (the "**Rule 68 test**")[337] is also well-established and has been articulated in detail by both Trial Chambers of the Special Court. The Defence must *target* specific material, show why it is exculpatory and material, and show that the Prosecution possessed or controlled the material and failed to disclose it.[338]

4.57 The scope of Rule 68 is clear: it applies to material that either suggests the innocence or mitigates the guilt of the accused, or that may affect the credibility of Prosecution evidence.[339] It has been held that material will affect the credibility of Prosecution evidence if it undermines the Prosecution's case.[340] Therefore, contrary to the Sesay Defence's interpretation of Rule 68, the rule does not cover any material "that *could be utilized* [...] in cross-examination".[341] The material must at least tend to *undermine* the Prosecution's case. The mere fact that the Defence might find some use for material is not of itself sufficient to bring the material within the Prosecution's Rule 68 disclosure obligation.

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335 *Prosecutor v. Stakić*, IT-97-24-A, "Judgement" Appeals Chamber, 22 March 2006 ("***Stakić* Appeal Judgement**"), para. 189; *Kordić and Čerkez* Appeal Judgement, para. 207; *Galić* Appeal Judgement, para. 56; *Blaškić* Appeal Judgement, para. 268. *Krstić* Appeal Judgement, para. 153; *Akayesu* Appeal Judgement, para. 340.

336 *Blaškić* Appeal Judgement, para. 295; *Krstić* Appeal Judgement, para. 199.

337 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-363, "Decision on Sesay-Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", Trial Chamber, 2 May 2005 ("***Sesay* Rule 68 Decision 2005**"), para. 36: The Appellants must demonstrate by *prima facie* proof: (i) that the *targeted* evidentiary material is exculpatory in nature; (ii) the materiality of the said evidence; (iii) that the material is in the Prosecution's possession, custody or control; and (iv) that the Prosecution has in fact failed to disclose the targeted exculpatory material; also see *Prosecutor v. Taylor*, SCSL-2003-01-T-735, "Public-decision on confidential defence application for disclosure of documents in the custody of the prosecution pursuant to rule 66 and rule 68," Trial Chamber, 13 February 2009 ("***Taylor* Rule 68 Decision 2009**"), para. 5

338 See Sesay Rule 68 Decision, 2005, para. 36; Taylor Rule 68 Decision, 2009, para. 5; Formulated slightly differently, but materially and substantively the same, see *Kordić and Čerkez* Appeal Judgement, para. 179; *Blaškić* Appeal Judgement, para. 268; *Krstić* Appeal Judgement, para. 153.

339 *Krstić* Appeal Judgement, para. 204; *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1268, "Decision on Sesay Motion Requesting the Appeal Chamber to Order the Prosecution to Disclose Rule 68 Materials", Appeals Chamber, 16 June 2009 ("***Sesay* Rule 68 Decision 2009**"), para. 19.

340 *Krstić* Appeal Judgement, para. 178.

341 Sesay Appeal Brief, para. 24 (emphasis added).

4.58 The determination of what constitutes exculpatory material is a facts-based judgement falling within the Prosecution's discretion.[342] It has been the general practice of the *ad hoc* tribunals to respect the Prosecution's exercise of that discretion in good faith.[343]

(b) The grounds of appeal should be summarily dismissed

4.59 **Sesay's Ground 4** contends that the Trial Chamber erred in dismissing his motion for disclosure of purportedly Rule 68 material ("**Sesay Rule 68 Motion**").[344]

4.60 **Sesay's Ground 5** contends that the Trial Chamber erred in finding that the fact that a witness had been relocated did not affect the Chamber's view of his testimony.[345]

4.61 The Prosecution submits that Sesay's Grounds 4 and 5 should both be summarily dismissed without evaluation on their merits.[346] The standards of review on appeal are clear. An appellant must be clear, logical and exhaustive in his submissions.[347] In relation to these grounds of appeal, the Sesay Defence is not, and accordingly a detailed consideration of these grounds of appeal by the Appeals Chamber is not warranted. The Sesay Defence's arguments suffer from fatal deficiencies by: (i) failing to explain how the alleged errors invalidate the *final* decision;[348] (ii) merely repeating arguments which failed in the Sesay Rule 68 Motion before the Trial

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342 *Blaškić* Appeal Judgement, para. 264; *Kordić and Čerkez* Appeal Judgement, para. 183; Sesay Rule 68 Decision, 2009, para. 20.

343 The Prosecution plays an important role in the administration of justice and the execution of its obligations in good faith is to be expected and respected: see for example, *Kordić and Čerkez* Appeal Judgement, para. 183; Sesay Rule 68 Decision, 2009, para. 20.

344 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-276, "Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor", Trial Chamber, 8 November 2008 ("**Sesay Rule 68 Motion 2005**"). See also Sesay Appeal Brief, para. 23.

345 Sesay Appeal Brief, para. 25.

346 The ICTY Appeals Chamber has listed the submissions on appeal which are liable to be summarily dismissed. See *Krajišnik* Appeal Judgement, paras 17-27; *Prosecutor v. Martić*, IT-95-11-A, "Judgement", Appeal Chamber, 8 October 2008 ("***Martić* Appeal Judgement**"), paras 14-21; *Strugar* Appeal Judgement, paras 17-24; *Prosecutor v. Brdanin*, IT-99-36-A, "Judgement", Appeals Chamber, 3 April 2007 ("***Brđanin* Appeal Judgement**"), paras 17-31.

347 *Krajišnik* Appeal Judgement, para. 16; *Prosecutor v. Orić*, IT-03-68-A, "Judgement", Appeals Chamber, 3 July 2008 ("***Orić* Appeal Judgement**"), para. 14; *Kordić and Čerkez* Appeal Judgement, para. 22; *Vasiljević* Appeal Judgement, paras 11-12; *Krnojelac* Appeal Judgement, para. 16; *Kunarac* Appeal Judgement, paras 43-44.

348 *Krnojelac* Appeal Judgement, para. 15.

Chamber;[349] (iii) merely substituting its own reasoning and evaluation of the evidence for that of the Trial Chamber's;[350] and (iv) merely asserting that the Trial Chamber failed to consider, or relied too heavily on, particular evidence.[351]

4.62 Alternatively, in the event that the Appeals Chamber does decide that a detailed consideration of these grounds of appeal is warranted, the Prosecution makes the following submissions.

(c) Alleged Rule 68 violations

4.63 The Sesay Defence contends that the Trial Chamber erred "in failing to order disclosure."[352] However, the Trial Chamber clearly and rationally explained its reasons for denying the Sesay Rule 68 Motion, holding that the Sesay Defence's sweeping allegations[353] lacked certainty and precision[354] and therefore failed to satisfy the Rule 68 test.[355]

4.64 The Sesay Defence does not challenge the Rule 68 test and does not suggest that the Trial Chamber applied the wrong legal principles in deciding the Rule 68 motion. The Sesay Defence simply disagrees with the Trial Chamber's ruling and merely insists that the alleged exculpatory material[356] was "identified with precision".[357] The Sesay Defenee relies solely on the support of a single footnote referencing over 300 pages of transcript testimony but did not specify pages or precise content in its Appeal Brief.[358] Furthermore, it is submitted that the Sesay Defence incorrectly

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349 *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16; *Orić* Appeal Judgement, para. 13; *Prosecutor v. Halilović*, IT-01-48-A, "Judgement", Appeals Chamber, 16 Oetober 2007 ("***Halilović* Appeal Judgement**"), para. 12; *Limaj* Appeal Judgement, para. 14; *Brđanin* Appeal Judgement, para. 16; *Naletilić and Martinović* Appeal Judgement, para. 13; *Kordić and Čerkez* Appeal Judgement, para. 21; *Blaškić* Appeal Judgement, para. 13; *Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003 ("***Rutaganda* Appeal Judgement**"), para. 18; *Krnojelac* Appeal Judgement, para. 17; *Kupreškić* Appeal Judgement, para. 22.

350 *Krnojelac* Appeal Judgement, paras 20, 23 and 25; *Kunarac* Appeal Judgement, para. 48.

351 *Krajišnik* Appeal Judgement, paras 19, 21 and 27; *Martić* Appeal Judgement, paras 19-21; *Strugar* Appeal Judgement, paras 21 and 23-24; *Brđanin* Appeal Judgement, paras 23-24 and 27-29.

352 Sesay Appeal Brief, para. 24.

353 Sesay Rule 68 Decision, 2005, paras 49 and 51.

354 Sesay Rule 68 Decision, 2005, paras 53, 55, 58, 60 and 64-67.

355 Sesay Rule 68 Decision, 2005, para. 53.

356 Sesay Appeal Brief, para. 23.

357 Sesay Appeal Brief, para. 24.

358 See Sesay Appeal Brief, footnote 79. *Ad hoc* tribunal jurisprudence shows that *exact references* are required such as indicating with precision the transcript pages or paragraph numbers in the judgement: see for example *Orić* Appeal Judgement, para. 14; *Halilavić* Appeal Judgement, para. 13; *Limaj*

maintains that its reference to "*[a]ny* information in the possession of, or known to the OTP which discloses *any* activity [...]"[359] is specific enough. It is not, and the Sesay Defence appears to have misunderstood the degree of specificity required[360] and the underlying reasons for that level of specificity.[361]

4.65 The Rule 68 test is clear and at an absolute minimum requires the Defence to specifieally *target* material that it alleges has not been disclosed.[362] The Sesay Defence has not donc so.

4.66 In addition to the Trial Chamber's reasoning,[363] the Prosecution submits that the object of a request must be specific and that the fulfilment of the request must be ascertainable and final. Overly speculative and broad requests are impossible to fulfil with any eertainty. In the instant case, it is unclear how much or what type of material is requested by the Sesay Defence and therefore it is unclear what exactly must be produced to fulfil the Sesay Defence's request.

4.67 To allow vaguely formulated requests would preelude the Prosecution from ever saying with legal certainty that it had fulfilled a given request. The consequence would be endless allegations that there is yet more undisclosed material, regardless of what and how much is disclosed pursuant to such a request.

4.68 The Proseeution therefore submits that the Trial Chamber was correct in ruling that the Sesay Defence's requests were too broad, vague and speculative in nature.[364] A high degree of specificity is required to support an allegation that Rule 68 had been violated,[365] espeeially when grave implications for the justice process are at stake.[366] The presumption that the Proseeution is acting in good faith, the interests

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Appeal Judgement, para. 15; *Naletilić and Martinović* Appeal Judgement, para. 14; *Kunarac* Appeal Judgement, para. 44; *Martić* Appeal Judgement, para. 14; *Strugar* Appeal Judgement, para. 16.

359 Sesay Rule 68 Motion, 2005, para. 14 (vi) (emphasis added).

360 Sesay Rule 68 Decision, 2005, paras 53 and 61; see also *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-146, "Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness summaries and Materials pursuant to Rule 68", Appeals Chamber, 8 July 2004 ("**Kondewa Rule 68 Decision 2004**"), paras 24-26.

361 Sesay Rule 68 Decision, 2005, paras 55-58 and 63.

362 Sesay Rule 68 Decision, 2005, paras 59-65.

363 Sesay Rule 68 Decision, 2005, paras 53-65.

364 Sesay Rule 68 Deeision, 2005, paras 53, 55, 58, 60 and 64-67.

365 Sesay Rule 68 Deeision, 2005, paras 36, 51, 53, 55.

366 Sesay Rule 68 Decision, 2005, para. 42.

of judicial economy and the principles of certainty and finality require *targeted* requests which are capable of being fulfilled with full legal certainty.

4.69 Furthermore, the Sesay Appeal Brief does not even attempt to show the exculpatory nature or the material relevance of the information sought. The Sesay Defence only makes bare assertions that this might have been established in the Sesay Rule 68 Motion.[367] Unable or unwilling to *target* specific material, the Sesay Defence also does not show that the Prosecution possesses or has control of any *specific* material or that the Prosecution has failed to disclose any such material.

4.70 The Sesay Defence offers nothing more than a bare allegation of an error[368] and devotes the bulk of its two paragraphs to a restatement of its previous allegations and submissions.[369] The Sesay Defence has not established that the Trial Chamber had abused its exercise of discretion, nor that the interlocutory decision itself is even incorrect, let alone that the alleged error invalidates the *final* decision or occasions a miscarriage of justice. Similarly, the Sesay Defence has not satisfied the requirements for establishing a violation of Rule 68 by the Prosecution nor has the Sesay Defence proved that it has suffered any material prejudice. Consequently, the Sesay Defence has not established that it is entitled to any remedy.

(d) Disregard of motive

4.71 The Sesay Defence claims that because the Trial Chamber ruled that the fact of relocation assistance "was not discloseable pursuant to Rule 68", "this material was not before the Chamber and it was not in a position to assess the impact of this potential incentive/indueement on witness testimony."[370] The Sesay Defence's argument is legally and factually incorrect and appears to misrepresent the Trial Chamber's findings.

4.72 First, the Trial Chamber did not rule that the fact of relocation assistance was not discloseable *per se*. Rather, it ruled that the mere speculative nature of the allegations in the Sesay Rule 68 Motion failed to meet the requirements of the Rule

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367 Sesay Appeal Brief, para. 24, referring to Sesay Rule 68 Motion, 2005, para. 14 (vi).

368 Sesay Appeal Brief, para. 24.

369 See Sesay Appeal Brief, paras 24-25; also see *Kupreškić* Appeal Judgement, para. 26, where the Appeals Chamber held that the Appellant appeared to be rearguing the same case that he raised before the Trial Chamber.

370 Sesay Appeal Brief, para. 25.

68 test,[371] and that there was "no legal basis for a disclosure order" regarding the relocation assistance.[372]

4.73 Second, the Sesay Defence misrepresents the Trial Chamber's findings by claiming that the Trial Chamber acknowledged the potential impact of relocation assistance upon testimony, and thereafter disregarded it.[373] It is clear from the very paragraph the Sesay Defence relies on that disclosure of various types of assistance had been made, that the Trial Chamber had examined the disclosed material and that the Trial Chamber was "of the considered view that there is *no evidence* to justify the conclusion that witnesses came to testify due to the financial incentives paid by the Court nor does this, in any way, negate their credibility."[374] Thus, the issue was taken into account, addressed and clearly not disregarded by the Trial Chamber.

4.74 Third, the Sesay Defence appears to conflate the *substance* of the assistance with the *fact of* assistance.[375] The Trial Chamber did not pronounce on the substance of any assistance and only held that, in light of the lack of evidence, the fact (or existence) of assistance would not, without more, sway its view of witness testimony.[376] The Prosecution submits that this finding is entirely reasonable and is fully within the Trial Chamber's discretion to make.

4.75 In conclusion, it is clear that the Trial Chamber did not disregard the issue of assistance and that it provided reasons explaining its exercise of discretion in accepting the testimony of witnesses who had been given assistance. The Trial Chamber clearly took into account the existence of any assistance and simply found the Sesay Defence's allegations unfounded. Therefore, the Prosecution submits that the Trial Chamber committed no error in taking the *fact of* assistance into consideration or in ruling that this fact would not sway its view on certain evidence.

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371 Sesay Rule 68 Decision, 2005, para. 53.
372 Sesay Rule 68 Decision, 2005, paras 53 and 66 (ix).
373 Sesay Appeal Brief, para. 26.
374 Trial Judgement, para. 525 (emphasis added).
375 Consider for example the common law hearsay principle on this point. The hearsay principle allows the *fact* that a conversation took place to be considered even though the *content* of the conversation may be inadmissible as hearsay.
376 Trial Judgement, para. 525.

(e) Abuse of process

4.76 **Gbao's Ground 14** alleges that the Trial Chamber erred in declining to make findings on the Gbao Defence's abuse of process allegation in its motion ("**Gbao Rule 68 Motion**"),[377] and specifically in requiring the Gbao Defence to demonstrate prejudice as a requirement for establishing an abuse of process.[378]

4.77 ICTR and ICTY jurisprudence indicates that the abuse of process doctrine may be relied on in two distinct situations: (1) where delay has made a fair trial for the accused *impossible*; and (2) where in the circumstances of a particular case, proceeding with the trial would contravene the court's sense of justice, due to pre-trial impropriety or misconduct.[379] Furthermore, application of the abuse of process doctrine is a matter of *discretion*.[380] A finding of impropriety must reach a certain threshold level to constitute an abuse of process.[381] In fact, the "case-law on [the issue of abuse of process] reflects mainly findings of serious injustice"[382] where "it needs to be clear that the rights of the accused have been *egregiously* violated."[383] Generally, the violation must be so egregious such that it would be unfair for the accused to stand trial at all.[384]

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377 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1174, " Urgent and Confidential with Redactions and Annex Gbao Motion requesting the Trial Chamber to Stay Trial Proceedings of Count 15-18 Against the Third Accused for Prosecution's Violations of Rule 68 and Abuse of Process", Trial Chamber, 9 June 2008 ("**Gbao Rule 68 Motion 2008**"), see also Gbao Appeal Brief, para. 290.

378 Gbao Appeal Brief, para. 298.

379 *Prosecutor v. Barayagwiza*, ICTR-97-19-AR72, "Decision", Appeals Chamber, 3 November 1999 ("***Barayagwiza* Appeal Decision**"), para. 77; *Prosecutor v. Milošević*, IT-02-54, "Decision on Preliminary Motions", Trial Chamber III, 8 November 2001 ("***Milošević* Decision on Preliminary Motions**"), para. 49; *Prosecutor v. Rwamakuba*, ICTR-98-44C-PT, "Decision on Defence Motion for Stay of Proceedings", Trial Chamber III, 3 June 2005 ("***Rwamakuba* Pre-Trial Decision**"), para. 38. Also see *Barayagwiza* Appeal Decision, para. 74, referring to a House of Lords summary of the abuse of process doctrine: "[P]roceedings may be stayed in the exercise of the judge's discretion not only where a fair trial is impossible, but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place."

380 *Barayagwiza* Appeal Decision, para. 74; *Milošević* Decision on Preliminary Motions, para. 50; *Akayesu* Appeal Judgement, para. 337.

381 *Prosecutor v. Brima, Kamara, Kanu* , SCSL-04-16-T-88 "Decision on motion challenging jurisdiction and raising objections based on abuse of process", Trial Chamber, 25 May 2004 ("***AFRC* Pre-Trial Decision on Abuse of Process**"), para. 26.

382 *Akayesu* Appeal Judgement, para. 339.

383 *Prosecutor v. Nikolić-Dragan*, IT-94-02-S, "Sentencing Judgement", Trial Chamber II, 18 December 2003 ("***Nikolić-Dragan* Seutencing Judgement**"), para. 27 (emphasis added).

384 *Barayagwiza* Appeal Decision, paras 73-74; *Milošević* Decision on Preliminary Motions, paras 50-51; *Akayesu* Appeal Judgement, para. 337.

4.78 The high threshold for establishing an abuse of process is also evident from the situations it applies to and the remedies that may be ordered in remedy. In other words, only very serious violations could make a fair trial impossible or contravene a court's overall sense of justice.[385] As to remedies, the case law shows that exceptional remedies such as the quashing of a conviction may be ordered in exceptional situations such as an unlawful arrest and illegally obtained confession.[386]

(f) Relevance of prejudice

4.79 The Gbao Defence argues that demonstration of prejudiee is not a neeessary precondition to establishing an abuse of proeess and relies on this point to challcnge the Trial Chamber's decision not to rule on abuse of process.[387] The Prosecution submits that an absence of prejudice or minimal prejudice necessarily rules out the basis of an abuse of process. Alternatively, the Prosecution submits that, at a minimum, prejudice could and should be considered by a trier of fact as evidence of an alleged abuse of process. The power to stay proceedings on grounds of an abuse of process is a discretionary power of the Trial Chamber. The standard of review in an appeal against an exercise of the Trial Chamber's discretion is dealt with in paragraphs 1.14 to 1.17 of the Prosecution Appeal Brief. In cases where the Defence has suffered no prejudice, it is submitted that the Appeals Chamber could not conclude that the Trial Chamber "abused its discretion" by not granting a remedy.

4.80 In cases before the *ad hoc* tribunals, the question of whether an accused suffered prejudice is clearly eonsidered.[388] Furthermore, the ICTR Appeals Chamber

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385 See *Nikolić-Dragan Sentencing Judgement*, para. 27, in which the Trial Chamber II gave as an example of pre-trial impropriety or misconduct "a situation where an accused is very seriously mistreated, maybe even subjected to inhuman, cruel or degrading treatment, or torture, before being handed over to the Tribunal".

386 *Borayagwiza* Appeal Decision, para. 75, see footnotes 193-195; also see *Akayesu* Appeal Judgement, para. 399, where the Appeals Chamber held that a stay of proceedings is an exceptional remedy for a finding of abuse of process.

387 Gbao Appeal Brief, paras 298-304 and 310.

388 *Akayesu* Appeal Judgement, para. 344: the ICTY Appeals Chamber dismissed Akayesu's argument because he did not "show that he suffered a prejudice"; also see *Barayagwiza* Appeal Decision, paras 75 and 77: The ICTY Appeals Chamber stated that "[...] it is quite impossible to say that there was no prejudice to the applicant in continuance of the case".

explicitly stated that although establishing an abuse depends on all the circumstanees of the case:

> ... it is ... more important that the aceused show that he had suffered prejudiee. Thus, 'an order staying proeeedings on the ground of abuse of process ... should never be made where there were other ways of aehieving a fair hearing of the case, *still less where there was no evidence of prejudice to the defendant.*'[389]

4.81 The Gbao Defence relies on two authorities but does not show how they are inconsistent with the challenged ruling.[390] The first authority only stresses that it is not necessary that there be *mala fides* and that it is sufficient that a violation of the accused's rights in bringing him to justice resulted.[391] The second authority simply reiterates that an abuse of proeess would exist if the court's sense of justiee is eontravened.[392] Neither authority speaks to the threshold level of an alleged violation or whether prejudice to an accused is a valid consideration or not. The Prosecution submits that these two authorities do not contradict the Trial Chamber's reasoning.

(g) Whether there was prejudice to the Appellant

4.82 The Gbao Defence in the alternative challenges the Trial Chamber's finding that there was no material prejudice.[393]

4.83 Thc Gbao Defence merely alleges that the verdict in Gbao's case *may* have been diffcrent, that the undisclosed statement *may* have been used in cross-examination, and that the Gbao Defence *may* have had a diffcrent strategy.[394] Simply claiming that there *may have* been other outcomes if ccrtain material had been disclosed cannot be sufficient to establish prejudice. Thesc types of arguments have bcen unsuceessful in previous *ad hoc* tribunal cases, and especially whcn the appellant has not proved an alleged error.[395] Furthermore, the Gbao Defence ignores the fact

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389 *Akayesu* Appeal Judgement, para. 340 (emphasis in original).
390 Gbao Appeal Brief, paras 301-302.
391 Gbao Appeal Brief, para. 301.
392 Gbao Appeal Brief, para. 302.
393 Gbao Appeal Brief, para. 304.
394 Gbao Appeal Brief, para. 307.
395 See for example *Krstić* Appeal Judgement, para. 184, where the Appeals Chamber held that the evidence in question "did not constitute direet evidence" challenging the Trial Chamber's finding and was considered evidence that could not have alterod the verdict of the Trial Chamber; also see *Krstić* Appeal Judgement, para. 186, where the evidence was considered insignificant in light of the

that the Trial Chamber's decision rested on the Gbao Defence's nearly two-year delay in raising the non-disclosure issue.[396] The Trial Chamber also found that there was no resulting material prejudice as a result of late disclosure and then considered that if there had been any prejudice several remedies existed and were available to the Gbao Defence to remove or mitigate any such prejudice.[397]

4.84 On substance, the Prosecution submits that contrary to the Gbao Defence's suggestions, the evidence in question does not "*[contradict] the gravamen* of the Prosecution case against Gbao",[398] nor can it reasonably be considered "evidence [...] that could have *absolved* an Accused of guilt"[399]. Even the summary of Major Maroa's statement provided by the Gbao Defence itself illustrates the relatively neutral content of the statement.[400] The statement plainly states that Gbao was at the scene but does not explicitly state what he did or did not do in relation the conduct underlying his convictions. In fact, the Trial Chamber also held that it was difficult to reconcile the Gbao Defence's claims that "no other 'document' could be more 'significant' to demonstrate the Accused Gbao's innocence" with the various alternatives that existed.[401] Thus, the Gbao Defence has not shown that there was any prejudice.

4.85 In conclusion, the Gbao Defence claims that the alleged error invalidates the interlocutory decision but does not make any submissions or give any reasons on how it invalidates the *final* verdict or results in a miscarriage of justice.[402] The Gbao Defence also does not show that the Trial Chamber exercised its discretion in a

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abundant evidence considered by the Trial Chamber; also see *Stakić* Appeal Judgement, para. 185, where the Appeals Chamber held that the Appellant was required to demonstrate that he would have presented his case differently had he had access to the disclosed material; also see *Akayesu* Appeal Judgement, para. 341, where Akayesu claimed that he was denied the right to a fair and public hearing as a result of the alleged violation but does not explain how the violation caused him prejudice.

396 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1201, "Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process", Trial Chamber, 22 July 2008 ("**Gbao Rule 68 Decision 2008**"), paras 59-61.

397 Gbao Rule 68 Decision, 2008, para. 62.

398 Gbao Appeal Brief, para. 297. (emphasis added).

399 Gbao Appeal Brief, para. 305 (emphasis added).

400 Gbao Appeal Brief, para. 291.

401 Gbao Rule 68 Decision, 2008, para. 58.

402 Gbao Appeal Brief, paras 301-302; also see Gbao Appeal Brief, para. 299, where the Gbao Defence alleges that the Trial Chamber's error "effectively invalidates the Trial Chamber's decision." The Gbao Defence does not show how the *final* decision or verdict is invalidated by the alleged error.

wholly erroneous manner or that no other Trial Chamber could have reached the same conclusion. Therefore, the standard of review on appeal has not been satisfied.

4.86 Finally, given the seriousness of an abuse of process allegation, the Prosecution submits that the existence of prejudice to the accused is a valid consideration when a Chamber is seized of an abuse allegation. It is submitted that it was open to the Trial Chamber to decline to make findings in light of the lack of prejudice to Gbao.

4.87 The Prosecution therefore requests that this ground of appeal be dismissed.

(iii) Alleged reliance on expert reports in determining ultimate issues

4.88 This section of this Response Brief responds to **Gbao's Ground 2**.

4.89 The Gbao Defence complains that the Trial Chamber misapplied what is says is the legal principle that expert reports should not be used to decide ultimate issues.[403]

4.90 The use of expert evidence is now commonly accepted in international courts "to provide the court with information that is outside its experience".[404]

4.91 The principle that an expert witness cannot express opinions on ultimate issues of fact reflects two fundamental considerations. The first is that "[o]nly the Chamber, as the finder of fact, is competent to make a judicial determination on the ultimate issues in the case".[405] The second is that ultimate issues of fact are outside the expertise of the expert witness.[406]

4.92 The "ultimate issue" in the case is whether or not an accused is guilty or not on a particular count with which he or she has been charged. This is clearly an issue to be determined by a Trial Chamber and not by a witness. Moreover, this ultimate issue is necessarily a question of international criminal law. The Trial Chamber (and the Appeals Chamber) are presumed to know and to have all necessary expertise in international criminal law, which is the law of the forum. Chambers may hear *submissions* of counsel on such questions of law, but such questions of law are not appropriate matters for expert *evidence*.

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403 Gbao Appeal Brief, para. 5.

404 Richard May and Marieka Wierda (2002), *International Criminal Evidence*, Transnational Publishers, Inc., Ardsley, New York, 2002, p. 199.

405 *Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, "Decision on the Prosecution's Objections to Expert Witesses Lugan and Strizek", Trial Chamber, 23 October 2008 ("***Ndindiliyimana* 23 October 2008 Decision**"), para. 13.

406 *Ibid.*, paras 15-16.

4.93 Contrary to what the Gbao Defence argues, there is no principle that an expert witness cannot give an opinion on matters that "go to the acts or conduct of the accused". Provided that the opinion is on an issue that falls within the expertise of the expert witness, there is no reason why an expert witness should not do so. For instance, there would be nothing inappropriate in a handwriting expert giving an expert opinion as to whether the signature appearing on a particular document is the signature of the accused. Such an opinion would relate to the aets or conduct of the accused (that is, the opinion would be to the effect that it was the accused who personally signed the document), but the expert opinion would not be on the ultimate question in the case, namely whether the accused is guilty of a crime with which he is charged.

4.94 In this example, if the accused is charged with the war crime of ordering the murder of prisoners of war, and if the document in question is a written order to subordinates of the accused to kill prisoners of war, and if the defence case is that it was not the accused who signed the order, then the expert opinion may well be a crucial piece of evidence on which the conviction is based. However, that does not make the expert opinion inadmissible. The opinion relates to a matter that is within the expert's expertise, and does not express a view on the ultimate issue (whether or not the accused is guilty), but only on the objective fact of whether or not the signature on the document is that of the accused.

4.95 The Trial Chamber is not bound to accept expert evidence. Even on a question that is within an expert's expertise, and on which the court has no expertise, the court is still entitled to reject the expert evidence if it finds it unhelpful or unpersuasive. Thus, the Trial Chamber said that "it is the prerogative of the Chamber to decide what probative value to attach to it [expert evidence]".[407]

4.96 Paragraph 10 of the Gbao Defence Brief claims that the Trial Chamber relied on expert evidence in establishing the facts referred to in paragraphs 1409, 1412, 1413 and 1474-1475. In fact, none of these paragraphs contain findings as to an ultimate issue in the case (that is, none of these paragraphs contain a finding that Gbao is guilty of a crime). Moreover, none of these paragraphs contain findings that relate

[407] Trial Judgement, para. 512.

to the personal acts or conduct of Gbao. These paragraphs contain general findings that forced marriages occurred. None of these paragraphs even mention Gbao. The findings in these paragraphs relate to the crime base for some of the Counts, but do not touch in any way on the question whether Gbao was individually responsible for those crimes. The Prosecution does not understand how the Gbao defence can even suggest that these paragraphs relate to the acts or conduct of Gbao. Ultimately, the submission of the Gbao Defence appears to be that the Trial Chamber, in determining the individual responsibility of an accused, cannot take into account any conclusions drawn from an expert opinion. The Prosecution submits that this argument is absurd. In determining the ultimate issue in the case (whether the guilt of the accused has been proved), the Trial Chamber will have regard to all of the evidence in the case as a whole, including the expert evidence.

5. Alleged errors of fact: JCE

A. Alleged misapplication of the theory of JCE

(i) Introduction

5.1 This section of this Response Brief responds to **Sesay's Grounds 24, 26 and 33, Kallon's Grounds 2 and (in part) 11(A) and (B),** and **Gbao's Ground 8, sub-grounds 8(d), 8(e), 8(f) and 8(g).**

(ii) Alleged errors relating to the principle of *nulla poena sine culpa*[408]

5.2 The Trial Chamber itself observed that "this trial is not a trial of the RUF organisation".[409] It is well-established that the JCE mode of liability does not permit convictions based on guilt by association and that Trial Chambers must be assumed to be acutely conscious of the strict requirements of the doctrine.[410]

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408 Kallon Appeal Brief, paras 26-29 and 39; Gbao Appeal Brief paras 84-86.

409 Trial Judgement, para. 4.

410 See e.g. *Brđanin* Appeal Judgement, para. 428: "The Appeals Chamber emphasizes that JCE is not an open-ended concept that permits convictions based on guilt by association. On the contrary, a conviction based on the doctrine of JCE can occur only where the Chamber finds all necessary elements satisfied beyond a reasonable doubt." See also *Martić* Appeal Judgement, para. 172: "when all the elements of JCE are met in a particular case, 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. Thus, he is appropriately held liable also for those actions of other JCE members, or individuals used by them,

(iii) Alleged errors relating to "over expansive" JCE[411]

5.3 The Trial Chamber was guided appropriately by the jurisprudence of international criminal tribunals in preference to US conspiracy cases in determining the boundaries of JCE liability, the former being distinguishable from the inchoate offence of conspiracy. There is no limit in the jurisprudence to the size of a JCE. The *Karadžić* Indictment alleges an overarching JCE spanning the period from October 1991 to November 1995.[412] The Trial Chamber in *Karemera* did not consider that "the scale of a joint criminal enterprise has any impact on such form of liability. The argument that the novelty of making the allegation of a joint criminal enterprise in a large scale operation takes it outside of the scope of the jurisprudence is not therefore persuasive."[413] When the Trial Chamber in the instant case referred to a JCE being "divisible as to participants, time and location" as well as "the crimes charged as being within or the foreseeable consequence of the purpose of the joint enterprise",[414] it was referring to the pleading requirements for JCE which were applied strictly.[415]

(iv) Alleged errors in defining the common purpose[416]

5.4 The argument in the Sesay Appeal Brief as to the alleged erroneous approach to the JCE[417] is based on an incorrect interpretation of the Trial Chamber's approach to defining the common purpose. The Trial Chamber did not define the objective of taking power and control over State territory as criminal in itself by virtue of the criminal means used to achieve that objective, but rather gave the proper characterization to objective and means in accordance with the jurisprudence of

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that further the common criminal purpose (first category of JCE) or criminal system (second category of JCE), or that are a natural and foreseeable consequence of the carrying out of this crime (third category of JCE)."

411 Kallon Appeal Brief, paras 30-34.

412 *Prosecutor v. Karadžić*, IT-95-5/18-I, "Third Amended Indictment", 27 February 2009, para. 6. Three additional JCEs are alleged during the existence of the overarching JCE.

413 *Prosecutor v. Karemera* et al., ICTR-98-44-R72, "Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal enterprise", Trial Chamber, 5 August 2005 ("***Karemera* JCE Decision**"), para. 7.

414 Trial Judgement, para. 354.

415 See e.g. Trial Judgement, paras 368 and 374.

416 Sesay Appeal Brief, paras 81-105, 204-205, 227; Kallon Appeal Brief paras 38-40, 49-51; Gbao Appeal Brief, paras 76-87, 88-95 and 96-102.5.

417 Sesay Appeal Brief, paras 81-102.

this Appeals Chamber[418] and that of other tribunals such as the ICTY in the *Martić* case.[419]

5.5 In the *AFRC* Appeal Judgement, this Appeals Chamber stated:

> It can be seen from a review of the jurisprudence of the international criminal tribunals that the criminal purpose underlying the JCE can derive not only from its ultimate objective, but also from the means contemplated to achieve that objective. The objective and the means to achieve the objective constitute the common design or plan.[420]

5.6 This was not the ratio of the decision as argued by Sesay[421] but rather identified the "question for determination" in the appeal. The Appeals Chamber went on to conclude, in the finding correctly relied upon by the Trial Chamber:[422]

> ... that the requirement that the common plan, design or purpose of a joint criminal enterprise is inherently criminal means that it must either have as its objective a crime within the Statute, or contemplate crimes within the Statute as the means of achieving its objective.[423]

5.7 The Appeals Chamber has subsequently reaffirmed that "the common purpose comprises both the objective of the JCE and the means contemplated to achieve that objective".[424] These statements of the Appeals Chamber are consistent with the findings of the Trial Chamber and Appeals Chamber in *Martić*.[425] Further:

> For the first and third categories of joint criminal enterprise ... the requirement of proof that there was a common plan, design, or purpose to commit a crime or underlying offence is fulfilled where the Prosecution proves that the accused and at least one other person, who may or may not be the physical perpetrator or intermediary perpetrator, came to an

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418 *AFRC* Appeal Judgement, para. 80.
419 *Martić* Appeal Judgement, para. 123.
420 *AFRC* Appeal Judgement, para. 76.
421 Sesay Appeal Brief, para. 89.
422 Trial Judgement, para. 260.
423 *AFRC* Appeal Judgement, para. 80.
424 *Taylor* JCE Decision, para. 25.
425 See *Prosecutor v. Martić*, IT-95-11-T, "Judgement", Trial Chamber, 12 June 2007 ("**Martić Trial Judgement**"), para. 442: "The Trial Chamber considers that such an objective, that is to unite with other ethnically similar areas, in and of itself does not amount to a common purpose within the meaning of the law on JCE pursuant to Article 7(1) of the Statute. However, where the creation of such territories is intended to be implemented through the commission of crimes within the Statute this may be sufficient to amount to a common criminal purpose." The Appeals Chamber in that case confirmed that: "The Trial Chamber identified the 'common purpose' of the JCE [...] as 'the establishment of an ethnically Serb territory' which – under the prevailing circumstances – 'necessitated the forcible removal of the non-Serb population from the SAO Krajina and RSK territory.'": *Martić* Appeal Judgement, para. 92, referring to *Martić* Trial Judgement, para. 445.

> express or implied agreement that a particular crime or underlying offence would be committed.[426]

5.8 The established principles were correctly applied by the Trial Chamber in the instant case. The Trial Chamber recalled that in order to establish a JCE, "there must be a plurality of persons acting in concert in pursuance of a common plan whose purpose is either inherently criminal or which contemplates the realization of an objective through conduct constituting crimes within the Statute".[427] The Trial Chamber found that "following the 25 May 1997 coup, high ranking AFRC members and the RUF leadership agreed to form a joint 'government' in order to control the territory of Sierra Leone."[428] It was found that:

> ... such an objective is not criminal and therefore *does not amount to a common purpose* within the meaning of the law of joint criminal enterprise pursuant to Article 6(1) of the Statute. However, where the taking of power and control over State territory is intended to be implemented through the commission of crimes within the Statute, this may amount to a common criminal purpose.[429]

5.9 The Trial Chamber found that "the crimes charged under Counts 1 to 14 were within the joint criminal enterprise and intended by the participants to further the common purpose to take power and control over Sierra Leone."[430] Just as in *Martić* "the common purpose of the JCE was the establishment of an ethnically Serb territory through the displacement of the Croat and other non-Serb population, as charged",[431] in the current case the common purpose of the JCE was the taking of power and control over Sierra Leone through the crimes charged under Counts 1 to 14. Thus, the means and objective constituted the common purpose. The Trial Chamber did not have to be satisfied that a crime was committed with the specific intent to terrorise or collectively punish in order to conclude that that crime was within the JCE.

5.10 The *Kvočka* case, cited by Sesay,[432] concerned a non-criminal design (the creation of a Serbian State within the former Yugoslavia) to be achieved by participation in

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426 *Prosecutor v Milutinović et al.*, IT-05-87-T, "Judgement", Trial Chamber, 26 February 2009 ("***Milutinović* Trial Judgement**"), Vol. I, para. 101, cited in Gbao Appeal Brief, para. 102.2.
427 Trial Judgement, para. 1978.
428 Trial Judgement, para. 1979.
429 Trial Judgement, para. 1979 (emphasis added).
430 Trial Judgement, para. 1982.
431 *Martić* Trial Judgement, para. 445.
432 Sesay Appeal Brief, para. 93.

the crime of persecution.[433] In that case the crime of persecution was comprised of other separately charged crimes such as murder, torture and rape.[434] Similarly, in the instant case, the crimes of acts of terrorism and collective punishments are comprised of the crimes charged in Counts 3-14 and together constitute the criminal means. These crimes were found to have been "contemplated by the participants of the joint criminal enterprise to be within the common purpose".[435] There is little to distinguish the Trial Chamber's overall approach to the approach taken in the *Milutinović* case preferred by Sesay[436] or the *Martić* case preferred by Gbao.[437]

5.11 The Trial Chamber did not confuse the criminal means with the common purpose itself as alleged by Gbao[438] as the two had to be taken together. The findings as to the RUF ideology were linked to the assessment of Gbao's individual responsibility and the ideology was seen as providing a nexus to the JCE.[439] It was not inconsistent to find that the ideology was a propelling force for RUF fighters at the same time as finding that the RUF and AFRC shared the same common purpose. To the extent that the revolution was the "ideology in action",[440] the conclusion was reasonably open to the Trial Chamber that it was only by joining with the AFRC in a common plan that the fulfilment of any ideological ambitions could be realised.

5.12 Notably in the *Milutinović* case the existence of a common plan, design or purpose was established substantially from the evidence of a pattern of crimes in the relevant time period.[441] The existence of a common plan, design or purpose, or the

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433 *Kvočka* Appeal Judgement, para. 46.

434 *Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement", Trial Chamber, 2 November 2001 ("***Kvočka* Trial Judgement**"), para. 320: "The joint criminal enterprise pervading the camp was the intent to persecute and subjugate non-Serb detainees. The persecution was committed through crimes such as murder, torture, and rape and by various means, such as mental and physical violence and inhumane conditions of detention." See also at para. 212.

435 Trial Judgement, para. 1985.

436 Sesay Appeal Brief, para. 102. There is no single approach to an assessment of a JCE provided the elements are addressed.

437 Gbao Appeal Brief, para. 101.

438 Gbao Appeal brief, paras 88-92.

439 Trial Judgement, paras 2013-2014.

440 Trial Judgement, para. 2032.

441 *Milutinović* et al. Trial Judgement, vol. III, para. 46: "In light of all the evidence discussed in this Judgement, the Chamber is of the view that there is a clearly discernible pattern of numerous crimes

contemplation of criminal means to achieve a common plan, design or purpose, like any other fact, can be established circumstantially, from the facts and evidence in the case as a whole.[442] The Trial Chamber in the present case was entitled on the evidence to be satisfied that the means agreed upon by the Junta to accomplish the goals of the JCE "entailed massive human rights abuses and violence against and mistreatment of the civilian population and enemy forces".[443] Indeed, it is submitted that this was the only reasonable inference open to it.[444]

5.13 While in *Martić* it was found that the non-criminal objective necessitated the crimes of deportation and forcible transfer,[445] it was not the finding of the Trial Chamber in the current case that the objective of taking control over Sierra Leone *necessitated* the crimes charged under Counts 1 to 14. It was rather the finding of the Trial Chamber that that those crimes were intended in order to accomplish this objective.[446] Nonetheless, it would not be an error *per se* to determine that "under the prevailing circumstances"[447] of a particular case, a broad objective such as

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committed in Kosovo by the forces of the FRY and Serbia during the Indictment period. These crimes were not committed in a random and un-orchestrated manner, but rather according to a common purpose."

442 *Krajišnik* Appeal Judgement, paras 163, 202; *Prosecutor v. Brđanin*, IT-99-36-T, "Judgement", Trial Chamber, 1 September 2004 ("***Brđanin* Trial Judgement**"), para. 35: "The Trial Chamber considered circumstantial evidence as being such evidence of circumstances surrounding an event or offence from which a fact at issue may be reasonably inferred. Since crimes are committed very often when witnesses are not present, and since in criminal trials, especially in cases like the ones before this Tribunal, the possibility of establishing the matter charged by the direct and positive testimony of eye-witnesses or by conclusive documents is problematic or unavailable, circumstantial evidence may become a critical ingredient not only for the Prosecution but also for an accused. The individual items of such evidence may by themselves be insufficient to establish a fact, but, taken together, their collective and cumulative effect may be very revealing and sometimes decisive. The Trial Chamber has embraced the principle that "it is no derogation of evidence to say that it is circumstantial. Consequently, the Trial Chamber has not considered circumstantial evidence to be of less substance than direct evidence."

443 Trial Judgement, para. 1980.

444 See arguments in Sesay Appeal Brief, paras 103-104, 107, and Gbao Appeal Brief, para. 78. Gbao argues that the inference drawn in the findings at paragraphs 1980 and 1981 of the Trial Judgement was "not the only reasonable inference the Trial Chamber may have drawn and that it erred in fact in doing so". Gbao must demonstrate on appeal that this inference *was not reasonably open to the Trial Chamber*.

445 *Martić* Trial Judgement, para. 445.

446 See Trial Judgement, para. 1981. Paragraph 2016 of the Trial Judgement should be viewed in the context of the assessment as to the Accused's intent and paragraph 12 of Justice Boutet's Dissenting Opinion cannot be relied upon as an interpretive tool for the findings of the Majority.

447 *Martić* Appeal Judgement, para. 92.

taking over power necessarily entailed criminal acts, and as such was an inherently criminal objective.

5.14 The Trial Chamber did not, as alleged by Sesay,[448] presume criminal intention from the involvement in the pursuit of a non-criminal objective rather than from the participation in criminal acts. The Trial Chamber found in paragraph 2002 of the Trial Judgement that Sesay (i) intended to take power and control over the territory of Sierra Leone (the objective of the JCE), (ii) actively participated in the furtherance of the common purpose (the objective and the criminal means), (iii) significantly contributed to the commission of acts of terrorism, unlawful killings and pillage (individual contribution to the criminal means of the JCE), and (iv) shared the requisite intent for these crimes (*mens rea*).[449] The Trial Chamber did not err in this analysis, which must in any case be viewed in the context of all its findings. Notably as part of its analysis as to *Martić*'s participation in a JCE, the ICTY Trial Chamber addressed initially the question whether he worked together with the other JCE participants to fulfil the objective of a unified Serb State.[450] This is a proper approach where the objective and means together constitute the common purpose and does not dispense with the need for a rigorous assessment of individual criminal culpability[451] as was in fact conducted by the Trial Chamber in the current case.

(v) Alleged errors in finding that there was a common plan[452]

5.15 Kallon fails to demonstrate that no reasonable trier of fact could have found that a common plan existed between senior RUF and AFRC leaders[453] or that such a plan

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448 Sesay Appeal Brief, para. 88.

449 See also e.g. Trial Judgement, paras 2008, 2056, 2092, 2163.

450 *Martić* Trial Judgement, para. 448. The Trial Chamber concluded at para. 453 that "Milan Martić intended to forcibly displace the non-Serb population from the territory of the SAO Krajina, and subsequently the RSK, and actively participated in the furtherance of the common purpose of the JCE".

451 See e.g. *Brđanin* Appeal Judgement, para. 430, for the requirements for a conviction under the JCE doctrine.

452 Kallon Appeal Brief, paras 52-53 and 115-118.

453 Paragraph 52 of the Kallon Appeal Brief argues that "an equally reasonable inference could have been that there was no single common plan, if there was any common plan at all". This is not the test for establishing an error on appeal. It may be true that an inference must be "the only reasonable inference available on the basis of the evidence" (*Brđanin* Trial Judgement, para. 353). However, it is for the Trial Chamber, and not the Appeals Chamber, to determine whether or not an inference is the

continued to exist after the retreat from Freetown.[454] Harmony between members of a JCE is not a legal requirement of JCE responsibility.[455] In paragraph 2067 of the Trial Judgement, the Trial Chamber merely finds that the senior RUF and AFRC leadership had to reorganise themselves and devise new strategies in order to regain power and control over Sierra Leone. The common purpose was found to remain one of taking power and control and, crucially, contemplated the same criminal means.[456]

(vi) Alleged error as to time of commencement of the JCE[457]

5.16 The Trial Chamber did not err in its finding as to when the JCE came into existence. Notably, there is no necessity for the common purpose to have been "previously arranged or formulated."[458] It may "materialise extemporaneously and be inferred from the facts."[459] Having established that both the RUF and AFRC held the goal of taking control of Sierra Leone,[460] the Trial Chamber traced the first acts of the Junta and the evidence as to the conduct of AFRC/RUF joint operations.[461] The Trial Chamber found that crimes contemplated within the JCE commenced soon after the coup in May 1997 and were linked to attacks in Districts where the Junta had not yet consolidated its power, such as Bo.[462] To the extent that that there was a gap between the point at which the forces joined in pursuit of the common objective and the point at which evidence of the criminal means were established, this is not indicative of any error. The Accused were convicted only in respect of these criminal means. The Trial Chamber was moreover entitled to consider the role of the Supreme Council in the context of the

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only reasonable inference. If the Trial Chamber decides that an inference is the only reasonable inference, the Appeals Chamber will only intervene if it is established that no reasonable trier of fact could have concluded that this was the only reasonable inference. The Appeals Chamber will not intervene merely because the Appeals Chamber itself considers that another inference would have been reasonable. See also Kallon Appeal Brief, para. 53 (last two sentences).

454 Kallon Appeal Brief, para. 115.

455 See Prosecution Appeal Brief, para. 2.94.

456 Trial Judgement, para. 2069.

457 Sesay Appeal Brief, paras 108-120.

458 *Vasiljević* Appeal Judgement, para. 100.

459 *Vasiljević* Appeal Judgement, para. 100.

460 Trial Judgement, para. 1979 to be viewed together with, *inter alia*, paras 7-27, 743-775.

461 Trial Judgement, paras 1980-1981.

462 Trial Judgement, paras 1983-1984.

pattern of atrocities and to draw the necessary inferences. The Trial Chamber made its findings on the basis of all of the evidence in the case as a whole.[463] Its findings necessarily mean that the Trial Chamber was satisfied on the evidence that the violence was not random or committed by individuals "on a criminal frolic of their own".[464] That conclusion was reasonably open to the Trial Chamber on the evidence before it.

(vii) Alleged error as to time of ending of the JCE[465]

5.17 The Trial Chamber acknowledged that it had been unable to ascertain with certainty the date on which the split between the AFRC and RUF occurred[466] but that it was sometime in the end of April 1998. Nothing turns on the reference in paragraphs 2091 and 2102 of the Trial Judgement to April/May 1998 as the Trial Chamber proceeded to determine the individual responsibility of the Accused under other modes of liability for crimes committed in Kono from May 1998.[467]

5.18 In response to Sesay's argument that no reasonable Trial Chamber could have concluded that the JCE continued after March 1998, the Prosecution relies upon its submissions in support of the Prosecution's First Ground of Appeal in the Prosecution appeal in this case, in particular at paragraphs 2.42 to 2.45 of the Prosecution Appeal Brief. Annex F to the Sesay Appeal Brief fails to establish that the evidence is unequivocally in favour of Sesay's argument but rather highlights the appropriateness of giving a margin of deference to the Trial Chamber that received the evidence at trial, and that is best placed to assess that evidence, including the demeanour of witnesses.[468]

(viii) Alleged error as to fluid nature of the JCE[469]

5.19 The Trial Chamber did not in fact apply the theory that a JCE can come to embrace expanded criminal means, as long as the evidence shows that the JCE members agreed on this expansion of means, as set out in paragraph 259 of the

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463 Trial Judgement, para. 2004.
464 Sesay Appeal Brief, para. 120.
465 Sesay Appeal Brief, paras 193-195; Kallon Appeal Brief, para. 118 (also para. 63).
466 Trial Jndgement, para. 820.
467 See Trial Judgement, paras 2117-2120 and 2134.
468 *CDF* Appeal Judgement, para. 33.
469 Kallon Appeal Brief, para. 41.

Trial Judgement and established in ICTY jurisprudence.[470] Indeed, the Chamber found that after the ECOMOG intervention, "the common purpose and the means contemplated within remained the same as they were as there was no fundamental change".[471]

(ix) Alleged error as to non-members of the JCE being used as tools by JCE members[472]

5.20 The Trial Chamber did not err in its examination of the link between the lower ranks and the plurality of persons constituting the JCE, and in this respect paragraph 1992 of the Trial Judgement must be read in its entirety and also read together with the specific findings of crimes in each District,[473] and the findings as to the RUF Organisation and the AFRC/RUF relationship including the RUF ideology.[474] The analysis of the Trial Judgement by the Appeals Chamber "must be conducted on the basis of the Trial Judgement as a whole."[475] As noted in *Martić*, the Appeals Chamber "is only called upon to decide whether a reasonable trier of fact could reach the same finding beyond reasonable doubt as the Trial Chamber did when it established a link between [the Accused] and the principal perpetrators."[476]

5.21 It is well-established in the jurisprudence that members of a JCE can incur liability for crimes committed by principal perpetrators who were non-JCE members.[477] It was reasonably open to the Trial Chamber to rely on this jurisprudence[478] and indeed, it was proper for it to do so.

5.22 In order for all JCE members to be held responsible for a crime committed by a non-JCE member, it must be established that the crimes can be imputed to at least one member of the JCE and that this member, when using the principal

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470 *Krajišnik* Appeal Judgement, para. 163.
471 Trial Judgement, para. 2069.
472 Sesay Appeal Brief, paras 105-107, 206-224, 230; Kallon Appeal Brief, paras 44-48, 55-60 and 119; Gbao Appeal Brief, paras 63-75.
473 In this respect Annex II attached to the Gbao Appeal Brief isolates the Trial Chamber's findings and creates a misleading impression.
474 See Trial Judgement, paras 648-816.
475 *Krajišnik* Appeal Judgement, para. 237.
476 *Martić* Appeal Judgement, para. 170.
477 *Brđanin* Appeal Judgement, paras 413 and 430; *Krajišnik* Appeal Judgement, paras 225-226.
478 Trial Judgement, para. 263, citing *Brđanin* Appeal Judgement, paras 413 and 430 and *Martić* Appeal Judgement, paras 161-195. The *Krajišnik* Appeal Judgement post-dated the *RUF* Trial Judgement.

perpetrators, acted in accordance with the common purpose.[479] "Such a link is established by a showing that the JCE member used the non-JCE member to commit a crime pursuant to the common criminal purpose of the JCE."[480] Further, the establishment of a link between the crime and a member of the JCE is a matter to be assessed on a case-by-case basis.[481] It was held in *Krajišnik* that:

> Factors indicative of such a link include evidence that the JCE member explicitly or implicitly requested the non-JCE member to commit such a crime or instigated, ordered, encouraged, or otherwise availed himself of the non-JCE member to commit the crime. However, it is not determinative whether the non-JCE member shared the *mens rea* of the JCE member or that he knew of the existence of the JCE; what matters in JCE Category 1 is whether the JCE member used the non-JCE member to commit the *actus reus* of the crime forming part of the common purpose.[482]

5.23 The Trial Chamber did not err in its application of these principles to the facts. The Trial Chamber found explicitly that mid- and low-level RUF and AFRC Commanders as well as rank-and-file fighters were used by the members of the JCE to commit crimes that were part of the common purpose.[483] The Trial Chamber established the link between the RUF/AFRC leadership and such Commanders and fighters. The responsibility and leadership role of each Accused and their authority and control were established, as well as relevant reporting lines.[484] Several crimes committed by these Commanders and fighters were linked directly to JCE members such as Bockarie.[485] Although the Trial Chamber was not satisfied that CO Rocky, RUF Rambo, AFRC Commander Savage and his deputy, Staff Sergeant Alhaji were members of the JCE, it was explicitly found that "they were directly subordinate to and used by members of the joint criminal enterprise

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479 *Brđanin* Appeal Judgement, para. 430; *Krajišnik* Appeal Judgement, paras 225 and 235. Paragraph 1087 of *Prosecutor v. Krajišnik*, IT-00-39-T, "Judgement," Trial Chamber, 27 September 2006 ("***Krajišnik* Trial Judgement**"), as relied upon by Sesay (Sesay Appeal Brief, para. 106) is not authority for the proposition that the Chamber "had to be satisfied that each crime was committed by either a JCE member or a perpetrator being used by a JCE member in furtherance of the common purpose".

480 *Krajišnik* Appeal Judgement, para. 225; see also *Martić* Appeal Judgement, para. 168.

481 *Krajišnik* Appeal Judgement, para. 226.

482 *Krajišnik* Appeal Judgement, para. 226, citing *Brđanin* Appeal Judgement, para. 410.

483 Trial Judgement, para. 1992.

484 See e.g. Trial Judgement, paras 1999-2000, 2084, 2086 (Sesay); 2093-2095, 2099 (Kallon); 2168, 2170-2171 (Gbao). Cf the analysis in *Martić* Appeal Judgement, para. 187.

485 See e.g. Trial Judgement, para. 2050, 3.1.1(vii), 3.1.2 (iii), para. 2156, 5.1.1(i).

to commit crimes that were either intended by the members to further the common design, or which were a reasonably foreseeable consequence of the common purpose."[486] It was also established that Kallon had a supervisory role over Rocky in Kono District.[487] Hence, the Trial Chamber did find a causal relationship between the Accused and the direct perpetrators.[488] In addition, the Trial Chamber properly took into account the widespread and systematic nature of the crimes, in other words, the pattern of atrocities,[489] which, contrary to Sesay's argument, provided a substantial and valid basis for the inferences drawn.[490]

5.24 While more detailed reasoning could have been provided by the Trial Chamber, the absence of such does not invalidate the Trial Judgement.[491] It is clear from the reasoning provided, viewed in the context of the findings as a whole, that the Trial Chamber was satisfied that the crimes were not committed by "independent groups of criminals pursuing their own agenda" rather than by RUF/AFRC fighters whose crimes could be imputed to the JCE.[492]

5.25 Sesay argues that the facts relating to the killings at Sunna Mosque give rise to "a reasonable inference that these crimes were committed for personal reasons" and that the killings were not part of the common purpose.[493] Sesay fails to demonstrate that no reasonable Trial Chamber could have reached the conclusion that they were committed within the JCE. In particular, in cases where a non-JCE member is being used as a tool by a JCE member, a distinction needs to be drawn between the purpose of the non-JCE member and the purpose of the JCE-member. Even if a non-JCE member believes that he or she is acting for personal reasons and pursuing a personal agenda, and even if the non-JCE member has no

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486 Trial Judgement, para. 2080.
487 Trial Judgement, para. 2118.
488 See Kallon Appeal Brief, para. 48.
489 Trial Judgement, para. 1992. Cf *Krajišnik* Appeal Judgement, para. 248 and *Martić* Appeal Judgement, para. 189.
490 Sesay Appeal Brief, para. 107.
491 See e.g. *Martić* Appeal Judgement, para. 181, finding that the Trial Judgement was not invalidated by the Trial Chamber's failure to make an explicit finding that it was satisfied beyond reasonable doubt that members of the JCE, when using the relevant forces, were acting in accordance with the common purpose.
492 Gbao Appeal Brief, para. 75.
493 Sesay Appeal Brief, para. 208.

knowledge of the JCE, that person may nonetheless at the same time in fact be being used as a tool by a JCE member to commit a crime that is within the JCE.[494]

5.26 It should also be noted that DIS-188 did not specify that Superman, Kallon and Rocky were recalled by Bockarie for punishment but merely that they were recalled, as found by the Trial Chamber.[495] For the reasons given in paragraphs 5.20 to 5.25 above, Sesay also fails to establish that the Trial Chamber erred in relation to crimes by Savage and Staff Alhaji,[496] the beatings of TF1-197,[497] the amputations of the hands of three civilians,[498] rapes, beatings and amputations in Sawao,[499] forced marriage in Wendedu,[500] the beating of TF1-015,[501] rapes at Bunpeh,[502] and physical violence at Kayima.[503] Similarly, no error has been demonstrated in relation to the burning of houses in Tombodu,[504] and the evidence of TF1-012 was not relied upon without corroboration.[505] The error alleged with respect to the killing in Wendedu of Sata Sesay's family[506] has no merit as the Trial Chamber specifically placed this event outside the timeframe of the JCE.[507] In relation to the killings in Yardu,[508] and sexual violence in Bomboafuidu,[509] the Trial Chamber was entitled to conclude on the evidence that the perpetrators were AFRC/RUF rebels.

5.27 The Kallon Defence's argument that the "agency" theory of JCE is inappropriate because the common purpose in this case was not a criminal one has no merit as the common purpose did include criminal means as explained above.[510]

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494 See further para. 7.32 below.
495 Compare Sesay Appeal Brief, para. 208, DIS-188, Transcript 26 October 2007, p. 111 and Trial Judgement, para. 1151.
496 Sesay Appeal Brief, paras 209-211.
497 Sesay Appeal Brief, paras 212 and 214.
498 Sesay Appeal Brief, para. 213.
499 Sesay Appeal Brief, para. 221.
500 Sesay Appeal Brief, para. 222.
501 Sesay Appeal Brief, para. 223.
502 Sesay Appeal Brief, para. 219.
503 Sesay Appeal Brief, para. 224.
504 Sesay Appeal Brief, para. 216.
505 See Trial Judgement, paras 1159-1160.
506 Sesay Appeal Brief, para. 217.
507 Trial Judgement, para. 2065, 4.1.2.1(iv). See also Trial Judgement, para. 2139.
508 Sesay Appeal Brief, para. 218.
509 Sesay Appeal Brief, para. 220.
510 See paras 5.4 to 5.14 above.

(x) Alleged errors as to JCE II and JCE III[511]

5.28 Having found that the second category of joint criminal enterprise had not been properly pleaded, the Trial Chamber explicitly stated that it would give no consideration to liability under this category.[512] The Kallon Defence does not establish that the Trial Chamber nevertheless erred by introducing this category into the Trial Judgement. References to certain crimes being a "systemic feature" of AFRC/RUF operations and a "deliberate policy" of the AFRC/RUF in no way suggest reliance on the systemic form of JCE (JCE II). Evidence of "systemic features" were relevant (and were used) in other contexts, such as in establishing the widespread and systematic nature of the attack,[513] and were clearly relevant to determining the existence of a common plan contemplating the use of criminal means to achieve its purpose, for purposes of JCE I.

5.29 The Kallon Defence fails to establish any error on the part of the Trial Chamber as to the legal requirements for the third category of JCE. Moreover, Kallon was convicted exclusively under the first category of JCE.[514]

(xi) Alleged errors in making JCE I and JCE III findings in the alternative[515]

5.30 Paragraph 1992 of the Trial Judgement is a general finding and must be read together with the specific findings as to the crimes committed and the responsibility of the Accused.

5.31 It is possible for certain crimes to be intended as part of the common purpose, while other crimes are a natural and foreseeable consequence of the implementation of the common purpose.[516] The Trial Chamber in fact held that the crimes charged in Counts 1-14 were intended within the common purpose[517] and all the convictions of Sesay and Kallon were entered on this basis,[518] while for

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511 Kallon Appeal Brief, paras 35-37, 65.
512 Trial Judgement, para. 385.
513 See context in which terms were used in Trial Judgement, paras 2004 and 784.
514 See Trial Judgement, paras 2008, 2056, 2103 and 2163. See also Kallon Appeal Brief, para. 64.
515 Kallon Appeal Brief, paras 54 and, in part, 119.
516 See e.g. *Stakić* Appeal Judgement, paras 91-98; *Martić* Appeal Judgement, para. 3.
517 Trial Judgement, para. 1982.
518 Trial Judgement, paras 2002, 2008, 2056, 2092, 2102-2103 and 2163.

Gbao convictions on this basis appeared to be limited to the crimes found to have been committed in Kailahun District.[519]

(xii) Alleged error as to significant contributions to the JCE[520]

5.32 In order to establish liability on the basis of participation in a JCE, it is not necessary to prove a significant contribution in all geographical areas covered by the JCE. "[O]nce a participant in a joint criminal enterprise shares the intent of that enterprise, his participation may take the form of assistance or contribution with a view to carrying out the common plan or purpose. The party concerned need not physically and personally commit the crime or crimes set out in the joint criminal enterprise."[521] Further, "the presence of the participant in the joint criminal enterprise at the time the crime is committed by the principal offender is not required either for this type of liability to be incurred."[522]

(xiii) Alleged errors in assessment of evidence: common purpose in Bo District

5.33 The Sesay Defence challenges the finding that the JCE was furthered in Bo District (through acts of terror including killings and burnings in Tikonko, Sembehun and Gerihun) on the basis that there was insufficient evidence to conclude that the crimes committed in Bo District and considered to be acts of terror were part of the common criminal plan and committed as part of a common plan to terrorise.[523] It is submitted that the Trial Chamber properly assessed all the evidence available to it in concluding that there was a campaign to spread terror as a means of achieving the common purpose of the JCE and that the particular acts committed in Bo amounted to acts to terror that furthered the common plan of the JCE.[524] The Trial Chamber also carefully assessed the evidence in respect of the role of Bockarie, and other senior members of the RUF including Sesay, in the commission of these crimes as participants in the JCE.[525]

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519 Trial Judgement, para. 2172.
520 Kallon Appeal Brief, paras 61-62.
521 *Krnojelac* Appeal Judgement, para. 81.
522 *Krnojelac* Appeal Judgement, para. 81.
523 Sesay Appeal Brief, paras 122-126.
524 Trial Judgement, paras 1982-1985.
525 Trial Judgement, paras 1986-2002.

(xiv) Alleged errors in assessment of evidence: common purpose in Kono and Kailahun Districts [526]

5.34 The Sesay Defence asserts that the Trial Chamber erred in finding that the specific intent for acts of terror and collective punishment was established in relation to unlawful killings and sexual violence committed in Kono and Kailahun Districts.

5.35 The Trial Chamber appropriately considered the cumulative effect of the acts of sexual violence "and the body of evidence adduced in relation to the various Districts of Sierra Leone as charged in the Indictment"[527] in order to be satisfied that the specific intent to terrorise, i.e. cause extreme fear, had been established. An analogy may be drawn with the crime against humanity of persecution, where proof of the specific discriminatory intent in relation to each underlying act charged is not required.[528] The fact that certain acts were graver than others did not preclude the Trial Chamber from focusing on their overall impact as portraying a "calculated and concerted pattern on the part of the perpetrators to use sexual violence as a weapon of terror."[529] Nonetheless, the Trial Chamber did provide reasons why certain acts of killing did not amount to terror,[530] and can be assumed to have considered (and excluded) this possibility with respect to sexual violence and forced marriage.

5.36 The Trial Chamber did not err in concluding that the killings of alleged Kamajors in Kailahun Town constituted an act of terror. The Sesay Appeal Brief[531] confuses motive with the specific intent for acts of terror. Indeed, the Trial Chamber clearly viewed the motive, to reinforce to civilians in RUF-controlled territory that there would be no tolerance or sympathy for Kamajors, as being consistent with the requisite intent for terror.[532]

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526 Sesay Appeal Brief, paras 196-203, 225-226, 228-229.
527 Trial Judgement, para. 1346.
528 *Prosecutor v. Stakić*, IT-97-24-T, "Judgement", Trial Chamber, 31 July 2003 ("***Stakić* Trial Judgement**"), paras 740-744; *Stakić* Appeal Judgement, paras 329-339.
529 Trial Judgement, para. 1347.
530 Trial Judgement, paras 1344-1345.
531 Sesay Appeal Brief, para. 229.
532 Trial Judgement, paras 2165-2168.

B. Alleged error in finding Sesay to be a JCE participant

5.37 This section of this Response Brief responds to **Sesay's Grounds 25, 27, 34 and 37.**

5.38 Sesay has failed to demonstrate that the Trial Chamber erred in assessing his participation in the JCE. Sesay misrepresents the approach taken by Justice Boutet in his Dissenting Opinion which was *not* to assess each crime and ascertain what contribution the Accused had made to that individual crime.[533] This was also *not* the approach in the *Milutinović* case. The approach in the *Milutinović* case was as follows:

> For Milutinović's liability to arise pursuant to the first category of joint criminal enterprise, the evidence must show that he participated in at least one aspect of the common purpose to ensure continued control by the FRY and Serbian authorities over Kosovo, through crimes of forcible displacement, which the Chamber has already found existed. In order to fulfil this element, Milutinović need not have physically committed the crimes through which the goal was achieved, or any other offenee for that matter. Indeed, he need not even have been present at the time and plaee of the physical perpetration of these crimes. His contribution, however, to the plan must have been significant. An omission may also lead to responsibility [...] where there is a legal duty to aet. As for the neeessary mental element, it must be proved that Milutinović participated voluntarily in the joint criminal enterprise and that he shared the intent with other members of the joint criminal enterprise to commit the crime or underlying offence that was the object of the enterprise, in this case the forcible displacement.[534]

5.39 The Trial Chamber needed to be satisfied that Sesay made a substantial contribution *to the JCE*, and not that he made a substantial eontribution *to each crime in each location*. As explained above,[535] it was furthermore *not* necessary for the Trial Chamber to find a specific eontribution to the crimes of terror and collective punishments. While the indicia put forward by Sesay[536] are relevant to an assessment of an accused's substantial contribution to a JCE, Sesay has manifestly failed to establish any error in the Trial Chamber's reasoning.

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533 Sesay Appeal Brief, para. 232 and see Dissenting Opinion of Justice Boutet, paras 8, 10, 14 and 17. Justice Boutet did, however, favonr a narrow interpretation of the concept of "significant contribution".

534 *Milutinović* Trial Judgement, para. 273.

535 See para. 5.9 above.

536 Sesay Appeal Brief, para. 235, second sentence.

5.40 The conclusion that Sesay participated in Kenema District by giving orders from 1997 onwards for civilians to be captured and taken to Bunumbu is consistent with the Trial Chamber's findings at paragraph 1437 of the Trial Judgement and the testimony of TF1-362[537] and did not represent an error of fact.

5.41 Paragraph 238 of the Sesay Appeal Brief claims that the Trial Chamber omitted to refer at all to one particular item of evidence. However, the Trial Chamber need not refer to every item of evidence, and it is presumed that the Trial Chamber considered all of the evidence as a whole. The item of evidence in question is not such that it can be said that it would prevent any reasonable trier of fact from reaching the conclusions that the Trial Chamber did. The Sesay Defence does not satisfy the standard of review on appeal.

5.42 In relation to the finding that Sesay endorsed Johnny Paul Koroma's order to burn Koidu, it should be recalled that the Trial Chamber had "cautioned itself on the risk and danger of accepting uncorroborated evidence from an insider witness as credible, but at the same time, acknowlege[d] its authority to accept such evidence."[538] Due deference should be afforded to the Trial Chamber that received the relevant evidence at trial and that is best placed to assess it in the context of all the evidence. It should be noted that the testimony relied upon was from the *AFRC* trial, where any motive the witness might have had in implicating Sesay is not evident.

5.43 In relation to Sesay's involvement in mining activities in Kono District between 14 February and May 1998, it should be noted that the Trial Chamber found that the practice of forced mining "continued throughout 1998"[539] and *intensified* in December 1998.[540] The reference to Yengema must also be seen in its context as a reference to involvement in the planning and creation of the base.[541]

5.44 Sesay has failed to establish that no reasonable Trial Chamber could have concluded that Sesay received regular radio reports of events in Kono and

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537 TF1-362, Transcript 20 April 2005, p. 32, 38.
538 Trial Judgement, para. 540.
539 Trial Judgement, para. 1242.
540 Trial Judgement, para. 1242.
541 Trial Judgement, para. 2088.

incorrectly states that the Trial Chamber relied exclusively upon the evidence of TF1-361.[542]

C. Alleged error in finding Kallon to be a JCE participant

5.45 This section of this Response Brief responds to **Kallon's Grounds 8 to 11 and 15**.

5.46 The Kallon Defence fails to demonstrate that the only reasonable conclusion open to the Trial Chamber was that the "Supreme Council" and "AFRC Council" were distinct bodies.[543] The Trial Chamber's conclusion was reasonably open to it on the evidence before it.[544]

5.47 The Kallon Defence argues that Kallon "was an ordinary member of the AFRC Council" who did not contribute to the decisions or policies of the Junta Government.[545] The Prosecution submits that the Kallon Defence fails to establish that this would have been the only reasonable conclusion open to a trier of fact on the evidence before the Trial Chamber, or indeed, even that it would be *a* conclusion reasonably open to the Trial Chamber at all. The Trial Chamber expressly found that "there is sufficient evidence to conclude that Kallon by his membership in the Supreme Council was involved in decisions or policy-making by the Supreme Council".[546] The Kallon Defence does not establish that the evidence was such that no reasonable trier of fact could have reached this conclusion.

5.48 Further, there is no indication in the Trial Judgement that the Trial Chamber equated membership in the Supreme Council with criminal conduct.[547] The Trial Chamber did not find that involvement on the governing body of the Junta amounted, in and of itself, to a contribution to the joint criminal enterprise. Rather, the Trial Chamber considered the determinative issue to be "whether Kallon's

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542 See Sesay Appeal Brief, para. 248 and Trial Judgement, para. 827, finding that "In addition, Sesay's bodyguards in Kono would report to him via radio or written messages."
543 Kallon Appeal Brief, paras 87-88.
544 Trial Judgement, para. 754.
545 Kallon Appeal Brief, para. 93.
546 Trial Judgement, para. 2004.
547 Kallon Appeal Brief, paras 89-90.

actions assisted or contributed to the common criminal purpose".[548] The Trial Chamber ultimately found that his involvement on the governing body of the Junta did contribute to the joint criminal enterprise for the reasons given in paragraph 2004 of the Trial Judgement, namely that the crimes were "a deliberate policy of the AFRC/RUF" which "must have been initiated by the Supreme Council, of which Kallon was a member". Again, the Kallon Defence does not establish that this conclusion was one that was not reasonably open to the Trial Chamber on the evidence before it.

5.49 With regard to crimes in Bo District,[549] it must be recalled that the Trial Chamber needed to be satisfied that Kallon made a substantial contribution *to the JCE*, and not that he made a substantial contribution *to each crime* in each location. Kallon's assertions of various errors made by the Trial Chamber therefore rest on an incorrect premise. The Prosecution relies additionally on its submissions in response to Kallon's Ground 2.[550]

5.50 The argument of the Kallon Defence that the Trial Chamber applied a prejudicial standard in assessing Kallon's contribution to the JCE lacks any merit.[551] The Trial Chamber appropriately considered his responsibility having regard to his leadership position and the evidence as a whole.

5.51 With regard to crimes in Kenema District,[552] the Prosecution relies on its arguments at paragraphs 5.49 and 5.50 above.

5.52 The Trial Chamber's finding that "it was often difficult for Kallon to travel to Freetown" does not contradict the finding that "he regularly attended Supreme Council meetings."[553] There is no logical contradiction in finding that a person engaged in a particular activity even though it was often difficult for him to do so. It is not illogical or inherently contradictory to find that although it was often difficult to travel to Freetown, Kallon nonetheless managed to attend Supreme

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548 Trial Judgement, para. 2004.
549 Kallon Appeal Brief, paras 91-101.
550 See paragraphs 5.4 to 5.27 above.
551 Kallon Appeal Brief, para. 95.
552 Kallon Appeal Brief, paras 102-113.
553 Trial Judgement, para. 776, referred to in Kallon Amended Notice of Appeal, para. 10.7.

Council meetings on "a fairly regular basis."[554] The Kallon Defence has not established that this conclusion was not reasonably open to the Trial Chamber.

5.53 With regard to crimes in Kono District, the Prosecution relies upon its arguments at paragraphs 5.4 to 5.27 and 5.49 to 5.50 above. Kallon fails to demonstrate that the only reasonable conclusion open to the Trial Chamber was that Kallon distaneed himself from the JCE.[555] Further, a particular type of authoritative position, or indeed "effective control over all fighters in Kono", is not a prerequisite for JCE liability.[556] It is not correct to assert that the Trial Chamber relied upon the testimony of TF1-141 without eorroboration.[557] Moreover, the fact that Kallon had bodyguards was eorroborated by other evidenee in the case.[558] The Trial Chamber did not err in drawing inferences from Kallon's status as a Vanguard.[559]

5.54 With regard to crimes in Kailahun District, the Proseeution relies upon its arguments at paragraphs at paragraphs 5.4 to 5.27 and 5.49 to 5.50 above. Kallon's arguments in relation to convictions for sexual violence committed outside the JCE timeframe[560] contradict the express findings of the Trial Chamber and ignore its decision *not* to consider responsibility under different modes of liability after the end of April 1998.[561]

D. Alleged error in finding Gbao to be a JCE participant

(i) Introduction

5.55 This section of this Response Brief responds to **Gbao's Ground 8, sub-grounds 8(b), 8(c), 8(i), 8(j), 8(k), 8(l), 8(m), 8(o), 8(p), 8(q), 8(r) and 8(s).**

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554 Trial Judgement, para. 2004.
555 Kallon Appeal Brief, para. 120.
556 Kallon Appeal Brief, paras 121 and 125-126.
557 See Trial Judgement, para. 835, footnotes 1636 and 1637.
558 See e.g. Trial Judgement, para. 1175.
559 Notably Justice Boutet accepted the particular status accorded to Vanguards in his Dissenting Opinion, para. 10. See also Trial Judgement, para. 667.
560 Kallon Appeal Brief, para. 155.
561 Trial Judgement, para. 2173.

5.56 Gbao's Ground 8 challenges all convictions entered against him with respect to crimes in Bo, Kenema, Kono and Kailahun Districts on the basis of his membership in a JCE between 25 May 1997 and 19 February 1998.[562]

(ii) Gbao's sub-ground 8(b)

5.57 The Gbao Defence claims that a finding that "Augustine Gbao trained every RUF recruit in ideology is the foundation upon which the Majority's JCE theory lies". That is incorrect. While the Trial Chamber drew inferences from Gbao's role as an ideology trainer, the entire JCE theory in relation to Gbao did not rest on that single fact. Even if it were the case that the Trial Chamber erroneously found that Gbao trained all RUF recruits in ideology, this error would not invalidate Gbao's convictions. The Trial Chamber also found that Gbao was directly involved in planning and maintaining a system of enslavement.[563] Furthermore, he was found to have observed the conduct of investigations in his role as Vanguard and OSC in order to ensure that the RUF ideology was put into practice.[564] Gbao was clearly found to have been an adherent of the RUF ideology and to have imparted and disseminated his knowledge of this ideology. Whether all new recruits were in fact trained in the ideology is not determinative of Gbao's responsibility pursuant to the JCE mode of liability.

5.58 Gbao's contribution to the JCE is dealt with further in paragraphs 2.168 to 2.169 and 3.45 to 3.83 of the Prosecution Appeal Brief. On the basis of the findings of the Trial Chamber referred to in the Prosecution Appeal Brief, the only conclusion open to any reasonable trier of fact is that Gbao did share the common purpose of the JCE, and that he made a substantial contribution to it.

(iii) Gbao's sub-ground 8(c)

5.59 The Trial Chamber did not err in finding that Gbao was part of the plurality of persons constituting the JCE. While Gbao was not found to belong to the Junta's governing body, this was not the only basis of participation in the JCE. The Trial Chamber correctly found that as a matter of law it did not have to identify each

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562 Gbao Appeal Brief, paras 27-31.
563 Trial Judgement, para. 2036.
564 Trial Judgement, para. 2035.

member of the JCE,[565] while at the same time the Trial Chamber identified certain senior AFRC and RUF members who were members of the JCE.[566] Gbao was found by the Trial Chamber to be a senior RUF Commander.[567] On the Trial Chamber's findings, Gbao's position as a Vanguard[568] also placed him amongst those with leadership status; Vanguards being recognised as senior officers and military advisors to Junior Commanders.[569] In any event, the Trial Chamber did not expressly restrict the scope of the plurality to senior AFRC and RUF officers. It did, however, distinguish mid and low-level Commanders and rank-and-file fighters from "the more senior leaders of both movements".[570]

5.60 The fact that the Trial Chamber's reasoning in relation to Gbao's inclusion in the plurality was less developed than its reasoning in relation to Sesay and Kallon does not in itself constitute an error if the Trial Chamber's conclusion was one that was reasonably open to the Trial Chamber on the evidence before it.

5.61 The Trial Chamber found that on Bockarie's instructions, Gbao remained in Kailahun District after the coup where he was the RUF OSC and Overall IDU Commander during the Junta period.[571] He remained as such through the attack on Freetown.[572] The fact that he was based in Kailahun District throughout the relevant period does not "militate directly against membership in the JCE" on the basis that "Kailahun District was largely disconnected [...] from the rest of Sierra Leone and the power-base of the Junta government" as asserted by Gbao.[573] The Trial Chamber found that the RUF:

> ... maintained military and civil control in Kailahun District, and during the Junta period, the RUF sustained a widespread and systematic pattern of conduct which included conducting military training, such as the enlistment, conscription and use of children under the age of 15 years to participate in active hostilities; using enslaved civilians as labour on RUF

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565 Trial Judgement, para. 1991.
566 Trial Judgement, para. 1990
567 Trial Judgement, para. 765. In his Dissenting Opinion, para. 21, Justice Boutet agreed that Gbao was a "senior RUF Commander".
568 In his Dissenting Opinion, para. 10, Justice Boutet concurred that "Gbao's position as a Vanguard and as OSC, as well as his relationship with Sankoh, commanded respect and prestige."
569 Trial Judgement, para. 667.
570 Trial Judgement, para. 1992.
571 Trial Judgement, para. 775.
572 Trial Judgement, para. 903.
573 Gbao Appeal Brief, para. 52.

> 'government' farms and in other areas; and, compelling women to remain in sexual slavery or to live in conjugal relationships with RUF fighters from which they were not free to leave.[574]

5.62 The Trial Chamber further found that these "widespread and systematic crimes were for the benefit of the RUF and the Junta in furthering their ultimate goal of taking political, economic and territorial control over Sierra Leone"[575] since it was only through their joint action that the AFRC and RUF were able to control the entire country. "Thus, RUF activities in Kailahun furthered the ultimate goal of joint political, economical and territorial control."[576]

5.63 It was not necessary for the Trial Chamber to find specific joint action between Gbao and the AFRC in order to be satisfied that he belonged to the plurality. Interaction or cooperation between leaders of the RUF and leaders of the AFRC was sufficient to demonstrate action in concert in the implementation of a common objective as described in the *Haradinaj* case.[577]

(iv) Gbao's sub-ground 8(i)

5.64 The Gbao Defence argues that the Trial Chamber erred in finding that Gbao made any contribution to the JCE, in particular as the "RUF ideologist".

5.65 The Trial Chamber found that Gbao "participated and significantly contributed to the joint criminal enterprise *in a number of ways*".[578] It further found that "Gbao was an ideology instructor and that ideology played a significant role in the RUF movement" as well as dictating the "spirit" in which the crimes alleged in the Indictment were committed.[579] In his Dissenting Opinion, relied upon in detail by the Gbao Defence, Justice Boutet made it clear that he did *not* accept the defence that the "RUF ideology prohibited criminal behaviour, that Gbao believed strongly in this aspect of the ideology and strove to implement it by preventing and punishing crimes where he was able to do so".[580] Indeed, Justice Boutet was of the view that "The general conduct of the RUF throughout the Indictment period as

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574 Trial Judgement, para. 2158.
575 Trial Judgement, para. 2159.
576 Trial Judgement, para. 2159.
577 *Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Judgement", Trial Chamber 3 April 2008 ("***Haradinaj* Trial Judgement**"), para. 139.
578 Trial Judgement, para. 2009 (emphasis added).
579 Trial Judgement, para. 2010.
580 Dissenting Opinion of Justice Boutet, para. 5.

we have found it did not portray this principle of the ideology. Quite the opposite [...]."[581] The Majority did not err in considering the criminal nexus between the ideology, its development and dissemination, and the crimes that were committed: it was open to a reasonable trier of fact on the evidence to so conclude.

5.66 While Foday Sankoh may have been the "driving force" behind the RUF,[582] this did not preclude reliance on others, especially Gbao who was found to have had a close relationship with Sankoh,[583] to impart the ideology of the movement.[584] The Trial Chamber found that Gbao was a Vanguard and that Vanguards were trained at Camp Naama.[585] It was thus a reasonable inference that Gbao was trained at Camp Naama.

5.67 Even if the Appeals Chamber were to accept Gbao's arguments as to the alleged incorrect or unsubstantiated reliance on Gbao's role as an ideology instructor, the Prosecution nevertheless submits that the Trial Chamber did not err in finding that Gbao contributed to the JCE in other ways. In particular, the Trial Chamber correctly assessed Gbao's rank and status, his functions in Kailahun and his direct involvement in criminal activities. His supervisory role as OSC over the IDU, the MPs, the IO and the G5[586] allowed him to exert influence and remain informed even if these units were less effectual during the Junta period.

5.68 It is true that the Trial Chamber relied substantially upon the evidence of Witness DIS-188 in paragraph 2035 of the Trial Judgement, and that this Witness was found to require corroboration.[587] However, this paragraph of the Trial Judgement builds on earlier findings of the Trial Chamber that Gbao was highly regarded and was not immobile within Kailahun, and in any case does not lead directly to the ultimate finding of liability in relation to Bo, Kenema and Kono. The Gbao

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581 Dissenting Opinion of Justice Boutet, para. 5.
582 Gbao Appeal Brief, para. 107, citing Trial Judgement, para. 651.
583 Trial Judgement, paras 734 and 2033.
584 At the Nuremberg Trial, for example, Rosenberg was recognized as the Nazi Party's ideologist who developed and spread Nazi doctrines even though Hitler was the leader of the movement. Indeed, he had tried to keep the Nazi Party together while Hitler was in jail. *Judgment of the International Military Tribunal for the Trial of German Major War Criminals: Rosenberg, 30th September, 1946 - 1st October, 1946*, London, His Majesty's Stationery Office, 1951, pp. 94-95.
585 Trial Judgement, para. 667.
586 Trial Judgement, para. 2034. See also Trial Judgement, paras 701-703.
587 Trial Judgement, para. 568.

Appeal Brief urges reliance on the testimony of DAG-048 in relation to Gbao's rank.[588] DAG-048's testimony was found to be "inconsistent, unreliable and untrustworthy and unacceptable", and requiring corroboration.[589]

5.69 In relation to forced farming in Kailahun District, the Prosecution relies upon its response to Gbao's Grounds 8(s) and 11.[590] Further, it is submitted that the Trial Chamber did not err in finding that Gbao made a substantial contribution to the JCE through his involvement in forced labour. The Trial Chamber's detailed findings are set out at paragraphs 2036 and 2037 of the Trial Judgement. It is furthermore clear from the Trial Chamber's findings that Kailahun District was of "central importance to the RUF throughout the conflict".[591] It was a major farming area and thus an important source of food for the troops, as well as a key logistical base.[592] It was a reasonable inference open to the Trial Chamber that forced farming furthered the objective of taking control over Sierra Leone.[593] While Justice Boutet dissented in relation to the finding of the Majority that enslavement of civilians in Kailahun was directed to achieving the goals of the JCE, he nevertheless would have convicted Gbao for planning enslavement in Kailahun District between 25 May 1997 and late April 1998.[594]

5.70 The Trial Chamber did not describe Gbao's failure to investigate the beating of TF1-113 as an independent and direct contribution to the JCE, but rather as a manifestation of his role in suppressing the civilian population which was designed to compel the obedience of the civilian population to RUF authority.[595] It was reasonable to infer that such actions did contribute to the fulfilment of the objective of the JCE.

5.71 The Prosecution also relies on paragraphs 2.168 to 2.169 and 3.45 to 3.83 of the Prosecution Appeal Brief.

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588 Gbao Appeal Brief, para. 137, footnote 161.
589 Trial Judgement, para. 572.
590 See paragraphs 5.91 to 5.94 and 7.147 to 7.165 below.
591 Trial Judgement, para. 1381.
592 Trial Judgement, paras 1381 and 1383.
593 See also Trial Judgement, para. 2159.
594 Dissenting Opinion of Justice Boutet, para. 19.
595 Trial Judgement, para. 2039.

(v) Gbao's sub-ground 8(j)

5.72 The Trial Chamber's approach was to evaluate the evidence and the role of each Accused in the JCE by location. It was open to the Trial Chamber to adopt such an approach to the evidence, which was pragmatic in a large and complex case. However, when it came to applying the legal framework for JCE liability to the facts, this approach increased the burden on the Trial Chamber in terms of setting out a coherent analysis of its findings. In fact, the Trial Chamber assumed a greater burden than required by the applicable legal principles. Those principles do not require proof of a significant contribution and the requisite intent for the crimes charged with respect to each location covered by a single JCE. On the contrary, they require proof of a significant contribution to the JCE, and, under the first category of JCE, the intent "to commit the crime and ... to participate in a common plan whose object was the commission of the crime."[596] The Trial Chamber was correct in finding that "Where the joint criminal enterprise is alleged to include crimes committed over a wide geographical area [...] an Accused may be found criminally responsible for his participation in the enterprise, even if his significant contributions to the enterprise occurred only in a much smaller geographical area, provided that he had knowledge of the wider purpose of the common design".[597]

5.73 The starting point must be the assessment of Gbao's responsibility in Kaliahun where the requisite intent for the relevant crimes under the first category of JCE was found to be satisfied.[598] Seen in the context of these findings, the Trial Chamber's approach of considering whether Gbao had knowledge of the wider purpose of the common design in Bo, Kenema and Kono[599] was not erroneous.

5.74 Alternatively, to the extent that the Trial Chamber applied the *mens rea* standard for the third category of JCE to Gbao with respect to Bo, Kenema and Kono, this was legally permissible. The Trial Chamber had noted both the "divisibility" of

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596 Trial Judgement, para. 265.

597 Trial Judgement, para. 262, citing *Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 ("***Tadić* Appeal Judgement**"), para. 199, and cases referred to therein.

598 Trial Judgement, paras 2164-2173.

599 See e.g. Trial Judgement, paras 2106-2108.

the JCE with respect to location[600] and that responsibility under the third category of JCE could only arise "if the Accused had sufficient knowledge that the additional crime was a natural and foreseeable consequence *to him in particular*".[601] In principle, there is nothing to prevent a JCE from being seen as divisible in the sense of certain crimes in certain locations being intended by some members but foreseeable only to others. Such a result may occur, for example, in separate trials of different accused charged with participation in the same broad JCE.[602] The key point is that an accused must only be punished with respect to his actual contribution. As noted by the ICTY Appeals Chamber:

> Where all these requirements for JCE liability are met beyond a reasonable doubt, 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 when ascertaining the contours of the doctrine of joint criminal enterprise, he is 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* (third category of JCE) ...
>
> The Appeals Chamber recognizes that, in practice, this approach may lead to some disparities, in that it offers no formal distinction between JCE members who make overwhelmingly large contributions and JCE members whose contributions, though significant, are not as great. However, the Appeals Chamber recalls that any such disparity is adequately dealt with at the sentencing stage.[603]

5.75 The Trial Chamber therefore did not err by applying the wrong legal standard.

(vi) Gbao's sub-ground 8(k)

5.76 The Prosecution relies upon its submissions in response to Sub-ground 8(j) above.

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600 Trial Judgement, para. 354.

601 *Trial Judgement*, para. 266 (emphasis added).

602 For example, Vlastimir Đorđević is being tried separately at the ICTY with respect to his role in a JCE that included the Accused in the Milutinović et al trial. The Indictment alleges that "The crimes enumerated in Counts 1 to 5 of this Indictment were within the object of the joint criminal enterprise and the accused shared the intent with the other co-perpetrators that these crimes be perpetrated. Alternatively, the crimes enumerated in Counts 3 to 5 were natural and foreseeable consequences of the joint criminal enterprise and the accused was aware that such crimes were the possible consequence of the execution of that enterprise." IT-05-87/1-PT, "Fourth Amended Indictment", 9 July 2008, paras 20-21.

603 *Brđanin* Appeal Judgement, paras 431-432.

(vii) Gbao's sub-ground 8(l)

5.77 The Trial Chamber did not make findings against Gbao in the absence of evidence. On the contrary, its findings as to Gbao's intent in Bo, Kenema and Kono were adequately reasoned.[604] The Prosecution relies in addition on its arguments in response to Sub-ground 8(j) and at paragraphs 5.20 to 5.27 above.

(viii) Gbao's sub-ground 8(m)

5.78 The Prosecution relies on its response to Sub-grounds 8(b), (c), (i), (j), (k), and (l) above.

(ix) Gbao's sub-ground 8(o)

5.79 Gbao argues that the Trial Chamber erred in convicting him under Count 1 in relation to Kailahun District without an explicit finding that he shared the specific intent of the perpetrators to spread terror.[605] In assessing whether the Trial Chamber's inference as to Gbao's specific intent to cause terror was reasonable, the Trial Chamber's findings must be viewed as a whole, including those as to the scope of the JCE[606] and Gbao's status and role.[607] The Trial Chamber found that the common purpose of the JCE was "through the spread of extreme fear and punishment to dominate and subdue the civilian population in order to exercise power and control over captured territory".[608] Gbao was found to have been a participant in the JCE, which necessarily meant that he shared the intent of the JCE, which in turn necessarily means that he intended the "spread of extreme fear". There is therefore necessarily implicit in the Trial Judgement a finding that Gbao shared the specific intent for terror. In cases of very large crimes, elements of crimes can be inferred from the evidence and circumstances as a whole.

5.80 Furthermore, conduct may be driven by more than one purpose, and it is only necessary to show that one such purpose satisfies the specific intent to spread terror. "Whether the specific intent to spread terror is satisfied is determined on a case-by-case basis and may be inferred from the circumstances, the nature of the

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604 See e.g. Trial Judgement, paras 2040-2047, 2058-2059 and 2106-2109.
605 Gbao Appeal Brief, para. 172.
606 Trial Judgement, para. 1977-1985.
607 Trial Judgement, para. 2034.
608 Trial Judgement, para. 1981.

acts or threats and the manner, timing or duration of acts or threats of violence."[609] It was open to the Trial Chamber to find from the evidence and circumstances as a whole that Gbao had the intent for the crime of terror. He was in Kailahun District for a greater portion of the Indictment period. During this period, he was a key figure in the RUF movement and he contributed directly to the various acts which, when taken together, terrorized the people of Kailahun, as was intended by the RUF in order to strengthen the RUF's control of the region.

5.81 The Trial Chamber was satisfied that the killing of the suspected Kamajors was connected to the "ideological objective of toppling the 'selfish and corrupt' regime by eliminating all those who supported that regime and who, a fortiori, were considered as enemies to the AFRC/RUF Junta alliance."[610] Gbao shared the objective of strengthening the RUF's hold over Sierra Leone and Kailahun in particular and the killing of the Kamajors was an act calculated to promote this objective whilst at the same time demonstrating to the people the power of the RUF.[611]

5.82 For the same reasons, the Trial Chamber did not err in its finding as to the specific intent for terror in relation to sexual violence.

(x) Gbao's sub-ground 8(p)

5.83 In response to the argument that the Trial Chamber erred in finding that Gbao had the requisite intent for Count 2, the Prosecution relies upon its submissions in response to Sub-ground 8(o) above and notes that the circumstances surrounding the killing of the suspected Kamajors were described in depth by the Trial Chamber.[612] As the trier of fact, the Trial Chamber was best placed to draw the appropriate inferences.

(xi) Gbao's sub-ground 8(q)

5.84 The Prosecution relies on its argument at paragraph 5.81 above in addition to the following.

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609 *CDF* Appeal Judgement, para. 357 citing *Galić* Appeal Judgement, para. 104.
610 Trial Judgement, para. 2028.
611 Trial Judgement, paras 2166 and 2167.
612 Trial Judgement, paras 1387-1397.

5.85 Gbao's release of the first set of alleged Kamajors in itself does not raise a logical inference that Gbao did not intend the killing of the 64 Kamajors. Gbao was present when the order to kill the suspects was given and he was the most senior RUF personnel present in Kailahun (after Bockarie had left) when the bulk of the order was carried out. It was therefore a reasonable inference that Gbao intended the killings in furtherance of the JCE. While Gbao argues that he "could not have stopped Bockarie,"[613] there is no suggestion in the evidence that he wanted to or tried to do so. On the basis of the evidence before it, the Trial Chamber was entitled to reach the conclusion that it did.

(xii) Gbao's sub-ground 8(r)

5.86 The Prosecution submits that the Trial Chamber's findings at paragraphs 2167 and 2168 of the Trial Judgement cannot be viewed in isolation and that the Trial Chamber was entitled to infer intent from the totality of the evidence. The conclusion that Gbao shared the intent for Counts 7-9 in Kailahun District was not an unreasonable one.

5.87 In relation to the alleged error concerning expert evidence, the Prosecution refers to its submissions in response to Gbao's Ground 2 at paragraphs 4.88 to 4.96 above.

5.88 In relation to the use of Defence witness testimony, the Gbao Defence does not establish how the Trial Chamber erred in taking account of the evidence of Witness DIS-080 in support of a general finding as to married women also being taken as bush wives, especially when corroborated by other evidence.[614]

5.89 In relation to testimony allegedly outside the Junta period, there is no reason why the Trial Chamber should be precluded from relying on such evidence as the JCE was found to continue after the intervention until the end of April 1998.

5.90 In relation to the argument that certain testimony required corroboration, the Gbao Appeal Brief fails to set out precisely where the Trial Chamber made findings on the basis of uncorroborated evidence. The Gbao Defence has failed to establish that the Trial Chamber erred in its assessment of the extensive evidence of the

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[613] Gbao Appeal Brief, para. 192.
[614] Trial Judgement, para. 1412, and evidence cited at footnote 2624.

widespread sexual violence in Kailahun[615] and in drawing the appropriate inferenees as to Gbao's intent.

(xiii) Gbao's sub-ground 8(s)

5.91 The Gbao Defence incorreetly states that the JCE period was restricted to the Junta period, namely to the period between 25 May 1997 and 19 February 1998, and that findings outside this period are irrelevant to the JCE. The Trial Chamber clearly found that the JCE continued until the end of April 1998, ineluding in Kailahun.[616] Only the crimes of unlawful killings were found to have occurred on 19 February 1998 and not subsequently.[617] The Trial Chamber therefore did not err in taking into account evidence relating to the period after the intervention until the end of April 1998. Gbao has not demonstrated that the Trial Chamber erred in making the appropriate inferences as to Gbao's intent.

5.92 Contrary to the Gbao Defence's argument that the Trial Chamber did not explain how forced farming in Kailahun furthered the goals of the JCE,[618] the Trial Chamber in fact emphasized the critieal importance of Kailahun District as a place where abducted civilians from all over the country were taken for forced labour as part of a planned and organised system.[619] The Trial Chamber's findings as to Gbao's intent were reasonable on the evidence and the fact of Justice Boutet's dissent is not in itself demonstrative of an error.

5.93 In addition, the Prosecution relies on its arguments in response to Gbao's Ground 11 at paragraphs 7.147-7.165 below.

5.94 With respect to forced mining, it is not necessary to prove that diamonds were in fact found and used in support of the JCE.[620] The crime being one of enslavement, Gbao has not demonstrated that the Trial Chamber erred in finding that the requisite elements were satisfied.

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615 Trial Judgement, para. 1405.
616 Trial Judgement, paras 2172-2173.
617 Trial Judgement, para. 2156, 5.1.1.
618 Gbao Appeal Brief, para. 226.
619 Trial Judgement, paras 1478-1479, 2036.
620 Gbao Appeal Brief, paras 235-236.

6. Kallon's Article 6(3) responsibility

A. Introduction

6.1 This section of this Response Brief responds to **Kallon's Grounds 6, 13 and 14**, in which the Kallon Defence contends that not all elements of Article 6(3) were established by the Prosecution in respect of the crimes for which Kallon was convicted under this mode of liability, in particular the forced marriages of TFI-016 and her daughter in Kissi Town between May and June 1998 (see B below), the killing by an RUF fighter of a female Nigerian civilian in May or June 1998 (see C below) and the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998 (see D below).

[redacted] **Forced marriages** [redacted]

6.2 In response to the complaint that the Kallon Defence did not have notice[621] of these crimes, the prosecution submits that both the statement of TF1-061 which was disclosed to Kallon as early as May 2003 and the Prosecution's Supplemental Pre-trial Brief referred to this crime.[622] Further Kallon cross-examined TF1-061 without complaining of this lack of notice.

6.3 The Prosecution relies on the discussion of Article 6(3) responsibility at paragraphs 2.51 – 2.53 of this Response Brief. The Trial Chamber found that the crime was committed by his subordinates at Kissi Town,[623] and was "of the view that the commission of the crime of 'forced marriage' was widespread in Kono District and indeed throughout Sierra Leone and we find that in these circumstances, Kallon had reason to know of the fighters who committed this crime at Kissi Town".[624] The Defence has not established that this conclusion was unreasonable on the evidence.

6.4 The contention that Kallon was a low ranking officer[625] who lacked effective control over the perpetrators is merely an attempt to relitigate matters already decided by the Trial Chamber. The Trial Chamber found that Kallon exercised

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621 Kallon Appeal Brief, para. 140.
622 Prosecution Supplemental Pre-trial Brief, p. 1938.
623 Kallon Appeal Brief, para. 140.
624 Kallon Appeal Brief, para. 2148.
625 Kallon Appeal Brief, para. 140 (Kallon compared to Rocky, Rambo and Isaac Mongor).

superior authority.[626] The Defence has not established that this conclusion was unreasonable on the evidence.

6.5 [redacted]. However, he enjoyed the company of his co-RUF who carried guns and the ability to terrorise civilians who were not RUF. [redacted] Therefore this does not amount to exculpatory evidence as suggested by Kallon.[629]

6.6 The Prosecution submits that the Trial Chamber evaluated the evidence of TF1-016 and reached conclusions which a reasonable trier of fact seised of all the evidence in the case was entitled to reach. The Trial Chamber did not "simply ignore or fail to consider the defence submissions",[630] but gave reasons for disregarding the testimony of Defence witnesses. The Kallon defence has not met the standard of review on appeal. This ground must be dismissed accordingly.

C. Killing of a female Nigerian civilian by an RUF fighter in Wendedu

6.7 This section of this Response Brief responds to **Kallon's Ground 12**[631] challenging his conviction for instigating the murder of a female Nigerian civilian.

6.8 As to the contention in paragraph 134 of the Kallon Appeal Brief that Kallon was convicted for a crime in a location that was not specifically pleaded in the Indictment, the Prosecution refers to Section 2 D of this Response Brief.

6.9 Additionally, and in any event, it is submitted that the Kallon Defence has not demonstrated any prejudice and that none has been suffered. There was no objection from the Kallon Defence when the evidence was adduced,[632] and the

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626 Trial Judgement, para. 2135-2136.
627 Kallon Appeal Brief, para. 141.
628 Trial Judgement, paras 1412 and1413.
629 Kallon Appeal Brief, para. 141.
630 Kallon Appeal Brief, para. 142.
631 Kallon Appeal Brief, paras 134-137.
632 TF1-071, Transcript 21 January 2005, pp. 57-71.

Kallon Defence cross-examined the witness about the incident.[633] The first time that the Kallon Defence raised the objection that the incident involving the killing of the female Nigerian civilian related to a location that was not pleaded in the indictment was in the Motion filed on 14 March 2008.[634] It is noted that TF1-071, who gave evidence about the incident, testified from 18 to 27 January 2005. This witness's statement of 23 December 2004 was disclosed to the Kallon Defence on 31 December 2004, which contained details of the incident including naming the location as Wendedu.

6.10 In response to paragraphs 135-137 of the Kallon Appeal Brief it is submitted that contrary to the Kallon Defence's claims,[635] the fact that the Trial Chamber, while assessing Kallon's responsibility for instigation, also considered Kallon's supervisory role over Rocky, did not mean that the Trial Chamber applied Article 6(3) *mens rea* for Article 6(1) *actus reus* in convicting Kallon for instigating the murder.[636]

6.11 Even if the Trial Chamber erred in this regard, which is denied, based on the Trial Chamber's factual findings,[637] the Trial Chamber would have arrived at the same conclusion that Kallon was liable under Article 6(1) for instigating the murder if it applied the correct Article 6(1) *mens rea* and *actus reus* elements.

6.12 Contrary to the Kallon Defence's claims,[638] based on its findings,[639] the Trial Chamber was entitled to find that the crime was proven beyond reasonable doubt and to find Kallon liable.[640] Further, contrary to the Kallon Defence's submissions,[641] the Trial Chamber's findings clearly show the nature of Kallon's

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633 TF1-071, Transcript 26 January 2005, pp. 29-31.

634 *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-1057, "Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A", 14 March 2008 ("**Kallon Indictment Motion**"). See also *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment", Trial Chamber, 26 June 2008 ("***Kallon* Indictment Decision**").

635 Kallon Appeal Brief, para. 135.

636 Trial Judgement, paras 2117-2120.

637 Trial Judgement, paras 1174-1175, 2117-2120.

638 Kallon Appeal Brief, para. 136.

639 Trial Judgement, paras 1174-1175, 2117-2120. It is recalled that TF1-071 gave details about Kallon's role in this crime: TF1-071, Transcript 21 January 2005, pp. 57-71.

640 Trial Judgement, para. 2110.

641 Kallon Appeal Brief, para. 136.

instigation.[642] Kallon was found to have had a supervisory role over Rocky although they were both Vanguards.[643] Even if they were to be regarded as "equals" as suggested by Kallon,[644] this would not weaken the Trial Chamber's findings of Kallon's conduct[645] in instigating the murder. Kallon's conduct as found by the Trial Chamber[646] was definitely a "factor substantially contributing to the conduct of another person committing the crime"[647] and was "intended to provoke or induce the commission of the crime or was aware of the substantial likelihood that the crime would be committed as a result of that instigation."[648]

6.13 It is therefore submitted that Kallon's Ground 12 should be dismissed.

D. Enslavement of civilians in camps in Kono District between February and December 1998

6.14 This section of this Response Brief responds to **Kallon's Ground 14** (in respect of which, see also Section 2.G above).

6.15 Apart from the argument that Count 13 was deficiently pleaded (which is dealt with in 2.G above), Kallon's Ground 14 contends that the Trial Chamber erred in law and fact in finding him liable as a superior for the enslavement of hundreds of civilians in camps throughout Kono District between February and December 1998.

6.16 The Kallon Defence claims that the Trial Chamber made "the overly exaggerated presumption that Kallon had effective control over all RUF troops in Kono District between February and December 1998 lacking in any evidential basis."[649] The Kallon Appeal Brief refers to the Kallon Final Trial Brief,[650] and argues that there "is absolutely no reference to knowledge by the Appellant of crimes by his alleged subordinates or any subordinates at all."[651]

6.17 This contention squarely contradicts the findings in paragraph 2148 of the Trial Judgement, where the Trial Chamber expressly found that Kallon had actual

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642 Trial Judgement, paras 1174-1175, 2117-2120.
643 Trial Judgement, paras 1175 and 2118.
644 Kallon Appeal Brief, para. 136.
645 Trial Judgement, paras 1174-1175, 2119-2120.
646 Trial Judgement, paras 1174-1175, 2119-2120.
647 Trial Judgement, para. 271, discussing the elements of instigating.
648 Trial Judgement, para. 271, discussing the elements of instigating.
649 Kallon Appeal Brief, para. 143.
650 Kallon Appeal Brief, para. 145.
651 Kallon Appeal Brief, para. 146.

knowledge of the enslavement of civilians in camps in Kono District. That finding was based, *inter alia*, on the finding that Kallon occupied a supervisory role with respect to these camps. The findings in paragraph 2149 of the Trial Judgement show that the Trial Chamber decided the question of Kallon's actual or imputed knowledge regarding the crimes committed by his subordinates on the basis of its careful assessment of the relevant evidence in the case.

6.18 Paragraph 145 of the Kallon Appeal Brief argues that "diamond mining was a matter of great and exclusive interest to the RUF high command in Buedu" and that Kallon "did not wield a supervisory role over the RUF Camps in Kono", and simply refers to the Defence submissions relating to Kallon's Ground 13. The Prosecution refers to the submissions in Section 2.C(ii) of this Response Brief in relation to Kallon's Ground 13. It is submitted that the Defence arguments in respect of Kallon's Ground 14 are merely an expression of disagreement with the Trial Chamber's findings, and that these Defence arguments do not meet the standards of review on appeal. Kallon's Ground 14 should accordingly be dismissed.

E. Attacks on UNAMSIL peacekeepers

6.19 This section of this Response Brief responds to **Kallon's Ground 29** in which the Kallon Defence argues that the Trial Chamber erred in law by "amending the indictment *de facto*" in convicting Kallon on Counts 15-18 for conduct alleged to have been committed through AFRC/RUF joint action without a showing that the joint alliance was under his command.[652] The Prosecution submits that this is a misstatement of the facts as to the Trial Chamber's finding on Kallon's superior responsibility for Counts 15 and 17.[653] The issue of Kallon's superior responsibility pleadings for Counts 15 and 17 has been addressed in Section above 2.C(iii), and substantial issues regarding these counts are dealt with in Section 7.J

7. Other alleged errors of fact

A. Chapeau elements of crimes against humanity

7.1 This part of this Response Brief responds to **Sesay's Grounds 28, 38 and 41**.

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[652] Kallon Notice of Appeal, para. 30.1.
[653] Trial Judgment, paras 2291-2292.

7.2 The Sesay Appeal Brief makes no specific submissions under Sesay's Ground 41.[654]

7.3 In relation to Sesay's Ground 28, the Sesay Defence submits that the Trial Chamber erred in finding that there was an attack against the civilian population of Kenema Town[655] and Tongo Field[656] between May 1997 and February 1998. In support of this submission, the Sesay Defence merely repeats the arguments made at trial and asserts that those arguments were disregarded.[657] It is submitted that it is clear from the Trial Chamber's findings that the Trial Chamber was of the considered view that the crimes in Kenema Town were neither isolated, nor few, nor committed for personalized reasons.[658] The Sesay Defence's submissions based only on Kenema Town[659] and Tongo Field[660] ignore the fact that the Trial Chamber's findings consider several locations in Kenema as a District,[661] including Panguma, Bumpe,[662] and Cyborg Pit in Tongo Fields.[663] Further, the expression "attack against the civilian population" does not mean that the entire population of the geographical entity in which the attack is taking place must have been the subject of that attack.[664] Perceived or suspected collaborators are likewise part of a "civilian population".[665]

7.4 It is submitted that the Trial Chamber was entitled to make the findings that it made with regard to Kenema District.[666] In making findings about Kenema District, there was no requirement for the Trial Chamber to rely on a particular

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654 Sesay Notice of Appeal, paras 88-89. Ground 41 is presented together with Ground 48 in paragraphs 287-292 of the Sesay Appeal Brief but the arguments appear to relate only to Ground 38.

655 Sesay Appeal Brief, para. 177, referring to Trial Judgement, paras 956-958.

656 Sesay Appeal Brief, para. 184, referring to Trial Judgement, paras 956-958.

657 Sesay Appeal Brief paras 177-179, 186 repeatedly referring to Sesay Final Trial Brief.

658 See the findings of the Trial Chamber concerning crimes found to have been committed in Kenema Town: Trial Judgement, para. 2050, items 3.1.1(i)-(vii), (ix); 3.1.2(i)-(iv).

659 Sesay Appeal Brief, paras 177-183.

660 Sesay Appeal Brief, paras 184-186.

661 Trial Judgement, paras 944, 946, 956-958, 1042-1095.

662 Trial Judgement, para. 956.

663 Trial Judgement, para. 957.

664 *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to SCSL-04-16-T-628, Corrigendum to Judgement Filed on 21 June 2007", Trial Chamber, 19 July 2007 ("***AFRC* Trial Judgement**"), para. 217; *Kunarac* Appeal Judgment, para. 90; *Limaj* Trial Judgment, para. 187.

665 *CDF* Appeal Judgement, para. 264. See Sesay Appeal Brief, para. 292.

666 Trial Judgement, paras 946, 956-958, 1042-1135.

piece of evidence or exhibit "without more."[667] The Trial Chamber had to consider the totality of the evidence.

7.5 Similarly, there is no merit in the Sesay Defence's submissions that there was no sufficient evidence to support findings of an attack directed against the civilian population in Kailahun District[668] because there were "few crimes occurring in Kailahun."[669] The Trial Chamber found for example that in Kailahun District, "hundreds of civilians were forced to labour", "an unknown number of women and young girls were forced to 'marry' RUF rebels" and "civilians were abducted and forced to act as porters, sexual slaves and fighters."[670] In view of these findings, the absence of certain crimes[671] or the existence of some normal or near normal conditions[672] or the existence of RUF laws[673] in Kailahun District does not detract from the existence of an attack directed against the civilian population. It was for the Trial Chamber to evaluate whether as a matter of fact the legal elements of a widespread or systematic attack against the civilian population were satisfied, and on the evidence before it, the Trial Chamber was entitled to conclude that they were.

B. Acts of terror

7.6 This part of this Response Brief responds to **Sesay's Grounds 23, 29, 31** (in part) and **32** (in part), **Kallon's Ground 16** and **Gbao's Ground 12**.

7.7 Paragraphs 157-160 of the Kallon Appeal Brief argue that terrorism was not a recognised crime in international law during the relevant period of the Indictment, as it was not sufficiently precisely defined to satisfy the principle of *nullum crimen sine lege*. In response, it is submitted that the existence of acts of terror as a crime punishable under the Statute is settled case law affirmed by this Appeals Chamber in the *CDF* Appeal Judgement and by the ICTY Appeals Chamber in the

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667 Sesay Appeal Brief, para. 179, suggesting that the Trial Chamber could have relied on Exhibit 28 "without more" in agreeing with the submissions made by Sesay under his Ground 28.

668 Sesay Notice of Appeal, para. 78; Sesay Appeal Brief, paras 287-292.

669 Sesay Appeal Brief, para. 287; see also para. 292.

670 Trial Judgement, para. 954. See also the Trial Chamber's factual findings on crimes committed in Kailahun District: Trial Judgement, paras 1380-1443.

671 Sesay Appeal Brief, para. 288.

672 Sesay Appeal Brief, para. 289. 291.

673 Sesay Appeal Brief, para. 290.

Galić Appeal Judgement, to which the Trial Chamber correctly referred in holding that the prohibition of terror against the civilian population was part of customary international law.[674]

7.8 The main issue in relation to acts of terror, systematically challenged by the Defence for the three Appellants, is the specific intent of the perpetrator to spread terror amongst the population. Almost every act found to be a crime and additionally found to be an act of terror is challenged by the Defence in that respect.

7.9 It is important to recall the law spelt out by this Appeals Chamber in the *CDF* Appeal Judgement in respect of the specific intent, which was relied upon by the Trial Chamber. The Appeals Chamber held that "the specific intent to spread terror need not be the only purpose of the unlawful acts or threats of violence", and relied on *Galić* to find it established that "[t]he fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge."[675] The presence of a coexisting purpose does not, however, detract from the requirement that what must be proved irrespective of any other coexisting purpose, is the specific intent to spread terror.[676]

7.10 Both the Kallon Defence and Gbao Defence argue that acts of sexual violence in Kailahun District, including forced marriages and sexual slavery, do not constitute acts of terror, as they were not committed "with the primary intent to spread terror" and were merely to satisfy the sexual desires of the fighters.[677] The Gbao Defence argues further that there are no indicia in the factual and legal findings relating to Kailahun District of an intent to terrorise.[678] Sesay also disputes the fact that forced marriages could be "classified as acts of terror".[679]

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674 Trial Judgement, para. 112: "The Chamber adopts with the ICTY Appeals Chamber in *Galić* which ruled that the prohibition of terror against the civilian population was a part of customary international law from at least the time it was included in those treaties and that the offence gave rise to individual criminal responsibility pursuant to customary international law".

675 Trial Judgement, para. 121 referring to *CDF* Appeal Judgement, para. 357.

676 *CDF* Appeal Judgement, para. 357.

677 Gbao Appeal Brief, paras 283-286 and Kallon Appeal Brief, para. 167.

678 Gbao Appeal Brief, para. 284.

679 Sesay Appeal Brief, para. 80.

7.11 In response, the Prosecution submits that the use of women to satisfy sexual needs or to fulfil conjugal duties does not extinguish the presence of a "calculated and concerted pattern [...] to use sexual violence as a weapon of terror".[680] The Prosecution recalls that the Trial Chamber specifically said that it had "considered the body of evidence in relation to the various districts of Sierra Leone" to make its legal findings on sexual violence as acts of terrorism. Based on the evidence as a whole, the Trial Chamber correctly concluded that "the physical and psychological pain and *fear* inflicted on the women not only abused, debased and isolated the individual victim, but deliberately destroyed the existing family nucleus, thus undermining the cultural values and relationships which held the societies together"[681] and that "the pattern of sexual enslavement employed by the RUF was a deliberate system intended to spread terror by the mass abductions of women, regardless of their age or existing marital status, from legitimate husbands and families".[682] It was open to the Trial Chamber to so conclude. Reference is made to paragraph 5.25 above, noting that a distinction needs to be drawn between the purpose of the non-JCE member and the purpose of the JCE-member.

7.12 The Gbao Defence further seeks to support its argument by referring to the *AFRC* Trial Judgement which held, on the evidence in that case, that the acts of sexual slavery "in the particular circumstances before it" did not amount to acts of terrorism.[683] However, the *AFRC* Trial Judgement did not find, as a matter of *law*, that acts of sexual slavery could never be acts of terror. The finding in the *AFRC* Trial Judgement was a *factual* finding in respect of the particular circumstances of the *AFRC* case, to the effect that the particular sexual crimes in that particular case were not proven by the particular evidence led in that case to have been committed with the primary purpose to terrorise the civilian population. However, from the discussion of this issue in the *AFRC* Trial Judgement, it is clearly implicit that the Trial Chamber considered that acts of sexual violence *could* be, and *would* be, acts of terror if they *were* committed with the primary purpose to terrorise the civilian

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680 Trial Judgement, para. 1347.
681 Trial Judgement, para. 1349 (emphasis added).
682 Trial Judgement, para. 1351.
683 *AFRC* Trial Judgement, para. 1459.

population.[684] Furthermore, the *factual* finding in the *AFRC* Trial Judgement was challenged by the Prosecution before the Appeals Chamber in one of its grounds of appeal in the *AFRC* appeal. In the *AFRC* Appeal Judgement, the Appeals Chamber exercised its discretion not to entertain that ground of appeal on the basis that it was "an unnecessary exercise since the Appellants have already been convicted of acts of terrorism and an adequate sentence has been imposed".[685] Thus, even this finding of *fact* in the *AFRC* case remained unresolved at the Appeals Chamber level.

7.13 The Prosecution submits that as a matter of law, acts of sexual violence, including forced marriage and sexual slavery, *can* amount to acts of terrorism. The Appeals Chamber is respectfully requested to settle the law in that regard in the present case, as it clearly is a legal issue of general importance for the development of international criminal law. It is submitted that on the evidence before the Trial Chamber in the present case, it was open to a reasonable trier of fact to conclude, as the Trial Chamber did in paragraphs 1346-1352 of the Trial Judgement, that acts of sexual violence committed by the RUF against women were part of a campaign to terrorise the population.

7.14 The Kallon Defence's general argument is that the intent to spread terror was not the only reasonable inference available from the evidence and that various other inferences were open to the Trial Chamber in respect of the intent.[686] For each District, crimes considered to have amounted to acts of terror are challenged on that basis.[687] The Kallon Defence seeks to isolate each event from its overall context and to suggest a plethora of possible inferences other than the one found by the Trial Chamber to be the only reasonable one based on all of the evidence on

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[684] *AFRC* Trial Judgement, paras 1445-1446, 1455-1459.

[685] *AFRC* Appeal Judgement, paras 172-174.

[686] Kallon Appeal Brief, paras 161 and 168 wrongly referring to *Brdanin* Trial Judgement, para. 353: "The Trial Chamber is satisfied that there is no direct evidence to establish such an understanding or agreement between the Accused and the Relevant Physical Perpetrators and will therefore examine whether an understanding or agreement to that effect between the Accused and the Relevant Physical Perpetrators can be inferred from the fact that they acted in unison to implement the Strategic Plan. In order to draw this inference, it must be the only reasonable inference available from the evidence".

[687] Kallon Appeal Brief, paras 162-164 for Bo District, paras 165-166 Kenema District, para. 167 for Kailahun District; Sesay uses similar reasoning for killings in Kenema District, in Sesay Appeal Brief, paras 162 and 164.

the record.[688] The Prosecution recalls the need to assess items of evidence against the evidence in the case as a whole, particularly in light of the finding that there was a campaign of terror against the civilian population pursuant to which the crimes were committed.[689] In any case, as noted in paragraph 7.9 above, the fact that other purposes may have coexisted simultaneously with the purpose of spreading terror among the civilian population would not disprove this charge.

7.15 The Kallon Defence argues that the violence in Kenema was only directed at Kamajors who were legitimate targets and that there was only an intent on the part of the RUF to intimidate Kamajor combatants "pereeived as a military threat".[690] This submission is contrary to the findings of the Trial Chamber, which made numerous findings based on the evidence before it that eivilians were systematically and directly targeted by AFRC/RUF fighters.[691] The Kallon Defence has not established that the conclusion reached by the Trial Chamber was not reasonably open to it.

7.16 As regards acts of terror committed in Kenema District, the Sesay Defence alleges that the determination of the perpetrators' specific intent was flawed, particularly as it was erroneous for the Trial Chamber to infer the specific intent of unknown perpetrators.[692] The Appeals Chamber has recalled that the specific intent has to be determined "on a case-by-case basis and may be inferred from the circumstances, the nature of the acts or threats and the manner, timing or duration of acts or threats of violence".[693] This is exactly what the Trial Chamber did in this case. The Trial Chamber assessed the factors indicating an intent to spread terror, such as the public display of violence,[694] the proximity of the attacks,[695] the

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688 For example, the Kallon Defence alleges at para. 162 that the burning in Tikonko was committed to flush out any Kamajors there and that the killing of 200 civilians accompanied with the mutilation of a corpse could have been incidental, the town being suspected to be a Kamajor stronghold, at para. 163 that the burning of 30 homes in Sembehun was merely a military tactic to confuse or demoralize armed resistance, or that the proximity of the attacks in Gerihun, Sembehun and Tikonko was also a military strategy.

689 Trial Judgement, paras 1122, 1490, 1981-1982.

690 Kallon Appeal Brief, paras 165 and 167.

691 See for example Trial Judgement, paras 993, 1016, 1036, 1039, 1097, 1122, 1125, 1385, 1445, 1490 and 1981.

692 Sesay Appeal Brief, paras 141-151, in particular, paras 144, 145, 147, 148.

693 *CDF* Appeal Judgement, para. 357.

694 Trial Judgement, paras 1125, 1127, 1355.

systematic nature of the acts and the sentiment of fear expressed by numerous witnesses and taken into consideration by the Trial Chamber. It was entitled to conclude that some of these acts of violence were part of a campaign of terror which the RUF used to control and subdue the civilian population.[696] It was therefore open to the Trial Chamber to hold that all of the crimes found to be committed as part of that campaign had the purpose of spreading terror. The Trial Chamber did not err in considering the circumstances of the crimes committed in each District (Bo, Kenema, Kailahun and Kono) as a whole, with a view to determining whether the specific intent to spread terror was established.

7.17 Paragraph 169 of the Kallon Appeal Brief further argues that the Trial Chamber failed to provide its rationale for finding that the killings perpetrated in Kono District were intended to spread terror.[697] The Prosecution submits that the Trial Chamber considered the fact that civilians in particular were targeted,[698] the public nature of these acts, as well as their systematic nature.[699] The Trial Chamber also clearly referred to its factual findings to infer that these killings were not committed incidentally against civilians, but pursuant to "the execution of policies that promoted violence".[700] The Defence has not established that this conclusion was not reasonably open to the Trial Chamber on the evidence.

7.18 Is it to be noted that the Trial Chamber expressly took into account that "civilian populations are usually frightened by war and that legitimate military actions may have a consequence of terrorising civilian populations".[701] The findings in this case clearly indicate that the Trial Chamber was satisfied that the acts of violence perpetrated by the RUF did not induce extreme fear in the civilian population as a mere side effect or incidentally. Again, the Defence has not established that this conclusion was not reasonably open to the Trial Chamber.

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695 Trial Judgement, paras 1035-1036, 1355.
696 Trial Judgement, paras 1122, 1490, 1352.
697 Kallon Appeal Brief, para. 169.
698 Trial Judgement, para. 1342.
699 Trial Judgement, para. 1343 : "The unlawful killings were all committed widely and openly, without any rationale objective, except to terrorise the civilian population into submission".
700 Trial Judgement, para. 1342.
701 Trial Judgement, para. 120.

7.19 The Sesay Defence alleges in respect of the killings at Cyborg Pit that "the evidence shows that whatever happened did not spread terror".[702] However, it is settled case law that "actual terrorisation of the civilian population is *not* an element of the crime, the acts or threats of violence must be such that they are at the very least capable of spreading terror".[703] This consideration is thus irrelevant.

7.20 Paragraph 166 of the Kallon Appeal Brief and paragraphs 174-176 of the Sesay Appeal Brief also challenge the finding that the enslavement of civilians at Cyborg Pit constituted terror. The Defence has failed to establish how the Trial Chamber erred in distinguishing enslavement which spread terror as a "side-effect"[704] from enslavement as an "act of violence committed with the specific intent to spread terror among the civilian population",[705] as found to be the case in relation to Cyborg Pit.

7.21 Paragraph 168 of the Kallon Appeal Brief argues that there was no evidence to show that Kallon knew about acts of terror and that "even assuming that Kallon knew about some of the atrocities, the evidence could also reasonably lead to the inference that he chose to ignore their commission – even those done with the requisite specific intent – to avoid conflict with other high ranking members of the RUF who condoned the actions". In response, it is submitted that the *mens rea* requirement for acts of terror includes recklessness.[706]

7.22 The arguments in paragraphs 170-171 of the Kallon Appeal Brief in respect of burning as an act of terror are addressed in Section 2.E of this Brief.

C. Collective punishment

7.23 This part of this Response Brief responds to **Sesay's Ground 30**, which contends that the Trial Chamber erred in law and fact in concluding beyond a reasonable doubt that the crimes found to have been "committed in Kenema Town against victims suspected of collaborating with the Kamajors" were "targeted in order to punish them for allegedly providing assistance to enemies of the RUF, an action

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[702] Sesay Appeal Brief, para. 163; see also para. 150 using the same argument.
[703] Trial Judgement, para. 117 citing CDF Appeal Judgement, para. 352.
[704] Trial Judgement, para. 1359.
[705] Trial Judgement, para. 1130.
[706] Trial Judgement, para. 118 citing *CDF* Appeal Judgement, para. 355.

for which some or none of them may or may not have been responsible" and that these crimes therefore constituted collective punishment, as charged in Count 2.[707]

7.24 The Sesay Defence contends that the crime of collective punishment is a specific intent crime and that as such the specific intent of each individual crime should have been examined before the Trial Chamber made a conclusion in convicting Sesay. The Sesay Defence contends that the Trial Chamber failed to do so and therefore erred in law in failing to examine the circumstances of each individual crime thereby excluding all other "reasonable inferences"[708].

7.25 In substantiating this contention, the Sesay Defence alleges that the Trial Chamber's conclusion that "the victims were targeted in order to punish them for allegedly providing assistance to enemies of the RUF, an action for which some or none of them may or may not have been responsible", was to be understood as meaning that the victims were "not targeted because they were part of a group; not targeted indiscriminately and not punished collectively: they were punished individually for a suspicion, reasonable or otherwise, that they were betraying the AFRC/RUF".[709]

7.26 In response, the Prosecution submits that it is clear from the Trial Judgement that the Trial Chamber did consider, separately in relation to each crime, whether an intent to punish collectively had been proved.

7.27 The Trial Chamber correctly articulated the elements of collective punishment in paragraphs 122 to 128 of the Trial Judgement.

7.28 The Trial Chamber considered the intent of the perpetrator in relation to each individual crime. For instance, in relation to certain crimes in Kono District, the Trial Chamber specifically held that "the Prosecution has not adduced evidence to prove the particular intent of the perpetrators",[710] and held accordingly that the elements of collective punishment had not been proven in relation to those crimes.[711] In relation to other crimes the Trial Chamber similarly found that it had not been established "that the perpetrators acted with the intent of collectively

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707 Sesay Notice of Appeal, para. 62; Sesay Appeal Brief, paras 152-155.
708 Sesay Appeal Brief, para. 152.
709 Sesay Appeal Brief, para. 152.
710 Trial Judgement, para. 1370.
711 Trial Judgement, para. 1370.

punishing the civilians for acts for which they may or may not have been responsible".[712] The Trial Chamber also specifically found that even where the elements of acts of terror are satisfied, this did not necessarily mean that the elements of collective punishment were satisfied, as an intent to terrorise the civilian population is not the same thing as an intention to collectively punish the civilian population.[713]

7.29 Conversely, where the Trial Chamber found the elements of collective punishment to be satisfied, it did so on the basis of a finding that "the victims of the crimes were targeted in order to punish them for allegedly providing assistance to enemies of the RUF, *an action for which some or none of them may or may not have been responsible*".[714]

7.30 The Trial Chamber clearly considered whether this requirement was satisfied in relation to each particular crime. Thus, in the case of Kenema District and Kailahun District, for instance, certain crimes committed in that district were found to satisfy the elements of collective punishments, while other crimes in the same district were held not to do so.[715]

7.31 The Sesay Defence suggests that victims may not have been targeted indiscriminately because they were part of a group, but instead punished individually for a suspicion, reasonable or otherwise, that they were betraying the AFRC/RUF. It is submitted that it is clear from the Trial Judgement that the Trial Chamber understood the elements of collective punishment and that the Trial Chamber must therefore have been satisfied that the victims were not specifically targeted on the basis of a belief that the victims were actually assisting enemies of the RUF. When paragraphs 1132 and 1133 of the Trial Judgement are read together with the paragraphs dealing with the specific crimes in question (paragraphs 1057, 1059, 1065, 1078, 1052 and 1069), it is submitted that there is no basis for suggesting that the Trial Chamber's findings necessarily left open the

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712 For instance, Trial Judgement, paras 1040, 1495.

713 Trial Judgement, para. 1371.

714 Trial Judgement, para. 1133 (emphasis added). See also para. 1492.

715 Kenema District: compare Trial Judgement, para. 1133 (elements satisfied in relation to certain crimes), paras 1134-1135 (elements not satisfied in relation to other crimes). Kailahun District: compare Trial Judgement, para. 1492 (elements satisfied in relation to certain crimes), paras 1494-1495 (elements not satisfied in relation to other crimes).

possibility that each victim was individually targeted for things that that specific victim was individually suspected of having done.

7.32 In response to paragraphs 153 to 155 of the Sesay Appeal Brief, relating to Sesay's JCE liability for the crimes of collective punishment, the Prosecution relies on its submissions on JCE in paragraphs 5.20 to 5.27of this Response Brief in so far as it applies to the arguments concerning JCE liability in this ground of appeal. The Sesay Defence argues that the Trial Chamber's conclusion, that "control exercised by the AFRC and RUF over Kenema Town during the junta period created a permissive environment in which the fighters could commit crimes with impunity",[716] necessarily created a presumption that any crimes were committed for personal reasons, rather than in pursuance of the common criminal purpose.[717] That is not the case. The actual direct perpetrator of a crime within a JCE need not be a participant in the JCE: the participants in the JCE can use third persons as "tools" in executing the JCE.[718] It is necessarily implicit in the Trial Chamber's findings that the participants in the JCE contemplated the commission of crimes as a means of achieving their common purposes, and that one means of achieving this was to create a "permissive environment" that would lead fighters (who may not themselves have been members of the JCE) to commit crimes. In such circumstances, although the direct perpetrator, from his own perspective, is acting for purely personal reasons rather than to execute a JCE, the crime in question is one that is within the JCE, for which participants in the JCE are individually responsible.[719] The Trial Chamber found that Sesay was a participant in the JCE and shared the intent of the common purpose. It was reasonably open to the Trial Chamber to so find.

7.33 In any event, the Prosecution submits that on the Trial Chamber's findings there was a clear link between the crimes in question and JCE members. The Trial Chamber expressly found that "non-members [of the JCE] who committed crimes were sufficiently closely connected to one or more members of the joint criminal

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716 Trial Judgement, para. 1100.
717 Sesay Appeal Brief, para. 153.
718 *Martić* Appeal Judgement, para. 171 (cited in Trial Judgement, para. 1992); *Brđanin* Appeal Judgement, para. 418. See further paragraphs 5.20-5.27 above.
719 See further paragraph 5.25 above.

enterprise acting in furtherance of the common purpose that such crimes can properly be imputed to all members of the joint criminal enterprise when the other conditions for liability are fulfilled"[720] Again, on the evidence this finding was one that was open to a reasonable trier of fact to reach.

7.34 The Sesay Defence further argues that no reasonable trier of fact could conclude that Bockarie remained a member of the JCE when these crimes were committed. The Prosecution submits that there was evidence on the basis of which it was open to a reasonable trier of fact to conclude that the crimes which the Trial Chamber found to have been committed by Bockarie were committed within the common purpose and were not committed for purely personal reasons. The Trial Chamber found that there was a joint AFRC/RUF administration in Kenema Town within a week of the coup.[721] The Trial Chamber further found that Bockarie was living in Kenema town where he remained until the ECOMOG intervention. From Kenema town, Bockarie communicated over the radio with RUF forces all over the county to ensure that co-operation continued.[722]

7.35 Sesay's Ground 30 should therefore be dismissed in its entirety.

D. Unlawful killings

7.36 This part of this Response Brief responds to **Sesay's Ground 31**, **Kallon's Ground 17** and **Gbao's Ground 9**. Kallon's Ground 17 is argued in the submissions on Kallon's Grounds 2, 8, 11 and 12.[723]

(i) Sesay's Ground 31

7.37 The Defence claims that the Trial Chamber erred in finding beyond a reasonable doubt that there were killings in the Tongo Field area, and alternatively, that it was unreasonable for the Trial Chamber to find that these unlawful killings constituted acts of terrorism.[724] The second of these Defence submissions is dealt with in Section 7.B of this Response Brief, above.

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720 Trial Judgement, para. 1992.
721 Trial Judgement, para. 1987.
722 Trial Judgement, para. 1989.
723 Kallon Appeal Brief, para. 172.
724 Sesay Appeal Brief, para. 156, referring to Annex B of the Sesay Appeal Brief.

7.38 The Sesay Defence argues that Trial Chamber erred in not accepting the Defence explanations concerning the deaths at the Cyborg Pit, namely that "people died only when the sands of the pit collapsed on them." The Sesay Defence bases its contention mainly on the argument that "the evidence proffered by TF1-035 and TF1-045 was incapable of rebutting this inference."[725] The issues of witness credibility and the necessity of corroboration,[726] of the alleged failure to take into account relevant evidence[727] and of hearsay evidence are dealt with in Sections 4 A and B of this Brief. The Defence have not established that the Trial Chamber's finding of fact was one that no reasonable trier of faet could have reached on the evidence as a whole.

7.39 Last, the Sesay Defence alleges that "the Trial Chamber did not find that any member of the JCE, or his tool, committed this killing or otherwise had the requisite intent to spread terror."[728] This submission is not supported by any arguments. Furthermore, it is not correct. Reference is made to the findings in paragraphs 1127 to 1130 of the Trial Judgement, especially paragraph 1129. In cases where the direct perpetrator is not a JCE-member but a tool of the JCE, it is not necessary to prove that the direct perpetrator had the intent to terrorise the civilian population, but only that members of the JCE shared this common purpose. At paragraphs 1981-1982 of the Trial Judgement, the Trial Chamber found that on the evidence, this requirement was satisfied in this case. The Defence have not established that the Trial Chamber's findings of fact could not have been reached by any reasonable trier of fact. (Reference is also made to Section 7.B above.)

7.40 This ground of appeal should accordingly be rejected.

(ii) Ground 9 of Gbao's Appeal

7.41 The Gbao Defence contends that the Trial Chamber erred in law in paragraph 2156 of the Trial Judgement in finding that the killing of the *hors de combat*

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[725] Sesay Appeal Brief, para. 157, referring to Sesay Final Trial Brief, paras 634-638.
[726] Sesay Appeal Brief, paras 158-161.
[727] Sesay Appeal Brief, para. 159.
[728] Sesay Appeal Brief, para. 164.

AFRC soldier Kaiyoko constituted the crime against humanity of murder (Count 4). The Gbao Defence argues that the Trial Chamber contradicted itself in its legal findings, in which it stated that it is "trite law that an armed group cannot hold its own members as prisoners of war".[729]

7.42 The Trial Chamber found that the chapeau elements (general requirements) of crimes against humanity are as follows:

(i) There must be an attack;

(ii) The attack must be widespread or systematic;

(iii) The attack must be directed against any civilian population;

(iv) The acts of the Accused must be part of the attack; and

(vi) The Accused knew or had reason to know that his or her acts constitute part of a widespread or systematic attack directed against any civilian population.[730]

7.43 The Trial Chamber found that these general requirements were satisfied in this case.[731]

7.44 The general requirements of crimes against humanity are not the same as the general requirements for war crimes. Paragraphs 1451 to 1454 of the Trial Judgement, on which the Gbao Defence relies, deal with the latter and not the former. It is not a requirement of the chapeau elements for crimes against humanity that the perpetrator and the victim of the crime must belong to opposing parties in an armed conflict. Indeed, it is not a requirement for crimes against humanity that there be an armed conflict at all—crimes against humanity can also be committed in peacetime, provided that there is a widespread and systematic attack against a civilian population.[732]

7.45 The Trial Chamber found that where a person *hors de combat* is the victim of an act which objectively forms part of a broader attack directed against a civilian

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729 Gbao Appeal Brief, para. 238.

730 Trial Judgement, para. 76.

731 Trial Judgement, paras 942-963

732 Trial Judgement, para. 77 *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-T-785, "Judgement", Trial Chamber, 2 August 2007 ("***CDF* Trial Judgement**"), para. 111; *Tadić* Appeal Judgement, para. 251; *Prosecutor v. Tadić*, IT-94-1, "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction", Appeals Chamber, 2 October 1995 ("***Tadić* Jurisdictional Appeal Decision**"). *Kunarac* Appeal Judgement, para. 86.

population, this act may amount to a crime against humanity, and that therefore persons *hors de combat* may form part of the civilian population for the purpose of crimes against humanity.[733] That conclusion is consistent with the jurisprudence of international criminal tribunals.[734]

7.46 It is therefore submitted that Gbao Defence has established no error, and that this ground of appeal should be dismissed.

E. Sexual violence

7.47 This part of this Response Brief responds to **Sesay's Ground 39** and **Gbao's Ground 10**.

7.48 In response to the contentions in paragraphs 294-295 of the Sesay Appeal Brief, alleging improper pleading of the Indictment, the Prosecution relies on Section 2.F of this Response Brief.

7.49 The Sesay Defence contends that "the Prosecution was unable to eall evidence for a single victim who claimed to have been abducted and forcibly married during the indictment period in (or taken to) Kailahun" and that "this ought to have been dispositive of the issue".[735] At paragraphs 293 and 298 of the Sesay Appeal Brief, the Sesay Defence challenges the testimony of TF1-314 and TF1-093 who were found to have been victims of forced marriages and sexual slavery.[736] TF1-314 and TF1-093 were called by the Prosecution and related their experiences in great detail. [redacted] Her evidence therefore clearly put her within the Indictment period.[737] [redacted] It is recalled that the Trial Chamber found the crimes under Counts 6 to 9 to be of a "continuous nature".[739] It is submitted that this is correct as a matter of law, and that such

733 Trial Judgement, para. 82.
734 *Martić* Appeal Judgement, paras 308-309 and 313; *Prosecutor v. Mrkšić et al.*, IT-95-13/1-A, "Judgement", Appeals Chamber, 5 May 2009 ("***Mrkšić* Appeal Judgement**"), para. 29.
735 Sesay Appeal Brief, para. 293.
736 Trial Judgement, paras 1460-1464.
737 Trial Judgement, para. 1460.
738 Trial Judgement, para. 1462.
739 Trial Judgement, para. 2173.

crimes will be within the Indictment period if they began before the Indictment period and continued into the Indictment period.

7.50 As regards the credibility of TF1-093, the Sesay Defence contends that "the Trial Chamber failed to adhere to its own admonishment, that corroboration was required, especially as regards her own forced marriage".[740] This is not what the Trial Chamber said. The Trial Chamber explained that the testimony of TF1-093 was taken into account as far as her forced marriage was concerned, but that corroboration was needed otherwise.[741]

7.51 [redacted] It is submitted that the Defence cannot seek to challenge a verdict of a Trial Chamber before the Appeals Chamber on the basis of evidence that was not before the Trial Chamber, otherwise than in accordance with the procedure under Rule 115 of the Rules of Procedure and Evidence. In any case, even if it were the case that TF1-314 subsequently admitted to not telling the truth about one specific aspect of her evidence, this would not mean that the entirety of her evidence had to be disregarded as not being credible. The Trial Chamber accepted as credible her testimony in relation to her own forced marriage and the widespread practice of force marriages throughout Kailahun District during the Junta period, whilst only relying on other aspects of her testimony where it was corroborated,[743] and dismissing certain portions of her testimony that were considered "unsubstantiated".[744] It is submitted that there is no basis for suggesting that the

740 Sesay Appeal Brief, para. 301.

741 Trial Judgement, para. 603: "Although much of her testimony has been rejected, the Chamber accepts the core of her testimony, particularly as it relates to her own experiences, such as the time she spent as a 'bush' wife. The Chamber has otherwise relied upon her evidence to the extent that it was corroborated by reliable witnesses and is consistent with the general story adduced by other evidence".

[redacted]

743 Trial Judgement, para. 603, quoted above.

744 Trial Judgement, paras 593-594: "The Chamber has evaluated the concerns of the Defence and has decided that most of TF1-314's testimony is credible and will be accepted. The Chamber notes that the witness may have been confused at times regarding times, locations and troop movement. The witness provided unsubstantiated evidence concerning certain events which will not be accepted by the Chamber. Overall, the Chamber opines that the evidence of TF1-314 is largely credible." Portions

fact that she did not tell the truth about one specific aspect of her testimony, if known to the Trial Chamber, would have made a substantial difference to the Trial Chamber's evaluation of her testimony. None of the cases cited support the Defence conclusion that TF1-314's testimony should be disregarded in its entirety.[745]

7.52 The Sesay Defence abundantly criticizes the approach taken by the Trial Chamber in relation to victim evidence in respect of Counts 7 and 9. Paragraph 296 of the Sesay Appeal Brief claims that "evidence of victimization [...] was accepted as reliable" and consequently "subverted due process". It is submitted that such "victimization" evidence was directly relevant for the crime of forced marriage, as it went directly to proof of the great suffering, or serious physical or mental injury endured by the victim, an element of the crime of other inhumane act.[746] Evidence of the victimisation of such witnesses was therefore clearly material and relevant and admissible. It was a matter for the Trial Chamber in assessing the evidence as a whole whether to accept that evidence as reliable. Mere disagreement with the Trial Chamber's evaluation of the evidence is insufficient to establish an appealable error. The arguments presented in paragraph 297 of the Sesay Appeal Brief relating to the assessment of victim witnesses are addressed in Section 4 of this Response Brief.

7.53 The Sesay Appeal Brief further argues at paragraph 293 that "the Trial Chamber created a strict offence in which all relationships between the men and women in Kailahun during the civil war were assessed as abusive and criminal, irrespective of the evidence to the contrary". The Prosecution submits that there is no basis for this submission. The Trial Chamber consistently stated that it was "an unknown

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of her testimony not accepted related to her possession of a gun. See TF1-314, Transcript 7 November 2005, pp. 12-14 referred to in para. 593 of the Judgement.

745 For instance, see *Prosecutor v. Seromba*, ICTR-2001-66-I, "Judgement" Trial Chamber, 13 December 2006 ("***Seromba* Trial Judgement**"), para. 92: the witness had lied before the Trial Chamber in the same case.

746 *AFRC* Appeal Judgement, paras 199-200. For example, evidence of stigmatization of the victim in their communities was relevant to establish the commission of the crime. The Appeals Chamber also held at para. 184 that "the determination of whether an alleged act qualifies as an 'Other Inhumane Act' must be made on a case-by-case basis taking into account the nature of the alleged act or omission, the context in which it took place, *the personal circumstances of the victims including age, sex, health, and the physical, mental and moral effects of the perpetrator's conduct upon the victims*" (emphasis added).

number of women" who were captured and forced into marriages with RUF fighters.[747] The Trial Chamber did not say that *all* the women in Kailahun who were in any form of relationship with a member of the RUF were the victims of a crime perpetrated by the person with whom they were in a relationship. An "unknown number of women" does not mean "all women" or "all women in relationships with members of the RUF". There was evidence before the Trial Chamber on the basis of which it was open to the Trial Chamber to find that there was a general and widespread practice of forced marriages, including evidence of insider witnesses, victim witnesses and an expert report on forced marriages.[748] The Trial Chamber is not required to establish an exact number of women and girls against whom the crime was committed.

7.54 Both the Sesay Defence and Gbao Defence raise different issues regarding the presumption of **absence of genuine consent** found by the Trial Chamber.[749]

7.55 The Gbao Defence argues that Gbao's conviction could only stand "if women would have to be presumed to have been raped or forcefully married".[750] However, the Trial Chamber only resorted to a presumption in relation to the consent of some of the women against whom the crime was committed, where it was found that they could not have possibly genuinely expressed their consent, given the prevailing coercive circumstances. It is submitted that consent is not an element of the crime of sexual slavery or enslavement.[751] The two elements forming the *actus reus* are (1) the imposition of powers of ownership or similar deprivation of liberty and (2) the perpetration of sexual acts.[752] The Trial Chamber clearly held that "the lack of consent of the victim to the enslavement or to the sexual acts was not an element to be proved by the Prosecution".[753] Although it is an element considered to be relevant in determining whether the accused exercised

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747 Trial Judgement, paras 1409-1413, 1465, 2156 (Section 5.1.2).

748 See Trial Judgement, paras 1409-1411.

749 Sesay Appeal Brief, paras 300, 302-305 and Gbao Appeal Brief, paras 246-251. In particular, they challenge the finding made by the Trial Chamber, at Trial Judgement, para. 147, that "[...] in hostile and coercive circumstances of this nature, there should be a presumption of absence of genuine consent to having sexual relations or contracting marriages with the said RUF fighters".

750 Gbao Appeal Brief, para. 250.

751 See Gbao Appeal Brief, para. 246.

752 Trial Judgement, paras 158-159.

753 Trial Judgement, para. 163, citing *Kunarac* Appeal Judgement, para. 120.

a power attaching to the right of ownership, the Trial Chamber decided that the case at hand warranted the application of the ICTY *Kunarac* finding that "circumstances which render it impossible to express consent would be sufficient to presume the absence of consent".[754] As to the crime of forced marriage, it requires that a conjugal relationship was imposed on the victim.[755] It is submitted that by analogy, consent was also to be deemed absent given that the Trial Chamber found that the same coercive circumstances as sexual slavery existed.[756] The Trial Chamber was entitled to adopt this approach.

7.56 The Gbao Defence claims that the absence of consent can be presumed only for situations of confinement.[757] However, it is settled case law that "similar deprivation of liberty may cover situations in which the victims may not have been physically confined, but were otherwise unable to leave as they would have nowhere else to go and feared for their lives".[758] This is precisely the situation in which women who have been abused found themselves according to the own findings of the Trial Chamber.[759]

7.57 The Prosecution contests the Defence's assertions that there was no coercive environment in Kailahun on the ground that it was not a combat zone as such.[760] There is no need for actual fighting or violence for there to be an environment of coercion. On the findings of the Trial Chamber, Kailahun was an area fully under

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754 Trial Judgement, para. 163, citing *Kunarac* Appeal Judgement, para. 120. See also *AFRC* Trial Judgement, para. 709 citing *Prosecutor v Kunarac et al.*, IT-96-23-T&23/1, "Judgement", Trial Chamber, 22 February 2001 ("***Kunarac* Trial Judgement**"), para. 542, *Kunarac* Appeal Judgement, paras 129-131, Update to Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000.

755 Trial Judgement, paras 1472-1473.

756 See Trial Judgement, paras 1475-1463.

757 Gbao Appeal Brief, paras 247-248.

758 Trial Judgement, para. 162 citing *Kunarac* Trial Judgement, para. 750. See also *AFRC* Trial Judgement, para. 709. The footnote to this finding notably says: "This distinction was also insisted upon by some delegations to the Rome Statute Working Group on Elements of Crimes to ensure that the provision did not exclude from prohibition situations in which sexually abused women were not locked in a particular place but were nevertheless "deprived of their liberty" because they have no where else to go and fear for their lives ".

759 Trial Judgement, paras 1410-1413.

760 Sesay Appeal Brief, paras 300 and 302; Gbao Appeal Brief, para. 251.

RUF control, and its civilian population was strictly under RUF rule.[761] It is submitted that the organization of a stable and established administration such as the RUF in Kailahun is no bar to the presence of coercion. On the contrary, it may institutionalize such oppression and duress.

7.58 Contrary to the Sesay Defence claims, pre-Indictment circumstances were not considered decisive,[762] but were considered merely indicative of a continuing practice of abduction and imposition of a forced conjugal relationship during the Indictment period.

7.59 The argument of the Sesay Defence that civilians remained in Buedu for fear of being killed by Kamajors[763] further confirms the existence of circumstances creating a fearful environment and blurring any assessment of consent. The fact that "the threat also emanated from outside agencies"[764] is irrelevant.

7.60 The Prosecution submits that it was reasonably open to the Trial Chamber to find that the circumstances resulting from the RUF being in total control of Kailahun gave women a limited decision making power as to their prospects and their sexuality, all the more given that it was found that they were specifically targeted by RUF fighters.[765] It was therefore open to the Trial Chamber to consider that it was not possible to assess and establish the genuine consent of women who were victims of crimes of a sexual nature or of forced marriage.

7.61 Both the Sesay and Gbao Defence finally argue that the conviction on Count 9 was based solely on the expert report, which was "improperly used to determine ultimate issues".[766] It is submitted that the Trial Chamber was entitled to consider the expert report together with the other evidence in the case in determining the element of the crime relating to the humiliation, degradation and violation of the

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761 See for example Trial Judgement, paras 650, 679 (there was a "RUF security apparatus" [...] responsible for controlling the movements and activities of civilians"), 700 ("OSC was responsible for the enforcement of discipline and law and order"), 1414 ("captured civilians were placed in the custody of the G5 for screening"), 1416 (there was a "system of passes to control movement [...] Civilians were not free to move around Kailahun District"), "the pass system was [...] also a means of exercising control").

762 Sesay Appeal Brief, para. 304.

763 Sesay Appeal Brief, para. 305.

764 Sesay Appeal Brief, para. 305.

765 Trial Judgement, para. 1410: "The RUF routinely captured women during combat operations on villages in Kailahun District". See also paras 1465, 1493 referring to paras 1346-1352.

766 Sesay Appeal Brief, paras 298-299. See also Gbao Appeal Brief, para. 252.

dignity of the victim, as the report contained relevant information as regards the experiences of many victims of forced marriages in Kailahun. The expert report itself did not draw any conclusions as to the responsibility of any of the Accused.[767] Thus, in the *AFRC* case, the Appeals Chamber, in its assessment of the distinction between forced marriage and sexual slavery, said expressly that it "note[d] the evidence and report of the Prosecution expert [redacted] which demonstrates the physical and psychological suffering to which victims of forced marriage were subjected during the civil war in Sierra Leone".[768] This is an example of the permissibility of the use of an expert report for that purpose.

7.62 The Sesay Defence contends in addition that expert witness TF1-369 "could not categorized as an expert witness" and was biased as "the extraneous interests of the witness were aligned with the Prosecution's cause".[769] The Prosecution submits that issues as to the credibility and reliability of expert witnesses, including such issues as to whether the expert witness has any particular bias, are issues for the Trial Chamber to assess. The Prosecution submits that the Defence has not established that the Trial Chamber's assessment of the expert evidence was one that was not open to a reasonable trier of fact.

F. Physical violence

7.63 This part of this Response Brief responds to **Kallon's Ground 19**.[770]

7.64 The Kallon Defence complains that Kallon was convicted for crimes in Counts 10-11 in locations in Kono District such as Penduma, Yardu, Kayima, Wendedu and Sewao that were not pleaded in the Indictment and for which he lacked notice,[771] and that he was also convicted for unproven crimes in Kenema District of which he had no notice.[772] It is submitted that these complaints should be dismissed.

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767 See paragraphs 4.88 to 4.96above.
768 *AFRC* Appeal Judgement, para. 192.
769 Sesay Appeal Brief, para. 299.
770 Kallon Amended Notice of Appeal, paras 20.1-20.2; Kallon Appeal Brief, paras 174-176. Kallon states that in support of this Ground, he also relies on his submissions under Grounds 2 and 11 on JCE: Kallon Appeal Brief, paras 174 and 176. Kallon's Grounds 2 and 11 are addressed elsewhere in this Response Brief.
771 Kallon Appeal Brief, paras 174-175.
772 Kallon Appeal Brief, para. 176.

7.65 The Trial Chamber held that it had upheld the form of the pleading of the locations of criminal acts in the Indictment in its pre-trial decisions and found that the Defence had not demonstrated the existence of a clear error of reasoning in the *Sesay* Form of Indictment Decision.[773] Kallon does not allege any error in the Trial Chamber's finding in this regard.

7.66 In any event, contrary to the Kallon Defence's claim that the prejudice was never cured,[774] it is submitted that the Indictment had been cured in this regard by clear, consistent and timely disclosure, and that Kallon's ability to prepare his Defence was not materially impaired.[775] The Prosecution's Opening Statement referred to these crimes occurring in Penduma.[776] Further, it was standard practice in the RUF trial for witness statements in this case and transcripts from the *AFRC* trial used in this case, to be disclosed to the Defence[777] and for those statements and transcripts to also be filed with the Court,[778] long before the witness testimony.[779] The statements or transcripts referred to the crimes in Counts 10-11 in the particular locations; the crimes were also referred to in witness summaries in the Prosecution Supplemental Pre-trial Brief.[780] Further, there was no objection from Kallon when the evidence was adduced in Court.

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773 Trial Judgement, para. 422.

774 Kallon Appeal Brief, para. 174.

775 *CDF* Appeal Judgement, para. 443.

776 Transcript, 5 July 2004, pp. 28-29.

777 Prosecution records show that disclosures were made to the Defence as follows: TF1-217, 19/11/2003, 30/6/2004; TF1-197, 19/11/2003, 26/8/2004, 1/9/2004, 20/9/2004; TF1-195, 19/11/2003, 18/3/2004, 6/9/2004; TF1-129, 26/5/2003, 23/2/2005, 31/3/2005; TF1-122, 26/5/2003, 17/3/2004, 21/1/2005, 23/2/2005, 21/3/2005, 2/5/2005, 31/5/2005, 28/6/2005.

778 Statements of witnesses expected to testify were filed with Court and made available to the parties prior to the start of each of the 7 sessions constituting the Prosecution case.

779 The witnesses testified on various dates as follows: TF1-217 on 22/7/04; TF1-197 on 21/10/04-22/10/04; TF1-195 on 01/02/05; TF1-129 on 10/05/05-12/05/05; TF1-122 on 07/07/05-08/07/05.

780 For crimes in Penduma, see: TF1-217 statement of 11.9.2003; AFRC transcript, 17 October 2005, pp.15, 24-26. The crimes in Yaidu were referred to in the witness summary of TF1-197 in the Prosecution Supplemental Pre-trial Brief and the statement of TF1-197 of 23.09.2003. The crimes in Sawoa were referred to in the witness summary of TF1-195 in the Prosecution Supplemental Pre-trial Brief and the witness statements of TF1-195 of 24.09.2003 and 3.07.2008. The allegations testified to by TF1-129 were contained in TF1-129's witness summary contained in the Prosecution Supplemental Pre-trial Brief. TF1-112 referred to in the Kallon Appeal Brief, para. 176, did not testify in the in this case; the allegations testified to by TF1-122 were contained in TF1-122's witness summary contained in the Prosecution Supplemental Pre-trial Brief. The Prosecution Supplemental Pre-trial Brief was filed with Court on 21 April 2004.

7.67 Contrary to the Kallon Defence's submissions,[781] to be responsible for the crimes in Counts 10-11 as a participant in the JCE, it is not necessary to demonstrate that Kallon made a substantial contribution specifically to the commission of the Count 10-11 crimes. It is only necessary to establish that Kallon made a substantial contribution *to the JCE*.[782] Provided that he made a substantial contribution *to the JCE*, he will be individually criminally responsible for all crimes (i) that were contemplated by the JCE participants to be committed as a means of giving effect to the common purpose, or (ii) that were a natural and foreseeable consequence of the effecting of the common purpose. A participant in a JCE will be individually criminally responsible for all such crimes, even if he did not make a substantial contribution specifically to each and every one of those crimes. Kallon was found to have actively participated in the furtherance of the common purpose and thereby to have significantly contributed to the commission of crimes including those in counts 10-11.[783]

G. Child soldiers

7.68 This part of this Response Brief responds to **Sesay's Ground 43 and Kallon's Ground 20**, which challenge the convictions of Sesay and Kallon on Count 12 for "planning the use of children under the age of 15 by the RUF to actively participate in hostilities".[784]

7.69 Paragraphs 321-323 of the Sesay Appeal Brief argue that the "Trial Chamber failed to make any or adequate finding as to whether use or conscription by others of child soldiers was within the framework of any plan made by Sesay". However, the Trial Chamber clearly found that the crime of conscription and use of child soldiers was part of the common plan pursued by the joint criminal enterprise in which Sesay was found to be a participant.[785] Hence, on the Trial Chamber's findings there clearly was a plan in the framework of which the crime of

781 Kallon Appeal Brief, paras 175-176.
782 Trial Judgement, para. 261.
783 Trial Judgement para. 2102 specifically, and paras 2093-2103 generally (for Kono District); Trial Judgement, paras 2003-2008 (for Kenema District).
784 Trial Judgement, paras 2230 and 2234.
785 See Prosecution Appeal Brief, paras 3.19-3.27, referring in particular to Trial Judgement, paras 1698, 1982, 1985, 2070.

conscripting/using children under the age of 15 in hostilities was found to have been committed by RUF forces. The Sesay Defence seems to imply the necessity for "a plan made by Sesay"[786] or for it to be established that the plan was "Sesay's design".[787] However, this is not a legal requirement. It is sufficient that Sesay "contributed substantially to the planning of an operation in which it is intended that crimes will be committed" for the *actus reus* to be satisfied.[788] Paragraph 3.69 of the Prosecution Appeal Brief sets out the settled case law on planning. This Appeals Chamber has also held that "an individual may incur responsibility for planning when his level of participation is substantial even though the crime may have actually been committed by another person".[789]

7.70 Paragraph 325 of the Sesay Appeal Brief argues that the "Trial Chamber failed to convincingly approximate the number of child soldiers used pursuant to Sesay's plan". However, there is no need for the Trial Chamber to make a finding as to the precise number of victims of a large scale and systematic crime, which will typically be impossible. The Appeals Chamber has held that "the crime of enlisting children under the age of 15 years into armed forces or groups and of using them to participate actively in hostilities may be committed irrespective of the number of children enlisted by the accused person".[790] An identification of an exact number of victims is immaterial given the consistent practice found to have existed within the RUF in relation to child recruitment and use.

7.71 Paragraph 326 of the Sesay Appeal Brief argues that one of the possible inferences from the evidence, other than Sesay's involvement in "planning" the crime, was that Sesay "adapted his conduct to an existing strategy to use child soldiers, the formulation and execution of which was planned by others". Effectively, this argument merely requests the Appeals Chamber to substitute its evaluation of the evidence for that of the Trial Chamber. On the basis of the evidence before it, it was reasonably open to the Trial Chamber to conclude that it was satisfied beyond reasonable doubt that Sesay contributed substantially to the planning of the crime.

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786 Sesay Appeal Brief, para. 321.
787 Sesay Appeal Brief, para. 323.
788 Prosecution Appeal Brief, para. 3.69.
789 *AFRC* Appeal Judgement, para. 301.
790 *CDF* Appeal Judgement, para. 125.

The Trial Chamber did so conclude. In so concluding, the Trial Chamber necessarily excluded any alternative hypothesis consistent with Sesay's innocence. For the Sesay Defence to argue now that there is an alternative hypothesis is to seek to reargue the merits of the case before the Appeals Chamber.

7.72 The reasoning of the Trial Chamber was as follows. After having found that the practice of forced recruitment dated from the pre-Indictment period,[791] the Trial Chamber went on to explain how Sesay was active in this continuing pattern and only then concluded that effectively his conduct amounted to planning, as he had contributed and participated in the execution of the scheme set up by the RUF to recruit, train and use child soldiers in their ranks.[792]

7.73 It is submitted in any case that the acceptance by the Sesay Defence that Sesay "adapted" his conduct to the existing strategy amounts to accepting that Sesay at least aided and abetted the crime by tacit approval and by providing his assistance to its continued commission.

7.74 Paragraphs 326 and 327 of the Sesay Appeal Brief argue that the Trial Chamber erred in law and fact in considering that the orders issued by Sesay that young boys should be trained at Bunumbu constituted planning the use or conscription of child soldiers. Paragraph 330 of the Sesay Appeal Brief also argues that it was a legal or factual error to conclude that the receipt of reports from Bunumbu substantially contributed to the crimes. However, the Trial Chamber did not find that these acts *individually or in isolation* amounted to planning as such, and the Prosecution submits that the Sesay Defence takes an erroneous interpretation of the Trial Judgement. A close reading of paragraphs 2226 to 2228 of the Trial Judgement confirms that the approach taken by the Trial Chamber was to consider the various pieces of evidence relevant to Sesay's contribution to the execution of the system of conscription and use. The Trial Chamber's ultimate finding was based on all of the relevant evidence as a whole.

7.75 Paragraphs 328-329 and 331-332 of the Sesay Appeal Brief challenge the credibility of TF1-362 and TF1-141 as well as the findings made by the Trial

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791 Trial Judgement, para. 1615.
792 Trial Judgement, paras 2223-2230.

Chamber on the basis of their testimony in respect of Sesay's involvement in the RUF training scheme. It is submitted that the Trial Chamber acted within the scope of its discretion in assessing the credibility of these two witnesses, as submitted in Sections 4.B(i) and 4.B(vii) above.

7.76 In relation to Sesay's personal use of children as bodyguards, paragraphs 333-334 of the Sesay Appeal Brief merely reiterate the contention that the Trial Chamber favoured Prosecution evidence instead of considering "cogent [Defence] evidence indicating a complete lack of responsibility on Sesay's behalf'. This point is already dealt with in Section 4.A(ii) of this Response Brief.

7.77 As to **Kallon's Ground 20**, the Kallon Defence first argues that the Trial Chamber "erroneously convicted the accused simply because of his being an officer of the RUF movement which the Chamber found had a system of forced recruitment and use of child soldiers".[793] However, it is clear from its findings that the Trial Chamber did not rely only on Kallon's position of responsibility within the RUF to convict him.[794] Neither did it rely only on his "mere presence".[795] The Trial Chamber explained the extent of Kallon's involvement in the crime, and his position of authority and his presence when children were being abducted or used in hostilities were amongst the factors taken into account.[796] It was within the discretion of the Trial Chamber to take these factors into account. As to the Kallon Defence's challenge of Kallon's seniority during the attack on Koidu in 1998[797], the Prosecution refers to paragraph 6.4 of this Response Brief.

7.78 In general, it is submitted that the Kallon Defence, similarly to the Sesay Defence, misunderstands the reasoning of the Trial Chamber in convicting the Accused for planning the crime. Kallon was found guilty for his substantial contribution to the system of forced recruitment and use as a whole.[798] The Trial Chamber relied on

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793 Kallon Appeal Brief, paras 190-191.
794 Trial Judgement, para. 2232.
795 Kallon Appeal Brief, paras 193 and 191 referring to *CDF* Trial Judgement, para. 962: "the presence of Fofana where child soldiers were also seen is not sufficient by itself to establish beyond reasonable doubt that Fofana had any involvement in the commission of these criminal acts [...]". See also Kallon Appeal Brief, para. 200.
796 Trial Judgement, para. 2232.
797 Kallon Appeal Brief, paras 192-193.
798 Trial Judgement, para. 2231.

different aspects of Kallon's conduct throughout the Indictment period to come to the conclusion that he provided a substantial contribution to planning the execution and maintenance of the recruitment system. The Trial Chamber did not consider that each of Kallon's acts which were taken into consideration in making this assessment amounted *in and of itself* to a substantial contribution. Rather, his conduct as a whole amounted to a substantial contribution. Thus, it is wrong to suggest, as the Kallon Appeal Brief does at paragraphs 192, 194, 200, 203-208, that Kallon was found guilty for each finding on which the Trial Chamber relied to convict him.

7.79 For example, contrary to the Kallon Defence assertions, the Trial Chamber did not find that "Kallon's level of seniority and command position at the material time [...] per se could have played a substantial role in the crime"[799] or that "Kallon made a substantial contribution in the abduction of a large number of children to be sent to RUF camps".[800] The Trial Chamber merely found that "Kallon was senior RUF Commander during the attack on Koidu Town in February 1998 in which children were abducted in large numbers to be sent to RUF camps".[801]

7.80 Furthermore, contrary to the claim at paragraph 195 of the Kallon Appeal Brief relating to the Trial Chamber's reliance on TF1-263, the Trial Chamber did not make any finding implicating Kallon in the abduction of that witness and accordingly did not convict him for his personal role in the conscription of that witness. The Trial Chamber did not address the issue at all. The Kallon Defence points to portions of the testimony of TF1-263 not taken into account by the Trial Chamber and in respect of which it made no factual findings.[802]

7.81 Concerning the training of children, the Kallon Defence argues that there is no evidence of Kallon's involvement in the decision making processes that established the training bases, and no evidence of his involvement in the planning of the abduction of boys and girls subsequently trained.[803] The Prosecution

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799 Kallon Appeal Brief, para. 192.
800 Kallon Appeal Brief, para. 194.
801 Trial Judgement, para. 2232.
802 See Kallon Appeal Brief, para. 194, referring to TF1-263, Transcript 6 April 2005, pp. 28-30 and p. 47.
803 Kallon Appeal Brief, paras 205-206.

submits that the law on planning does not require any showing that Kallon participated in the planning of the detail of every aspect of the operation. He need not have planned necessarily in detail, or at all, the actual crimes that are committed in the course of the operation. Moreover, it is not necessary for there to be direct evidence of the specific contribution that the accused made to the plan in question. Some or all of the elements of a crime may be established circumstantially on the basis of the evidence in the case as a whole.[804] Even if the details of the specific contribution that an accused made to the planning cannot be known, the accused will nonetheless satisfy the elements of planning if it is established beyond a reasonable doubt, on the evidence as a whole, that the accused *did* in fact participate substantially in the planning of the crimes, and that the planning *was* a factor substantially contributing to such criminal conduct. Given that there is no need for direct evidence, the fact that certain witnesses who testified to the training of children (TF1-071, TF1-334 and TF1-362)[805] or to their use in combat (TF1-093)[806] do not mention or implicate directly Kallon in their testimony is irrelevant.

7.82 The Kallon Defence further argues that "the only evidence suggesting a tenuous link between Kallon and a venue where children were trained was rejected by the Chamber".[807] The Defence refers to the Trial Chamber's finding that Kallon brought a group of children for training in 1998.[808] This specific piece of evidence was not rejected by the Trial Chamber. The Trial Chamber considered that it could not *form the basis for a conviction* for personal commission as it was not adequately pleaded in the Indictment.[809] However, the Trial Chamber clearly took this finding into account as an indication of Kallon's contribution to planning, and was entitled to do so.

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804 See *Brđanin* Appeal Judgement, paras 12-13, 25, 337; *Gacumbitsi* Appeal Judgement, paras 72, 115 ("it is also permissible to rely on circumstantial evidence to prove material facts"); *Kamuhanda* Appeal Judgement, para. 241 ("nothing prevents a conviction being based on circumstantial evidence"); *Ntakirutimana Appeal Judgement*, para. 262; *Naletilić and Martinović* Appeal Judgement, paras 491-538.

805 See Kallon Appeal Brief, paras 203-204 and 206.

806 See Kallon Appeal Brief, para. 208.

807 Kallon Appeal Brief, para. 207.

808 Trial Judgement, paras 1638 and 2232.

809 Trial Judgement, paras 2221-2222.

7.83 Paragraph 209 of the Kallon Appeal Brief refers to the Trial Chamber's finding in paragraph 1638 of the Trial Judgement that Kallon and others gave orders that certain "young boys" aged 15 or above be trained. However, this incident was not within the conviction for Count 12 (the victims not being under 15 years of age). The evidence that Kallon ordered certain "young boys" aged 15 or above to be trained was evidence that was relevant, and which the Trial Chamber was entitled to take into account, in considering whether Kallon was also responsible for ordering the training of children under 15.[810]

7.84 The Kallon Defence further contends that the fighters under the age of 10 used by the RUF during the ambush of peacekeepers at Moria, led by Kallon, was an act of personal commission.[811] The Trial Chamber clearly did not consider this as an act of personal commission. It said indeed that "the RUF used children, some as young as 10, [...] to mount an ambush against UNAMSIL peacekeepers." It further clearly established that "the RUF fighters who used the children to participate in this ambush acted with the requisite knowledge and intent".[812] Furthermore, this was an act taken into consideration as one of the factors to infer Kallon's involvement in planning the crime, but Kallon was not convicted for that act in particular. The Prosecution refers to Section 7.H below, which addresses the challenges of the Defence in respect of the reliability of the testimony of Edwin Kasoma[813] and Kallon's superior role in the UNAMSIL ambush at Moria.[814]

7.85 Paragraphs 219-220 of the Kallon Appeal Brief refer to the Trial Chamber's factual finding that Kallon was seen at Camp Zogoda with child fighters in 1994.[815] The Trial Chamber simply made a factual finding to that effect but did not "conclude that Kallon was involved in the planning of child soldiers", as alleged by the Defence, merely on the basis of this factual finding. The Trial

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[810] See Trial Judgement, para. 1638. This particular evidenee of TF1-366 was considered by the Trial Chamber in light of the testimony of TF1-371 who mentioned senior commanders being with SBUs, including Kallon, and TF1-199 himself a SBU testifying that SBU were "small boys": see TF1-366, Transcript 8 November 2005, pp. 65-68; TF1-371, Transcript 21 July 2006, Closed Session, p. 63; TF1-199, Transcript 20 July 2004, p. 37.

[811] Kallon Appeal Brief, paras 213-215.

[812] Trial Judgement, para. 1714.

[813] Kallon Appeal Brief, para. 216.

[814] Kallon Appeal Brief, paras 217-218.

[815] Trial Judgement, para. 1615.

Chamber did not consider this finding in its legal findings given that it was clearly outside the timeframe of the Indictment.

7.86 As to the allegations of the Kallon Defence of a violation of Rule 93 regarding evidence of a consistent pattern,[816] the Prosecution submits that it is in view of the evidence adduced at trial attesting to the massive recruitment of children and system to that effect that the Trial Chamber concluded that there was a consistent pattern of conduct on the part of the RUF. The Trial Chamber did not rely on the presence of Kallon with child soldiers in Zogoda to demonstrate that pattern, and Kallon was in any case not convicted for that act. Furthermore, it was always the case of the Prosecution that the commission of the crime was a consistent pattern within the RUF.[817]

7.87 The Kallon Defence also argues that the Prosecution did not prove the ages of the children and that the Trial Chamber erred in concluding that the children conscripted and used were under the age of 15 years by using "improper circumstantial evidence".[818] Given the extremely high number of witnesses, on both the Prosecution and the Defence sides, who testified to the presence of very young children within RUF ranks and to the existence of SBU units within the movement, the Prosecution submits that it was reasonably open to the Trial Chamber to conclude that there was a pattern of conduct and that some children must have been under 15 years of age. Contrary to what is alleged, the Trial Chamber did not shift the burden of proof to the Defence. The burden of proof was on the Prosecution, and the Trial Chamber, considering all of the evidence in the case as a whole was satisfied that it had been established beyond reasonable doubt that there were many children under the age of 15. The Trial Chamber also correctly applied settled case law on the matter, according to which the *mens rea* standard of "had reason to know" or "should have known" encompasses

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816 Kallon Appeal Brief, para. 221.

817 The Indictment provides at para. 68 that the "The AFRC/RUF *routinely* conscripted, enlisted, and/or used boys and girls under the age of 15 to participate actively in hostilities" (*emphasis added*); Prosecution Final Supplemental Pre-Trial Brief, paras 463-465; Exhibit 155, Fourth Secretary General Report, 1998, para. 28; Exhibit 158, Humanitarian Situation Report, 1999, p. 4 (19112); Exhibit 162, Fourth UNOMSIL Report 1998, para. 32; Exhibit 175, HRW Report, 1998, pp. 21-23 (19454-19456); Exhibit 177, Sierra Leone: Childhood-a casualty of conflict, 31 August 2000.

818 Kallon Appeal Brief, paras 224-227.

negligence and requires the perpetrator to act with due diligence in the relevant circumstances.[819] It was therefore not "absurd" for the Trial Chamber to require that the perpetrator in a context of massive recruitment "ascertains the person's age".[820]

7.88 Finally, both the Sesay Defence and Kallon Defence allege defects in the Indictment regarding the pleading of Count 12.[821] The Prosecution refers to Section 2.H above generally addressing alleged defects of the Indictment. It is additionally submitted that the Kallon Defence's reference to the *Niyitegeka* case is not of relevance for the present case.[822] The ICTR Appeals Chamber adopted a strict approach to rule the Indictment defective in *Niyitegeka*, because the appellant was alleged to have *personally* shot at refugees. It was therefore an act of personal commission, for which the Appeals Chamber applied the *Kupreškić* standard.[823] This is clearly a different situation than the case at hand given that the conduct for which Kallon is convicted is *planning* the crime, which is not an act of personal commission, as erroneously alleged by the Defence.[824] Furthermore, planning was a mode of liability pleaded in the Indictment under Article 6(1).[825] Kallon's acts of personal commission were adequately dealt with by the Trial Chamber, whieh came to the conclusion that there was a defect in the Indictment

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819 Trial Judgement, para. 190. See also *Katanga* Decision on the Confirmation of Charges, paras 251-252: "The negligence standard of 'should have known' is met when the perpetrator: (i) did not know that the victim was under the age of fifteen years at the time he used the victim to partieipate actively in hostilities, and (ii) lacked such knowledge because he did not act with due diligence in the relevant circumstances (i.e the perpetrator 'should have known' and his lack of knowledge resulted from his failure to comply with his duty to act with due diligence)"

820 Trial Judgement, para. 1704.

821 Sesay Appeal Brief, para. 335; Kallon Appeal Brief, paras 178-188.

822 Kallon Appeal Brief, paras 181-183. Furthermore, in *Niyitegeka* the Indictment was found to be defective because the Appeals Chamber concluded that counsel knew about the attack in Kivumu before interrogating the witness, implying that the Prosecution intentionally hid that material fact: see *Niyitegeka* Appeal Judgement, para. 219.

823 *Niyitegeka* Appeal Judgement , para. 215: "Under *Kupreškić*, criminal acts that were physically committed by the accused personally *must be* set forth specifically in the indictment, including, where feasible, 'the identity of the victim, the time and place of the events and the means by which the acts were committed.' The location of the Kivumu attack and the means by which the Appellant allegedly participated in it are 'material' facts that should have been pleaded in the indictment."

824 Kallon Appeal Brief, paras 185-186.

825 Indictment, para. 68.

in that regard which had not been cured.[826] It is an erroneous reading of the findings to contend that the Trial Chamber found Kallon guilty "under the planning mode of liability based on other crimes he is alleged to have personally committed and in respect of which the indictment was equally defective."[827] The Trial Chamber merely made findings as to Kallon's acts of involvement in the crime and then relied on these findings to find him liable for planning, but it never considered these acts as acts of personal commission. The Prosecution submits that acts relied upon to convict Kallon were not acts which needed to be pleaded in the Indictment according to the *Kupreškić* requirements mentioned above.

7.89 The Prosecution submits that the alleged defects in the Indictment in respect of Count 12 should therefore be dismissed.

H. Enslavement

(i) Introduction

7.90 This part of this Response Brief responds to **Sesay's Grounds 35, 36, 32 in parts and 40**, **Kallon's Ground 21** and **Gbao's Ground 11**, all of which relate to the convictions of the Accused for enslavement as charged in Count 13 of the Indictment.

7.91 The submissions in the Defence Appeal Briefs in support of these grounds of appeal include arguments as to witness credibility and alleged defective pleading. In respect of these arguments, the Prosecution relies on its submissions in Sections 2.C and 2.G, 4.A and above respectively.

(ii) Sesay's Ground 35

(a) Introduction

7.92 This section of the Response Brief responds to **Sesay's Ground 35**, in which it is contended that the Trial Chamber erred in fact and law in finding Sesay responsible for "planning the enslavement of hundreds of civilians to work in mines in Tombodu and throughout Kono District between December 1998 and

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[826] The Trial Chamber proceeded to analyze whether the personal commission was alleged in the Indictment, concluded that it was not and consequently identified whether the Defence had sufficient notice, after which it concluded that the notice was not sufficient. See Trial Judgement, paras 1732-1733 read together with paras 2221-2222. See further Section 2.B of this Response Brief.

[827] Kallon Appeal Brief, para. 186.

January 2000, as charged in Count 13 of the Indictment."[828] The Sesay Defence argues that the Trial Chamber's "patently erroneous interpretation of the evidence and the disregard of evidence, except that elicited during the direct examination of Prosecution witnesses, was an abuse of judicial discretion".[829]

7.93 The standard of review on appeal for an alleged error of fact or alleged abuse of judicial discretion are dealt with in Section 1.B of the Prosecution Appeal Brief.

(b) Mining in Tombodu: assessing the evidence

7.94 The Sesay Defence submits that it was "wholly unreasonable to disregard the evidence that would have provided support for the Appellant's case and would have rebutted the presumption that 'genuine consent was not possible in the environment of violence and degradation existing in Tombodu'."[830]

7.95 However, the findings of the Trial Chamber in paragraphs 1246 to 1258 of the Trial Judgement were based on a careful evaluation of the evidence before it. The Trial Chamber found that civilians were forced to mine, that it was impossible for them to escape,[831] that civilians were punished if they did not obey,[832] and further, that Officer Med, the senior Mining Commander, reported to Sesay, who would at times visit the mining site.[833] It is submitted that on the totality of the evidence before it, it was reasonably open to the Trial Chamber to make those findings.

(c) Finding that mining occurred before early 2000

7.96 The Sesay Defence submits that the Trial Chamber erred in concluding that mining commenced in Tombodu at any stage prior to early 2000 and that the requisite indices of enslavement had been satisfied,[834] and that Sesay therefore could not be responsible for enslavement in Tombodu "between December 1998

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828 Sesay Appeal Brief, paras 251, referring to Trial Judgement, para. 2116.

829 Sesay Appeal Brief, para. 251, referring to Sesay Defence Closing Brief, paras 1220-1321 and Annex G: Errors in the relevant conclusions concerning Enslavement in Kono.

830 Sesay Appeal Brief, para. 251, referring to Trial Judgement, para. 1329.

831 Trial Judgement, para. 1252, referring to TF1-077, Transcript 20 July 2004, p. 113.

832 Trial Judgement, paras 1252 and 1254, referring to testimonies of TF1-304, Transcript 13 January 2005, pp. 32-35 and pp. 37-38; TF1-304, Transcript of 13 January 2005, pp. 30-33.

833 Trial Judgement, para. 1254, referring to TF1-077, Transcript 20 July 2004, p. 80; Transcript 21 July 2004, p. 30; TF1-304, Transcript 13 January 2005, pp. 30-33.

834 Sesay Appeal Brief, para. 253 and Sesay Appeal Brief Corrigendum, para. 33.

and January 2000".[835] It is submitted that these submissions are not supported in the Sesay Appeal Brief. The Sesay Defence's main argument is that the "Trial Chamber's reliance on TF1-077, TF1-199, and TF1-304 to support the finding on duration (December 1998 to January 2000) and other issues was unreasonable."[836] In this relation it is submitted that the clerical error mentioned in paragraph 255 of the Sesay Appeal Brief (namely, certain references in the Trial Judgement to "TF1-199" which should be to "TF1-177") is immaterial. The Sesay Defence has not demonstrated any impact of the clerical error, and in light of the remainder of the evidence this submission should therefore be rejected.[837]

7.97 The Sesay Defence argues that the Trial Chamber "disregarded" certain material evidence.[838] However, it is well established in the case law that the mere failure of the Trial Chamber to refer to certain evidence in its judgement does not mean that the Trial Chamber did not give proper consideration to that evidence. The Trial Chamber is not required to refer to every pieee of evidence or every submission made at trial (and it would obviously be impracticable for the Trial Chamber to do so), as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence.[839] There is a presumption that the Trial Chamber evaluated all of the evidence before it.[840]

7.98 The Sesay Defence argues that there was no mining in Tombodu in 1999, based on the testimony of TF1-304 (who allegedly testified in eross-examination that there was no mining in Tombodu in 1999) and TF1-077.[841] The Defence takes issue with the Trial Chamber's statement that it was "satisfied that TF1-077 is mistaken about the year, since the recapture of Koidu by the RUF occurred in December 1998."[842] The Prosecution submits that a closer analysis of the transcripts of the testimony of TF1-304 and TF1-077 shows that these witnesses,

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835 Sesay Appeal Brief, para. 253.
836 Sesay Appeal Brief, para. 254.
837 *Krajišnik* Appeal Judgement, para. 458 and footnote 1076.
838 Sesay Appeal Brief, paras 251, 255, 258, 262, 272, 275-275.
839 *Krajišnik* Appeal Judgement, para. 379; *Kvočka* Appeal Judgement, para. 23.
840 *Krajišnik* Appeal Judgement, para. 379; *Kvočka* Appeal Judgement, para. 23.
841 Sesay Appeal Brief, paras 256-257, referring to TF1-304, Transcript 13 January 2005, pp. 94-95 and TF1-077, Transcript 20 July 2004, p. 77;
842 Sesay Appeal Brief, para. 257, referring to Trial Judgement, footnote 2404.

[redacted] had obvious problems recalling exact dates and years,[844] a common occurrence in international trials. The witnesses rather remembered events such as the "time for Operation no Living Thing"[845], the time when "ECOMOG was in Kono"[846], [redacted] the dry season or the rainy season, rather than dates, months or years.[847] The extracts cited by the Defence are not unequivocal if read in their entirety, for instance this evidence of TF1-304 cited by the Sesay Defence:

> Q. What you observed as forced mining beginning was in 2000. It's quite important this, Mr Witness; is that correct?
> A. Yes, in my own presence.
> Q. And was that, Mr Witness, around, you would say, April of 2000?
> A. About that. The mining didn't have any time. That was around that.
> Q. Around April of 2000?
> A. I can't think too well on that. But we started this mining in the dry season. In fact, April found us mining.
> Q. Just, if you can't answer this, you can't. But would you estimate that –
> A. I won't be able to know the exact date, but this was in the dry season.[848]

7.99 The same can be said of witness TF1-012, who, according to the Sesay Defence "placed the mining in Tombodu in 2000 and beyond"[849], but whose testimony cited by the Sesay Defence was not unequivocal as to the timeframe.[850] During the examination in chief TF1-071 clearly testified that there was RUF mining as early

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843 TF1-077, Transcript 20 July 2004, p. 77 and TF1-304, Transcript 12 January 2005, p. 21. TF1-077 never went to school: TF1-077, Transcript 20 July 2004, p. 77.

844 TF1-077 for instance repeatedly mentioned the year "1990", although it was impossible that he meant 1990, e.g. TF1-077, Transcript 21 July 2004, p. 3. He referred to events rather then dates: e.g.: "... when ECOMOG was pushed out", TF1-077, Transcript 21 July 2004, p. 11.

845 TF1-077, Transcript 21 July 2004, p. 2.

846 TF1-077, Transcript 21 July 2004, p. 3.

847 For instance, TF1-077 was asked: "Mr. Witness, you understand when I say between '98 and '99; you understand that, don't you?" He answered: "What I know is that we arrived in the dry season. We were there until December when they arrested us. We were with ECOMOG when they arrested us after they've been pushed out." And when asked again: "So what -- where were you then between late '98 and late '99?" he said: "This man is pushing me back and forth. I said we arrived from the boundary between Guinea and Sierra Leone. We returned in the dry season and we were by this little stream between Kwakuma and Koidu town - high season (sic)", TF1-077, Transcript 21 July 2004, p. 12.

848 TF1-304, Transcript 13 January 2005, p. 95.

849 Sesay Appeal Brief, para. 258, referring to TF1-012, Transcript, 4 February 2005, p. 46 and TF1-071, Transcript 25 January 2005, p. 79.

850 TF1-012: "Q. ... You told us yesterday that Sesay started mining in Tombodu in November 2000. Is that correct? Just yes or no. A. I said the time their boss brought him and introduced him, that was the time we began mining. What can I answer beyond that?" See: TF1-012, Transcript, 4 February 2005, p. 46. On p. 8 of the same transcript, when asked whether he lived in Tombodu in 1999, TF1-012 answered "I cannot remember."

as March, April 1998 in Tombodu.[851] In suggesting otherwise, the Sesay Defence is citing particular parts of the evidence taken out of context. The Sesay Defence has not established that it was not reasonably open to the Trial Chamber, based on all of the evidence in the case as a whole, including the evidence referred to in paragraphs 1246 to 1249 of the Trial Judgement, to conclude as it did.

(d) Mining in Kono generally

7.100 As to the argument of the Sesay Defence that the Trial Chamber did not "particularize with the requisite specificity the criminal responsibility of the Appellant",[852] the Prosecution submits that this allegation is not supported in the Sesay Appeal Brief. The same applies to the allegations of "lack of clarity" and "lack of specificity in the factual findings purporting to explain the basis for the Appellant's responsibility".[853]

7.101 The Sesay Appeal Brief states that:

> The Appellant's defence at trial was that there was no organized system of enslavement in Kono from at least December 1998 through 2001. It was not, as mischaracterized by the Chamber, that "no civilians were forced to mine in Kono District". It was incumbent upon the Chamber to deal with the real defence and explain how (and why) it had been rebutted.[854]

7.102 However, the Trial Chamber expressly found that from December 1998 to January 2001, hundreds of civilians were abducted and forced to work in mining sites in Tombudu and throughout Kono District,[855] and that "the nature and magnitude of the forced mining in Kono District required extensive planning on an ongoing basis".[856] The Trial Judgement thereby expressly and substantively addressed and rejected the "real defence". The Defence complaint that the Trial Chamber did not "explain how (and why) it [the "real defence"] had been rebutted" is no more than a complaint that the Trial Chamber failed to address expressly all of the Defence

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851 TF1-071, Transcript 21 January 2005, p. 20. At the cited Transcript 25 January 2005, p. 79, TF1-071 does not say that mining stated only in 2000.
852 Sesay Appeal Brief, para. 259, referring to Trial Judgement, paras 1240-1250.
853 Sesay Appeal Brief, para. 259.
854 Sesay Appeal Brief, para. 259 (footnote omitted).
855 Trial Judgement, para. 1328.
856 Trial Judgement, para. 2114, see generally paras 2111 to 2116.

arguments, which the Trial Chamber is not required to do.[857] It is clear from the Trial Judgement what the factual finding of the Trial Chamber was, and how it came to that conclusion.

7.103 The Sesay Defence argues that "the system that was employed and the Appellant's alleged relationship to this widespread enslavement are unclear and insufficient to sustain a conviction".[858] This argument is not clear and not sufficiently supported in the Sesay Appeal Brief. The allegation that the "Judgment is transparently a list of evidence that breaches the right of an accused to know the case that it had to meet and the ease that was found",[859] is again no more than an argument that the Trial Chamber failed to address individually every single Defence argument. However, "a Trial Chamber is not required to articulate every step of its reasoning, nor is a Trial Chamber obliged to recount and justify its findings in relation to every submission made during trial".[860] The Trial Chamber made clear findings of fact, and gave reasons from which it is clear how it arrived at the conclusions it did.

7.104 The arguments in paragraphs 260 to 262 of the Sesay Appeal Brief are met with the same response. The Prosecution submits that, contrary to the assertions of the Sesay Defence, paragraphs 1246-1250 of the Trial Judgement clearly and distinctively assess the "critical issues", such as who was enslaved, how the victims were enslaved and how the perpetrators exercised the powers attaching to the right of ownership over a person.[861]

7.105 Contrary to what the Sesay Appeal Brief suggests, the Trial Chamber did not find that some miners worked voluntarily.[862] For instance, the Sesay Appeal Brief claims that the Trial Chamber found, at paragraph 1248 of the Trial Judgement, that miners had "weekends away and free" and "were free to leave the mining sites". That is a distortion of what the Trial Chamber found. The Trial Chamber found, at paragraph 1248 of the Trial Judgement that "Mining operations were

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857 See paragraph 7.97 above.
858 Sesay Appeal Brief, para. 259.
859 Sesay Appeal Brief, para. 259.
860 *Kvočka* Appeal Judgement, para. 930.
861 Sesay Appeal Brief, para. 260.
862 Sesay Appeal Brief, para. 260, referring to Trial Judgement, paras 1244, 1247, 1248.

conducted from Monday to Thursday", that "Civilians would go to the surrounding villages on the weekends to find food and would then return to work" and that "As they were constantly supervised by armed men there was no possibility of escape". In any event, there is nothing contradictory in a finding that even though forced mining occurred on a large scale, some miners did work voluntarily.

7.106 The Sesay Defence contends that the Trial Chamber did not "explain the guilt of the Appellant" and therefore undermined "the Appellant's inviolable Article 18 right to a reasoned Judgment".[863] The requirements of "a reasoned opinion in writing" are established in the case law.[864] For the reasons given above, the Sesay Defence has not established that these requirements were not met in this case.

7.107 The contentions of the Sesay Defence concerning lack of notice and "unreasonable dismissal ... of every aspect of the Defence case",[865] as well as Sesay's arguments regarding the testimony of TF1-367,[866] have been dealt with in Sections 3.C, 4.A and 4.B(i), above.

7.108 The Prosecution further submits that the arguments of the Sesay Defence regarding contradictory findings,[867] the findings in paragraphs 1247 and 1248 of the Trial Judgement[868] and the Trial Chamber's evaluation of TF1-367's evidence[869] are merely repetitive and do not add substantially to the earlier arguments of the Sesay Defence.

(e) Alleged improper application of the legal standard for planning

7.109 The Sesay Defence argues that the Trial Chamber erred in law in applying an incorrect legal standard for the Article 6(1) mode of liability of "planning", on the ground that the Trial Chamber used the term "significant contributory factor"

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863 Sesay Appeal Brief, para. 261.
864 *Kvočka* Appeal Judgement, paras 21-25; *Krajišnik* Appeal Judgement, paras 139-152.
865 Sesay Appeal Brief, para. 261.
866 Sesay Appeal Brief, para. 262.
867 Sesay Appeal Brief, para. 262.
868 Sesay Appeal Brief, paras 263-265.
869 Sesay Appeal Brief, paras 264-265.

instead of "substantial contribution".[870] It is submitted that Sesay has not established any material difference in meaning between these two expressions in the context of this case.

7.110 The Prosecution further submits, contrary to the assertion in paragraph 267 of the Sesay Appeal Brief, that the Trial Chamber's findings in paragraphs 2112 to 2116 of the Trial Judgement provide the factual basis to demonstrate that Sesay contemplated both the design and execution of enslavement in Kono and show that he was substantially involved in the design of that crime and possessed sufficient knowledge thereof.[871]

7.111 It is also submitted that the contentions in paragraphs 268 to 270 of the Sesay Appeal Brief concerning "lack of design" are immaterial, since they deal with the pre-December 1998 mining in Kono District, while the Trial Chamber found Sesay liable under Article 6(1) of the Statute for planning the enslavement of hundreds of civilians to work in mines at Tombodu and throughout Kono District between December 1998 and January 2000.[872]

7.112 As to the alleged inconsistencies in the testimony of TF1-041 and the issue of "voluntary work",[873] as well as the weight given to Defence evidence,[874] the Prosecution refers to paragraph 7.105 above and Sections 3.C and 4.A of this Response Brief. The allegations in paragraphs 271 to 275 of the Sesay Appeal Brief that the Trial Chamber ignored "testimony concerning reporting and Sesay's non-involvement in the diamond mining operations" are generally dealt with in

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870 Sesay Appeal Brief, para. 266, referring to Trial Judgement, para. 268, citing *Kordić and Čerkez* Appeal Judgement, para. 26.

871 The Trial Chamber found for instance that the mining system in Kono District was hierarchically organised, and that the overall Mining Commander reported to Sesay, that diamonds were remitted to Sesay and that throughout 1999 and 2000, Sesay visited Kono District and collected diamonds (Trial Judgement, paras 2112-2113.) It was also found that Sesay visited the mines, ordered that civilians be captured from other Districts and arranged for transportation of the captured civilians to the mines (Trial Judgement, para. 2113). The Chamber further found that "the nature and magnitude of the forced mining in Kono District required extensive planning on an ongoing basis." and that "Sesay, as the BFC and subordinate to Bockarie at that time, was actively and intimately involved in the forced mining operations and its processes in Kono District." (Trial Judgement, para. 2114.)

872 Trial Judgement, para. 2116.

873 Sesay Appeal Brief, para. 270 i-iii.

874 Sesay Appeal Brief, para. 270 iv-v.

Sections 3.C and 4.A. The Trial Chamber has a diseretion in assessing the appropriate weight and credibility to be accorded to the tcstimony of witnesses.[875]

7.113 The Sesay Defence seems to argue in paragraph 271 of the Sesay Appeal Brief that in order to prove the form of participation of "planning", the Prosecution must prove that orders were given. That is wrong in law. No authority is cited for this proposition. Likewise, the Scsay Defence seems to argue in paragraphs 276 to 280 of the Sesay Appeal Brief that the perpetrator who plans a erime must constantly be present on the site where the crime is actually committed. This is also wrong in law and unsupported by any case law or other authorities.

7.114 The submission in paragraph 272 of the Sesay Appeal Brief that the Trial Chamber erred in law and fact by inferring that the receipt of diamonds could amount to evidence of planning the enslavement is without merit. Thc Trial Chamber did not base its finding of Sesay's liability for planning enslavement solely on the fact that he received diamonds, but on a number of factual findings, as indicated above in paragraph 7.110 of this Response Brief. As to paragraphs 273 and 275 of Sesay's Appeal, the Prosecution refers to its general submissions regarding thc assessment of evidence in Section 4.A of this Response Brief.

7.115 For the reasons above, Sesay's Ground 35 should be dismissed entirely. It was not unreasonable for the Trial Chamber to find, based on the evidence before it, that Sesay planned enslavement in Tombodu and throughout Kono District between December 1998 and January 2000.

(iii) Sesay's Ground 36

7.116 Sesay's Ground 36 contends that the Trial Chamber erred in finding that Sesay "had notice that he failed to prevent or punish the perpetrators of enslavement of civilians at the military base at Yengema".[876] This contention is dealt with in Section 2.G above in response to Sesay's Ground 11. The Prosecution submits that, contrary to what the Sesay Defence argues in paragraph 281 of the Sesay

[875] See also *Ntagerura* Appeal Judgement, para. 388.
[876] Sesay Appeal Brief, para. 281.

Appeal Brief, there is no contradiction between the findings in paragraph 1262 of the Trial Judgement[877] and those in paragraph 1646.[878]

7.117 The argument in paragraphs 281 to 283 of the Sesay Appeal Brief that the Trial Chamber lacked specificity in its findings regarding forced military training in general and in the Yengema training camp in particular, is without merit. There are numerous findings of the Trial Chamber as to who was captured and brought to Yengema, who was in charge of the training camp and how the forced recruits were trained, punished and prepared for combat.[879] The findings of the Trial Chamber were based on the testimony of a number of different witnesses, including a former training commander,[880] other RUF and AFRC insider witnesses,[881] UNAMSIL personnel who were held captive in Yengema,[882] and civilians and former child soldiers who were forcibly abducted and forced into military training.[883] As to the credibility of the witnesses relied upon by the Trial Chamber, in partieular TF1-117 and TF1-362, and the argument of the Sesay Defence that the Trial Chamber disregarded other evidence, the Prosecution refers to Sections 4.A, 4.B, in particular 4.B(i), and 4.B(vii), of this Response Brief. As regards the testimony of DIS-065, who, according to the Sesay Defence, testified that there was no enslavement in Yengema,[884] the Prosecution refers to the

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877 Where the Trial Chamber found that the Yengema base operated from 1998 until disarmament, and where it describes how civilians captured in Kono were trained at the base.

878 Where the Trial Chamber held that the training camp was moved from Bunumbu to Yengema in approximately December 1998 by Bockarie and Sesay and that a "large number of recruits from Bunumbu in Kailahun District and from Kono District were trained at Yengema." The Trial Chamber again mentions that the Yengema base operated until the end of the disarmament process in Sierra Leone.

879 In particular, the findings in paras 1260 to 1265 of the Trial Judgement, also in paras 1646: "In approximately December 1998, Bockarie and Sesay issued orders to move the RUF training base from Bunumbu to Yengema in Kono District. Sesay personally discussed the creation of the new Yengema base with the training Commander. A large number of recruits from Bunumbu in Kailahun District and from Kono District were trained at Yengema. The base operated until the end of the disarmament process in Sierra Leone."

880 TF1-362, Transcript of 22 April 2005, 14-28.

881 TF1-071, Transcript of 21 January 2005, pp. 120-123; TF1-366, Transcript of 10 November 2005, p. 5, TF1-360, Transcript of 22 July 2005, pp. 68-69, TF1-334, AFRC Transcript of 20 May 2005, pp. 4-5.

882 E.g. Edwin Kasoma, Transcript of 22 March 2006, pp. 27-28.

883 TF1-330, Transcript of 14 March 2006, p. 51; TF1-117, Transcript of 3 July 2006, pp. 42-43 and pp. 80-83.

884 Sesay Appeal Brief, para. 282, referring in footnote 894 to DIS 065. Transcript 26 February 2008, pp. 70-80.

concerns expressed by the Trial Chamber in paragraphs 527 to 531 of the Trial Judgement with regard to the credibility of certain Defenee witnesses who held a eertain position or rank within the RUF.

7.118 In paragraph 282 of the Sesay Appeal Brief the Defence seems to argue that the factual findings of the Trial Chamber eould not "satisfy the indices of enslavement",[885] and refers again to issues related to the assessment of evidencc, disregard of Defence evidence and the payment of witnesses.[886] These issues are dealt with in Sections 4.A and 4.B(x),of this Response Brief.

7.119 The Sesay Appeal Brief also contends that enslavement did not exist, since "recruits would go to town (Yengema) to buy salt and wares, and return to the base."[887] The faet that recruits were permitted (or forced) to go to town to buy wares does not mean that they were not forced to retum after they had been to town, or that they were not enslaved. The Trial Chamber made numerous findings of fact, which were reasonably open to it to make on the evidence before it, on the basis of which it could reasonably conclude that the victims were being held against their will. In any event, lack of consent is not an elcment of the crime of enslavement. As the ICTY Appeals Chamber has said:

> ... Indeed, the Appeals Chamber does not accept the premise that lack of consent is an element of the crime since, in its view, enslavement flows from elaimed rights of ownership; aeeordingly, lack of consent does not have to be proved by the Proseeutor as an element of the erime. However, eonsent may be relevant from an evidential point of view as going to the question whether the Proseeutor has established the element of the crime relating to the exereise by the accused of any or all of the powers attaching to the right of ownership. In this respect, the Appeals Chamber considers that eircumstances which render it impossible to express eonsent may be sufficient to presume the absenee of eonsent.[888]

7.120 Paragraph 284 of the Sesay Appeal Brief contends that the Trial Chamber based its findings of the killings of recruits in Yengema solely on uncorroborated evidence of TF1-362. The Prosecution submits that this argument is irrelevant,

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885 Sesay Appeal Brief, para. 282, referring to *Kunarac* Appeal Judgement, para. 119.

886 Sesay Appeal Brief, paras 282 and 283, where the Sesay Defenee claims once more that their evidence had been disregarded, that TF1-362 was "an aceomplice, who had been paid by the Prosecution – according to her own sworn testimony." and that TF1-117 was "manifestly untruthful".

887 Sesay Appeal Brief, para. 282, referring to TF1-362, Transcript 3 July 2006, pp. 81-82, 84.

888 *Kunarac* Appeal Judgement, para. 120.

since the Appellant was not convicted for the killing of these recruits. The account of TF1-362 must be considered in the light of the evidence as a whole and as one factor establishing the crime of enslavement, namely to show the existence of the "control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force."[889] In any case, it is established in the jurisprudence of the Appeals Chambers of both the ICTY and ICTR that the testimony of a single witness, even as to a material fact, may be accepted without the need for corroboration.[890]

7.121 The Sesay Appeal Brief finally submits that the Trial Chamber erred in law and fact in concluding beyond reasonable doubt that Sesay exercised effeetive control over the RUF fighters at Yengema base. It is submitted that the alleged "error of law" in paragraph 285 of the Sesay Appeal Brief is in fact an alleged error of fact, since the Sesay Defence argues that the "superior–subordinate relationship" was not proven, referring to its submission in Sesay's Ground 44, which is discussed in detail in Section 7.J(ii) of this Response Brief. What the Defence actually argues is that the Trial Chamber based its finding of a superior-subordinate relationship solely on Sesay's *de iure* status.[891] This assertion in wrong. The Trial Chamber based its conelusion on a number of factual findings other than Sesay's *de iure* status, namely the fact that "Sesay regularly gave orders to RUF troops", "received reports from them" and "deployed forces, disciplined fighters",[892] and the fact that "Sesay was deeply involved in mining operations in Kono District between December 1998 and January 2000" and that "Sesay visited Yengema on several occasions and the training Commander there reported to him."[893]

7.122 The Prosecution therefore submits that Sesay's Ground 36 should be dismissed in its entirety.

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889 *Kunarac* Appeal Judgement, para. 119, referring to *Kunarac* Trial Judgement, paras 542-543.
890 *Kupreškić et al.* Appeal Judgement, para. 33, *Tadić* Appeal Judgement, para. 65; *Aleksovski* Appeal Judgeiment, para. 62; *Kayishema and Ruzindana*Appeal Judgeiment, para. 154.
891 Sesay Appeal Brief, para. 286.
892 Trial Judgement, para. 2127.
893 Trial Judgement, para. 2128.

(iv) Sesay's Ground 40 and (in part) 32

(a) Forced labour in Kailahun

7.123 **Sesay's Grouud 40** contends that the Trial Chamber erred in fact and in law in concluding beyond reasonablc doubt that the RUF was responsible for acts of enslavement in Kailahun.[894]

7.124 Again the Defence bases its grievances mainly on the alleged non-credibility of witnesses, in particular TF1-330 and TF1-108,[895] arguing that "[n]o reasonable Trial Chamber would have extrapolated, from the testimony of two individuals ... the occurrence of hundreds of crimes, occurring over a period of a decade, affecting hundreds of civilians."[896] It is difficult to understand how thc Sesay Defencc came to the conclusion that the Trial Chamber's findings on enslavement and forced labour in Kailahun were based on the testimony of two witnesses only. Paragraphs 1414 to 1443 of the Trial Judgement refer to transcripts of at least 20 different *other* witnesses, apart from TF1-330 and TF1-108; including numerous Defence witnesses.[897]

7.125 The issue of credibility of witnesses is discussed extensively earlier, in Sections 4.A, in particular 4.A(i), and 4.B, in particular 4.B(i), 4.B(vi) and 4.B(vii), of this Response Brief. Additionally, the credibility of witness TF1-108 is addressed in Section 4.B(viii)(a) of this Brief. Thc Proseeution submits that this assessment by the Trial Chamber of the evidence before it does not constitute an "error of law

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894 Sesay Appeal Brief, para. 306, referring to Trial Judgement, paras 1478-1486.

895 Sesay Appeal Brief, para. 306 and 311.

896 Sesay Appeal Brief, para. 306.

897 For instance: TF1-113, Transcript of 2 March 2006, pp. 32-35, 37-38, 71 and Transcript of 6 March 2006, pp. 25-38; DIS-080, Transcript of 5 October 2007, p. 87 and Transcript of 8 October 2007, p. 9; TF1-141, Transcript of 12 April 2005, pp. 15-19 and 22-27, 30-32; TF1-036, Transcript 27 July 2005, pp. 41-42; TF1-366, Transcript of 15 November 2005, pp. 59-60 and Transcript of 10 November 2005, pp. 6-7; TF1-367, Transcript of 23 June 2006, pp. 30-31, 34-38, 40-42 and 46-47; TF1-045, Transcript of 21 November 2005, pp. 63-64; TF1-371,Transcript of 28 July 2006, p. 123 and Transcript of 21 July 2006, pp. 60, 62-63; TF1-114, Transcript of 28 April 2005, pp. 66-67; TF1-362, Trauscript 20 April 2005, pp. 32, 43; Dennis Koker, Transcript of 28 April 2005, pp. 61 and 63; TF1-168, Transcript of 31 March 2006, p. 76; TF1-263, Transcript of 6 April 2005, pp. 34-38; DIS-047, Transcript of 4 October 2007, p. 38; DIS-174, Transcript of 21 January 2008, pp. 73-74; DIS-157, Transcript of 25 January 2008, p. 85; DIS-188, Transcript of 29 October 2007, pp. 48 aud 57; DIS-178, Transcript of 18 October 2007, p. 80; DIS-302, Transcript of 26 June 2007, p. 105-107 and Transcript 27 June 2007, pp. 22-33, p. 62; DAG-048, Transcript of 3 June 2008, pp. 118-119 and Transcript of 5 June 2008, pp. 23-24. DAG-110, Transcript of 25 January 2008, pp. 31-32 and 42-45.

which invalidated the convictions".[898] As to alleged defects in pleading enslavement in Kailahun in the Indictment, raised in paragraph 308 of the Sesay Appeal Brief, the Prosecution refers to its arguments in Section 2.G, above.

7.126 The allegation of the Sesay Defence that the Trial Chamber's finding "was guess work"[899] is unfounded given the detailed findings of the Trial Chamber in paragraphs 1414 to 1443 of the Trial Judgement and the abundant evidence before it. The same is true of Sesay's assertion that the Trial Chamber failed to have regard to the "preponderance of evidence" that contradicted the testimony of TF1-330 and TF1-108, allegedly resulting in an "abuse of discretion."[900] The assertion that the Defence evidence "covered the whole of Kailahun from 1991 to 2002 and encompassed the experiences of thousands of people"[901] is exaggerated and does not reflect the scope and content of the Defence case on this issue. The Trial Chamber took into consideration a considerable number of Defence witnesses – in fact around the same number of Prosecution and of Defence witnesses were cited in its findings in paragraphs 1414 to 1443 of the Trial Judgement.[902] In addition, the Prosecution refers to the concerns expressed by the Trial Chamber in paragraphs 527 to 531 of the Trial Judgement with regard to the credibility of certain Defence witnesses who held a certain position or rank within the RUF.

7.127 The Sesay Appeal Brief suggests that the fact that there was "no evidence of mass starvation during the indictment period" proves that there was no enslavement.[903] This is erroneous and unfounded. The image that the Sesay Defence tried to present throughout the trial was that civilians lived happily and voluntarily in a "system of cooperation between civilians and fighters in which labour was exchanged for services, supplies, and food".[904] The evidence to the contrary is

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898 Sesay Appeal Brief, para. 307.
899 Sesay Appeal Brief, para. 308.
900 Sesay Appeal Brief, para. 309.
901 Sesay Appeal Brief, para. 309.
902 DIS-047, Transcript of 4 October 2007, p. 38; DIS-174, Transcript of 21 January 2008, pp. 73-74; DIS-157, Transcript of 25 January 2008, p. 85; DIS-188, Transcript of 29 October 2007, pp. 48 and 57; DIS-178, Transcript of 18 October 2007, p. 80; DIS-302, Transcript of 26 June 2007, p. 105-107 and Transcript 27 June 2007, pp. 22-33, p. 62; DAG-048, Transcript of 3 June 2008, pp. 118-119 and Transcript of 5 June 2008, pp. 23-24. DAG-110, Transcript of 25 January 2008, pp. 31-32 and 42-45.
903 Sesay Appeal Brief, para. 310.
904 Sesay Appeal Brief, para. 310.

summarised in paragraphs 1414 to 1443 of the Trial Judgement. Exhibits 80, 81, 82, 83, 84a, and 84b do not prove the contrary,[905] since they are convincing evidence of the so called "subscription" system described in paragraphs 1427 to 1429 of the Trial Judgement. It was open to the Trial Chamber to reach the conclusion that it did on the basis of the evidence before it. The Sesay Defence is effectively seeking to re-run before the Appeals Chamber arguments that failed before the Trial Chamber.

7.128 Paragraph 312 of the Sesay Appeal Brief invites the Prosecution to respond to its assertion that the "Trial Chamber repeatedly erred in law and fact by failing to assess indices of enslavement", arguing that the Defence evidence regarding "certain forms of remuneration and benefits received by workers" was ignored, although relevant for the conclusion that there was no enslavement.[906] The Defence further argues that "provision of medical and other services" was "exculpatory or excusatory for the forced labour" and that "[k]ey inferences were drawn from the lack of money earned by farm workers and load carriers."[907]

7.129 The Prosecution submits that the Sesay Defence uses an overly narrow definition of enslavement which is wrong in law and is not in accordance with the case law of international tribunals. The Defence seems to refer to the traditional concept of slavery, referred to in *Kunarac* as "chattel slavery".[908] However, the Appeals Chamber in *Kunarac* held that the concept of slavery:

> ... has evolved to encompass various contemporary forms of slavery which are also based on the exercise of any or all of the powers attaching to the right of ownership. In the case of these various contemporary forms of slavery, the victim is not subject to the exercise of the more extreme rights of ownership associated with "chattel slavery", but in all cases, as a result of the exercise of any or all of the powers attaching to the right of ownership, there is some destruction of the juridical personality; the destruction is greater in the case of "chattel slavery" but the difference is one of degree.[909]

7.130 The Appeals Chamber in *Kunarac* further considered:

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[905] Sesay Appeal Brief, para. 310.
[906] Sesay Appeal Brief, paras 312-313.
[907] Sesay Appeal Brief, para. 314.
[908] *Kunarac* Appeal Judgement, para. 117.
[909] *Kunarac* Appeal Judgement, para. 117.

> ... that the question whether a particular phenomenon is a form of enslavement will depend on the operation of the factors or indicia of enslavement identified by the Trial Chamber. These factors include the "*control of someone's movement, control of physical environment, psychological control, measures taken to prevent or deter escape, force, threat of force or coercion, duration, assertion of exclusivity, subjection to cruel treatment and abuse, control of sexuality and forced labour.*"[910]

7.131 The Prosecution submits that most, if not all, of these factors were established in the findings of the Trial Chamber in paragraphs 1414 to 1443 and in paragraphs 1476 to 1489 of the Trial Judgement.

7.132 Furthermore, enslavement need not encompass ill-treatment, starvation or other inhumane treatment. As was said in the *Pohl* case:

> Slavery may exist even without torture. *Slaves may be well fed, well clothed, and comfortably housed, but they are still slaves* if without lawful process they are deprived of their freedom by forceful restraint. We might eliminate all proof of ill-treatment, overlook the starvation, beatings, and other barbarous acts, but the admitted fact of slavery - compulsory uncompensated labour - would still remain. *There is no such thing as benevolent slavery.* Involuntary servitude, even if tempered by humane treatment, is still slavery.[911]

7.133 The Prosecution further submits that even if civilians were not starved to death, and even if they got some medical treatment, and in certain cases some remuneration, this does not remove the fact that on the factual findings of the Trial Chamber—which were reasonably open to it on the evidence—the majority of civilians in Kailahun were forced to work for the RUF and did not do so voluntarily.[912] In the *Krnojelac* Appeal Judgement, the Appeals Chamber said the following in relation to the issue of whether the work performed by the detainees at the KP Dom in Foča (of which Kronjelac was commander) was forced or involuntary and whether it amounted to forced labour:

> The Appeals Chamber holds that, given the specific detention conditions of the non-Serb detainees at the KP Dom, a reasonable trier of fact should have arrived at the conclusion that the *detainees' general situation negated any possibility of free consent.* The Appeals Chamber is satisfied that the *detainees worked to avoid being beaten or in the hope of obtaining additional food.* Those who refused to work did so out of

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910 *Kunarac* Appeal Judgement, para. 119. (emphasis added)

911 *US v Oswald Pohl and Others*, Judgement of 3 November 1947, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10, Vol 5, (1997), p 958 at p 970, cited in paragraph 123 of the *Kunarac* Appeal Judgement (emphasis added).

912 See paragraphs 1414 to 1443 of the Trial Judgement.

> fear on aeeount of the disappearances of detainees who had gone outside of the KP Dom. The *climate of fear made the expression of free consent impossible* and it may neither be expeeted of a detainee that he voiee an objection nor held that a person in a position of authority need threaten him with punishment if he refuses to work in order for foreed labour to be established.[913]

7.134 The Sesay Defence further argues that the Sierra Leonean Constitution "sensibly excludes communal labour from the definition of foreed labour."[914] However, it is trite law that it is no defence to a crime under international law that the conduet in question was permitted under national law. In any event, there is no basis for assuming that the Constitution of Sierra Leone, correctly interpreted, would have recognised as legal the conduct which the Trial Chamber found on the evidence to have been committed in this case. In the absence of any expert opinion on the interpretation of the Constitution of Sierra Leone, it is submitted that its provisions must be interpreted in accordanee with international law, in *casu* namely the ILO Convention concerning Forced or Compulsory Labour,[915] which reads in its Article 2 (e):

> Minor communal services of a kind which, being performed by the members of the community in the direct iuterest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

7.135 The forced labour as described in the Trial Chamber findings in paragraphs 1414 to 1443 of the Trial Judgement does not fit this interpretation. The Prosecution recalls that the Convention concerning Forced or Compulsory Labour defines "forced or compulsory labour" in Article 2 as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily." Even if it was true that the RUF was "setting up ... schools" and that there was "cooperation between civilians" during the period which is referred to by the Sesay Defence as "occupation"[916] – a term that does not exist in the law of non-international armed conflicts – and that

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913 *Krnojelac* Appeal Judgement, para. 194. (emphasis added)
914 Sesay Appeal Brief, para. 314.
915 ILO No. 29, 39 U.N.T.S. 55, entered into force 1 May 1932, ratified by Sierra Leone on 13 Jnne 1961 (source: http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C29).
916 Sesay Appeal Brief, para. 316.

civilians were given food,[917] this does not change the fact that most of the work done was involuntary and that the vast majority of civilians in Kailahun were forced to work for the RUF during the indictment period and beyond.

(b) Mining in Tongo Field: assessing the evidence

7.136 This part of this Response Brief responds to **Sesay's Ground 32** (in part).

7.137 The Sesay Defence alleges that the Trial Chamber disregarded every piece of evidence demonstrating that civilians in Tongo Field were "free to leave Tongo at any time", as well all exculpatory evidence coming from Prosecution witnesses relied upon by the Trial Chamber found otherwise credible.[918] The Sesay Defence contends that such exculpatory evidence adduced by TF1-035, TF1-045 and TF1-060 should have been taken into consideration by the Trial Chamber.[919]

7.138 The Prosecution submits that it is evident from the Trial Judgement that the Trial Chamber carefully assessed the evidence before it. The Trial Chamber took into consideration evidence pointing to the existence of duress, maltreatment and restriction of movement to make its findings.[920] Furthermore, the Trial Chamber did not exclude the possibility that some civilians were mining voluntarily.[921] The Trial Chamber's findings were based on its assessment of the totality of the evidence. The Trial Chamber expressly found that it did not "accept as credible evidence that no civilians were forced to mine in Kenema District.[922] The Sesay Defence in effect merely disagrees with the Trial Chamber's evaluation of the evidence. It is submitted that the Sesay Defence does not establish that the conclusion of the Trial Chamber was one which could not have been reached by any reasonable trier of fact on the evidence before the Trial Chamber.

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917 Sesay Appeal Brief, para. 317.
918 Sesay Appeal Brief, para. 166.
919 Sesay Appeal Brief, paras 167-173.
920 Trial Judgement, paras 1094 and 1119.
921 Trial Judgement, para. 1121.
922 Trial Judgement, para. 1120.

(v) Kallon's Ground 21

(a) Introduction

7.139 The Trial Chamber convicted Kallon under Count 13 for enslavement, a crime against humanity punishable under Article 2(c) of the Statute, pursuant to Article 6(1) for his participation in a JCE in relation to events in Tongo Field in Kenema District, in Kono and Kailahun Districts, and pursuant to Article 6(3) in relation to events throughout Kono District.[923] **Kallon's Ground 21** contends that the convictions under Count 13 should be reversed based on a number of arguments which, it is submitted, are barely substantiated, if at all.

(b) Alleged error relating to Kallon's role in Tongo Field

7.140 The Kallon Appeal Brief claims that the Trial Chamber erred in law and fact by convicting him based on material facts not pleaded in the indictment and in respect of which he had no or no proper notice. It further claims that this defect caused material prejudice to Kallon and that this defect was not cured. However, the Kallon Appeal Brief does not substantiate this grievance and does not show how Kallon was prejudiced.[924] It is therefore not possible for the Prosecution to respond to the contention. The Prosecution submissions on general pleading issues related to Count 13 are set out in Section 2.G of this Response Brief.

7.141 The Kallon Defence further claims that the Trial Chamber "erred in law and fact by relying on the discredited testimonies of witnesses TF1-371, TF -045 and TF1-366 without corroboration by credible independent testimonies"[925] and in "failing to consider exculpatory testimonies of prosecution witnesses and defence testimonies." In response, the Prosecution refers to its arguments contained in Section 4.A, in particular 4.A(ii), above, dealing with Kallon's Ground 7.

(c) Alleged error relating to Kallon's role in Kono

7.142 In relation to Kallon's conviction for enslavement in Kono, the Kallon Defence submits again that the alleged defective pleading was not cured by timely, clear

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923 Trial Judgement, Disposition.
924 Kallon Appeal Brief, para. 229.
925 Kallon Appeal Brief, para. 230.

and consistent information.[926] In response, the Prosecution refers to its arguments in Section 2.G of this Response Brief. In addition, it is submitted that the Kallon Defence does not specify the prejudice that it claims to have suffered as a result of the alleged defect.

7.143 The Kallon Defence further argues that the "Trial Chamber erred in law and fact by finding that from 1999-2000 the Appellant, on the orders of Sesay gathered approximately 400 eivilians who were jailed and taken daily to Kono".[927] It is not clear to the Proseeution what is actually the submission of the Kallon Defence, since Kallon was not convieted for this act. It is therefore not apparent how Kallon eould have suffered "irreparable prejudice." Furthermore, the Kallon Defence does not establish how any finding of the Trial Chamber was erroneous.

7.144 The Kallon Appeal Brief then goes on to list findings of the Trial Chamber which the Kallon Defence argues should have been pleaded as acts of personal commission.[928] It is not clear whether the Kallon Defence claims that personal commission should have been pleaded instead of the JCE responsibility or instead of superior responsibility, or both. In any case, the Kallon Defence ignores the fact that its list of findings concerned particular acts, events and facts which were relevant to Kallon's responsibility as a superior, as well as to his responsibility as a member of the JCE, and which were legitimately taken into account for that purpose.

7.145 The Kallon Appeal Brief further argues that some of the findings contained in paragraph 2095 of the Trial Judgement in order to establish Kallon's participation in the JCE, in particular the requisite intent to commit the crimes within the JCE, were dismissed in relation to Count 12. In this respect, it is submitted that first, the

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926 Kallon Appeal Brief, para. 231.

927 Kallon Appeal Brief, para. 232.

928 Kallon Appeal Brief, paras 232-233: e.g. the "finding that from 1999-2000 the Appellant, on the orders of Sesay gathered approximately 400 civilians who were jailed and taken daily to Kono"; para. 232, the finding that "he had a house in Kono where his bodyguards lived and supervised forced mining"; para. 233, "the use of children under the age of 15 years in the attack on Koidu and during the period of the AFRC/RUF joint control over the District; that the Appellant had bodyguards who were under the age of 15 years who were involved in enslavement of civilians; that in 1998 and 1999 the Appellant brought persons under the age of 15 years to be trained at Bunumbu and that he was actively engaged in the abduction of and planning of training of SBU's in Kono District"; para. 234, refering to para. 2095 of the Trial Judgement.

Kallon Defence does not specify where the Trial Chamber dismissed these findings in relation to Count 12, and secondly, the Kallon Defence does not specify how this circumstance, even if true, would be relevant to his criminal responsibility under Count 13, since in relation to Count 13 he was convicted for planning, and not on the basis of JCE liability.[929]

7.146 As to the credibility of witnesses TF1-263 and TF1-141[930] the Prosecution refers to Section 4, in particular 4.B(i), of this Response Brief. As to the Defence's grievances concerning paragraph 2092 of the Trial Judgement, it is noted that this paragraph actually deals with the participation of Sesay in the JCE and not with Kallon's responsibility.[931] As to the grievances with regard to Kallon's conviction on Count 12,[932] the Prosecution refers to Section 7.G of this Response Brief.

(d) Other alleged errors in relation to Count 13

7.147 As to the alleged error relating to Kallon's superior responsibility in Kono District, no new arguments are raised in the Kallon Appeal Brief,[933] and the Prosecution therefore relies on its submission in Section 6 of this Response Brief. The same applies to the alleged errors in relation to Kallon's role in the crime of enslavement, where the Kallon Defence relies on its submissions relating to Kallon's JCE liability for crimes in Kailahun[934], which is dealt with in Section 5.C of this Response Brief.

(vi) Gbao's Ground 11

(a) Introduction

7.148 The Trial Chamber convicted Gbao under Count 13 for enslavement, a crime against humanity, punishable under Article 2(c) of the Statute, by participating in a joint criminal enterprise, pursuant to Article 6(1) of the Statute, in relation to

929 Kallon Appeal Brief, paras 234, 235 and 240.
930 Kallon Appeal Brief, para. 236-237.
931 Kallon Appeal Brief, para. 236.
932 Kallon Appeal Brief, paras 237 and 241.
933 Kallon Appeal Brief, para. 238.
934 Kallon Appeal Brief, para. 239.

events in Tongo Field in Kenema District; in Kono District; and in Kailahun District.[935]

7.149 Gbao's Ground 11 contends that the Trial Chamber thereby erred in both law and fact, as the Prosecution failed to adduce credible evidence that would lead a reasonable finder of fact to conclude that this count had been proved beyond reasonable doubt.[936]

7.150 The main arguments of the Gbao Defence are similar to those already discussed above, in response to Sesay's Ground 40 (Section 7.H(iv) above). Gbao mainly argues that workers in Kailahun were "actually remunerated 'in kind' for their work" and were not forced to work under gunpoint,[937] that the Trial Chamber committed numerous misinterpretations and other errors in its findings,[938] relied upon uncorroborated testimony[939] and based its findings upon testimony of non-credible witnesses.[940]

(b) Argument that workers in Kailahun were remunerated

7.151 The argument of the Gbao Defence that civilians were allegedly paid in kind for their efforts and that thus no enslavement existed,[941] is similar to the arguments in paragraphs 312 to 314 of Sesay's Appeal Brief, which are dealt with in paragraphs 7.128 to 7.133 above. Regarding the grievances in paragraphs 257 to 262 of the Gbao Appeal Brief, the Prosecution repeats that it is well-established jurisprudence that Trial Chambers of international tribunals exercise discretion in relation to trial management and the conduct of proceedings before them.[942] The standard of review of abuse of discretion has not been met. The Prosecution

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935 Trial Judgement, Disposition.
936 Gbao Appeal Brief, para. 253.
937 Gbao Appeal Brief, para. 254 (i).
938 Gbao Appeal Brief, para. 254 (ii).
939 Gbao Appeal Brief, para. 254 (iii).
940 Gbao Appeal Brief, para. 254 (iv).
941 Gbao Appeal Brief, paras 255 to 262.
942 *Prosecutor v. Prlić et al.*, IT-04-74-AR73.2, "Decision on Prosecution Appeal Concerning the Trial Chamber's Ruling Reducing Time for the Prosecution Case", Appeals Chamber, 6 February 2007 ("***Prlić* Appeals Decision on Reducing Time for Prosecutor's Case**"), para. 8; *Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, "Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused" ("***Tolimir* Appeal Decision on Joinder**"), Appeals Chamber, 27 January 2006, para. 4; *Prosecutor v. Milošević*, IT-02-54-AR73, "Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit", Trial Chamber, 16 May 2002, ("***Milošević* Reasons for Refusal of Leave to Appeal**"), para. 14.

further refers to its discussion of the issue of evidence evaluation in Section 4 above, and reversal of burden of proof in Section 3.B.

(c) Alleged misinterpretations of the evidence by the Trial Chamber

7.152 The Gbao Defence goes on to argue that the Trial Chamber based convictions "on misinterpretations and sometimes non-existing evidence" and that "Gbao was convicted in the absence of credible evidence, constituting a miscarriage of justice."[943] The Gbao Defence bases this grievance on a list of alleged "factual misinterpretations and other errors" contained in an Annex III to the Gbao Appeal Brief.[944] Annex III to the Gbao Appeal Brief contains almost 20 pages of substantial arguments that the Prosecution is incapable of answering in detail in the page limits prescribed for this Response Brief. The Prosecution reiterates the standards of review on appeal (Prosecution Appeal Brief, Section 1.B), and the grounds for summary dismissal of grounds of appeal (paragraphs 1.16-1.20 above). Mere disagreement with the Trial Chamber's evaluation of the evidence, or with the conclusions drawn by the Trial Chamber from the evidence, or mere failure by the Trial Chamber to refer to specific items of Defence evidence or Defence arguments, are insufficient to establish an appealable error.

(d) Gbao's role in Kailahun District

7.153 As to the third Defence argument, namely that Gbao did not play any personal role in the illegal forced farming in Kailahun District,[945] the Prosecution again refers to Sections 5.D of this Response Brief.

7.154 The Gbao Defence argues that if the Appeals Chamber were to consider Gbao's responsibility for crimes in Kailahun charged in Count 13 outside the JCE, no individual criminal responsibility could be established.[946]

7.155 The Gbao Defence bases this argument mainly on the fact that only four out of nine Prosecution witnesses mentioned the existence of a farm after the Junta period in 1999, when Gbao was allegedly located in Makeni. The Gbao Defence

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943 Gbao Appeal Brief, para. 263.
944 Gbao Appeal Brief, para. 262.
945 Gbao Appeal Brief, paras 264 to 280.
946 Gbao Appeal Brief, para. 264.

then argues that "all major Prosecution witnesses ... did not mention Gbao's role."[947]

7.156 The Gbao Defence further alleges that the Trial Chamber based its findings regarding Gbao's role on only three witnesses, one of them being TF-108, a witness the Gbao Defence believes to be "perhaps the least reliable witness in the entire case".[948] The Gbao Defence also takes issue with the credibility of witnesses TF1-366[949] and TF-330,[950] and requests that their testimony with regard to Gbao's involvement in forced labour in Kailahun District during the indictment period be disregarded. Regarding the issue of witness credibility, the Prosecution refers to its arguments in Sections 4.A and 4.B(i) above.

7.157 The Prosecution submits that the Gbao Defence avoids mention of the fact, testified to by numerous witnesses, including a number of Defence witnesses, that the elaborated system of forced labour, in particular forced farming, mining and the system of so called "subscription", was based on the well developed structure and network of G-5 commanders. There are numerous findings by the Trial Chamber on how the system of forced labour was planned, organised and maintained by G-5 commanders.[951] The Trial Chamber found, for instance, that "[t]he Army Agricultural Unit, which operated under the auspices of the G5, was responsible for organising civilians to farm for the RUF and managing their contributions.[952] The G5 gave orders relating to civilians farming for the RUF

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947 Gbao Appeal Brief, para. 265, referring to Trial Judgement, paras 1414-1433.

948 Gbao Appeal Brief, para. 266. The Gbao Appeal Brief then goes on throughout paragraph 266 and 267 to discredit this Prosecution witness.

949 Gbao Appeal Brief, para. 268.

950 Gbao Appeal Brief, para. 269.

951 Captured civilians were placed in the custody of the G5 for screening, Trial Judgement, para. 1414, referring to the testimony of DIS-080, Transcript of 5 October 2007, p. 87 and Transcript of 8 October 2007, p. 9. The purpose of the screening was to identify possible Kamajors, assess the health of the captives and then allocate them to different units, for combat training, forced farming or other forms of forced labour, Trial Judgement, para. 1414, referring to the testimony of Transcript of TF1-141, 12 April 2005, p. 15; TF1-113, Transcript of 6 March 2006, pp. 32-35; TF1-036, Transcript 27 July 2005, pp. 41-42; Those who were not selected were handed over to chiefs by the G5 Commander, Trial Judgement, para. 1414, referring to the testimony of DIS-302, Transcript of 27 June 2007, pp. 22-26; Civilians were carrying the crops to trading posts or to the G5 Commanders for re-distribution, Trial Judgement, para. 1418, referring to the testimonies of TF1-113, Transcript of 2 March 2006, p. 50; TF1-330, Transcript of 15 March 2006, pp. 14-24, 44-49.

952 Trial Judgement, para. 1417.

administered farms and for the individual farms run by RUF Commanders."[953] An RUF "government" farm existed at Pendembu from December 1999 to 2001 and operated under the supervision of the Pendembu G5.[954] Likewise, it was found that the G5 were in charge of the so called "subscription system" whereby civilians were required to obtain food for fighters, as well as deliver rice, cocoa, palm oil, coffee and meat to the G5.[955]

7.158 The Trial Chamber held that "the entrenched practices of using civilians as forced labour" were "not only condoned but were supervised by senior Commanders and in particular the Commanders of the G5, presided over by Gbao as OSC."[956] One of the principal functions of the RUF "G5 unit" in Kailahun District was the management of farms on which hundreds of civilians were forced to labour.[957] TF1-078 testified that whenever the rebels required work done, they instructed the G5 to arrange for civilians to do it.[958]

7.159 The Defence does not take issue with the finding that Gbao was the Overall Security Commander (OSC) from 1996 to 2001 and in that function supervised

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953 Trial Judgement, para. 1417, referring to the testimonies of TF1-045, Transcript of 21 November 2005, pp. 63-64; TF1-113, Transcript of 6 March 2006, p. 32; TF1-108, Transcript of 13 March 2006, pp. 32-34; TF1-330, Transcript of 14 March 2006, p. 25; TF1-371, Transcript of 28 July 2006, p. 123; TF1-113, Transcript of 6 March 2006, pp. 21-31; TF1-330, Transcript of 14 March 2006, p. 24 and Transcript of 16 March 2006, pp. 67-68, 75-80; TF1-371, Transcript of 21 July 2006, pp. 60, 62-63.

954 Trial Judgement, para. 1424, referring to the testimonies of TF1-113, Transcript of 2 March 2006, p. 70; Transcript of 6 March 2006, TF1-113, pp. 32-38; Transcript of 16 March 2006, TF1-330, pp. 44-45. In the mornings, civilians were rounded up by the G5 Commander, ibid. referring to: TF1-113, Transcript of 2 March 2006, p. 71 and Transcripts of 6 March 2006, pp. 36-37.

955 Trial Judgement, para. 1427, referring to TF1-108, Transcript of 10 March 2006, pp. 33, 42-43 and Transcript of 14 March 2006, pp. 41-42; TF1-330, Transcript of 16 March 2006, p. 56; TF1-367, Transcript of 23 June 2006, pp. 36-39.

956 Trial Judgement, para. 710, referring to the testimonies of TF1-371, Transcript of 21 July 2006, pp. 65-67; Denis Koker, Transcript of 28 April 2005, p. 63; TF1-045, Transcript of 21 November 2005, p. 63; TF1-113, Transcript of 6 March 2006, pp. 21-31; TF1-330, Transcript of 14 March 2006, p. 24; Transcript of 16 March 2006, TF1-330, pp. 67-68, 75-80 (CS); Transcript of 21 July 2006, TF1-371, pp. 60, 62-63 (CS). Also according to DAG-080, the OSC had the had the authority to maintain law and order by ensuring that the other units performed: DAG-080, Transcript 9 June 2008, pp. 44-51, p. 28.

957 Trial Judgement, para. 954, referring to the testimonies of TF1-366, Transcript of 10 November 2005, pp. 6-7; TF1-330, Transcript of 14 March 2006, pp. 27-29; DIS-047, Transcript of 4 October 2007, p. 38; DAG-048, Transcript of 3 June 2008, pp. 118-119. Also: The civilians were informed of the rules of the camp, the first of which was that escape was prohibited. Trial Judgement, para. 1222, referring to the testimony of TF1-078, Transcript of 25 October 2004, pp. 62-63.

958 Trial Judgement, para. 1230, referring to the testimony TF1-078, of Transcript of 22 October 2004, pp. 73-76.

and advised the IDU, IO, MP and G5.[959] The Trial Chamber found evidence that Gbao, as OSC, gave orders to G5.[960] The Trial Chamber further found that in RUF controlled territory, the OSC was responsible for the enforcement of discipline and law and order.[961] These findings of the Trial Chamber are not based merely on the testimony of two or three witnesses, as the Gbao Defence alleges, but on a number of different witnesses, including Defence witnesses. Any reasonable trier of fact was entitled to conclude from this evidence that Gbao was at least planning the enslavement in Kailahun.

7.160 It is incidentally noted that Justice Boutet, who dissented on the finding with regard to the finding of Gbao's JCE liability, stated in paragraph 19 of his Dissenting Opinion:

> Though I have found that Gbao is not liable for crimes committed under the concept of joint criminal enterprise, I am satisfied beyond reasonable doubt that the evidence demonstrates that Gbao designed and implemented a system of agricultural production and load-carrying in Kailahun District between 25 May 1997 and late April 1998 which relied on the enslavement of civilians in order to supply provisions for the RUF. I am also satisfied that Gbao's role substantially contributed to ensuring the forced labour of civilians and that he intended that those civilians be enslaved or that he was aware of a substantial likelihood that civilians would be enslaved in agricultural production and the carrying of loads. I am also satisfied that Gbao used his position to compel the G5 to provide him with forced civilian labour or the products thereof. I am also satisfied that the evidence demonstrates a nexus between Gbao's directions and the enslavement of civilians to produce agricultural goods or carry loads for the RUF. Finally, I am satisfied that Gbao gave such orders intending that civilians would be enslaved in order to carry them out. Therefore, I hold pursuant to Article 6(1) of the Statute that Gbao planned the enslavement of civilians in Kailahun District between 25 May 1997 and late April 1998.

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959 Trial Judgement, para. 697, referring to the testimonies of TF1-041, Transcript of 10 July 2006, p. 64; DAG-048, Transcript of 3 June 2008, p. 51. The Chamber noted that witnesses used various terms to refer to Gbao, including the Chief Security Officer, Chief of Securities and Joint Security Commander, referring to TF1-071, Transcript of 21 January 2005, p. 9-11; TF1-108, Transcript of 10 March 2006, pp. 115-116; DAG-080, Transcript of 6 June 2008, pp. 44-45. The Chamber was satisfied that these terms refer to the same role, which we have referred to for consistency as the OSC. See also: DAG-048, Transcript of 3 June 2008, pp. 50-51 and Transcript of 5 June 2008, p. 7; DAG-047, Transcript of 16 June 2008, p. 80; TF1-361, Transcript of 19 July 2005, pp. 32-33, 61; Leonard Ngondi, Transcript of 29 March 2006, p. 7-10.

960 Trial Judgement, para. 699, referring to the testimonies of DAG-048, Transcript 3 June 2008, p. 49; TF1-330, Transcript of 14 March 2006, pp. 41-42.

961 Trial Judgement, para. 700, referring to the testimony of DAG-080, Transcript 9 June 2008, pp. 28, 44-51.

(e) Gbao's farm

7.161 Paragraph 272 of the Gbao Appeal Brief argues that the findings of the Trial Chamber in paragraph 1425 of the Trial Judgement was misleading, since it allegedly compressed "its findings that Sesay, Gbao and Bockarie each had farms at which civilians were forced to work." It is not clear to the Prosecution what is meant by "compressed findings", and without any further explanation by the Defence, the Prosecution cannot answer this argument. Paragraph 1425 of the Trial Judgement refers expressly to evidence that Gbao had a separate private farm in 1996-1999, and it was open to the Trial Chamber to accept that evidence.

7.162 As to the issues of alleged defective pleading of Gbao's involvement in forced farming on his private farm[962] and of credibility of the witnesses TF1-108 and TF1-330,[963] the Prosecution refers Sections 2.G, 4.A(i) and 4.B(viii)(b) of this Response Brief. It is further submitted that these were not the only witnesses who testified about Gbao's private farm. [964]

(f) Gbao's role in mining

7.163 Again, the Gbao Defence refers to Annex III of the Gbao Appeal Brief without substantiating the grievances in the body of the Gbao Appeal Brief itself. The Gbao Appeal Brief merely says that "findings that misrepresent mining in Kailahun District are equally troubling."[965]

7.164 It is submitted that the Defence again ignores the fact that the Trial Chamber found that Gbao was Overall Security Commander (OSC) from 1996 to 2001 and in that function supervised and advised G5.[966] G5 were organising civilians for the

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962 Alleged in Gbao Appeal Brief, para. 273.

963 Gbao Appeal Brief, paras 272 to 274.

964 See also: TF1-113, Transcript 2 March 2006, pp. 71-72 and TF1-371, Transcript 1 August 2006, pp. 154-158.

965 Gbao Appeal Brief, para. 275.

966 Trial Judgement, para. 697, referring to the testimonies of TF1-041, Transcript of 10 July 2006, p. 64; DAG-048, Transcript of 3 June 2008, p. 51. The Chamber noted that witnesses used various terms to refer to Gbao, including the Chief Security Officer, Chief of Securities and Joint Security Commander, referring to TF1-071, Transcript of 21 January 2005, p. 9-11; TF1-108, Transcript of 10 March 2006, pp. 115-116; DAG-080, Transcript of 6 June 2008, pp. 44-45. The Chamber was satisfied that these terms refer to the same role, which we have referred to for consistency as the OSC. See also: DAG-048, Transcript of 3 June 2008, pp. 50-51 and Transcript of 5 June 2008, p. 7; DAG-047, Transcript of 16 June 2008, p. 80; TF1-361, Transcript of 19 July 2005, pp. 32-33, 61; Leonard Ngondi, Transcript of 29 March 2006, p. 7-10.

purpose of providing labour.[967] They were supervising civilians in camps at mining sites.[968] Even if Gbao was not personally seen at the mines, this does not logically mean that he was not planning mining activities from the background through his G5 commanders, such as Patrick Bangura, who is mentioned by witness TF1-330 and in paragraph 276 of the Gbao Appeal Brief.

7.165 As to the issue whether the miners received food or not,[969] the Prosecution submits that this is irrelevant to the existence of forced labour as a form of enslavement, for the reasons given in paragraphs 7.128 to 7.133 above.

7.166 The Prosecution therefore submits that Gbao's Ground 11 should be dismissed in its entirety.

I. Pillage

(i) Introduction

7.167 This part of this Response Brief responds to **Kallon's Ground 22**, in which the Kallon Defence alleges errors relating to Kallon's conviction on Count 14 for pillage.

7.168 As a preliminary matter, the Prosecution notes that Ground 22 of the Kallon Appeal Brief is substantially different from the Notice of Appeal.[970] The Notice of Appeal focused mainly on points of law. In the Kallon Appeal Brief, no submissions were made on any points of law which were alleged in the Notice of Appeal for this ground of appeal.

(ii) General submissions[971]

7.169 The Kallon Defence relies on its general submissions on JCE in relation to Bo (Ground 9) and Kono (Ground 11).[972] The Kallon Defence also makes specific allegations in this ground of appeal on pillage in Count 14. It is alleged that the Trial Chamber entered a conviction for pillage in Bo for the looting of Le 800,000

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967 Trial Judgement, para. 694, referring to the testimonies DAG-048, Transcript of 3 June 2008, p. 92; DIS-124, Transcript of 23 November 2007, pp. 8, 14.

968 Trial Judgement, para. 1237, referring to the testimony of TF1-078, Transcript of 25 October 2004, pp. 32-33. Also: Trial Judgement, para. 1325.

969 Raised in paras 277 and 278 of the Gbao Appeal Brief.

970 Kallon Notice of Appeal, paras 23.1-23.5.

971 Kallon Appeal Brief, para. 242-243.

972 Kallon Appeal Brief, para. 242.

from Ibrahim Kamara, a crime which was committed by Bockarie. It is argued that the Trial Chamber failed to demonstrate how Kallon could have been responsible for the crime when he was not present, had no control over Bockarie or even knew about the crime. The Kallon Defence claims that the Trial Chamber did not demonstrate how the accused could have substantially contributed to the crime.[973]

7.170 The Kallon Defence also argues that this particular crime was not specifically pleaded in the Indictment and that the accused had no notice of the crime[974].

7.171 In response to this ground of appeal, the Prosecution adopts and relies on its submissions on JCE in respect of Ground 9 Bo District.[975]. The Prosecution also relies on its submissions on defects in the form of the indictment dealing with the issue of notice in Section 2 of this Response Brief.

7.172 The Prosecution specifically submits that before the Trial Chamber entered a conviction for pillage in Bo District, it evaluated all the evidence before it and was satisfied that Kallon's active participation in the furtherance of the common purpose of the JCE significantly contributed to the commission of pillage in Bo District.[976] In so finding, the Trial Chamber went further than it needed to. For reasons given elsewhere in this Response Brief, the Trial Chamber was not required as a matter of law to find that Kallon's own conduct contributed substantially to the acts of pillage: it needed only to find that Kallon made a substantial contribution *to the JCE*, and that the crimes were within the JCE. The Trial Chamber did find that Kallon made a substantial contribution to the JCE,[977] and it did find that the crimes of pillage were within the JCE,[978] and it is necessarily implicit from the Trial Judgement as a whole that the Trial Chamber was satisfied that this particular act of pillage was within the JCE. That was legally sufficient to found a conviction. The Defence has not established that it

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973 Kallon Appeal Brief, para. 242.
974 Kallon Appeal Brief, para. 242-243.
975 See Section 2 above.
976 Trial Judgement, para. 2008.
977 See in particular Trial Judgement paras 2003-2008, which must be read in the light of the Trial Judgement as a whole.
978 See in particular Trial Judgement para. 1982, which must be read in the light of the Trial Judgement as a whole.

was not reasonably open to the Trial Chamber to reach the conclusions that it did on the basis of the evidence before it.

(iii) Alleged errors relating to pillage in Kono

7.173 The Kallon Defenee argues that the Trial Chamber erred in law and fact in relying on the uneorroborated evidence of TF1-366 to conelude that Kallon was present at a meeting in Koidu at which JPK ordered the burning of houses.[979] It is also argued that the Kallon Defence had insufficient notice regarding this meeting. The Kallon Defence further argues that the Trial Chamber erred by relying on the evidence TF1-217 as the Kallon Defenee did not have sufficient notice of the issues discussed by the witness in his testimony.[980]

7.174 In response, the Prosecution relies on the submissions above in respect of JCE and Ground 11.[981] The prosecution also relies on its submissions above on defects in the form of the indictment[982] in response to the allegation that the Kallon Defence did not have sufficient notice of witness TF1-217's testimony.

7.175 As to the argument concerning the credibility of Witness TF1-366, the Prosecution relies on section 4(B)(vii)[983] of this Response Brief which deals with the Trial Chamber's assessment of the credibility of certain witnesses in particular witness TF1-366.[984]

7.176 As to the argument that mere presence at a meeting does not amount to "commission", the Trial Chamber did not convict based on Kallon's mere presence at the meeting. The conviction was based on the Trial Chamber's consideration of the evidence and circumstances as a whole, including the fact that Kallon was one of the senior commanders "on the ground" who was not only present in Koidu when the order to burn Koidu was carried out.[985] The Trial Chamber found that although numerous complaints were made "about the burning, harassment and looting of their property by the Junta forces, the

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979 Kallon Appeal Brief, para. 244.
980 Kallon Appeal Brief, para. 245.
981 See Section 3 (j).above
982 See Section 2 above.
983 See Section4(B)(vii) above.
984 See Section 4(B)(vii)(b) above.
985 Trial Judgement paras 1141, 1144.

Commanders did not take any aetion in response to the eomplaints."[986] The Trial Chamber also found "that AFRC/RUF fighters engaged in a systematie campaign of looting upon their arrival in Koidu, marking the continuation of Operation Pay Yourself"[987]. It was open to a reasonable trier of fact to make the findings that the Trial Chamber did on the basis of the evidenee before it.

(iv) Alleged errors relating to the looting of Tankoro Bank

7.177 The Kallon Defence eomplains that the Trial Chamber convicted Kallon for the looting of the Tankoro Bank in Koidu when he had no notice of the allegation of this crime.[988] The Prosecution relies on its general submissions in Section 2 above dealing with defects in the form of the indictment and notice and the general submissions on JCE in Kono District for Ground 11. The Prosecution further submits that the Kallon Defenee had notice of the allegation of the looting of the Tankoro Bank as the statements of the witnesses on whose evidence the Trial Chamber relied in its evaluation of the issue was disclosed to the Kallon Defenee before the start of the trial.

(v) Alleged errors relating to witness TF1-197

7.178 The Kallon Defence contends that the Trial Chamber erred in finding him responsible [redacted] on the ground that the Trial Chamber failed to demonstrate how Kallon shared with the perpetrators the intent to commit the crime, and that the Kallon Defence did not have sufficient notice of the allegation.[990]

7.179 The Prosecution relies on the general submissions in paragraphs 3.40-3.44 above relating to JCE in Kono District for Ground 11, and the submissions on defects in the form of the indictment in Seetion 2.

(vi) Conclusion

7.180 For the reasons given above, the Trial Chamber did not err in eonvicting Kallon for pillage as charged in Count 14, and this ground of appeal should be dismissed.

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986 Trial Judgement paras 1141-1144.
987 Trial Judgement para. 1140.
988 Kallon Appeal Brief, paras 246-247.
[redacted]
990 Kallon Appeal Brief, para. 248.

J. Attacks against peacekeepers

(i) Introduction

7.181 This part of this Response Brief responds to **Sesay's Ground 44, Kallon's Grounds 23 to 28 and Gbao's Ground 16.**

(ii) Sesay's Ground 44

(a) Introduction

7.182 Sesay was found liable under Article 6(3) of the Statute for failing to prevent or punish his subordinates for directing 14 attacks against UNAMSIL personnel and killing four UNAMSIL personnel in May 2000, as charged in Counts 15 and 17.[991]

7.183 The Sesay Defence claims that the Trial Chamber erred in law by not requiring this alleged commission to have been pleaded and in misapplying the legal elements and salient facts in determining the Appellant's 6(3) liability.[992]

7.184 The standards of review on appeal are dealt with in Section 1.B of the Prosecution Appeal Brief. The contention regarding defective pleadings is dealt with in Section 2.I of this Response Brief in response to Sesay's Ground 13, 36 and 44 (in parts). As to the argument that the Prosecution was "permitted to adduce allegations and new evidence, throughout the trial and throughout the Kallon and Gbao case, depriving the Appellant of any opportunity to meet the charges",[993] the Prosecution is unable to answer this contention, since it is not sufficiently substantiated.

(b) Superior-subordinate relationship

7.185 The Sesay Defence contends that the Trial Chamber erred in fact and law in concluding beyond a reasonable doubt that "Sesay was effectively the overall military Commander of the RUF on the ground".[994]

7.186 The Sesay Defence in particular argues that the Trial Chamber failed to examine "reasonable doubts raised by the Appellant and Exhibit 212" which the Sesay Defence argues is the "most cogent and undisputed evidence of his relative

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991 Trial Judgement, Disposition.
992 Sesay Appeal Brief, para. 336, referring to Trial Judgement, para. 2284.
993 Sesay Appeal Brief, para. 338.
994 Sesay Appeal Brief, para. 339, referring to Trial Judgement, para. 2268.

impotence."[995] It is submitted that this contention is unsubstantiated, and that the Trial Chamber made numerous findings that Sesay had effective control over the perpetrators before and during the UNAMSIL attacks.[996]

7.187 In response to the arguments in paragraphs 341 to 346 of the Sesay Appeal Brief regarding the Trial Chamber's alleged erroneous assessment of the evidence before it, the Prosecution refers to the standards of review on appeal dealt with in Section 1.B of the Prosecution Appeal Brief and Section 4.A of this Brief.

7.188 It is further submitted that the findings in paragraphs 2267 to 2279 of the Trial Judgement show that it was not the case that the Trial Chamber's assessment of Sesay's command responsibility was "based almost exclusively on an erroneous perception of the Appellant within a chain of command"[997] or that the Trial Chamber "failed to impute any authority to Sankoh".[998] The question whether Sankoh had command responsibility or not is irrelevant to Sesay's own responsibility as a commander. Even if Sankoh had command responsibility as well, and even if he gave orders to Sesay, this does not reduce Sesay's own responsibility as a commander in respect of crimes committed by his subordinates. Acting on an order is not a defence in international criminal law.[999] For high ranking commanders, such as Sesay, it is not even a mitigating factor.[1000] The argument that Sankoh was higher in rank in the RUF than Sesay at the time of the UNAMSIL attacks, raised in paragraphs 341 and 342 of the Sesay Appeal Brief, would not diselose an error in the Trial Judgement even if it were true.

7.189 The argument of the Sesay Defence that "Sesay's command over key Commanders was wholly contingent on the good will of Sankoh"[1001] is not sufficiently substantiated and is in contradietion with the Trial Chamber's findings

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995 Sesay Appeal Brief, para. 340.
996 Trial Judgement, paras 923 and 2267-2279.
997 Sesay Appeal Brief, para. 341.
998 Sesay Appeal Brief, para. 341.
999 Article 6(4) of the Statute articulates the well-established rule that "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Special Court determines that justice so requires".
1000 For an overview see *Prosecutor v. Erdemović*, IT-96-22, "Sentencing Judgment", Trial Chamber, 29 November 1996 ("***Erdemović* Sentencing Judgement**"), paras 47- 52.
1001 Sesay Appeal Brief, para. 343.

in paragraphs 2267 to 2279 of the Trial Judgement. The alleged "overwhelming mass of evidence that showed that the Accused did not have effective control"[1002] consists of Sesay's own testimony and entries in a radio log book.[1003] In any event, as a matter of law, a person in a position of command can have superior responsibility under Article 6(3), even if that position of command is "wholly contingent on the goodwill" of another person.

7.190 The Trial Chamber's findings in paragraphs 2267 to 2279 of the Trial Judgement were reasonably open to the Trial Chamber to make on the basis of the evidence before it. It is submitted that there is no basis for the Sesay Defence's contention that the finding "that Sesay was in command of and exercised effective control over the perpetrators of the attacks on 3 and 4 May 2000"[1004] was "so unreasonable as to be perverse".[1005]

(c) Sesay's failure to take the necessary and reasonable measures to prevent and/or punish the criminal act

7.191 The Prosecution takes no issue with the Sesay Defence's legal analysis in paragraphs 347 and 349 of the Sesay Appeal Brief but rejects the allegation of late notice, which is dealt with in Section 2.C above. In view of the evidence before the Trial Chamber and numerous findings in the Trial Judgement to the contrary, the argument that Sesay "did what he could to contain the violence and that the control he had (or lack thereof) meant that he could not stop it"[1006] is without merit. On the basis of the evidence before it, it was open to the Trial Chamber to conclude that Sesay did not only fail to prevent or punish criminal acts but also that he *gave unequivocal orders to commit* them.[1007] The arguments raised in paragraphs 348 to 351 of the Sesay Appeal Brief should be rejected.

7.192 In the light of the above, the Prosecution submits that this ground of appeal should be dismissed in its entirety.

[1002] Sesay Appeal Brief, para. 343.
[1003] Sesay Appeal Brief, para. 343, footnote 1079.
[1004] Trial Judgement, para. 2277.
[1005] Sesay Appeal Brief, paras 345-346.
[1006] Sesay Appeal Brief, para. 348.
[1007] See for instance Trial Judgement, paras 1779, 1818-1819, 1837, 1840, 1844, 1848, 1851, 1864.

(iii) Kallon's Grounds 23 to 28

7.193 The Trial Chamber found Kallon liable under Article 6(3) of the Statute for eight attacks intentionally directed against UNAMSIL personnel in May 2000 and the killing of four UNAMSIL personnel, as charged in Counts 15 and 17.[1008] **Grounds 23, 24 and 28 of Kallon's Appeal** were argued together.[1009] It seems that the arguments regarding Ground 26 are also included in this part of the Kallon Appeal Brief.[1010]

(a) Alleged defective pleadings

7.194 The Appellant first argues that the pleading of the UNAMSIL attacks in the Indictment was defective since it "does not plead particulars of the acts and or omissions of the Appellant" and "any of the elements of 6.3 responsibility."[1011] The Kallon Defence further alleges that the "Prosecutor while purporting to demonstrate lack of prejudice to the Appellant failed to provide any evidence of clear timely and consistent information that could cure the defects in the indictment in respect of the UNAMSIL count."[1012] The Kallon Defence thereby ignores that this issue had been decided by the Trial Chamber in its decision dated 26 June 2008[1013] and in the Trial Judgement, where it held explicitly that it:

> ... does not accept Kallon's submission that it is impossible to cure a defective indictment that fails to plead sufficiently allegations of an accused's personal commission. Guided by the holding of the Appeals Chamber, we will consider whether the Prosecution has cured each

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1008 Trial Judgement, para. 2292.

1009 Kallon Appeal Brief, para. 249.

1010 In para. 26.1 of Kallon's Notice of Appeal the Appellant submitted that the "Trial Chamber erred in relying on unreliable, uncorroborated hearsay and insufficient circumstantial identification evidence to connect and convict the accused on the unamsil counts, namely in the unpleaded locations of makump, makot, moria and locations in tonkolili, port loko and kono (para 573 p192,1790 p531)." The Kallon Appeal Brief does not contain any specific heading regarding Ground 26, but it appears that these issues are covered under "GROUNDS 23-26 & 28: DIRECTING ATTACKS AGAINST UNAMSIL: COUNTS 15 & 17".

1011 Kallon Appeal Brief, paras 249-252.

1012 Kallon Appeal Brief, para. 251, referring to Prosecution response with confidential annex A to Kallon Motion to exclude evidence outside the scope of the indictment with confidential annex A, 31 March 2008.

1013 *Kallon* Indictment Decision, paras 25-27.

> allegation of personal commission by subsequent communications when the Chamber discusses the liability of the Accused for these crimes."[1014]

The Prosecution refers to Section 2.C(iii) above for further arguments in response to Kallon's allegations regarding defective pleadings and lack of clear, timely and consistent notice.[1015]

(b) Lack of identification during trial

7.195 The Kallon Defence further submits that Kallon was not sufficiently identified as the person who attacked Salahuedin and abducted Jaganathan and that "Jaganathan provided insufficient particulars to establish that it was the Appellant involved in these crimes."[1016] In response, the Prosecution refers paragraphs 492 to 494 of the Trial Judgement, where the Trial Chamber discussed the value of "Identification Evidence" and where it explicitly pointed out that "[i]t is generally accepted that identification evidence is affected by the vagaries of human perception and recollection. Its probative value depends not only on the credibility of the witness, but also on other circumstances surrounding the identification."[1017] The evaluation of the evidence was a matter for the Trial Chamber. The Kallon Defence has not established that the evaluation given to the evidence by the Trial Chamber was not one that was open to a reasonable trier of fact.

(c) Other evidence issues

7.196 The allegation that the Trial Chamber relied on "unreliable hearsay evidence of Jaganathan" is not sufficiently substantiated to be addressed in this Brief.[1018] Claims that Jaganathan could not remember details during his testimony and the

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[1014] Trial Judgement, para. 400, referring to *AFRC* Appeal Judgement, para. 111 and *CDF* Appeal Judgement, para. 443, as well as numerous further references, such as, for instance: *Muhimana* Appeal Judgement, paras 195-202; *Kvočka* Appeal Judgement, para. 33; *Ntakirutimana* Appeal Judgement, paras 32-40, 62; *Niyitegeka* Appeal Judgement, paras 212, 218, 220, 224-228, 236-237; *Kupreškić* Appeal Judgement, paras 92-93; *Prosecutor v. Seromba*, ICTR-2001-66-A, "Judgement", Appeals Chamber, 12 March 2008 (*"**Seromba* Appeal Judgement**"), para. 100; *Simić* Appeal Judgement, para. 24; *Gacumbitsi* Appeal Judgment, paras 175-179.

[1015] Kallon Appeal Brief, paras 253-256, 259, 260 and 263-264.

[1016] Kallon Appeal Brief, para. 258. Further concerns about identification of the accused by witnesses were raised in para. 257, 261 and 265-266.

[1017] Trial Judgement, para. 492, referring, *inter alia*, to *Kupreškić* Appeal Judgement, paras 34-40 and footnoted references.

[1018] Kallon Appeal Brief, para. 259.

doubts raised against other witnesses' testimony[1019] are immaterial, as submitted above in Sections 4.B(vi) and 4.A(i) of this Response Brief.

7.197 The Kallon Defence also takes issue with the testimony of Lt Colonel Kasoma with regard to the abduction at Moria and the fact that Kallon was identified to him later. The Kallon Defence argues that there was ample evidence to show that Kallon was not the commander in charge when the ZAMBATT personnel were abducted.[1020] The Prosecution submits that the findings in paragraphs 928-930, 1833-1837, 1858, 2256-2258 and 2285-2289 of the Trial Judgement establish the contrary, and that the Defence has not shown that the conclusion reached by the Trial Chamber was one that was not reasonably open to it.

7.198 As to further allegations regarding "legal and factual errors on the application of a wrong standard adopted in assessing identification evidence", raised in paragraphs 267 to 269 of the Kallon Appeal Brief, in particular regarding the "assessment of the uncorroborated identification of the Appellant",[1021] and the fact that there were "two other Morris Kallons in the RUF",[1022] the Prosecution refers to Section 4 of this Response Brief.

(d) Alleged error with regard to Kallon's mens rea

7.199 The Kallon Defence claims further that Kallon did not have the necessary *mens rea* with regard to the alleged crimes, since his actions must be seen "within this frame of mind and general disposition and publicly expressed hostility and opposition to the disarmament process by Foday Sankoh that the radio message to the appellant and the opposition of some RUF commanders to the process on the orders of Foday Sankoh ought to be assessed and evaluated and not in isolation and unreasonable inferences drawn from such acts detached from context."[1023] In light of the evidence adduced during the trial and the resulting findings of the Trial Chamber in paragraphs 2242-2258 and 2290 of the Trial Judgement, the argument that Kallon did not oppose the disarmament process but rather "actively co-

[1019] Kallon Appeal Brief, paras 261-262.
[1020] Kallon Appeal Brief, para. 265.
[1021] Kallon Appeal Brief, para. 267.
[1022] Kallon Appeal Brief, para. 269.
[1023] Kallon Appeal Brief, paras 270-271.

operated with the process"[1024] is without merit. The Defence has not shown that the conclusion reached by the Trial Chamber was one that was not reasonably open to it. For further details with regard to Kallon's role in the attacks and his intent the Prosecution refers to its submission in paragraphs 4.91 to 4.104 of the Prosecution Appeal Brief.

(e) Other legal issues raised by the Kallon Defence

7.200 The argument concerning unpleaded locations raised in paragraph 274 of the Kallon Appeal Brief[1025] is dealt with in Section 2.B of this Response Brief. As regards the allegation that the "Trial Chamber found Kallon guilty under article 6(3) relying mainly on the co-aecused evidence tendered at trial"[1026] the Prosecution refers to Section xx of this Response Brief.

7.201 The Kallon Defence further submits that the Trial Chamber erred "by finding that the accused incurred superior command responsibility for the crimes of alleged subordinates in Magburaka and Makeni."[1027] The Kallon Defence, similar to the Sesay Defence, seems to argue that Kallon was not responsible as a commander, because he was a "subordinate commander under Sesay and Sankoh" and because "commanders by-passed Kallon and sent messages direetly to Sankoh through Sesay on the critical issue of disarmament."[1028] The Kallon Defence seems to argue in paragraphs 277 to 278 of the Kallon Appeal Brief, that Kallon had no effective control, first because "on 1 May 2000, Sankoh sent Sesay to move to Makeni to ascertain the cause of events" and beeause he had contacted "The Brigade Commander in Bombali District, Komba Gbundema and Commanders in Tongo field to send re-enforcements"[1029] and that therefore Kallon could not be "liable as a superior for crimes committed by several RUF commanders amongst them, Gilbril Massaquoi, Alfred Turay, Kailondo and others."[1030] This argument is not further developed. In response, the Prosecution nevertheless generally refers to

[1024] Kallon Appeal Brief, paras 271-272.
[1025] Kallon Appeal Brief, para. 274.
[1026] Kallon Appeal Brief, para. 275.
[1027] Kallon Appeal Brief, para. 276.
[1028] Kallon Appeal Brief, para. 276.
[1029] Kallon Appeal Brief, para. 277, referring to Trial Judgement, para. 1844.
[1030] Kallon Appeal Brief, para. 278, referring to Trial Judgement, para. 2286.

its arguments above in paragraph 7.188. The argument that the Trial Chamber never found Kallon to have been Gbao's superior is irrelevant, since Kallon was still the superior of other perpetrators involved in the acts for which Gbao was convicted as an aider and abettor.[1031]

7.202 Further, the argument that the Trial Chamber found for the same time frame that Kallon was "Battle Ground Commander" and was "promoted to Brigadier and moved to Makeni as a Brigade Commander"[1032] seems to ignore the fundamental difference between "rank" and "assignment" in the RUF, as explained in paragraph 649 Trial Judgement:

> In *addition to ranks*, the RUF had a system of assignments or appointments and a hierarchy of status among their fighters depending on where they were trained. These criteria determined in large part the respect and obedience to which a Commander was entitled and were critical to his/her ability to control troops. The RUF command structure was thus polycentric, in that a Commander's importance and his power and authority over troops were derived from a combination of multiple recognised sources. (Emphasis added.)

7.203 The Trial Chamber also found that:

> The most senior assignments in the RUF movement were the Leader, the Battle Field Commander ("BFC") and the Battle Group Commander ("BGC"). This *trias* was the centre of the military power and control of the RUF and together formed the core of the RUF "High Command." Subordinate to these senior Commanders there was a system of appointments of both operational and staff Commanders whose responsibilities generally corresponded to a particular geographical area of control.[1033]

7.204 It is submitted that the facts that there may have been instances of disobedience by certain subordinates, that Kallon "took orders from and reported directly to Foday",[1034] and that some subordinates "reported directly to Foday Sankoh bypassing the Appellant",[1035] are immaterial,[1036] since they do not negate the existence of effective control, as argued above, in paragraph 7.188.

[1031] Kallon Appeal Brief, para. 278, referring to paras 2262-2264.
[1032] Kallon Appeal Brief, para. 279, referring to paras 928-931.
[1033] Trial Judgement, para. 657 (footnotes omitted).
[1034] Kallon Appeal Brief, para. 279.
[1035] Kallon Appeal Brief, para. 280.
[1036] See *Erdemović* Sentencing Judgement, paras 47-52.

7.205 It is furthermore erroneous to say that the Trial Chamber based the finding that Kallon had effeetive control solely on his *de iure* authority.[1037] There are numerous findings of the Trial Chamber that Kallon issued orders to subordinate commanders, that these orders were implemented and that commanders reported to Kallon.[1038]

7.206 The evidence issues, in particular regarding the credibility of UNAMSIL and victim witnesses, raised in paragraphs 282 to 285 of the Kallon Appeal Brief, are addressed generally above in Section 4.A and 4.B(vii) of this Response Brief. The argument raised in paragraph 286 of the Kallon Appeal Brief is not substantiated.

7.207 The contention regarding defective pleading of the killings of UNAMSIL personnel is addressed above in Section 2.C(iii) of this Brief. Further, the Kallon Defence does not sufficiently substantiate the argument that "the alleged murder of the UNAMSIL peacekeepers was not part of the Prosecution case during presentation of his case."[1039] The issue of convictions for unpleaded locations[1040] is addressed in Section 2.B of this Response Brief.

7.208 Regarding the convictions under Count 17, the Kallon Defence argues that it was not "established that the accused knew or had reason to know that his subordinates had committed the killings"[1041] and that "at the material moment to this case, there was no fighting in Makeni", thus no "nexus between the attack and armed conflict" existed.[1042] Neither of these contentions is substantiated, but in any event, they are without merit. The Trial Chamber established in paragraph 2290 of the Trial Judgement that Kallon had the necessary knowledge. In the *Tadić* case, the Appeals Chamber held that:

> International humanitarian law applies from the initiation of such armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved. [...], international humanitarian law continues to apply in the whole territory of the warring States or, in the

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1037 Kallon Appeal Brief, para. 281.
1038 Trial Judgement, paras 929-930 and 2286-2287.
1039 Kallon Appeal Brief, paras 287-288.
1040 The Kallon Defence seems to raise this issue in para. 288 of the Kallon Appeal Brief.
1041 Kallon Appeal Brief, para. 288.
1042 Kallon Appeal Brief, para. 289.

> case of internal conflicts, the whole territory under the control of a party, *whether or not actual combat takes place.*[1043]

7.209 The Prosecution therefore submits that Grounds 23 to 28 of Kallon's Appeal should be dismissed in their entirety.

(f) Alleged requirement of a specific intent for convictions under Count 15

7.210 **Kallon's Ground 25** contends that the Trial Chamber "erred in law by failing to make any finding as to the specific intent of the Appellant in the conviction under Article 6(1) and 6(3)" in particular, that the "accused must have intended the personnel to be the primary object of the attack".[1044] The contention of the Kallon Defence in paragraph 291 of the Kallon Appeal Brief, that the Trial Chamber "... ought to have shown how Kallon personally intended to make the specified peacekeepers 'the primary objects of the attacks directed by him' as stated in paragraph 232 of the Trial Judgment, rather than how he used his subordinates to commit the offences through an Article 6(3) mode" has no legal basis and is without merits. The cited *Rutaganda* case does not support the Appellants erroneous contention.[1045]

7.211 It is submitted, that the Trial Chamber's legal findings regarding the *mens rea* requirements for superior responsible under Article 6(3) of the Statute are correctly stated in paragraphs 308 to 311 of the Trial Judgement. The Prosecution must only prove that the superior knew or had reason to know that his subordinate was about to commit or had committed such crimes.[1046]

(g) Alleged error relating to civilian status of UNAMSIL

7.212 In **Ground 27** of the Kallon Appeal Brief, the Appellant submits "that the leadership of UNAMSIL acted in a belligerent manner in dealing ... with the RUF, hence stripping itself of any international protection accorded civilians or peacekeepers."[1047] In support of this argument, the Appellant simply refers to

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[1043] *Tadić* Jurisdictional Appeal Decision, para. 70 (emphasis added).
[1044] Kallon Appeal Brief, para. 290.
[1045] Kallon Appeal Brief, para. 291, referring to *Prosecutor v. Rutaganda,* ICTR-96-3-T, "Trial Judgment and Sentence", Trial Chamber, 6 December 1999 ("***Rutaganda* Trial Judgement**"), paras 61-63.
[1046] Trial Judgement, para. 308.
[1047] Kallon Appeal Brief, para. 293.

Annex III added to his Appeal Brief to "illustrate and throw light on this Ground."[1048] It is submitted, that it is not possible to answer such an unsubstantiated submission. In response the Prosecution refers to the elaborate legal analysis of the civilian status of UNAMSIL personnel provided in the Trial Judgement in paragraphs 1906 to 1924 and the use of force by UNAMSIL in self-defence in paragraphs 1925 to 1936 which concluded in the finding: For the foregoing reasons, the Chamber finds that UNAMSIL personnel were not taking direct part in hostilities against the RUF at the time of the attacks. Their use of force in self-defence did not make them combatants. The Chamber is therefore satisfied that the peacekeepers were entitled in these circumstances to the protection guaranteed to civilians under the international law of armed conflict.[1049]

(iv) Gbao's Ground 16

(a) Introduction

7.213 Gbao was found liable under Article 6(1) of the Statute for aiding and abetting the attacks directed against Salahuedin and Jaganathan on 1 May 2000 at the Makump DDR camp, as charged in Count 15.[1050] The Gbao Defence submits that his "actions were not specifically directed to assist the perpetration of the crimes" because he "attempted to calm Kallon before such crimes were perpetrated."[1051] The Gbao Defence therefore submits that Gbao "did not possess the requisite *actus reus* or *mens rea* to constituting aiding and abetting."[1052]

(b) Gbao's opposition against disarmament in general

7.214 The Gbao Defence argues that the Trial Chamber erroneously found him to be opposed to disarmament, arguing that witness TF1-071 lied about Gbao's involvement in the incident of 1 May 2000 at the Lunsar DDR camp.[1053] In response, the Prosecution submits that the Trial Chamber did not take issue with TF1-071's credibility and that the Trial Chamber has a wide discretion regarding

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[1048] Kallon Appeal Brief, para. 293.
[1049] Trial Judgement, para. 1937.
[1050] Trial Judgement, para. 2265.
[1051] Gbao Appeal Brief, para. 313.
[1052] Gbao Appeal Brief, para. 313.
[1053] Gbao Appeal Brief, para. 316.

the assessment of the evidence (see Section 4.A above). It is further submitted that the Trial Chamber relied on other evidence in finding Gbao liable under Count 15.

7.215 The Gbao Defence further argues that Gbao's behaviour during an earlier incident, on 17 April 2000 at the Reception Centre near Makeni, showed Gbao's real "state of mind during this time."[1054] This contention is based merely on one sentence in TF1-165's testimony and ignores the rest of the evidence, which shows that Gbao, in concert with the RUF High Command, was *not in favour of the DDR programme*. TF1-165 gave evidence of Gbao's concerns regarding disarmament:

> He gave me several reasons but I can remember a few. One is that the Lome Peace Accord, which they were signatory, was not being implemented properly, citing that RUF was promised some certain appointments and they not been given yet. To be specific, ambassadorial appointments aud, ... , some of them to be also appointed district commissioners or something of the sort. They were claiming that all combatants, which included Sierra Leone Army, were to be disarmed and weapons taken care of by UNAMSIL. And as the case it were, they were saying even if the SLA combatants were disarmed, the weapons were still kept in the stores in their camps. They complained that their leader, ..., Foday Sankoh, was not being given the respect that he deserved, even if he had been appointed the vice-president of this country.[1055]

7.216 Gbao's statement, made in the second half of April 2000, that any fighter who was found disarming secretly would face execution,[1056] also shows that he was opposed to disarmament and that he was ready to use violence to stop it. Further, TF1-174, a reliable and credible witness, stated that Gbao took the children from the Interim Care Centre (ICC) in Makeni and that one of the boys returned to the ICC crying and reported that a good number of his companions were killed in the attack at Lunsar.[1057] The Prosecution therefore submits that one line of evidence of one witness in one transcript does not make the Trial Chamber's finding unreasonable.

[1054] Gbao Appeal Brief, para. 317. Also paras 318-321.
[1055] TF1-165, Transcript 29 March 2006, pp. 18-19.
[1056] Trial Judgement, para. 1780.
[1057] TF1-174, Transcript 21 March 2006, p. 66.

(c) Gbao's aiding and abetting was not ex post facto

7.217 The Gbao Defence further submits that Gbao did not aid and abet the assault of Salahuedin and Jaganathan's abduction on 1 May 2000 at Makump DDR camp. The Gbao Defence principally argues that "the act of taking up an AK-47 and standing passively while Jaganathan was asking for assistance occurred after the two UN men had been physically assaulted and after the order for Jaganathan's arrest had been issued."[1058] According to Gbao's Defence this was a case of *ex-post facto* aiding and abetting and that it must therefore "be established that a prior agreement existed between the principal and the person who subsequently aided and abetted in the commission of the crime."[1059]

7.218 These submissions are legally wrong since they rely on one single moment within the course of crimes, instead of looking at the crime as a whole and at Gbao's prior and later behaviour. The Gbao Defence's suggestion that the described behaviour during the abduction of Jaganathan and the assault on Salahuedin was *ex post facto* is erroneous.[1060] In fact, the crime, which consisted not only of the physical assault, but also of the abduction of the peacekeeper, *started* with these acts and lasted for several weeks, until the UNAMSIL personnel were released.

7.219 It is further submitted that it was not only the fact that Gbao was standing in the camp holding an AK-47 in his hands that led the Trial Chamber to convict him for aiding and abetting. It was his behaviour as a whole, together with his position of authority, which actually amounted to "tacit approval and encouragement" of the crimes.[1061] Further, Gbao's behaviour went far beyond "tacit approval". When Jaganathan requested Gbao to explain his problems on 1 May 2000 at Makump DDR camp, Gbao responded: "[g]ive me back my five men and their weapons, otherwise I will not move an inch from here."[1062] Later the same day, Gbao did

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1058 Gbao Appeal Brief, para. 326.

1059 Gbao Appeal Brief, para. 326, citing: Trial Judgement, para. 278, referring to *Blagojević and Jokić* Trial Judgement, para. 731.

1060 Gbao Appeal Brief, para. 317.

1061 *Brđanin* Appeal Judgement, para. 273; *Orić* Appeal Judgement, para. 42; *Kayishema and Ruzindana* Appeal Judgement, paras 201-202.

1062 Trial Judgement, para. 1786. Jaganathan attempted further discussion but did not make any progress in resolving the problem.

not appear willing to enter into discussions with UNAMSIL commanders.[1063] On the contrary, the Trial Chamber found that when Maroa arrived at Makump DDR camp, he reported to Ngondi via radio that:

> [...] Gbao was very wild [...] and he was demanding that we must give them their ten combatants and their ten rifles because that was RUF territory. He was demanding to a certain extent to close down the entire exercise and even the camp. And he was calling more combatants who were assembled within the DDR camp.[1064]

7.220 It was further found that Gbao later escorted the abducted peacekeepers arriving in a Land Rover to Makeni. He took three rifles out of the boot of his car. Moroa was bleeding from his mouth and the other three peacekeepers were limping.[1065]

7.221 In the light of these findings it is difficult to understand how the Defence can argue that the Trial Chamber "committed an error of fact that amounts to an abuse of its discretion."[1066]

7.222 As to the non existence of the requisite *mens rea* – which has as a matter of law nothing to do with the question whether Gbao's behaviour amounted to "tacit approval", as erroneously argued by the Gbao' Defence[1067] – it is submitted that the Trial Chamber did not err in finding that Gbao had the requisite *mens rea* of an aider and abettor, as discussed below.

(d) Gbao's actus reus and mens rea were established

7.223 It is submitted that in the light of the above, of the Trial Chamber's findings in paragraphs 1786 and 2261 to 2265, and of the submissions made by the Prosecution in its Appeal Brief in paragraphs 4.105 to 4.112, the Gbao Defence's lengthy and somewhat repetitive discussion regarding Gbao's lack of *actus reus* and *mens rea* in paragraphs 333 to 353 of the Gbao Appeal Brief is without merit.

7.224 First, an aider and abettor need not "actively assist" the crime, as suggested by the Gbao Defence.[1068] Second, there are numerous findings and ample evidence that

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[1063] Trial Judgement, para. 1787.
[1064] Trial Judgement, para. 1789 and TF1-165, Transcript 29 March 2006, p. 28.
[1065] Trial Judgement, para. 1799.
[1066] Gbao Appeal Brief, para. 330.
[1067] Gbao Appeal Brief, paras 328-330.
[1068] Gbao Appeal Brief, para. 331.

show that Gbao was in *fact in a position of authority*, contrary to the Defence contention.[1069] As full Colonel and Overall Security Commander (OSC),[1070] Gbao was "heavily involved in the disarmament of RUF fighters and he interacted with external delegations and NGOs in Makeni on behalf of the RUF."[1071] The Trial Chamber further held that "Sesay testified that in his absence, Kallon, Gbao and Kailondo were the most senior Commanders in Makeni. Other witnesses also stated that Gbao was one of the most senior Commanders in Makeni."[1072] The Trial Chamber also found "that Gbao's disciplinary powers in relation to minor offences were enhanced and that he possessed greater authority and influence over RUF fighters than previously in Kailahun District."[1073]

7.225 In arguing that Gbao's acts did not substantially affect the commission of the crime, the Gbao Defence again erroneously focuses only on one single act where Gbao picks up a gun and stands by watching Kallon assaulting Salahuedin and arresting Jaganathan, apparently trying to calm Kallon down. The Defence again ignores all the *other acts* described above in detail,[1074] in particular what the Trial Chamber explained accurately in paragraph 2263 of the Trial Judgement:

> ... Gbao deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at the Makump DDR camp and that Gbao's actions in arming himself with an AK-47 amounted to tacit approval of Kallon's conduct. We therefore find that Gbao's conduct before and during the attacks on Salahuedin and Jaganathan had a substantial effect on their perpetration.

7.226 The mere fact that Gbao appeared to have tried at a certain point to calm down Kallon is therefore immaterial.[1075] On the contrary, the findings of the Trial Chamber, in particular in paragraphs 2261 to 2265 and in paragraph 1786 of the Trial Judgement, and the evidence before the Trial Chamber clearly show that Gbao in fact *fuelled the conflict in the DDR camp*[1076] and therefore contributed

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1069 Gbao Appeal Brief, paras 333-335.
1070 Trial Judgement, para. 934.
1071 Trial Judgement, para. 940.
1072 Trial Judgement, para. 2295 (footnotes omitted).
1073 Trial Judgement, paras 936-939 and para. 2295.
1074 Gbao Appeal Brief, paras 336-337.
1075 As suggested in Gbao Appeal Brief, para. 342.
1076 Contrary to the contentions in paras 339-344.

substantially to the commission of the crimes of which he was convicted. The Defence contentions that some UN personnel allegedly tried to talk to Gbao,[1077] that there was supposedly no criminal conduct before Kallon arrived,[1078] that there is no evidence that Kallon and Gbao were in contact before the events in the DDR camp,[1079] and that Gbao did not physically attack the UN peacekeepers himself,[1080] are immaterial.

7.227 As to the Defence contention that Gbao did not possess the requisite intent to support the commission of the crimes in the DDR camp,[1081] the Prosecution submits that the *mens rea* element for an aider and abetter is the mere "knowledge that the acts performed by the accused assist the commission of the crime by the principal offender."[1082] Such "knowledge may be inferred from all relevant circumstances."[1083] In the light of the above, it was open to the Trial Chamber to infer this requisite knowledge: Gbao as a member of the RUF high Command knew about Kallon's actions and supported them. Gbao's Defence again fails to take into consideration Gbao's behaviour as a whole, including before and after the incident where Salahuedin was assaulted and Jaganathan arrested. The argument that the Trial Chamber's interpretation of the evidence was "grossly misleading" is incorrect.[1084] The Gbao Defence tries to picture Gbao as completely inferior to Kallon and "terrified" of the latter's acts.[1085] This contention is not supported by the evidence before the Trial Chamber, or the Trial Chamber's findings. On the contrary, the Trial Chamber found that "Gbao was one of the

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1077 Gbao Appeal Brief, para. 342.
1078 Gbao Appeal Brief, para. 341.
1079 Gbao Appeal Brief, para. 343.
1080 Gbao Appeal Brief, para. 344.
1081 Gbao Appeal Brief, paras 345-353.
1082 Trial Judgement, para. 280, referring to *Vasiljević* Appeal Judgement, para. 102; *Blaškić* Appeal Judgement, para. 49; *Tadić* Appeal Judgement, para. 229.
1083 Trial Judgement, para. 280, *Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998 ("***Čelebići* Trial Judgement**"), para. 328 and to *Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997 ("***Tadić* Trial Judgement**"), para. 676.
1084 Gbao Appeal Brief, para. 348.
1085 Gbao Appeal Brief, para. 349.

most senior Commanders in Makeni"[1086] and "... cognisant that Kallon, as BGC, was senior to Gbao in the RUF command structure", nevertheless found:

> ... that proof of aiding and abetting does not require Gbao to have possessed the material ability to prevent the abduction. Nonetheless, the Chamber does not accept that Gbao did not act on account of Kallon's seniority. Gbao and Kallon were both Vanguards and knew each other well. Gbao was the senior RUF Commander present until Kallon's arrival and he remained the Commander with the largest number of fighters present.[1087]

7.228 The Gbao Defence's interpretation of the facts is particularly far-fetched and inconceivable, if one takes into consideration Gbao's behaviour as a whole as shown above. Gbao had clearly shown his opposition to the disarmament on several occasions and that he was ready to use violence to stop it. He arrived at the Makump DDR camp with a group of 30 to 40 armed fighters on 1 May 2000 and he stated "give me back my five men and their weapons, otherwise I will not move an inch from here."[1088]

7.229 Gbao's Ground 16 of the Appeal should therefore be dismissed in its entirety.

8. Cumulative convictions

A. General matters

8.1. This section of this Response Brief responds to **Kallon's Ground 30** and **Gbao's Ground 19**.

8.2. The law on cumulative convictions is well-established in the jurisprudence of the *ad hoc* tribunals. A two-pronged test was articulated in the *Čelebići* Appeal Judgment (**"*Čelebići* test"**)[1089] and has been followed in subsequent case law.[1090]

[1086] Trial Judgement, para. 2295, referring to the testimonies of TF1-174, Transcript of 27 March 2006, p. 100 and DMK-161, Transcript of 22 April 2008, p. 46.

[1087] Trial Judgement, para. 2262.

[1088] Trial Judgement, paras 2296 and 1786.

[1089] *Čelebići* Appeal Judgement, paras 412-413.

[1090] *CDF* Appeal Judgement, para. 220; *Krajišnik* Appeal Judgement, para. 386; *Strugar* Appeal Judgement, para. 321; *Galić* Appeal Judgement, para. 163; *Naletilić and Martinović* Appeal Judgement, para. 584; *Stakić* Appeal Judgement, para. 355; *Kordić and Čerkez* Appeal Judgement, para. 1032; *Krstić* Appeal Judgement, para. 218; *Kunarac* Appeal Judgement, para. 168; *Musema* Appeal Judgement, paras 358 and 361-363; *Kupreškić* Appeal Judgement, para. 387; *Prosecutor v. Jelisić*, IT-95-10-A, "Judgement", Appeals Chamber, 5 July 2001 (**"*Jelesić* Appeal Judgement"**), paras 78-79.

8.3. Generally, multiple convictions on the same facts are permissible so long as each charging provision contains a materially distinct element not contained in the other, even in cases of intra-Article convictions.[1091] Contrary to the assertion of the Gbao Defence,[1092] whether cumulative convictions for the same conduct are permissible is strictly a question of law.[1093]

B. Cumulative convictions for murder and extermination

8.4. The Kallon Defence and Gbao Defence both submit that the Trial Chamber erred by convicting Kallon and Gbao for both murder and extermination in respect of the same conduct,[1094] and appear to argue that cumulative convictions for both murder and extermination for the same conduct are impermissible in general.[1095]

8.5. The Prosecution acknowledges that international criminal law jurisprudence does support this proposition to the extent that it applies to *intra*-Article murder and extermination convictions: that is to say, cumulative convictions for murder *as a crime against humanity* and for extermination *as a crime against humanity* are impermissible.[1096] Consistently with this case law, the Trial Chamber *expressly* held that it was impermissible to enter cumulative convictions for both murder and extermination as crimes against humanity under Counts 4 and 3 in respect of the same conduct, although it is possible to enter convictions for both counts in respect of different conduct.[1097]

[1091] *Kordić and Čerkez* Appeal Judgement, paras 1039-1043; *Krajišnik* Appeal Judgement, paras 388-391; *Naletilić and Martinović* Appeal Judgement, paras 589-590; *Stakić* Appeal Judgement, paras 359-364 and 367; *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 84; *Kunarac* Appeal Judgement, paras 179, 186 and 196; *Kupreškić* Appeal Judgement, para. 394.

[1092] Gbao Appeal Brief, para. 488: The Gbao Defence alleged an error in *fact*; The Kallon Defence failed to classify the error altogether.

[1093] *Krajišnik* Appeal Judgement, para. 387; *Strugar* Appeal Judgement, para. 322; *Stakić* Appeal Judgement, para. 356; *Kordić and Čerkez* Appeal Judgement, para. 1032; *Krstić* Appeal Judgement, para. 226; *Vasiljević* Appeal Judgement, para. 145; *Kunarac* Appeal Judgement, para. 174.

[1094] Kallon Appeal Brief, para. 295; Gbao Appeal Brief, para. 488.

[1095] See Kallon Appeal Brief, para. 295; Gbao Appeal Brief, para. 488.

[1096] Trial Judgement, para. 2304, referring to *Ntakirutimana* Appeal Judgement, para. 542: The ICTR Appeals Chamber held that "[...] the only element that distinguishes [murder as a crime against humanity from extermination as a crime against humanity] is the requirement of [extermination] that the killings occur on a mass scale"; also see *Stakić* Appeal Judgement, para. 367; *Kayishema and Ruzindana* Trial Judgement, paras 647-650; *Rutaganda* Trial Judgement, para. 422; *Prosecutor v. Semanza*, ICTR-97-20-T, "Judgement and Sentence", Trial Chamber, 15 May 2003 ("***Semanza* Trial Judgement**"), paras 500-505.

[1097] Trial Judgement, para. 2304.

8.6. On the other hand, it is well-settled law, and it was expressly stated in the Trial Judgement, that cumulative convictions may be entered for the same conduct under Article 2 of the Statute (crimes against humanity) and Article 3 (war crimes).[1098] Therefore, cumulative convictions for murder *as a war crime* (namely, a violation of common Article 3 to the Geneva Conventions) (Count 5), and for extermination *as a crime against humanity* (Count 3), are *inter*-Article convictions and clearly permissible.

8.7. It follows from this that to the extent that the convictions on Count 3 and Count 5 both relate to the same conduct, the convictions are *not* impermissibly cumulative as these are *inter*-Article cumulative convictions.

8.8. On the other hand, it also follows that the convictions on Count 3 and Count 4 (extermination and murder as a crime against humanity), to the extent that they relate to the same conduct, *are* impermissibly cumulative.

8.9. The Prosecution acknowledges that although the Trial Chamber articulated the correct principles, the Appellants were nonetheless convicted cumulatively under Counts 3 and 4 for the same conduct in respect of the conduct referred to in the following paragraphs of the Trial Judgement:

(1) Paragraph 1974, Items 2.1.1.(i) to (ii);

(2) Paragraph 2050, Items 3.1.1.(x) to (xiv);

(3) Paragraph 2063, Items 4.1.1.1.(iii) to (vii) and (viii) to (ix);

(4) Paragraph 2156, Item 5.1.1.(i).

8.10. The Prosecution therefore acknowledges that the Disposition of the Trial Judgement should be amended so that this conduct is included only under Count 3 (extermination), rather than under both Counts 3 and 4.

8.11. In respect of this conduct, it is the conviction for Count 3 (extermination) that should stand, rather than the conviction for Count 4 (murder). First, contrary to the Gbao Defence's suggestion,[1099] the decision of which of the two convictions is to be

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[1098] Trial Judgement, para. 2302; also see *Kordić and Čerkez* Appeal Judgement, paras 1036-1037; *Galić* Appeal Judgement, para. 165; *Vasiljević* Appeal Judgement, para. 145; *Kunarac* Appeal Judgement, para. 176; *Musema* Appeal Judgement, paras 362-363; *Kupreškić* Appeal Judgement, para. 387; *Jelesić* Appeal Judgement, paras 82-83; *Jelesić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 46.

[1099] Gbao Appeal Brief, para. 488.

dismissed in such circumstances is not a matter of discretion. Upon a finding of impermissibly cumulative convictions, "the conviction under the more specific provision should be upheld", subsuming the less specific one.[1100] Second, just as "multiple convictions serve to describe the full eulpability of a particular accused or provide a eomplete picture of his criminal eonduct", in cases where cumulative convictions are impermissible in respect of two crimes, a conviction should be entered for the one crime that will "serve to describe the full culpability of a particular accused or provide a complete picture of his criminal conduct".[1101] The Prosecution submits that the Appellants' full culpability would be more adequately and fairly described by the convietion for extermination (under Count 3), reflecting the massive scale and indiscriminate nature of the unlawful killings.[1102]

8.12. There remain convictions for other conduct under Count 4 which is not covered by the Count 3 convictions.[1103] This conduct should remain part of the conviction on Count 4 as it is not cumulative with the conviction on Count 3. Thus, the end result is that the convictions for both Counts 3 and 4 stand, although the criminal conduct encompassed within the Count 4 conviction is reduced.

8.13. The Gbao Defence further submits that Gbao's "sentence pursuant to counts 3 and/or 4 should accordingly be substantially reduced."[1104] The Gbao Defence did not however cite any authority justifying the proposition that a reduction in sentence is warranted in such circumstances, let alone a substantial reduction. The Prosecution submits that a reduction in sentence is unwarranted and inappropriate as "penalty is one thing, conviction another."[1105] The material acts underlying the

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[1100] *Čelebići* Appeal Judgement, para. 413; *Strugar* Appeal Jndgement, para. 321; *Galić* Appeal Judgement, para. 163; *Stakić* Appeal Judgement, para. 355; *Kordić and Čerkez* Appeal Judgement. para. 1032; *Kunarac* Appeal Jndgement, paras 168 and 172-174; *Blaškić* Appeal Judgement, para. 721; *Krstić* Appeal Judgement, para. 218; *Musema* Appeal Judgement, para. 361; *Kupreškić* Appeal Judgement, para. 387; *Jelesić* Appeal Judgement, para. 79.

[1101] *Jelesić* Appeal Jndgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 34; *Naletilić and Martinović* Appeal Judgement, para. 585; *Kordić and Čerkez* Appeal Judgement, para. 1033; *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 82; *Kunarac* Appeal Judgement, para. 169.

[1102] Gbao Appeal Brief, para. 488.

[1103] Trial Judgement, para. 1974, Items 2.1.1.(iii) to (iv); Trial Judgement para. 2050, Items 3.1.1.(i) to (ix); Trial Judgement para. 2063, Items 4.1.1.1.(i), (ii) and (x) to (xii); Trial Judgement para. 2156, Item 5.1.1.(ii).

[1104] Gbao Appeal Brief, para. 488.

[1105] *Jelesić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 34.

convictions are the same in respect of Count 4 as in respect of Counts 3 and 5 for which the appellants would remain convicted.[1106] Although the Trial Chamber entered cumulative convictions on Counts 3 and 4 in respect of the same conduct, there is no indication that this led the Trial Chamber to impose a substantially higher sentence than it would otherwise have imposed. Thus, even if the convictions under Count 4 are reversed, it is submitted that this should not lead to a reduction in the Appellants' sentences.[1107] Moreover the Appellants' sentences were ordered to run and to be served concurrently,[1108] and the reversal of one conviction, and the sentence imposed in respect of that particular conviction, would not and should not have any bearing on the remaining convictions and sentences.

C. Cumulative convictions for collective punishment and the other war crimes, and for terrorism and the other war crimes

8.14. The Kallon Defence additionally submits that the Trial Chamber erred in convicting him of: (*i*) terrorism (under Count 1) cumulatively with murder, outrages upon personal dignity, mutilation and pillage (the "**other war crimes**"); and (ii) collective punishment (under Count 2) cumulatively with the other war crimes.[1109]

8.15. The *Čelebići* test clearly focuses on the *legal elements* of each crime rather than on the *underlying conduct*.[1110] In asserting that each of the other war crimes did not have a materially distinct element not found in collective punishment or terrorism, the Kallon Defence mistakenly conflated the *factual* conduct in the underlying

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[1106] For each instance mentioned by the Gbao Defence and Kallon Defence in these grounds of appeal, the conduct in question was found to constitute murder (as charged in Count 4 *and* Count 5) and extermination (as charged in Count 3).

[1107] The reasoning in *Aleksovski* Appeal Judgement, para. 153 (iii) pertained to a case of a reversal of acquittal, but this reasoning naturally and logically applies to the mirror-case of a reversal of conviction.

[1108] Trial Judgement, Disposition.

[1109] Kallon Appeal Brief, paras 296-297.

[1110] *Stakić* Appeal Judgement, para. 356; *Kordić and Čerkez* Appeal Judgement, para. 1033; *Strugar* Appeal Judgement, para. 322; *CDF* Trial Judgement, para. 974.

crimes with the *legal* elements of those crimes.[1111] This is a misapplication of the *Čelebići* test.[1112]

8.16. The issue to be determined is whether two crimes are in fact *legally distinct offences*,[1113] and "it is important to bear in mind the distinction between the legal elements of an offence and the evidence on which those elements are based."[1114] The conduct of the appellant in committing the other war crimes may be evidence of the crime of collective punishment, but the legal elements of the other war crimes are not themselves part of the legal elements of the crime of collective punishment. Were it otherwise, the legal elements of collective punishment would vary from case to case according to the legal elements of the particular crime on which the collective punishment is based.[1115] The same reasoning applies to the crime of terrorism.

8.17. As conceded by the Kallon Defence, the definitions of terrorism and collective punishment each contain a materially distinct element not found in the other war crimes, i.e. the specific intent of spreading terror and the specific intent to punish collectively.[1116] As for the other war crimes: (i) murder requires proof of the death of one or more persons;[1117] (ii) outrages upon personal dignity requires proof that the appellant humiliated, degraded or otherwise violated the dignity of one or more persons;[1118] (iii) mutilation requires proof that the conduct was neither justified by the medical, dental or hospital treatment of the person(s) concerned nor carried out in their interests;[1119] and (iv) pillage requires proof that the appellant unlawfully appropriated property and that the appropriation was without the consent of the

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1111 Kallon Appeal Brief, paras 299-300.

1112 The question is whether two statutory provisions, *as a matter of law*, require proof of a materially distinct element not contained in the other; and not whether, as a matter of fact, each is based on a material fact on which the other is not based.

1113 *Čelebići* Appeal Judgement, para. 421; *Čelebići* Appeal Judgment, Separate and Dissenting Opinion of Judges Hunt and Bennouna, para. 16; *Kordić and Čerkez* Appeal Judgement, Joint Dissenting Opinion of Judges Schomburg and Guney, paras 3-5.

1114 *Kordić and Čerkez* Appeal Judgement, para. 1033; *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, para. 90.

1115 *Krstić* Appeal Judgement, Partial Dissenting Opinion of Judge Shahabuddeen, paras 90-91.

1116 Kallon Appeal Brief, para. 297; also see Trial Judgement, paras 113 and 126.

1117 Trial Judgement, para. 138.

1118 Trial Judgement, para. 175.

1119 Trial Judgement, para. 180.

owner.[1120] None of these elements are required by terrorism or collective punishment.

8.18. Thus, each of the other war crimes has an element requiring proof of a fact not required by collective punishment or terrorism, and collective punishment and terrorism each have an element requiring proof of a fact not required by the other war crimes. Thus, it is not possible to hold that any of the other war crimes are "lesser included offences" of collective punishment or terrorism. Therefore, under the *Ćelebići* test, cumulative convictions are possible in this case.

9. Alleged errors of law and fact: sentencing

A. Introduction

9.1 This section of this Response Brief responds to **Sesay's Ground 46**, **Kallon's Ground 31** and **Gbao's Ground 18**. It is submitted that in sentencing each of the Accused, the Trial Chamber properly exercised its discretion within the Statute of the Court.[1121]

B. The sentence imposed on Sesay

(i) Assessment of gravity

9.2 Contrary to the Sesay Defence's submissions,[1122] in sentencing Sesay for the crimes for which he was convicted as a participant in the JCE, the Trial Chamber did consider the form and degree of his participation in the *crimes*, and Sesay's participation in the JCE and other criminal conduct was neither "remote", nor "minimal."[1123]

9.3 Regarding Sesay's "other criminal conduct", the Trial Chamber found that Sesay's conduct was a significant contributory factor to the perpetration of enslavement and that he, acting in concert with other senior members of the RUF, designed the abduction and enslavement of hundreds of civilians for diamond mining throughout Kono District.[1124] On the basis of these findings, Sesay was found liable under Article 6(1) of the Statute for the planning of enslavement in

[1120] Trial Judgement, para. 207.
[1121] Article 19(2) of the Statute.
[1122] Sesay Appeal Brief, paras 353-359.
[1123] Sesay Appeal Brief, paras 355 and 358.
[1124] Sentencing Judgement, para. 209.

Count 13 of the Indictment.[1125] Not only did the Trial Chamber further find that the conscription of child soldiers was conducted on a massive scale, the Trial Chamber also found that Sesay had a substantial involvement in the planning of the system of conscription of child soldiers.[1126] On the basis of these findings, Sesay was held liable under Article 6(1) for planning the use of persons under the age of 15 years to participate actively in hostilities.[1127]

9.4 As to Sesay's participation in the JCE, co-perpetratorship in a JCE, for which Sesay was found guilty, only requires that the Accused shares the *mens rea* or "intent to pursue a common purpose" and performs some acts that "in some way are directed to the furtherance of the common design." Participation in a JCE does not require that the accused commit the *actus reus* of a specific crime.[1128]

9.5 The findings of the Trial Chamber regarding Sesay's participation in the JCE are found at paragraphs 1993-2002 and 2082-2092 of the Trial Judgement. At sentencing, the Trial Chamber recalled its findings that given Sesay's position of power, authority and influence, including his role, rank and relationship with Bockarie, Sesay contributed significantly to the JCE;[1129] and that Sesay "by his personal conduct furthered the common purpose by securing revenues, territory and manpower for the Junta Government by aiming to reduce or eliminate the civilian opposition to the Junta regime".[1130] Sesay was found to have been acting as an "architect of the seheme" by planning the enslavement of civilian miners and the use of child soldiers.[1131] The Trial Chamber found that Sesay's level of participation in the JCE was key to the furtherance of the objectives of the JCE and that his conduct seriously increased the gravity of the offences committed.[1132]

9.6 In light of these findings and submissions, the Trial Chamber was entitled to conclude that Sesay's "culpability reaches the highest level."[1133]

[1125] Sentencing Judgement, para. 209.
[1126] Sentencing Judgement, para. 212.
[1127] Sentencing Judgement, para. 212.
[1128] *Babić* Judgement on Sentencing Appeal, para. 38.
[1129] Sentencing Judgement, para. 214.
[1130] Sentencing Judgement, para. 215.
[1131] Sentencing Judgement, para. 215.
[1132] Sentencing Judgement, para. 215.
[1133] Sentencing Judgement, para. 215.

9.7 In response to the Sesay Defence's other submissions,[1134] it is submitted that there is no requirement that the participation of an accused in a joint criminal enterprise *must* always be assessed relative to the participation of other perpetrators in determining the overall level of the accused's participation.[1135] It all depends on the "circumstances of that case".[1136]

9.8 Furthermore, contrary to the Sesay Defence's submission, the Trial Chamber did take into account Sesay's participation relative to other members of the joint criminal enterprise in referring to Boekarie for example[1137] and in considering for sentencing purposes each of the accused Sesay,[1138] Kallon[1139] and Gbao's[1140] individual roles in the JCE and arriving at different findings for each of them. The Trial Chamber was cognisant of the fact that there were other players in the JCE and properly addressed Sesay's individual role in that JCE.

(ii) Sentence was not manifestly excessive and disproportionate

9.9 The Sesay Defence claims that the sentence imposed on Sesay is manifestly excessive and disproportionate compared to the sentences imposed on Kallon and Gbao, the *AFRC* accused, and sentences imposed in cases before other tribunals.[1141]

9.10 However, Trial Chambers must tailor the penalties to fit the individual circumstances of the accused and the gravity of the criminal conduct; therefore, the comparison between the sentences imposed in different cases is generally of limited assistance.[1142] Further, as a general principle, comparisons with other cases as an attempt to persuade the Appeals Chamber to either increase or reduce the sentence are of limited assistance as the differences are often more significant

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1134 Sesay Appeal Brief, para. 358.
1135 *Babić* Judgement on Sentencing Appeal, para. 40.
1136 *Babić* Judgement on Sentencing Appeal, para. 40.
1137 Sentencing Judgement, para. 214.
1138 Sentencing Judgement, paras 213-215.
1139 Sentencing Judgement, paras 238-240.
1140 Sentencing Judgement, paras 265-271.
1141 Sesay Appeal Brief, paras 360-364.
1142 Krajisnik Appeal Judgement, para. 783.

than the similarities and the mitigating and aggravating factors dictate different results.[1143]

9.11 In *Babić*[1144] the ICTY Appeals Chamber observed that in the *Jelisić* case, in addressing the appellant's arguments to the effect that he was given a sentence in excess of those rendered in other cases, the Appeals Chamber held the following:

> The Appeals Chamber agrees that a sentence should not be capricious or excessive, and that, in principle, it may be thought to be capricious or excessive if it is out of reasonable proportion with a line of sentences passed in similar circumstances for the same offences. Where there is such disparity, the Appeals Chamber may infer that there was disregard of the standard criteria by which sentence should be assessed, as prescribed by the Statute and set out in the Rules.[1145]

9.12 The Sesay Defence is not alleging that Sesay's case falls within a *pattern or a line of sentences passed in similar circumstances for the same offences*. On the contrary, the Sesay Defence highlights the significant differences in terms of gravity of the crimes and aggravating factors in those cases,[1146] while failing to consider the gravity of the crimes and aggravating factors that the Trial Chamber found in his case.[1147]

(iii) The sentences for Counts 15 and 17

9.13 On the findings of the Trial Chamber, Sesay's culpability for Counts 15 and 17 was neither "minimal"[1148] nor of "the lowest level".[1149] It is recalled that the Trial Chamber found that 14 attacks were made against the peacekeepers.[1150] Sesay was found liable under Article 6(3) of the Statute for all of the 14 attacks. The Trial Chamber found that the inherent gravity of the criminal acts in Counts 15 and 17 of the Indictment "is exceptionally high".[1151] The Trial Chamber recalled its findings that at the time of the UNAMSIL attacks, Sesay was the Battle Field Commander, effectively the most senior and overall military commander of the

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1143 *Babić* Judgement on Sentencing Appeal, para. 33.
1144 *Babić* Judgement on Sentencing Appeal, para. 33.
1145 *Babić* Judgement on Sentencing Appeal, para. 33, referring to *Jelisić* Appeal Judgement, para. 96.
1146 Sesay Appeal Brief, paras 361-364.
1147 Sentencing Judgement, paras 103-204, 208-219
1148 Sesay Appeal Brief, paras 365 and 369.
1149 Sesay Appeal Brief, para. 367
1150 Trial Judgement, para. 1944.
1151 Sentencing Judgement, para. 2004. The Trial Chamber came to this conclusion in view of its findings in paragraphs 188-203 of the Sentencing Judgement.

RUF on the ground.[1152] Sesay in his leadership role gave orders to all commanders ineluding Kallon and Sesay was in full command of RUF operations relating to UNAMSIL peacekeepers.[1153] The Trial Chamber found that the gravity of Sesay's criminal eonduct reached "the highest level".[1154] It was reasonably open to the Trial Chamber to so conelude.

9.14 Contrary to the Sesay Defence's suggestion,[1155] there is no general principle to the effect that Article 6(3) responsibility warrants a lesser sentence than Article 6(1) responsibility. It all depcnds on the circumstances of the individual case. It is submitted that the Trial Chamber was entitled to impose the sentences that it imposed on Sesay for Counts 15 and 17.

9.15 In the event that Sesay's sentence of 51 years on Count 15 is found to be cxcessive, which is denied, no prejudice has bcen causcd as this does not alter the outcome in terms of the final or aggregate scntence.

(iv) The sentence for Count 12

9.16 The Sesay Defence argues that Sesay's role in the system of conscription was "limited in comparison with that of other RUF members"[1156] and that the system "was firmly established" by the time Sesay attaincd a leadership role.[1157] The Sesay Defence does not, however, establish that the Trial Chamber failed to take all relcvant considcrations into account. The Trial Chamber considered Sesay's own role in the system of conscription as found by the Trial Chamber.[1158] The scntence to be imposed was a matter within the Trial Chamber's discretion.

9.17 The Trial Chamber found that conscription of child soldiers was conducted on a massive scale, and that Sesay had a substantial involvement to the planning of thc system of conscription.[1159] It was found that some of his own personal bodyguards were child soldicrs and participated in hostilities.[1160] It was found that

[1152] Senteneing Judgement, para. 217
[1153] Sentencing Judgement, para. 217
[1154] Sentencing Judgement, para. 218.
[1155] Sesay Appeal Brief, para. 365.
[1156] Sesay Appeal Brief, para. 371.
[1157] Sesay Appeal Brief, para. 371.
[1158] Sentencing Judgement, para. 212.
[1159] Sentencing Judgement, para. 212.
[1160] Sentencing Judgement, para. 212.

he gave orders that "young boys" should be trained, that he distributed drugs as "morale boosters" for these fighters,[1161] and that at a meeting in Makeni, he expressed concern that child combatants were being removed from the RUF, and that the RUF were losing "their fighters".[1162] The Trial Chamber recalled its findings in relation to the nature and physical impact of the crime of use of child soldiers.[1163] The Trial Chamber found that the gravity of Sesay's criminal conduct reached the highest level.[1164] It is submitted that Sesay was not punished for planning an "entrenched and institutionalized system";[1165] rather, Sesay was punished for his individual responsibility for crimes committed by that "entrenched and institutionalized system".[1166]

(v) There was no "double counting"

9.18 Contrary to the submission of the Sesay Defence,[1167] the Trial Chamber made no error in holding that:

> ... where a particular act amounting to criminal conduct within the jurisdiction of the Court, such as murder or rape as a crime against humanity has also, because of the additional element of intent necessary for a conviction for acts of terrorism or collective punishments as a war crime, amounted to a crime as alleged in Counts 1 and 2 of the Indictment, for purposes of sentencing we will consider such acts of terrorism or collective punishment as factors which increase the gravity of the underlying offence.[1168]

9.19 The factors that a Trial Chamber may consider in sentencing are not exhaustive, and it is within the discretion of the Trial Chamber to consider all relevant matters when determining the sentence to be imposed.[1169] It is submitted that the fact that certain of the crimes for which the Accused were convicted also qualified as acts of terrorism and collective punishment increased the gravity of the overall

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1161 Sentencing Judgement, para. 212.
1162 Sentencing Judgement, para. 212.
1163 Sentencing Judgement, para. 212. The Trial Chamber's findings in relation to the nature and physical impact of the crime of use of child soldiers are found at paragraphs 179-187.
1164 Sentencing Judgement, para. 212.
1165 Sesay Appeal Brief, para. 372.
1166 Sesay Appeal Brief, para. 372.
1167 Sesay Appeal Brief, para. 373.
1168 Sentencing Judgment, para. 106.
1169 *AFRC* Sentencing Judgement, para. 11; *Prosecutor v. Kambanda*, ICTR-97-23-T, "Judgement and Sentence", Trial Chamber, 4 September 1998 ("***Kambanda* Judgement and Sentence**"), paras 30-31; *Prosecutor v. Serushago*, ICTR-98-39-S, "Sentence", Trial Chamber, 5 February 1999, ("***Serushago* Sentencing Judgement**"), paras 21-23; *Rutaganda* Trial Judgement, paras 457-459.

conduct of the Accused. The Trial Chamber ultimately must impose a sentence that reflects the totality of the convicted person's culpable conduct. "The *totality principle* requires that a sentence must reflect the inherent gravity of the totality of the criminal conduct of the accused, giving due consideration to the particular circumstances of the case and to the form and degree of the participation of the accused."[1170]

9.20 The approach taken by the Trial Chamber *ensured* that there was no double counting, by adopting an approach under which the gravity of the crimes in Counts 1 and 2 were not considered separately. Rather, the additional gravity that arose from the fact that other crimes were also acts of terror or collective punishments was taken into account only as an aggravating factor in the sentencing for those other crimes.

9.21 Furthermore, it is noted that in the *AFRC* case, the Appeals Chamber declined to interfere with the sentences imposed even after finding that there were instances of double-counting in the Sentencing Judgement, in circumstances where it was found that this error did not have a significant impact on the sentences.[1171]

9.22 It is submitted that in view of the gravity of the crimes and the aggravating circumstances and after taking into account the mitigating factors found, it was open to the Trial Chamber to consider that the final or aggregate sentence that it imposed on Sesay reflects the "totality of the culpable conduct" or "the gravity of the offences and the overall culpability"[1172] of Sesay. There is no basis for the Appeal Chamber to interfere in the sentence.

(vi) Alleged failure to give adequate weight to Sesay's contribution to the peace process as a mitigating factor

9.23 In response to paragraphs 375-382 of the Sesay Appeal Brief, it is submitted as follows.

9.24 The issue on appeal is not whether the facts alleged must be taken into account as a matter of law as mitigating circumstances. The issue is whether the Trial Chamber abused its discretion in deciding which facts may be taken into

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[1170] *CDF* Appeal Judgement, para. 546 (emphasis added).
[1171] *AFRC* Appeal Judgement, paras 319-320.
[1172] See *AFRC* Appeal Judgement, paras 322 - 325.

account.[1173] In tailoring the sentence to fit the individual circumstances of the accused and the gravity of the crime, it is open to a Trial Chamber to weigh the mitigating circumstances against other factors, such as the gravity of the crime, the particular circumstances of the case and the form and the degree of the participation of the accused in the crime.[1174]

9.25 There is no requirement that a Trial Chamber *must* take post-conflict conduct into account as a mitigating factor. The ICTY Appeals Chamber has emphasised in this context that "Leaving such considerations to the Trial Chambers, the Appeals Chamber recognized that they are 'endowed with a considerable degree of discretion in deciding on the factors which may be taken into account'".[1175]

9.26 It is submitted that Sesay's post-conflict conduct cannot be compared with that of Biljana Plavšić who was found to have been "instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska" and to have "made a considerable contribution to peace in the region".[1176]

9.27 Further, Sesay's case is distinguishable from *Plavšić*. The Trial Chamber found that Sesay's peace efforts amounted to mitigating circumstances, but did not give his peace efforts "any or any noticeable weight",[1177] given that "[s]tanding in contrast to these clear statements describing Sesay as a reliable partner in the peace process however are his convictions by this Chamber for his part in the attacks directed against the UNAMSIL peacekeepers in May 2000".[1178] Furthermore, the Trial Chamber refused to accept "Sesay's explanation of his reasons for failing to prevent or punish the perpetrators of the attacks against the UNAMSIL personnel, a *direct affront to the international community's own*

[1173] *Prosecutor v. Bralo*, IT-95-17, "Judgement on Sentencing Appeal", Appeals Chamber, 2 April 2007 ("***Bralo* Judgement on Sentencing Appeal**"), para. 11.

[1174] *Bralo* Judgement on Sentencing Appeal, para. 33.

[1175] *Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Judgement", Appeals Chamber, 9 May 2007 ("***Blagojević and Jokić* Appeal Judgement**"), para. 328, referring to *Babić* Sentencing Appeal Judgement, para. 43, quoting *Čelebići* Appeal Judgement, para. 780.

[1176] *Prosecutor v. Plavšić*, IT-00-39&40/1, "Sentencing Judgement" Trial Chamber, 22 February 2003 ("***Plavšić* Trial Judgement**"), para. 94.

[1177] Sesay Appeal Brief, para. 376.

[1178] *Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1251, "Sentencing Judgement", Trial Chamber, 8 April 2009 ("**Sentencing Judgement**"), para. 227.

attempt to facilitate peace in Sierra Leone."[1179] It was a matter for the Trial Chamber to determine in its discretion what weight to give to Sesay's post-conflict conduct, and it gave reasons for exercising its discretion in the way that it did. It is submitted that the Trial Chamber was entitled to consider that the gravity of the crimes in Counts 15 and 17 involving attacks against peacekeepers outweighed any mitigation arising from Sesay's peace efforts, and to decide not to give the post-conflict conduct "any or any noticeable weight".[1180] Further, Sesay's acts and conduct relating to Counts 15 and 17 for which he was convicted were *contrary* to the peace process, a factor that did not exist in *Plavšić*.

9.28 It is a matter for the Trial Chamber to determine what constitutes a mitigating circumstance in the exercise of its discretion.[1181] "Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to the weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing".[1182] "Proof of mitigating circumstances does not automatically entitle the Appellant to a "credit" in the determination of the sentence; rather, it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination."[1183]

(vii) Alleged failure to give weight to Sesay's reputation as a "moderate" and his protection of civilians during the conflict

9.29 In response to paragraphs 383-393 of the Sesay Appeal Brief, it is submitted as follows.

9.30 Sesay's alleged "reputation as a moderate commander"[1184] does not lessen the gravity attaching to his significant contribution in the JCE and the gravity and aggravating circumstances of the crimes for which he was convicted. Further, it is not demonstrated how the Trial Chamber's alleged failure to consider Sesay's

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[1179] Sentencing Judgement, para. 228. (Emphasis added)
[1180] Sesay Appeal Brief, para. 376.
[1181] *Prosecutor v. Simba*, ICTR-01-76, "Judgement", Appeals Chamber, 27 November 2007 ("***Simba* Appeal Judgement**"), para. 328.
[1182] *Simba* Appeal Judgement, para. 328.
[1183] *Prosecutor v. Niyitegeka*, ICTR-46-A, "Judgement", Appeal Chamber, 9 July 2004 ("***Niyitegeka* Appeal Judgement**") para. 267.
[1184] Sesay Appeal Brief, para. 383.

"reputation as a moderate commander"[1185] as a mitigating factor invalidates the decision.

9.31 Contrary to the submissions of the Sesay Defence,[1186] it was within the Trial Chamber's discretion to consider that any assistance that Sesay gave civilians, "should not be given undue weight in mitigation".[1187] It has not been demonstrated that the Trial Chamber abused its discretion in this regard. The cases cited are not comparable to Sesay's alleged assistance to civilians.[1188]

(viii) Alleged coercive treatment of Sesay by the Prosecution as a mitigating factor

9.32 In response to paragraphs 394-396 of the Sesay Appeal Brief, it is submitted that contrary to the Sesay Defence's claims,[1189] there was no evidence that the Prosecution interviewed Sesay under "coercive conditions" or that the need for Sesay's "urgent psychiatric care"[1190] resulted from the Prosecution's alleged coercive treatment of Sesay. The Trial Chamber made no error in ignoring this claim as a mitigating factor.

(ix) Likelihood of serving sentence abroad as a mitigating factor

9.33 In response to paragraphs 397-400 of the Sesay Appeal Brief, it is submitted that serving sentence outside the country is not necessarily a mitigating factor although this factor was "taken into account" in the *Mrđa* case.[1191] Further, there is no indication that this factor was in any event given any significant weight in the *Mrđa* case, and it was observed there that serving sentenee in a foreign country was a "common aspect of the prison sentences imposed by the Tribunal".[1192] It is submitted that the Trial Chamber was entitled, in its discretion, to give little significance or weight to this factor, or to not treat it as a mitigating factor at all.

[1185] Sesay Appeal Brief, para. 383.
[1186] Sesay Appeal Brief, paras 384-393.
[1187] Sentencing Judgement, para. 224.
[1188] Sesay Appeal Brief, paras 384-385.
[1189] Sesay Appeal Brief, paras 394 and 396.
[1190] Sesay Appeal Brief, para. 396.
[1191] *Prosecutor v Mrđa*, IT-02-59-S, "Judgment", Trial Chamber, 31 March 2004 ("***Mrđa* Trial Judgment**"), para. 109, para. 109.
[1192] *Mrđa* Trial Judgment, para. 109.

(x) Alleged failure to give weight to Sesay's statement of remorse

9.34 Contrary to Sesay Defence's claims,[1193] it is submitted that the Trial Chamber did consider Sesay's expression of empathy with the victims in mitigation[1194] and properly exereised its discretion in finding that Sesay's statement of remorse was not sincere.[1195]

C. The sentence imposed on Kallon

(i) Assessment of gravity: alleged failure to consider the form and degree of Kallon's participation in the "JCE crimes"

9.35 In response to paragraphs 302-311 of the Kallon Appeal Brief, it is submitted as follows.

9.36 As alrcady submitted in respect of Sesay, co-perpetratorship in a JCE, on the basis of which Kallon was found guilty, only requires that the accused shares the *mens rea* or "intent to pursue a common purpose" and performs some acts that "in some way are directed to the furtherance of the common design." Participation in a JCE does not require that the accused commit the *actus reus* of a specific crime.[1196] A participant in a JCE will be individually criminally responsible for crimes, evcn if there was "lack of personal involvement"[1197] in those crimes; similarly the "form and degrcc of participation" in each individual crime[1198] is immaterial.

9.37 Kallon was found to have actively participated in the furtherance of the common purpose and thereby to havc significantly contributed to the commission of the "JCE crimes"[1199] for which he was convicted.[1200] At sentencing, the Trial Chamber rccalled that Kallon's involvemcnt in the governing body of the Junta substantially contributed to the joint criminal enterprise and that Kallon was also directly involvcd in crimes committed in the diamond mining areas of Kenema

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[1193] Sesay Appeal Brief, para. 401.
[1194] Sentencing Judgement, para. 232.
[1195] Sentencing Judgement, para. 231.
[1196] *Babić*Judgement on Sentencing Appeal. para. 38.
[1197] Kallon Appeal Brief, para. 305.
[1198] Kallon Appeal Brief, paras 302-303,307-312.
[1199] Kallon Appeal Brief, paras 306-307.
[1200] Trial Judgement para. 2102 specifically and paras 2093-2103 generally; Trial Judgement paras 2003-2008.

District and was present when rebels killed unarmed enslaved civilian miners.[1201] The Trial Chamber recalled that it held in the Trial Judgement that Kallon endorsed the enslavement and the killing of civilians in order to control and exploit natural resources vital to the financial survival of the Junta Government.[1202] Kallon's contribution to the offences committed pursuant to a JCE was found to be substantial, and his eulpability was found to reach a high level.[1203] The Kallon Defence's claims that the Trial Chamber considered crimes committed by "others" in sentencing Kallon,[1204] and its repeated claims that Kallon was "only remotely connected" to the crimes,[1205] therefore lack merit and should be rejected.

(ii) Assessment of gravity: Alleged consideration of crimes of others in sentencing Kallon on Count 12 (child soldiers)

9.38 In response to paragraph 312 of the Kallon Appeal Brief, it is submitted that the Trial Chamber did not consider crimes of others in sentencing Kallon on Count 12. Kallon was convicted on Count 12 in relation to the conscription or use of child soldiers in Kenema, Kailahun, Kono and Bombali Districts.[1206] In eonsidering the scale and brutality of the offences, the Trial Chamber did state that the offences relating to the use of child soldiers were committed throughout the territory of Sierra Leone.[1207] However, the Trial Chamber's specific findings all relate specifically to the conscription or usc of child soldiers in the Districts for which Kallon was convicted, namely Kenema, Kailahun, Kono and Bombali Districts.[1208] It is submitted that it is these specific findings relating to the erimes for which Kallon was convicted that the Trial Chamber considered in sentencing Kallon; there is no indieation that extraneous factors were eonsidered.

1201 Sentencing Judgement, para. 239.
1202 Sentencing Judgement, para. 239.
1203 Sentencing Judgement, para. 240.
1204 Kallon Appeal Brief, paras 302-303,307-312.
1205 Kallon Appeal Brief, paras 307-311. Kallon is merely repeating the same arguments made at trial that he was only "remotely linked to these crimes": Kallon Sentencing Brief, paras 57-58.
1206 Trial Judgement, Disposition, p. 683.
1207 Sentencing Judgement, para. 180.
1208 Sentencing Judgement, paras 180-181.

9.39 Even if in considering the scale of the crimes, the Trial Chamber may have wrongly considered "the territory of Sierra Leone" as a whole, which is denied, it is submitted that this would have had no significant impact on the outcome, considering that Kenema, Kailahun, Kono and Bombali Districts would in any event constitute a "greater part" of the territory of Sierra Leone.

(iii) There was no "double counting"

9.40 In response to paragraphs 313-314 of the Kallon Appeal Brief, the Prosecution relies on the submissions made in paragraphs 9.18-9.22 above.

(iv) No error in considering crimes committed at Mosque as aggravating

9.41 In response to paragraph 315 of the Kallon Appeal Brief, it is submitted that the unlawful killings by Rocky were some of the crimes for which Kallon was convicted on the basis of JCE liability.[1209] Committing crimes in a place of religious worship or sanctuary may be aggravating.[1210] It was within the Trial Chamber's discretion to find that "the fact that civilians were abducted from a Mosque a traditional place of civilian safety and sanctuary" was aggravating.[1211]

(v) Alleged failure to consider certain factors in mitigation and failure to give sufficient weight to certain mitigating factors

9.42 Kallon submits that the Trial Chamber erroneously failed to consider duress,[1212] "under orders,"[1213] conduct subsequent to the crimes,[1214] young age at the time of the crimes,[1215] serving sentence outside Sierra Leone,[1216] good behaviour in detention,[1217] lack of education or training,[1218] attempts to prevent brutal

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[1209] Trial Judgement, para. 1341 (ii).
[1210] *Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-624, "Sentencing Judgement", Trial Chamber, 19 July 2007 ("***AFRC* Sentencing Judgement**"), para. 22.
[1211] Sentencing Judgement, para. 247.
[1212] Kallon Appeal Brief, para. 318.
[1213] Kallon Appeal Brief, paras 319-320.
[1214] Kallon Appeal Brief, paras 321-323.
[1215] Kallon Appeal Brief, paras 324-325.
[1216] Kallon Appeal Brief, para. 326. The Prosecution relies on the submissions made in respect of Sesay at paragraph 9.33 above.
[1217] Kallon Appeal Brief, para. 327.
[1218] Kallon Appeal Brief, para. 328.

crimes,[1219] and renunciation of violence and commitment to peace[1220] as mitigating factors.

9.43 Kallon further submits that the following mitigating factors were given insufficient weight: sincere remorse,[1221] lack of previous convictions,[1222] family circumstances,[1223] and assistance to detainees.[1224]

9.44 In response, it is submitted that the Trial Chamber considered and gave what it considered was appropriate weight to each mitigating circumstance that it found in Kallon's case.[1225]

9.45 It is recalled that Trial Chambers are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account". They are not required to "articulate every step" of their reasoning in reaching particular findings, and failure to list in a judgement "each and every circumstance" placed before them and considered "does not necessarily mean that [they] either ignored or failed to evaluate the factor in question." For instance, a Trial Chamber's express reference to the parties' written submissions concerning mitigating circumstances is *prima facie* evidence that it was cognisant of these circumstances and took them into account.[1226]

9.46 It is further recalled that proof of mitigating circumstances "does not automatically entitle an appellant to a 'credit' in the determination of the sentence; it simply requires the Trial Chamber to consider such mitigating circumstances in its final determination". An appellant challenging the weight given by a Trial Chamber to a particular mitigating factor thus bears "the burden of demonstrating that the Trial Chamber abused its discretion". The Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant

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1219 Kallon Appeal Brief, para. 329.
1220 Kallon Appeal Brief, para. 330.
1221 Kallon Appeal Brief, para. 331.
1222 Kallon Appeal Brief, para. 332.
1223 Kallon Appeal Brief, para. 333.
1224 Kallon Appeal Brief, para. 334.
1225 Sentencing Judgement, paras 250-262
1226 *Babić* Judgement on Sentencing Appeal, para. 43. The Trial Chamber stated that "[i]n issuing this Judgement, the Chamber has taken into consideration both the written and oral submissions of the Parties.": Sentencing Judgement, para. 33.

considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[1227] Kallon fails to demonstrate how any alleged errors amounted to any abuse by the Trial Chamber in exercising its sentencing discretion.

D. The sentence imposed on Gbao

(i) Alleged attribution of the gravity of Sesay's and Kallon's crimes to Gbao

9.47 In response to paragraphs 356-364 of the Gbao Appeal Brief, it is submitted that there is no indication that the Trial Chamber attributed to Gbao the gravity of offences in Counts 1 and 2 for which Sesay and Kallon were convicted, but for which Gbao was acquitted. This is clear from Gbao's considerably lower sentence compared to that imposed on either Sesay or Kallon, not only on Counts 1 and 2 but also on Counts 3-11 and 13-14. In the case of Counts 3-11 and 13-14, Gbao's sentence was considerably lower than Sesay's or Kallon's, even when all three accused were convicted of offences in exactly the same locations.[1228]

(ii) Alleged consideration of the gravity of "all" UNAMSIL crimes

9.48 Contray to Gbao's claims,[1229] it is submitted that only the gravity of the UNAMSIL crime for which Gbao was convicted was considered in respect of Gbao. The Trial Chamber stated as follows:

> Gbao was found guilty by the Chamber of aiding and abetting the attacks directed against Salahuedin and Jaganathan on 1 May 2000 and found that he deliberately fomented an atmosphere of hostility and orchestrated an armed confrontation at that Makump DDR camp. The gravity of this crime is high. However the Chamber recognises that Gbao was not primarily responsible for the attaek, and may not have been able to prevent it, although he remains criminally responsible for his direct involvement in it.[1230]

1227 *Babić* Judgement on Sentencing Appeal, para. 44

1228 Sesay, Kallon, and Gbao were convicted on Coumts 3-11, 13-14 on the basis of JCE for crimes in the same locations for each Count, but Gbao's sentence was always considerably lower than that of Sesay or Kallon.

1229 Gbao Appeal Brief, paras 365-366.

1230 Sentencing Judgement, para. 264.

(iii) Alleged improper reliance on expert evidence

9.49 In response to paragraphs 367-368 of the Gbao Appeal Brief, it is submitted that paragraph 128 of the Sentencing Judgement relies on witness testimony and refers to paragraphs 1409-1410 of the Trial Judgement, which also rely on witness testimony. The Trial Chamber's conclusions were not based only on expert evidence.

(iv) Alleged consideration of unproven findings or crimes

9.50 The Gbao Defence does not demonstrate how, nor point out where in the Sentencing Judgement, the Trial Chamber considered the crimes referred to in paragraph 369 of the Gbao Appeal Brief in sentencing Gbao.

9.51 Contrary to the claims of the Gbao Defence,[1231] the findings in the Sentencing Judgement are based on findings in the Trial Judgement. There is no indication that the Trial Chamber's findings at paragraphs 165[1232] and 168[1233] of the Sentencing Judgement were meant to relate only to Kailahun District. Further, contrary to the claims of the Gbao Defence,[1234] he was sentenced only on the basis of acts for which he was convicted.[1235]

(v) Alleged failure to give sufficient weight to Gbao's limited role in the JCE

9.52 In response to paragraphs 372-384 of the Gbao Appeal Brief, it is submitted that the Trial Chamber considered the extent of Gbao's role in the JCE[1236] including his "limited role".[1237] The Trial Chamber further considered Gbao's role in Count 15 in recognizing that Gbao was not primarily responsible for the attack, and may not have been able to prevent it.[1238] In the end, Gbao's "limited role" in Count 15 is properly reflected in the considerably lower sentence that he received, compared to Sesay and Kallon.

1231 Gbao Appeal Brief, paras 370-371.
1232 Gbao Appeal Brief, para. 370 (i).
1233 Gbao Appeal Brief, para. 370 (ii) and (iii).
1234 Gbao Appeal Brief, para. 371.
1235 Sentencing Judgement, paras 263-271.
1236 Sentencing Judgement, paras 265-271.
1237 Sentencing Judgement, para. 268.
1238 Sentencing Judgement, para. 264.

(vi) Alleged use of an element of the crime in sentencing Gbao on Count 15

9.53 Contrary to the submissions of the Gbao Defence,[1239] it is submitted that the Trial Chamber was correct to consider as an aggravating factor Gbao's abuse of his position of leadership and authority.[1240] Gbao was convicted on Count 15 (attacks against peacekeepers) under Article 6(1) of the Statute.

9.54 It is settled case law that if a particular circumstance is an element of the underlying offence, it cannot be considered as an aggravating factor.[1241] However, it is also the case that "the position of leadership of an [a]ccused held criminally responsible for a crime under Article 6(1) of the Statute can be considered to be an aggravating circumstance."[1242] A leadership position or its abuse is not an element of the offence for Article 6(1) liability. Contrary to the claim of the Gbao Defence that the Trial Chamber's analysis fails to demonstrate how Gbao abused his position,[1243] it is clear from the Trial Chamber's finding that the Trial Chamber considered that in using his position to engage in criminal conduct on that occasion, Gbao thereby abused his position of leadership and authority.[1244]

9.55 Where an accused is convicted under Article 6(1), possession of effective control and material ability to prevent or punish the crimes[1245] is not required in order for his leadership role to be taken into account as an aggravating factor.[1246]

1239 Gbao Appeal Brief, paras 385-399.

1240 Sentencing Judgement, para. 272.

1241 *Prosecutor v. Fofana, Kondewa*, SCSL-04-14-T-796, "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa", Trial Chamber, 9 October 2007 ("***CDF* Sentencing Judgement**"), para. 36 and *AFRC* Sentencing Judgement, para. 23, both referring to *Blaškić* Appeal Judgement, para. 693.

1242 *CDF* Sentencing Judgement, para. 38. See also *Prosecutor v. Krstić*, IT-98-33, "Judgement", Trial Chamber, 2 August 2001 ("***Krstić* Trial Judgement**"), para. 709: "The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes" (footnote omitted); *Kupreškić et al* Appeal Judgement, para. 451; *Prosecutor v. Babić*, IT-03-72-S, "Sentencing Judgment", Trial Chamber, 29 June 2004 ("***Babić* Sentencing Judgement**"), para. 61; *Stakić* Trial Judgement, para. 913: "The commission of offences by a person in such a prominent position aggravates the sentence substantially."

1243 Gbao Appeal Brief, para. 390.

1244 Sentencing Judgement, para. 272.

1245 Gbao Appeal Brief, paras 393-394

1246 *Babić* Judgement on Sentencing Appeal, para. 80.

(vii) Alleged failure to consider certain factors in mitigation

9.56 In response to the submission regarding the likelihood of Gbao's serving sentence in a foreign country,[1247] the Prosecution relies on the submissions made in respect of Sesay at paragraph 9.33 above.

9.57 In response to Gbao's submissions relating to other mitigating factors that were allegedly not considered or rejected,[1248] it is recalled that Trial Chambers are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account". They are not required to "articulate every step" of their reasoning in reaching particular findings, and failure to list in a judgement "each and every circumstance" placed before them and considered "does not necessarily mean that [they] either ignored or failed to evaluate the factor in question." For instance, a Trial Chamber's express reference to the parties' written submissions concerning mitigating circumstances is *prima facie* evidence that it was cognisant of these circumstances and took them into account.[1249]

(viii) Alleged excessiveness and disproportionality of the sentences

9.58 In response to paragraphs 428-484 of the Gbao Appeal Brief, it is submitted that the assertion that the average sentence at the ICTY for membership of a JCE is 13 years is incorrect even based on the article cited.[1250] Further, the conclusions in the article are not based on all of the ICTY cases but just a few of them[1251] and those conclusions are not binding on the Trial Chamber or the Appeals Chamber.

9.59 Significantly, the article points out what the authors consider to be an anomaly in ICTY JCE sentences in observing that even aiders and abetters have been punished more severely than JCE participants whereas participation in a JCE should be considered a more serious contribution to a criminal activity than aiding and abetting as "[p]articipation in JCE connotes a close involvement in the

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1247 Gbao Appeal Brief, paras 401-404.
1248 Gbao Appeal Brief, paras 405-415.
1249 *Babić* Judgement on Sentencing Appeal, para. 43.
1250 Gbao Appeal Brief, para. 426 (footnote 474), referring to Barbara Hola, Alette Smeulers, and Catrien Bijleveld, "Is ICTY Sentencing Predictable? An Empirical Analysis of ICTY Sentencing Practice", Leiden Journal of International Law, 22 (2009) ("**Hola**") pp.79-97 (see specifically, p.91).
1251 Hola, p.91.

commission of a crime..."[1252] The same article observes that the final (post-appeal) sentences of aiders and abetters have been much longer than those pronounced at trial.[1253] Again, this conclusion would not have been based on all the ICTY cases of aiders and abetters.

9.60 It is submitted that the observations made in the article only serve to further demonstrate that the sentence to be imposed on an individual accused always depends on the circumstances of that case. JCE liability is a mode of liability, not a substantive crime. It is meaningless to discuss how long a sentence should be imposed for "JCE" liability, just as it would be meaningless in a national system to discuss what sentence should be imposed for "attempt". The latter question will always depend on what was attempted—attempted murder is clearly more serious than attempted theft. Similarly, the sentence imposed for JCE liability will depend on what the common purpose of the JCE was, and what crimes were committed within the JCE, and in what circumstances and on what scale, as well as many other factors. Any discussion of appropriate sentences for "JCE" in the abstract is an impossibility. All of the aiding and abetting sentences imposed in all the examples cited by Gbao which happen to be lower than Gbao's 25 year sentence[1254] were all based on the individual circumstances of those cases. On the other hand, in *Kristić*[1255] for example, a JCE conviction was on appeal substituted with one of aiding and abetting and the sentence reduced to 35 years which is still much higher than Gbao's sentence, but again was dictated by the circumstances of that case.

E. Conclusion

9.61 Based on the above submissions, it is submitted that all of the Grounds of Sesay, Kallon and Gbao relating to sentence be dismissed and that the sentences imposed on Sesay, Kallon and Gbao be upheld.

[1252] Hola, p.92.
[1253] Hola, p.92.
[1254] Gbao Appeal Brief, paras 447-481.
[1255] *Kristić* Appeal Judgement.

10. Final conclusion

10.1 Except in relation to the matters dealt with in paragraphs 8.4-8.13 above, the appeals of all three Accused should be dismissed in their entirety.

10.2 Alternatively, in the event that the Appeals Chamber were to consider allowing any Defence ground of appeal, the Prosecution draws the Appeals Chamber's attention to its power to substitute a different mode of liability for the one found by the Trial Chamber.[1256]

10.3 Thus, for instance, if the Appeals Chamber were to set aside any of the Appellants' convictions under Article 6(1) of the Statute for their participation in a joint criminal enterprise, it is submitted that the Appeals Chamber should consider whether the Trial Chamber's findings support responsibility under a different mode of liability pleaded in the Indictment.[1257]

10.4 It is respectfully requested that the Appeals Chamber give an indication to the parties if it would be assisted by possible alternative modes of liability being addressed in oral argument.[1258]

Filed in Freetown,
26 June 2009
For the Prosecution,

Christopher Staker

Vincent Wagona

[1256] *Krstić* Appeal Judgement, paras 134-138 and first three operative paragraphs of the Disposition; *Stakić* Appeal Judgement, para. 59; *Blaškić* Appeal Judgement, para. 670.
[1257] See *Simić* Appeal Judgement, paras 75-76.
[1258] See approach adopted in *Simić* Appeal Judgement, para. 75; *Stakić* Appeal Judgement, para. 60.

APPENDIX A

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APPENDIX B

TABLE OF DEFENCE GROUNDS OF APPEAL AND PROSECUTION RESPONSE

DEFENCE GROUNDS OF APPEAL	PART OF THIS RESPONSE BRIEF CONTAINING THE PROSECUTION RESPONSE
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Ground 1 - Burden of proof - Evaluation of evidence generally - Alleged inconsistencies	Section 3 B Section 4 A Section 4 B (vi)
Ground 2 - Defence evidence - Evaluation of evidence generally - Alleged inconsistencies	Section 3 C Section 4 A Section 4 B (vi)
Ground 3 - Reasoned opinion - Evaluation of evidence generally - Alleged inconsistencies	Section 3 A Section 4 A Section 4 B (vi)
Ground 4	Section 4 C (ii)
Ground 5	Section 4 C (ii)
Ground 6 - Article 6(1) pleading - Pleading of locations	Section 2 B (ii) Section 2 D
Ground 7	Section 2 E
Ground 8	Section 2 E

Ground 9	Section 2 F
Ground 10	Section 2 F
Ground 11	Section 2 G
Ground 12	Section 2 A (i) & (ii)
Ground 13	Section 2 C (i); Section 2 G; Section 2 I
Ground 14 -Evaluation of evidence generally - Accomplices - Alleged inconsisteneies	Section 4 A Section 4 B (i) Section 4 B (vi)
Ground 15 - Accomplices - Evaluation of evidence generally	Section 4 B (i) Section 4 A
Ground 16 - Alleged economic motivation of witnesses - Evaluation of evidence generally	Section 4 B (x) Section 4 A
Ground 17	Section 4 B (viii)
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Ground 19	Ground dropped. See Sesay Appeal Brief para. 71.
Ground 20	Section 4 A
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Ground 31 - Evaluation of evidence generally - Acts of terror - Unlawful killings	Section 4 A Section 7 B Section 7 D (i)
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Ground 36 - Pleading - Notice - Convictions for enslavement	Section 2 C (i) & (iii); Section 2 G; Section 2 I Section 2 G Section 7 H (iii)
Ground 37	Section 5 B
Ground 38	Section 7 A
Ground 39 - Pleading - Sexual violence	Section 2 F Section 7 E
Ground 40	Section 7 H (iv)
Ground 41	Section 7 A
Ground 42	No submission in the Sesay Appeal Brief. See Sesay Notice of Appeal, para. 90 and Sesay Appeal Brief paras. 293-305.
Ground 43	Section 7 G
Ground 44 - Pleading - UNAMSIL attacks	Section 2 C (i) & (iii); Section 2 I Section 7 J (ii)
Ground 45	Section 4 C (i)
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Kallon Appeal Brief	
Ground 1 - Alleged violation of fair trial guarantees - Evaluation of evidence - As regards para. 2.11 of the Kallon Notice of Appeal	Section 3 B, D, E, F, G, H, I, J Section 4 A No submissions in the Kallon Appeal Brief. Kallon Amended Notice of Appeal, para. 2.11. Kallon Brief para. 19 states that sub-ground (para.) 2.11 of the Notice of Appeal is argued together with Ground 18. However, Kallon makes no submissions under Ground 18 and instead relies for Ground 18 on his arguments for Grounds 2, 6, 8, 13 and 15: see Kallon Appeal Brief, para. 173.
Ground 2	Section 5 A
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Ground 8 - Hearsay evidence - Sectionicipation in JCE	Section 4 B (iii) Section 5 C
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Ground 14	Section 2 C (iv); Section 6 D; Section 2 G
Ground 15	Section 5 C
Ground 16 - Pleading of Counts 1 & 2 - Counts 3-14 as acts of terror	Section 2 E Section 7 B
Ground 17	No submissions in Kallon Appeal Brief: see Kallon Appeal Brief, para. 172 stating that for Ground 17, the Kallon Defence relies on submissions in Grounds 2, 8, 6, 11, 13 and 15.

Ground 18	Section 2 F
Ground 19	Section 7 F
Ground 20 - Pleading of Counts 1 & 2 - Conviction on Count 12	Section 2 H Section 7 G
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Gbao Appeal Brief	
Ground 1	No submissions in the Gbao Appeal Brief. See Gbao Appeal Brief, para. 4.
Ground 2	Section 4 C (iii)
Ground 3	Section 3 A
Ground 4	Section 2 B (ii)
Ground 5	No submissions in the Gbao Appeal Brief: see Gbao Appeal Brief, para. 19.
Ground 6	Section 4 B (ix)
Ground 7	Section 4 B (ix)
Ground 8 (a)	Section 2 A (i) & (iv)
Ground 8 (b) and (c)	Section 5 D
Ground 8 (d), (e), (f), (g)	Section 5 A
Ground 8 (h)	No submissions in the Gbao Appeal Brief: see Gbao Appeal Brief, pp. 30-34 moving from Sub-ground 8 (g) to 8(i).
Ground 8 (i), (j), (k), (l), (m)	Section 5 D
Ground 8 (n)	Ground dropped. See Gbao Appeal Brief, para. 171.

Ground 8 (o), (p), (q), (r), (s)	Section 5 D
Ground 9	Section 7 D (ii)
Ground 10	Section 7 E
Ground 11	Section 7 H
Ground 12	Section 7 B
Ground 13	No submissions in the Gbao Appeal Brief: see Gbao Appeal Brief, para. 289.
Ground 14	Section 4 C (ii)
Ground 15	No submissions in the Gbao Appeal Brief: see Gbao Appeal Brief, para. 312.
Ground 16	Section 7 J
Ground 17	Ground dropped. See Gbao Appeal Brief, para. 355.
Ground 18	Section 9 A & D
Ground 19	Section 8

APPENDIX C

LIST OF CITED AUTHORITIES AND DOCUMENTS

Authorities and documents for which abbreviated citations are used

1. Decisions, orders, judgements and filings in this case

Decision on Prosecution Additional Witness Request	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-320, "Decision on Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", Trial Chamber, 29 July 2004
Gbao Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1279, "Appeal Brief of Augustine Gbao", 1 June 2009
Gbao Notice of Appeal	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1253, "Notice of Appeal for Augustine Gbao", 28 April 2009
Gbao Public Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSl-04-15-A-1283, "Public Appeal Brief for Augustine Gbao", 4 June 2009
Gbao Rule 68 Decision 2008	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1201, "Written Reasoned Decision on Gbao Motion Requesting the Trial Chamber to Stay Trial Proceedings of Counts 15-18 Against the Third Accused for Prosecution's Violation of Rule 68 and Abuse of Process", Trial Chamber, 22 July 2008
Gbao Rule 68 Motion 2008	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1174, "Urgent and Confidential with Redactions and Annex Gbao motion requesting the Trial Chamber to Stay Trial Proceedings of Count 15-18 Against the third Accused for Prosecution's violations of Rule 68 and Abuse of Process", Trial Chamber, 9 June 2008
Indictment	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-PT-619, "Corrected Amended Consolidated Indictment", Trial Chamber, 2 August 2006
Kallon Amended Notice of Appeal	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1275, "Amended Kallon's Notice and Grounds of Appeal", 13 May 2009
Kallon Appeal Decision on Extension of Time and Page Limit	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1263, "Decision on 'Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit'", Appeals Chamber, 4 May 2009

Kallon Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1280, "Kallon Appeal Brief", 1 June 2009
Kallon Appeal Brief Corrigendum	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1287, "Corrigendum to Kallon Appeal Brief with Revised Table of Contents and Overview of Appellant's Appeal", 17 June 2009
Kallon Corrigendum To Appeal Decision on Extension of Time and Page Limit	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1266, "Corrigendum to 'Decision on Kallon Defence Motion for Extension of Time to File Appeal Brief and Extension of Page Limit'", Appeals Chamber, 6 May 2009
Kallon Defect in the Indictment Order	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-965, "Order Relating to Kallon Motion Challenging Defects in the Form of the Indictment and Annexes A, B and C", Trial Chamber, 31 January 2008
Kallon Final Trial Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1270, "Kallon Final Trial Brief", 31 July 2008
Kallon Indictment Decision	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-1186, "Decision on Kallon Motion to Exclude Evidence Outside the Scope of the Indictment", Trial Chamber, 26 June 2008
Kallon Indictment Motion	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-1057, "Kallon Motion to Exclude Evidence Outside the Scope of the Indictment With Confidential Annex A", 14 March 2008
Kallon Notice of Appeal	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1254, "Kallon's Notice and Grounds of Appeal", 28 April 2009
Payment to Witnesses Decision	*Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-15-1185, "Public Decision on Sesay Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses", Trial Chamber, 25 June 2008
Payment to Witnesses Motion	*Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-04-15-1161, "Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payments to Witnesses", Trial Chamber, 30 May 2008
Payment to Witnesses Response	*Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-15-1169, "Public Prosecution Response to Sesay Motion to Request the Trial Chamber to Hear Evidence Concerning the Prosecution's Witness Management Unit and its Payment to Witnesses", Trial Chamber, 5 June 2008

Prosecution Additional Witness Request	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-T-191, "Prosecution Request for Leave to Call Additional Witnesses and Disclose an Additional Statement", 12 July 2004
Prosecution Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1278, "Prosecution Appeal Brief", 1 June 2009
Prosecution Notice Concerning JCE	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-812, "Prosecution Notice concerning Joint Criminal Enterprise and Raising Defects in the Indictment", Trial Chamber, 3 August 2007
Prosecution Pre-Trial Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-39, "Prosecution's Pre-Trial Brief Pursuant to Order For filing Pre-Trial Briefs (Under Rules 54 and 73bis) of 13 February 2004", 1 March 2004
Prosecution Supplemental Pre-Trial Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-82, "Prosecution Supplemental Pre-Trial Brief Pursuant to Order to the Prosecution to File a Supplemental Pre-Trial Brief of 30 March 2004 as Amended by Order to Extend the Time For Filing of the Prosecution Supplemental Pre-Trial Brief of 2 April 2004", 21 April 2004
Protective Measures Appeal Decision	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1146, "Decision on Prosecution Appeal of Decision on the Sesay Defence Motion Requesting the Lifting of Protective Measures in Respect of Certain Prosecution Witnesses", Appeals Chamber, 23 May 2008
Sentencing Judgement	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1251, "Sentencing Judgement", Trial Chamber, 8 April 2009
Sesay Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1281, "Grounds of Appeal", 1 June 2009
Sesay Appeal Brief Corrigendum	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1284, "Corrigendum to the Grounds of Appeal", 8 June 2009
Sesay Corrected Redacted Appeal Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1285, "Corrected Redacted Grounds of Appeal", 15 June 2009
Sesay Decision on False Testimony	*Prosecutor v. Sesay Kallon, Gbao*, SCSL-04-15-610, "Decision on Sesay Defence Motion to Direct the Prosecutor to Investigate the Matter of False Testimony by Witness TF1-366," 25 July 2006

Sesay Decision on Various Relief	*Prosecutor* v. *Sesay Kallon, Gbao*, SCSL-04-15-1147, "Decision on Sesay Defence Motion for Various Relief Dated 6 February 2008", Trial Chamber, 26 May 2008
Sesay et al Prosecution Final Trial Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-2004-15-PT-1206, "Prosecution Final Trial Brief" 29 July 2008
Sesay Final Trial Brief	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-1210, "Sesay Defence Final Trial Brief", 31 July 2008
Sesay Indictment Decision	*Prosecutor v. Sesay*, SCSL-2003-05-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 13 October 2003
Sesay Notice of Appeal	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1255, "Notice of Appeal", 28 April 2009
Sesay Rule 68 Decision 2005	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-363, "Decision on Sesay-Motion Seeking Disclosure of the Relationship Between Governmental Agencies of the United States of America and the Office of the Prosecutor", Trial Chamber, 2 May 2005
Sesay Rule 68 Decision 2009	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-A-1268, " Decision on Sesay Motion Requesting the Appeal Chamber to Order the Prosecution to Disclose Rule 68 Materials", Trial Chamber, 16 June 2009
Sesay Rule 68 Motion 2005	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-276, "Motion Seeking Disclosure of the Relationship Between the United States of America's Government and/or Administration and/or Intelligence and/or Security Services and the Investigation Department of the Office of the Prosecutor", Trial Chamber, 8 November 2008
Sesay Rule 92bis Decision	*Prosecutor* v. *Sesay, Kallon, Gbao*, SCSL-04-15-1125, "Decision on Sesay Defence Motion and Three Sesay Defence Applications to Admit 23 Witness Statements Under Rule 92*bis*"
Trial Judgement	*Prosecutor v. Sesay, Kallon, Gbao*, SCSL-04-15-T-1234, "Judgement", Trial Chamber, 2 March 2009

2. Other SCSL case law

***AFRC* Appeal Judgement**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-A-475, "Judgment", Appeals Chamber, 22 February 2008
***AFRC* Pre-Trial Decision on Abuse of Process**	*Prosecutor v. Brima, Kamara, Kanu* , SCSL-04-16-T-88 "Decision on motion challenging jurisdiction and raising objections based on abuse of process", Trial Chamber, 25 May 2004
***AFRC* Sentencing Judgement**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-624, "Sentencing Judgement", Trial Chamber, 19 July 2007
***AFRC* Trial Judgement**	*Prosecutor v. Brima, Kamara, Kanu*, SCSL-04-16-T-613, "Judgement", Trial Chamber, 20 June 2007, as revised pursuant to SCSL-04-16-T-628, Corrigendum to Judgement Filed on 21 June 2007", Trial Chamber, 19 July 2007
***CDF* Appeal Judgement**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-829, "Judgment", Appeals Chamber, 28 May 2008
***CDF* Rule 98 Decision**	*Prosecutor v. Norman, Fofana, Kondewa*, SCSL-04-14-T, "Decision on Joint Motion of the First and Second Accused to Clarify the Decision on Motions for Judgement of Aequittal Pursuant to Rule 98", Trial Chamber, 3 February 2006
***CDF* Sentencing Judgement**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-T-796, "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa", Trial Chamber, 9 October 2007
***CDF* Trial Judgement**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-T-785, "Judgement", Trial Chamber, 2 August 2007
***Kondewa* Indictment Decision**	*Prosecutor v. Kondewa*, SCSL-2003-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 27 November 2003
***Kondewa* Rule 68 Decision**	*Prosecutor v. Fofana, Kondewa*, SCSL-04-14-A-146, "Decision on Motion to Compel the Production of Exculpatory Witness Statements, Witness summaries and Materials pursuant to Rule 68", Appeals Chamber, 8 July 2004
***Taylor* JCE Decision**	*Prosecutor v. Taylor*, SCSL-2003-01-T-775, "Decision on 'Defence Notice of Appeal and Submissions Regarding the Majority Decision Concerning the Pleading of JCE in the Second Amended Indictment'", Trial Chamber, 1 May 2009

***Taylor* Rule 68 Decision**	*Prosecutor v. Taylor*, SCSL-2003-01-T-735, "Public-decision on confidential defence application for disclosure of documents in the custody of the prosecution pursuant to rule 66 and rule 68," Trial Chamber, 13 February 2009

3. ICTY case law and documents

***Aleksovski* Appeal Judgement**	*Prosecutor v. Aleksovski*, IT-95-14/1-A, "Judgement", Appeals Chamber, 24 March 2000 http://www.un.org/icty/aleksovski/appeal/judgement/index.htm
***Babić* Judgment on Sentencing Appeal**	*Prosecutor v. Babić*, IT-03-72, "Judgement on Sentencing Appeal", Appeals Chamber, 18 July 2005 http://www.un.org/icty/babic/appeal/judgement/index.htm
***Babić* Sentencing Judgement**	*Prosecutor v. Babić*, IT-03-72-S, "Sentencing Judgment", Trial Chamber, 29 June 2004 http://www.icty.org/x/cases/babic/tjug/en/bab-sj040629e.pdf
***Blagojević and Jokić* Appeal Judgement**	*Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Judgement", Appeals Chamber, 9 May 2007 http://www.icty.org/x/cases/blagojevic_jokic/acjug/en/blajok-jud070509.pdf
***Blagojević and Jokić* Confidential Material Decision**	*Prosecutor v. Blagojević and Jokić*, IT-02-60-A, "Decision on Momcilo Perisic's Motion Seeking Access to Confidential Material in the Blagojevic and Jokic Cases", Appeals Chamber, 18 January 2006 http://www.icty.org/x/cases/perisic/tdec/en/060118.htm#4

***Blagojević and Jokić* Trial Judgement**	*Prosecutor v Blagojević and Jokić*, IT-02-60-T, "Judgement", Trial Chamber, 17 January 2005 http://www.un.org/icty/blagojevic/trialc/judgement/index.htm
***Blaškić* Appeal Judgement**	*Prosecutor v. Blaškić*, IT-95-14-A, "Judgement", Appeals Chamber, 29 July 2004 http://www.un.org/icty/blaskic/appeal/judgement/index.htm
***Boškoski* Decision on Form of Indictment**	*Prosecutor v. Boškoski et al.*, IT-04-82-PT, "Decision on Ljube Boškoski's Motion Challenging The Form of the Indictment", Trial Chamber, 22 August 2005 http://www.icty.org/x/cases/boskoski_tarculovski/tdec/en/050822.htm
***Bralo* Judgement on Sentencing Appeal**	*Prosecutor v. Bralo*, IT-95-17, "Judgement on Sentencing Appeal", Appeals Chamber, 2 April 2007 http://www.icty.org/x/cases/bralo/acjug/en/bra-aj070402-e.pdf
***Brđanin and Talić* 20 February 2001 Decision on Form of Indictment**	*Prosecutor v. Brđanin and Talić*, IT-99-36-T, "Decision on Objections by Momir Talić to the Form of the Amended Indictment", Trial Chamber, 20 February 2001 http://www.icty.org/x/cases/brdanin/tdec/en/10220FI214869.htm
***Brđanin and Talić* 26 June 2001 Decision on Form of Indictment**	*Prosecutor v. Brđanin and Talić* , IT-99-36-T, "Decision on form of Further Amended Indictment and Prosecution Application to Amend", Trial Chamber, 26 June 2001 http://www.icty.org/x/cases/brdanin/tdec/en/10626FI215879.htm
***Brđanin* Appeal Judgement**	*Prosecutor v. Brđanin*, IT-99-36-A, "Judgement", Appeals Chamber, 3 April 2007 http://www.un.org/icty/brdjanin/appeal/judgement/brd-aj070403-e.pdf
***Brđanin* Motion for Separate Trial Decision**	*Prosecutor v. Brđanin*, IT-99-36-T "Decisions on Motions by Momir Talić for a separate Trial and for Leave to File a Reply, Trial Chamber, 9 March 2000 http://www.icty.org/x/cases/brdanin/tdec/en/00309ST212150.htm
***Brđanin* Sixth Amended Indictment**	*Prosecutor v. Brđanin*, IT-99-36, "Sixth Amended Indictment", 9 December 2003

	http://www.icty.org/x/cases/brdanin/ind/en/brd-6ai031209e.pdf
***Brđanin* Trial Judgement**	*Prosecutor v. Brđanin*, IT-99-36-T, "Judgement", Trial Chamber, 1 September 2004 http://www.un.org/icty/brdjanin/trialc/judgement/index.htm
***Čelebići* 2 October 1996 Decision on Form of Indictment**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Decision on Motion by the Accused Zejlic Delalić based on Defects in the Form of the Indictment", Trial Chamber, 2 October 2006 http://www.icty.org/x/cases/mucic/tdec/en/61002FI2.htm
***Čelebići* Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-A, "Judgement", Appeals Chamber, 20 February 2001 http://www.un.org/icty/celebici/appeal/judgement/index.htm
***Čelebići* Sentencing Appeal Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-*Abis*, "Judgment on Sentence Appeal", Appeals Chamber, 8 April 2003 http://www.un.org/icty/celebici/appeal/judgement2/index.htm
***Čelebići* Trial Judgement**	*Prosecutor v. Delalić et al. (Čelebići case)*, IT-96-21-T, "Judgement", Trial Chamber, 16 November 1998
***Đorđević* Fourth Amended Indictment**	*Prosecutor v. Đorđević*, IT-05-87/1-PT, "Fourth Amended Indictment", 9 July 2008 http://www.icty.org/x/cases/djordjevic/ind/en/dor-4thdai080709.pdf
***Erdemović* Appeal Judgement**	*Prosecutor v. Erdemović*, IT-96-22-A, "Judgement", Appeals Chamber, 7 October 1997 http://www.un.org/icty/erdemovic/appeal/judgement/erd-asojmcd971007e.htm
***Erdemović* Sentencing Judgement**	*Prosecutor v. Erdemović*, IT-96-22, "Sentencing Judgment", Trial Chamber, Trial Chamber, 29 November 1996 http://www.un.org/icty/erdemovic/trialc/judgement/erd-tsj980305e.htm
***Furundžija* Appeal Judgement**	*Prosecutor v. Furundžija*, IT-95-17/1-A, "Judgement", Appeals Chamber, 21 July 2000 http://www.un.org/icty/furundzija/appeal/judgement/index.htm

***Galić* Appeal Judgement**	*Prosecutor v. Galić*, IT-98-29-A, "Judgement", Appeals Chamber, 30 November 2006 http://www.un.org/icty/galic/judgment/gal-acj061130e.pdf
***Galić* Indictment**	*Prosecutor v. Galić*, IT-98-29-T, "Initial Indictment," 26 March 1999 http://www.icty.org/x/cases/galic/ind/en/gal-ii990326e.pdf
***Hadžihasanović* 7 December 2001 Decision on Form of Indictment**	*Prosecutor v. Hadžihasanović et al.*, IT-01-47-PT, "Decision on Form of Indictment", Trial Chamber, 7 December 2001 http://www.icty.org/x/cases/hadzihasanovic_kubura/tdec/en/11207FI216966.htm
***Hadžihasanović* Appeal Decision**	*Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, "Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility", Appeals Chamber, 16 July 2003 http://www.icty.org/x/cases/hadzihasanovic_kubura/acdec/en/030716.htm
***Hadžihasanović* Trial Judgement**	*Prosecutor v. Hadžihasanović et al.*, IT-01-47-T, "Judgement", Trial Chamber, 15 March 2006 http://www.un.org/icty/hadzihas/trialc/judgement/had-judg060315e.pdf
***Halilović* Appeal Judgement**	*Prosecutor v. Halilović*, IT-01-48-A, "Judgement", Appeals Chamber, 16 October 2007 http://www.un.org/icty/halilovic/appeal/judgement/hav-app-jud-071016e.pdf
***Haradinaj* Trial Judgement**	*Prosecutor v. Haradinaj et al.*, IT-04-84-PT, "Judgement", Trial Chamber 3 April 2008 http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf
***Jelisić* Appeal Judgement**	*Prosecutor v. Jelisić*, IT-95-10-A, "Judgement", Appeals Chamber, 5 July 2001 http://www.un.org/icty/jelisic/appeal/judgement/index.htm

***Karadžić* Third Amended Indictment**	*Prosecutor v. Karadžić*, IT-95-5/18-I, "Third Amended Indictment", 27 February 2009 http://www.icty.org/x/cases/karadzic/ind/en/090227.pdf
***Kordić and Čerkez* Appeal Judgement**	*Prosecutor v. Kordić and Čerkez*, IT-95-14/2-A, "Judgement", Appeals Chamber, 17 December 2004 http://www.un.org/icty/kordic/appeal/judgement/index.htm
***Krajišnik* 1 August 2000 Decision on Form of Indictment**	*Prosecutor v. Krajišnik*, IT-00-39-T, "Decision Concerning Preliminary Motion on the Form of The Indictment", Trial Chamber, 1 August 2000 http://www.icty.org/x/cases/krajisnik/tdec/en/00801FI513386.htm
***Krajišnik* Amended Consolidated Indictment**	*Prosecutor v. Krajišnik and Plavšić*, IT-00-39-T, "Amended Consolidated Indictment", 7 March 2002 http://www.icty.org/x/cases/krajisnik/ind/en/kra-cai020307e.pdf
***Krajišnik* Appeal Judgement**	*Prosecutor v Krajišnik*, IT-00-39-A, "Judgement", Appeals Chamber, 17 March 2009 http://www.icty.org/x/cases/krajisnik/acjug/en/090317.pdf
***Krajišnik* Trial Judgement**	*Prosecutor v. Krajišnik*, IT-00-39-T, "Judgement," Trial Chamber, 27 September 2006 http://www.un.org/icty/krajisnik/trialc/judgement/kra-jud060927e.pdf
***Krnojelac* 11 February 2000 Decision on Form of Indictment**	*Prosecutor v. Krnojelac*, IT-97-25-T, "Decision on Preliminary Motion on form of Amended Indictment", Trial Chamber, 11 February 2000 http://www.icty.org/x/cases/krnojelac/tdec/en/00211AI212639.htm
***Krnojelac* 24 February 1999 Decision on Form of Indictment**	*Prosecutor v. Krnojelac*, IT-97-25-T, "Decision on the Defence Motion on the Form of Indictment", Trial Chamber, 24 February 1999 http://www.icty.org/x/cases/krnojelac/tdec/en/902247325494.htm

***Krnojelac* Appeal Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-A, "Judgement", Appeals Chamber, 17 September 2003 http://www.un.org/icty/krnojelac/appeal/judgement/index.htm
***Krnojelac* Trial Judgment**	*Prosecutor v. Krnojelac*, IT-97-25-T, "Judgement", Trial Chamber, 15 March 2002 http://www.un.org/icty/krnojelac/trialc2/judgement/index.htm
***Krstić* Appeal Judgement**	*Prosecutor v. Krstić*, IT-98-33-A, "Judgement", Appeals Chamber, 19 April 2004 http://www.un.org/icty/krstic/Appeal/judgement/index.htm
***Krstić* Trial Judgment**	*Prosecutor v. Krstić*, IT-98-33, "Judgement", Trial Chamber, 2 August 2001 http://www.un.org/icty/krstic/TrialC1/judgement/index.htm
***Kunarac* Appeal Judgement**	*Prosecutor v. Kunarac et al.*, IT-96-23&23/1, "Judgement", Appeals Chamber, 12 June 2002 http://www.un.org/iety/kunarac/appeal/judgement/index.htm
***Kunarac* Trial Judgement**	*Prosecutor v Kunarac et al.*, IT-96-23-T&23/1, "Judgement", Trial Chamber, 22 February 2001 http://www.un.org/icty/kunarac/trialc2/judgement/kun-tj010222e.pdf
***Kupreškić* Appeal Judgement**	*Prosecutor v. Kupreškić et al.*, IT-95-16-A, " Judgement", Appeals Chamber, 23 October 2001 http://www.un.org/icty/kupreskic/appeal/judgement/index.htm
***Kupreškić* Transcript 15 February 1999**	*Prosecutor v. Kupreškić*, IT-95-16-T, Trial Transcript, 15 February 1999 http://www.icty.org/x/cases/kupreskic/trans/en/990215ed.htm
***Kupreškić* Trial Judgemeut**	*Prosecutor v. Kupreškić et al.*, IT-95-16-T, "Judgement", Trial Chamber, 14 January 2000 http://www.un.org/icty/kupreskic/trialc2/judgement/index.htm

***Kvočka* 12 April 1999 Decision on Form of Indictment**	*Prosecutor v. Kvočka et al.*, IT-98-30/1 "Decision on Defence Preliminary Motions on the Form of the Indictment", Trial Chamber, 12 April 1999 http://www.icty.org/x/cases/kvocka/tdec/en/90412FI56822.htm
***Kvočka* Appeal Judgement**	*Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement" Appeals Chamber, 28 February 2005 http://www.un.org/icty/ Kvočka /appeal/judgement/index.htm
***Kvočka* Rule 90 H Decision**	*Prosecutor v. Kvočka et al.*, IT-98-30-PT, "Decision on the 'Request to the Trial Chamber to Issue a Decision on Use of Rule 90 H'", Trial Chamber, 11 January 2001 (Copy attached in Appendix C)
***Kvočka* Trial Judgement**	*Prosecutor v. Kvočka et al.*, IT-98-30/1, "Judgement", Trial Chamber, 2 November 2001 http://www.un.org/icty/kvocka/trialc/judgement/index.htm
***Limaj* Appeal Judgement**	*Prosecutor v. Limaj et al.*, IT-03-66-A, "Judgement", Appeals Chamber, 27 September 2007 http://www.icty.org/x/cases/limaj/acjug/en/Lima-Jug-070927.pdf
***Limaj* Trial Judgement**	*Prosecutor v. Limaj et al.*, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005 http://www.un.org/icty/limaj/trialc/judgement/index.htm
***Martić* Appeal Judgement**	*Prosecutor v. Martić*, IT-95-11-A, "Judgement", Appeal Chamber, 8 October 2008 http://www.icty.org/x/cases/martic/acjug/en/mar-aj081008e.pdf
***Martić* Trial Judgement**	*Prosecutor v. Martić*, IT-95-11-T, "Judgement", Trial Chamber, 12 June 2007 http://www.icty.org/x/cases/martic/tjug/en/070612.pdf
***Milošević* Amended Indictment**	*Prosecutor v. Milošević*, IT-02-54, "Second Amended Indictment" 28 July 2004 http://www.icty.org/x/cases/slobodan_milosevic/ind/en/040727.pdf

***Milošević* Decision on Preliminary Motions**	*Prosecutor v. Milošević*, IT-02-54, "Decision on Preliminary Motions", Trial Chamber, 8 November 2001 http://www.icty.org/x/cases/slobodan_milosevic/tdec/en/111087351 6829.htm
***Milošević* Reasons for Refusal of Leave to Appeal**	*Prosecutor v. Milošević*, IT-02-54-AR73, "Reasons for Refusal of Leave to Appeal from Decision to Impose Time Limit", Appeal Chamber, 16 May 2002 http://www.icty.org/x/cases/slobodan_milosevic/acdec/en/16052002 .htm
***Milutinović* Decision on Review**	*Prosecutor v. Milutinović et al.*, IT-05-87-AR108*bis*.2, "Decision on the Request of the United States of America for Review", 12 May 2006 Copy attached in Appendix C
***Milutinović* Trial Judgement**	*Prosecutor v Milutinović et al.*, IT-05-87-T, "Judgement", Trial Chamber, 26 February 2009 http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226e1of4.pdf
***Mrđa* Trial Judgment**	*Prosecutor v Mrđa*, IT-02-59-S, "Judgment", Trial Chamber, 31 March 2004 http://www.icty.org/x/cases/mrda/tjug/en/sj-040331.pdf
***Mrskić* 19 June 2003 Decision on Form of Indictment**	*Prosecutor v. Mrskić et al.*, IT-95-13/1, "Decision on Form of Indictment", Trial Chamber, 19 June 2003 http://www.icty.org/x/cases/mrksic/tdec/en/030619.htm
***Mrkšić* Appeal Judgement**	*Prosecutor v. Mrkšić et al.*, IT-95-13/1-A, "Judgement", Appeals Chamber, 5 May 2009 http://www.icty.org/x/cases/mrksic/acjug/en/090505.pdf
***Naletilić and Martinović* Appeal Judgement**	*Prosecutor v. Naletilić and Martinović*, IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006 http://www.un.org/icty/naletilic/appeal/judgement/index.htm

***Nikolić-Dragan* Sentencing Appeal Judgement**	*Prosecutor v. Nikolic-Dragan*, IT-94-02-T, "Judgement on Sentencing Appeal", Appeals Chamber, 4 February 2005 http://www.icty.org/x/cases/dragan_nikolic/acjug/en/nik-jsa050204e.pdf
***Nikolic-Dragan* Sentencing Judgment**	*Prosecutor v. Nikolic-Dragan*, IT-94-02-S, "Sentencing Judgement" Trial Chamber, 18 December 2003 http://www.icty.org/x/cases/dragan_nikolic/tjug/en/nik-sj031218e.pdf
***Orić* Trial Judgement**	*Prosecutor v. Orić*, IT-03-68-T, "Judgement", Trial Chamber, 30 June 2006 http://www.un.org/icty/oric/trialc/judgement/ori-jud060630c.pdf
***Orić* Appeal Judgement**	*Prosecutor v. Orić*, IT-03-68-A, "Judgement", Appeals Chamber, 3 July 2008 http://www.un.org/icty/oric/appeal/judgement/oric_jud080703.pdf
***Plavšić* Trial Judgement**	*Prosecutor v. Plavšić*, IT-00-39&40/1, "Sentencing Judgement" Trial Chamber, 22 February 2003 http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf
***Prlić* Decision on Admission of Transcript**	*Prosecutor v. Prlić et al.*, IT-04-74-AR73.6, "Decision on Appeals against Decision Admitting Transcript Jadranko Prlić's Questioning into Evidence", Appeals Chamber, 23 November 2007 http://www.icty.org/x/cases/prlic/acdec/en/071123.pdf
***Simić* Appeal Judgement**	Prosecutor v. *Simić*, IT-95-9-A, "Judgement", Appeals Chamber, 28 November 2006 http://www.un.org/icty/simic/appeal/judgement-e/sim-acjud061128e.pdf
***Stakić* Appeal Judgement**	*Prosecutor v. Stakić*, IT-97-24-A, "Judgement" Appeals Chamber, 22 March 2006 http://www.un.org/icty/stakic/appeal/judgement/index.htm

***Stakić* Trial Judgement**	*Prosecutor v. Stakić*, IT-97-24-T, "Judgement", Trial Chamber, 31 July 2003 http://www.un.org/icty/stakic/trialc/judgement/index.htm
***Strugar* Appeal Judgement**	*Prosecutor v. Strugar*, IT-01-42-A, "Judgement", Appeals Chamber, 17 July 2008 http://www.icty.org/x/cases/strugar/acjug/en/080717.pdf
***Strugar* Trial Judgement**	*Prosecutor v. Strugar*, IT-01-42-T, "Judgement", Trial Chamber, 31 January 2005 http://www.un.org/icty/strugar/trialc1/judgement/index2.htm
***Tadić* Additional Evidence Appeal Decision**	*Prosecutor v. Tadić*, IT-94-1-A, "Decision on Appellant's Motion for the Extension of the Time Limit and Admission of Additional Evidence", Appeals Chamber, 15 October 1998 http://www.icty.org/x/file/Legal%20Library/Statute/statute_sept08_en.pdf
***Tadić* Appeal Judgement**	*Prosecutor v. Tadić*, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 http://www.un.org/icty/tadic/appeal/judgement/index.htm
***Tadić* Judgement on Allegations of Contempt**	*The Prosecutor v. Tadić*, IT-94-1-A, "Appeal Judgement on allegations of contempt against prior counsel, Milan Vujin", Appeals Chamber, 27 February 2001 http://www.icty.org/x/cases/tadic/acjug/en/vuj-aj010227c.pdf
***Tadić* Jurisdictional Appeal Decision**	*Prosecutor v. Tadić*, IT-94-1-AR72, "Decision on Defence Motion for Interlocutory Appeal on Jurisdiction ", Appeals Chamber, 2 October 1995 http://www.un.org/icty/tadic/appeal/decision-e/51002.htm
***Tadić* Trial Judgement**	*Prosecutor v. Tadić*, IT-94-1-T, "Opinion and Judgement", Trial Chamber, 7 May 1997 http://www.un.org/icty/tadic/trialc2/judgement/index.htm

***Tolimir* Appeal Decision on Joinder**	*Prosecutor v. Tolimir et al.*, IT-04-80-AR73.1, "Decision on Radivoje Miletić's Interlocutory Appeal Against the Trial Chamber's Decision on Joinder of Accused", Appeals Chamber, 27 January 2006 http://www.icty.org/x/cases/tolimir/acdec/en/060127.htm
***Vasiljević* Appeal Judgement**	*Prosecutor v. Vasiljević*, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004 http://www.un.org/icty/vasiljevic/appeal/judgement/index.htm

4. ICTR case law and documents

***Akayesu* Appeal Judgement**	*Prosecutor v. Akayesu*, ICTR-96-1-A, "Judgement". Appeals Chamber, 1 June 2001 http://69.94.11.53/ENGLISH/cases/Akayesu/judgement/Arret/index.htm
***Bagilishema* Appeal Judgement**	*Prosecutor v. Bagilishema*, ICTR-95-1A-A "Judgement (Reasons)", 3 July 2002 http://www.ictr.org/ENGLISH/cases/Bagilishema/judgement/acjudge/131202.htm
***Bagilishema* Trial Judgement**	*Prosecutor v. Bagilishema*, ICTR-95-1A-T, "Judgement", Trial Chamber, 7 June 2001 http://69.94.11.53/ENGLISH/cases/Bagilishema/judgement/index.htm
***Bagosora* Exclusion of Evidence Appeal Decision**	*Prosecutor v. Bagosora et al.*, ICTR-98-41-AR73, "Decision on Aloys Ntabakuze's Interlocutory Appeal on Questions of Law Raised by the 29 June 2006 Trial Chamber I Decision on Motion for Exclusion of Evidence", Appeals Chamber, 18 September 2006 http://69.94.11.53/ENGLISH/cases/Bagosora/decisions/180906.htm
***Bagosora* Severance Decision**	*Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Request for Severance of Three Accused", Trial Chamber, 27 March 2006 http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/270306.htm

***Bagosora* Testimony Admissibility Decision**	*Prosecutor v. Bagosora et al.*, ICTR-98-41-T, "Decision on Admissibility of Proposed Testimony of Witness DBY", Trial Chamber, 18 September 2003 http://www.ictr.org/ENGLISH/cases/Bagosora/decisions/180903.htm
***Barayagwiza* Appeal Decision**	*Prosecutor v. Barayagwiza,* ICTR-97-19-AR72, "Decision", Appeals Chamber, 3 November 1999 http://www.ictr.org/ENGLISH/cases/Barayagwiza/decisions/dcs991103.htm
***Gacumbitsi* Appeal Judgement**	*Prosecutor v. Gacumbitsi*, ICTR-2001-64-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Gachumbitsi/judgement/judgement_appeals_070706.pdf
***Kajelijeli* Appeal Judgement**	*Prosecutor v. Kajelijeli,* ICTR-98-44A, "Judgement", Appeals Chamber, 23 May 2005 http://69.94.11.53/ENGLISH/cases/Kajelijeli/judgement/appealsjudgement/index.pdf
***Kambanda* Appeal Judgement**	*Prosecutor v. Kambanda,* ICTR-97-23-A, "Judgement", Appeals Chamber, 19 October 2000 http://69.94.11.53/ENGLISH/cases/Kambanda/judgement/191000.htm
***Kambanda* Judgement and Sentence**	*Prosecutor v. Kambanda,* ICTR-97-23-T, "Judgement and Sentence", Trial Chamber, 4 September 1998 http://www.ictr.org/ENGLISH/cases/Kambanda/judgement/kambanda.html
***Kamuhanda* Appeal Judgement**	*Prosecutor v. Kamuhanda,* ICTR-95-54-A, "Judgement", Appeals Chamber, 19 September 2005 http://69.94.11.53/ENGLISH/cases/Kamuhanda/judgement/Appeals%20Judgement/Kamuhanda190905.pdf

***Karemera* Amended Indictment**	*Prosecutor v. Karemera et al.*, ICTR-98-44-R72, "Amended Indictment", Trial Chamber, 23 February 2005 http://www.ictr.org/ENGLISH/cases/Karemera/indictment/050824.pdf
***Karemera* JCE Decision**	*Prosecutor v. Karemera et al.*, ICTR-98-44-R72, "Decision on Defence Motion Challenging the Jurisdiction of the Tribunal – Joint Criminal enterprise", 5 August 2005 http://www.ictr.org/ENGLISH/cases/Karemera/decisions/050805b.htm
***Kayishema and Ruzindana* Appeal Judgement**	*Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-A, "Judgement", Appeals Chamber, 1 June 2001 http://69.94.11.53/ENGLISH/cases/KayRuz/appeal/index.htm
***Kayishema and Ruzindana* Decision**	*Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T. "Decision on the Defence Motion for the Re-Examination of Witness DE", Trial Chamber, 19 August 1998 http://www.ictr.org/ENGLISH/cases/KayRuz/decisions/dcs9808.htm
***Kayishema and Ruzindana* Trial Judgement**	*Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, "Judgement", Trial Chamber, 21 May 1999 http://www.ictr.org/ENGLISH/cases/KayRuz/judgement/index.htm
***Mpambara* Amended Indictment**	*Prosecutor v. Mpambara*, ICTR-01-65, "Amended Indictment", 7 March 2005 http://www.ictr.org/ENGLISH/cases/Mpambara/indictment/amended.pdf
***Muhimana* Appeal Judgement**	*Prosecutor v. Muhimana*, ICTR-95-1B-A, "Judgement", Appeals Chamber, 21 May 2007 http://www.ictr.org/ENGLISH/cases/Muhimana/judgement/070521_apl_judgement.pdf

***Musema* Appeal Judgement**	*Prosecutor v. Musema*, ICTR-96-13-A, "Judgement", Appeals Chamber, 16 November 2001 http://69.94.11.53/ENGLISH/cases/Musema/judgement/Arret/index.htm
***Nahimana* Appeal Decision**	*Prosecutor v. Nahimana et al.*, ICTR-99-52-A, "Decision on Jean-Bosco Barayagwiza's Request for Reconsideration of Appeals Chamber Decision of 19 January 2005", Appeals Chamber, 4 February 2005 http://www.ictr.org/ENGLISH/cases/Nahimana/decisions/040205.htm
***Ndindiliyimana* 23 October 2008 Decision**	*Prosecutor v. Ndindiliyimana*, ICTR-00-56-T, "Decision on the Prosecution's Objections to Expert Witesses Lugan and Strizek", Trial Chamber, 23 October 2008 http://www.ictr.org/ENGLISH/cases/Ndindiliyimana/decisions/081023.pdf
***Ndindiliyimana* Disclosure of Closed Session Testimony Decision**	*Prosecutor v. Ndindiliyimana et al.*, ICTR-00-56-T, "Decision on Nsengiyumva's Extremely Urgent and Confidential Motion for Disclosure of Closed Session Testimony OX and the Witness' Unredacted Statements and Exhibits.", 23 August 2006 http://www.ictr.org/ENGLISH/cases/Ndindiliyimana/decisions/230806.pdf
***Niyitegeka* Appeal Judgement**	*Prosecutor v. Niyitegeka*, ICTR-96-14-A, "Judgement" Appeals Chamber, 9 July 2004 http://www.ictr.org/ENGLISH/cases/Niyitegeka/judgement/NIYITEGEKA%20APPEAL%20JUDGEMENT.doc
***Ntagerura* Appeal Judgement**	*Prosecutor v. Ntagerura*, ICTR-96-10-A, "Judgement", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement/index.htm
***Ntakirutimana* Appeal Judgement**	*Prosecutor v. Ntakirutimana*, ICTR-96-10-A and ICTR-96-17-A, "Judgement", Appeals Chamber, 13 December 2004 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement/Arret/Index.htm

***Nyiramashuko* Motion for Separate Proceedings Decision**	*Prosecutor v. Nyiramashuko.* ICTR-97-21-T, "Decision on Nyiramashuko's Motion for Separate Proceedings, a New Trial, and Stay of Proceedings", Trial Chamber, 7 April 2006 http://www.ictr.org/ENGLISH/cases/Nyira/decisions/070406.htm
***Rutaganda* Appeal Judgement**	*Prosecutor v. Rutaganda*, ICTR-96-3-A, "Judgement", Appeals Chamber, 26 May 2003 http://69.94.11.53/ENGLISH/cases/Rutaganda/decisions/030526%20Index.htm
***Rutaganda* Trial Judgement**	*Prosecutor v. Rutaganda,* ICTR-96-3-T, "Trial Judgment and Sentence", Trial Chamber, 6 December 1999 http://69.94.11.53/ENGLISH/cases/Rutaganda/judgement.htm
***Rwamakuba* Pre-Trial Decision**	*Prosecutor v. Rwamakuba,* ICTR-98-44C-PT, "Decision on Defence Motion for Stay of Proceedings", Trial Chamber III, 3 June 2005 http://www.ictr.org/ENGLISH/cases/Rwamakuba/decisions/030605.htm

***Semanza* Appeal Judgement**	*Prosecutor v. Semanza*, ICTR-97-20-A, "Judgement", Appeals Chamber, 20 May 2005 http://69.94.11.53/ENGLISH/cases/Semanza/judgement/index.htm
***Semanza* Trial Judgement**	*Prosecutor v. Semanza*, ICTR-97-20-T, "Judgement and Sentence", Trial Chamber, 15 May 2003 http://69.94.11.53/ENGLISH/cases/Semanza/judgement/index.htm
***Seromba* Appeal Judgement**	*Prosecutor v. Seromba*, ICTR-2001-66-A, "Judgement" Appeals Chamber, 12 March 2008 http://www.ictr.org/ENGLISH/cases/Seromba/decisions/080312-Appeals_judg.pdf
***Seromba* Trial Judgement**	*Prosecutor v. Seromba*, ICTR-2001-66-I, "Judgement" Trial Chamber, 13 December 2006 http://www.ictr.org/ENGLISH/cases/Seromba/judgement/061213.pdf
***Serushago* Sentencing Judgement**	*Prosecutor v. Serushago*, ICTR-98-39-S, "Sentence", Trial Chamber, 5 February 1999 http://www.ictr.org/ENGLISH/cases/Serushago/judgement/os1.htm
***Simba* Appeal Judgement**	*Prosecutor v. Simba*, ICTR-01-76, "Judgement", Appeals Chamber, 27 November 2007 http://69.94.11.53/ENGLISH/cases/Simba/decisions/071127_judg.pdf

5. Other authorities and documents

(i) International treaties

Convention (IV) respecting the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land, The Hague, 18 October 1907

http://www.icrc.org/ihl.nsf/385ec082b509e76c41256739003e636d/1d1726425f6955aec125641e0038bfd6

Convention Concerning Forced or Compulsory Labour", International Labour Organisation ("ILO"), No. 29, 39 U.N.T.S. 55 (entry into force 1 May 1932)

http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C29

Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflict (Protocol I), 8 June 1977

http://www.icrc.org/ihl.nsf/FULL/475?OpenDocument

(ii) UN Documents

Update to Final report submitted by Ms. Gay J. McDougall, Special Rapporteur, *Contemporary Forms of Slavery: Systematic rape, sexual slavery and slavery-like practices during armed conflict*, Economic and Social Council, Commission on Human Rights, Sub-Commission on the Promotion and Protection of Human Rights, E/CN.4/Sub.2/2000/21, 6 June 2000

http://www.unhchr.ch/Huridocda/Huridoca.nsf/0/5b7b329c0462676bc125694d0057a669/$FILE/G0013934.pdf

(iii) Books, Articles and Commentaries

Richard May and Marieka Wierda (2002), International Criminal Evidence, Transnational Publishers, Inc., Ardsley, New York, 2002

(Extract attached in Appendix C. This authority exceeds 30 pages: see Practice Direction on the Filing of Documents, Article 7(E))

(iv) National Cases

Yamashita v. Styer, Supreme Court of the United States of America, 4 February 1996

http://www.icrc.org/IHL-NAT.NSF/46707c419d6bdfa24125673e00508145/1d4c8a391cc93c38c1256d1700575bb2!OpenDocument

(v) Other International Cases

US v Oswald Pohl and Others, Judgement of 3 November 1947, reprinted in Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council No. 10, Vol 5, (1997)

http://www.mazal.org/archive/nmt/05/NMT05-T0986.htm

Judgment of the International Military Tribunal for the Trial of German Major War Criminals Judgement: Rosenberg, 30th September, 1946 - 1st October, 1946, London, His Majesty's Stationery Office, 1951, pp. 94-95

http://www.nizkor.org/ftp.cgi?imt/tgmwc/judgment/j-defendants-rosenberg

SPECIAL COURT FOR SIERRA LEONE
JOMO KENYATTA ROAD • FREETOWN • SIERRA LEONE

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Trial Chamber
☐ Designated Judge:
☐ Trial Chamber I

Appeal Chamber
☐ Pre-Hearing Appeals Judge
☒ Appeals Chamber
☐ President

☒ **Defence Counsel: Mr Jordash (Sesay)**
Mr Taku (Kallon)
Mr Cammegh (Gbao)

☒ **Prosecution Counsel: Mr Vincent Wagona**

☒ **Defence Office: Ms Claire Carlton-Hanciles**
☐ **Others required:**

Filed by:	☐ Chamber ☐ Judge	☐ Defence (name)	☒ Prosecutor **The Prosecutor,** **Mr. Stephen Rapp**	☐ Other: (name)
Case Name: **Case Number:**	The Prosecutor vs. **Sesay, Kallon, Gbao** SCSL-2004-**15-T**			
Classification	☒ PUBLIC	☐ CONFIDENTIAL **(PLEASE COMPLETE SECTION BELOW)**	☐ UNDER SEAL ☐ EX PARTE	
Dates:	Filing date: 25 June 2009		Document's date: 25 June 2009	
Pages:	Total No. of Pages: 220	No. of Appendices: 4		
Appendices:	**Appendix A: Table of Contents** **Appendix B: Table of Defence Grounds of Appeal and Prosecution Response** **Appendix C: List of Cited Authorities and Documents** **Appendix D: Copies of Authorities**			
Document's Full Title	PUBLIC PROSECUTION RESPONSE BRIEF			
Reasons for Confidentiality. (Please indicate whether all or only part of the document is to be considered confidential, and mark clearly each confidential page accordingly).				

SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – 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 Hon. Justice Shireen Fisher
Acting Registrar	Ms Binta Mansaray
Date filed:	25 June 2009

THE PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No. SCSL-04-15-A

PUBLIC

PROSECUTION RESPONSE BRIEF

Office of the Prosecutor:
Dr Christopher Staker
Mr Vincent Wagona
Dr Nina Jørgensen
Mr Reginald Fynn
Ms Elisabeth Baumgartner
Ms Régine Gachoud

Defence Counsel for Issa Hassan Sesay
Mr Wayne Jordash
Ms Sareta Ashraph

Defence Counsel for Morris Kallon
Mr Charles Taku
Mr Kennedy Ogeto

Defence Counsel for Augustine Gbao
Mr John Cammegh
Mr Scott Martin

APPENDIX D

COPIES OF AUTHORITIES

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IT-98-30/1-T
D4501 - D4499
11 JANUARY 2001

3/268 4501

UNITED NATIONS

International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of The Former Yugoslavia since 1991

Case No. IT-98-30/1-T

Date 11 January 2001

Original: ENGLISH
FRENCH

IN THE TRIAL CHAMBER

Before: **Judge Almiro Rodrigues, Presiding**
Judge Fouad Riad
Judge Patricia Wald

Registrar: **Mr. Hans Holthuis**

Decision of: **11 January 2001**

THE PROSECUTOR

v.

MIROSLAV KVOČKA
MILOJICA KOS
MLADO RADIĆ
ZORAN ŽIGIĆ
DRAGOLJUB PRCAĆ

DECISION ON THE "REQUEST TO THE TRIAL CHAMBER TO ISSUE A DECISION ON USE OF RULE 90H"

The Office of the Prosecutor:
Ms. Brenda Hollis
Ms. Susan Somers
Mr. Kapila Waidyaratne

Defence Counsel:
Mr. Krstan Simić for Miroslav Kvočka
Mr. Zarko Nikolić for Milojica Kos
Mr. Toma Fila for Mlado Radić
Mr. Slobodan Stojanović for Zoran Žigić
Mr. Jovan Simić for Dragoljub Prcać

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TRIAL CHAMBER I ("the Trial Chamber") of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 ("the Tribunal");

BEING SEISED of the "Request to the Trial Chamber to issue a decision on use of Rule 90H" filed by the Defence of Miroslav Kvočka on 1 December 2000 ("the Motion"), asking the Trial Chamber to limit Prosecution cross-examination of defence witnesses to questions relating to the accused who has called the witness, and to prohibit cross-examination by the co-accused;

NOTING the "Response by Milojica Kos to the Request to the Trial Chamber to issue a decision on use of Rule 90H filed on behalf of Miroslav Kvočka on 1 December 2000", filed on 8 December 2000, opposing the Motion insamuch as it concerns cross-examination by co-accused and requesting the Trial Chamber to allow each accused to cross-examine all defence witnesses, and the "Prosecution's Response to accused Kvočka's 'Request to the Trial Chamber to issue a decision on use of Rule 90H'", filed on 19 December 2000 which opposes the Motion in full;

CONSIDERING that the Trial Chamber may admit any relevant evidence which it deems to have probative value pursuant to Rule 89 (C) of the Rules of Procedure and Evidence of the Tribunal ("the Rules");

CONSIDERING that, pursuant to Rule 90 (H) of the Rules, cross-examination shall be limited to the subject-matter of the evidence-in-chief and matters affecting the credibility of the witness and, where the witness is able to give evidence relevant to the case for the cross-examining party, to the subject matter of that case, although the Trial Chamber may, in the exercise of its discretion, permit enquiry into additional matters;

CONSIDERING that it goes against the plain wording of Rule 90 (H) to limit the scope of Prosecution cross-examination further as requested in the Motion, particularly in context of the current matter, in which the case against each accused may affect the others since crimes of multiple participation, joint liability and superior responsibility are alleged;

CONSIDERING the right of each accused to examine or have examined the witnesses against him as enshrined in Article 21 of the Statute of the Tribunal;

CONSIDERING that a witness presented by an accused may give evidence against one of his co-accused, so that the co-accused has a right to cross-examine that witness, and further that to prohibit all cross-examination by a co-accused as requested in the Motion could exclude relevant evidence;

CONSIDERING that the Trial Chamber has a duty to exercise control over the mode and order of interrogating witnesses and presenting evidence so as to make the interrogation and presentation effective for the ascertainment of the truth and to avoid needless consumption of time, pursuant to Rule 90 (G) of the Rules;

HEREBY DENIES the Motion and **ORDERS** as follows:

1) Defence witnesses shall be questioned in the following sequence:
   a) Examination in chief;
   b) Cross-examination by the defence of the co-accused, if relevant, in accordance with paragraph (2) below;
   c) Cross-examination by the Prosecutor;
   d) Re-examination;
   e) Questions from the judges.

2) When a witness presented by the defence of one accused mentions another accused, the defence of that co-accused shall be entitled to cross-examine the witness. In other circumstances, co-accused wishing to cross-examine the witness shall make an application to the bench explaining the relevance of the proposed questioning.

Done in English and French.

Almiro Rodrigues
Presiding Judge

Dated this eleventh day of January 2001,
At The Hague
The Netherlands.

[Seal of the Tribunal]

UNITED NATIONS

	International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991	Case No.:	IT-05-87-AR108*bis*.2
		Date:	12 May 2006
		Original:	English

IN THE APPEALS CHAMBER

Before: **Judge Fausto Pocar, Presiding**
Judge Mohamed Shahabuddeen
Judge Mehmet Güney
Judge Theodor Meron
Judge Wolfgang Schomburg

Registrar: **Mr. Hans Holthuis**

Decision of: **12 May 2006**

PROSECUTOR

v.

MILAN MILUTINOVIĆ
NIKOLA ŠAINOVIĆ
DRAGOLJUB OJDANIĆ
NEBOJŠA PAVKOVIĆ
VLADIMIR LAZAREVIĆ
VLASTIMIR ĐORĐEVIĆ
SRETEN LUKIĆ

DECISION ON REQUEST OF THE UNITED STATES OF AMERICA FOR REVIEW

The Office of the Prosecutor

Mr. Thomas Hannis
Mr. Chester Stamp
Ms. Christina Moeller

The Government of the United Kingdom

Mr. Dominic Raab, Legal Adviser

Counsel for the Accused Dragoljub Ojdanić

Mr. Tomislav Višnjić
Mr. Peter Robinson

Counsel for the United States of America

Mr. Clifton Johnson
Ms. Heather A. Schildge
Ms. Karen K. Johnson

1. The Appeals Chamber of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 ("Appeals Chamber" and "International Tribunal", respectively), is seized of the "Request of the United States of America for Review of the Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" filed by the Government of the United States of America ("United States") on 2 December 2005 ("Request") pursuant to Rule 108*bis* of the Rules of Procedure and Evidence of the International Tribunal ("Rules").

I. BACKGROUND

2. On 27 June 2005, Dragoljub Ojdanić ("Ojdanić") filed "General Ojdanić's Second Application for Orders to NATO and States for Production of Information" before Trial Chamber III ("Application"). After holding an oral hearing on the Application on 4 October 2005, the Trial Chamber issued its "Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*" on 17 November 2005 ("Impugned Decision"). In that decision, the Trial Chamber granted Ojdanić's Application in part and ordered Canada, Iceland, Luxembourg, the United States and the North Atlantic Treaty Organization ("NATO") to produce documents of intercepted communications made during a specific period and taking place in whole or in part in the Federal Republic of Yugoslavia.[1]

3. Thereafter, the United States filed its Request for review of the Impugned Decision on 2 December 2005 as did NATO in a separate filing.[2] In its Request, the United States seeks reversal of the Impugned Decision.[3] On 7 December 2005, Ojdanić filed "General Ojdanić's Submisson on Admissibility of Requests for Review" ("Submission on Admissibility")[4] and, on 12 December, "General Ojdanić's Consolidated Response to Requests for Review" ("Response").[5] The United

[1] Impugned Decision, pp. 3, 17.
[2] *See* NATO Request for Review of Decision on Second Application of Dragoljub Ojdanić for Binding Orders Pursuant to Rule 54*bis*, 2 December 2005. The present Decision solely disposes of the Request filed by the United States.
[3] Request, p. 3.
[4] In his Submission on Admissibility, Ojdanić requested an opportunity to be heard on the merits of the United States' Request, *see* para. 4, and then submitted his Response addressing the merits of the Request five days later. The Appeals Chamber notes that it is required to consider Ojdanić's Response under Rule 108*bis*(B), which stipulates that "[t]he party upon whose motion the Trial Chamber issued the impugned decision shall be heard by the Appeals Chamber. [...]" The Appeals Chamber further notes that neither the United States nor Ojdanić requested an oral hearing on the United States' Request and that pursuant to Rule 108*bis*(D) and Rule 116*bis*, a Rule 108*bis* request for review may be determined entirely on the basis of written briefs. The Appeals Chamber considers that it is appropriate to do so here in light of the entirety of the written submissions made by the United States and Ojdanić, which allow for it to reach a reasoned and fair disposition without requiring the oral presentation of arguments.
[5] The Appeals Chamber notes that Ojdanić has expressly argued for the Appeals Chamber to allow, in the interests of justice, that the Prosecution and/or his co-accused be heard on the important issues raised in this interlocutory review if they so desired. *See* Submission on Admissibility, para. 5. While the Appeals Chamber has power to do so under Rule

States filed the "Reply of the United States of America to General Ojdanić's Consolidated Response to Requests for Review" on 16 December 2005 ("Reply"). That day, the Appeals Chamber stayed the Impugned Decision until its resolution of the United States' Request.[6]

4. As a preliminary matter, the Appeals Chamber notes that there is no right of reply by a State in Rule 108*bis* proceedings[7] and that the United States has failed to request leave to file its Reply. Nevertheless, the Appeals Chamber considers that it is in the interests of justice to consider this additional submission from the United States, especially in light of the fact that Ojdanić has made no objection to this filing.[8]

5. The Appeals Chamber also notes that the Government of the United Kingdom ("United Kingdom") filed a submission by letter dated 20 December 2006 ("Submission") requesting to be associated in support of the United States' Request, particularly with regard to certain portions of the Request.[9] In its Submission, the United Kingdom provided additional legal and policy arguments against paragraph 38 of the Impugned Decision as well as against the general implications that would result from enforcement of that decision.[10] The Appeals Chamber considers that, as noted by the United Kingdom, the Impugned Decision dismissed or denied the Application as it related to a request for information from the United Kingdom.[11] Therefore, although the United Kingdom's Submission addresses issues of importance[12] also raised in the United States' Request, the United Kingdom does not have standing to make its Submission before the Appeals Chamber. Consequently, the Appeals Chamber finds that the United Kingdom's Submission is inadmissible and will not consider it in disposing of the United States' Request.

II. STANDARD OF REVIEW

6. The Appeals Chamber recalls that Rule 54 and Rule 54*bis* allow a party in proceedings before the International Tribunal to request a Judge or a Trial Chamber to order a State to produce

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108*bis*(B) of the Rules, none of the other parties to these proceedings has filed a submission requesting to be heard and the Appeals Chamber does not consider that the interests of justice require that they be further invited to do so.

[6] Stay of Trial Chamber Decision, 16 December 2005.

[7] *Prosecutor v. Milošević*, Decision on Request of Serbia and Montenegro for Review of the Trial Chamber's Decision of 6 December 2005, 6 April 2006 ("*Milošević* Decision of 6 April 2006"), para. 15; *Prosecutor v. Milošević*, Case No. IT-02-54-AR108*bis* & AR73.3, Public Version of the Confidential Decision on the Interpretation and Application of Rule 70, 23 October 2002 ("*Milošević* Rule 70 Decision"), para. 4.

[8] *Cf. Milošević* Rule 70 Decision, para. 4.

[9] Submission, p. 1.

[10] *Id.*, pp. 2-3.

[11] Impugned Decision, p. 17.

[12] *Cf. Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Decision on the Admissibility of the Request for Review by the Republic of Croatia of an Interlocutory Decision of a Trial Chamber (Issuance of *Subpoenae Duces Tecum*) and Scheduling Order, 29 July 1997 ("*Blaškić* Decision on Admisaibility"), para. 16.

documents or information for the purposes of an investigation or the preparation or conduct of a trial. The Appeals Chamber considers that a Judge or Trial Chamber's decision on a Rule 54*bis* request is a discretionary one.[13] Therefore, the Appeals Chamber will not conduct a *de novo* review of a Rule 54*bis* decision and the question before it is not whether it "agrees with that decision" but "whether the Trial Chamber has correctly exercised its discretion in reaching that decision."[14] It must be demonstrated that the Trial Chamber has committed a "discernible error"[15] resulting in prejudice to a party. The Appeals Chamber will overturn a Trial Chamber's exercise of its discretion only where it is found to be "(1) based on an incorrect interpretation of governing law; (2) based on a patently incorrect conclusion of fact; or (3) so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion."[16] The Appeals Chamber will also consider whether the Trial Chamber "has given weight to extraneous or irrelevant considerations or that it has failed to give weight or sufficient weight to relevant considerations [. . .]" in reaching its discretionary decision.[17]

III. DISCUSSION

A. Admissibility

7. In order to consider the United States' Request, the Appeals Chamber must first determine whether it is admissible. Under Rule 108*bis*, a State may request review of a Rule 54*bis* decision after first demonstrating that the request is admissible. To meet the threshold test of admissibility, the State must demonstrate: (1) that it is directly affected by the Trial Chamber's Rule 54*bis* decision, and (2) that the decision concerns issues of general importance relating to the powers of the International Tribunal.[18]

8. The United States submits that it is directly affected by the Impugned Decision,[19] and the Appeals Chamber finds that this is established. The Impugned Decision issued a binding order to

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[13] *See The Prosecutor v. Kordić and Čerkez*, Case No. IT-95-14/2-AR108*bis*, Decision on the Request of the Republic of Croatia for Review of a Binding Order, 9 September 1999 (*Kordić and Čerkez* Review Decision"), paras. 19, 40 (holding that a Trial Chamber's determination of whether documents requested by a party from a State would be admissible and relevant at trial such that a binding order for production of those documents may be warranted is an issue that "falls squarely within the discretion of the Trial Chamber"); *see also Prosecutor v. Milošević*, Case Nos. IT-99-37-AR73, IT-01-50-AR73, and IT-01-51-AR73, Reasons for Decision on Prosecution Interlocutory Appeal from Refusal to Order Joinder, 18 April 2002 ("*Milošević* Joinder Decision"), para. 3 (stating that a Trial Chamber exercises its discretion in "many different situations – such as when imposing sentence, in determining whether provisional release should be granted, in relation to the admissibility of some types of evidence, in evaluating evidence, and (more frequently) in deciding points of practice or procedure.").
[14] *Milošević* Decision of 6 April 2006, para. 16 (internal citations omitted).
[15] *Ibid.*
[16] *Ibid.*
[17] *Ibid.*
[18] *See* Rule 108*bis* (A).
[19] Request, p. 3.

the United States to produce, by a certain date, copies of documents in its possession relating to intelligence information as requested in Ojdanić's Application.[20]

9. The United States further submits that the Impugned Decision concerns issues of general importance relating to the powers of the International Tribunal.[21] The United States argues that the Impugned Decision has the effect of lowering the threshold for a Trial Chamber to issue a binding Rule 54*bis* order to produce documents or information such that parties before the International Tribunal will not have an incentive to work cooperatively with States to obtain sensitive information voluntarily provided under the safeguards found in Rule 70.[22] As a result, the United States claims that the Impugned Decision puts the International Tribunal "into conflict with States over the protection of their national security interests and makes it significantly more difficult for States to cooperate in providing such information to the parties in Tribunal proceedings."[23] The United States also argues that the Impugned Decision "seriously intrudes" on the relations between sovereign States because it requires a State or international organization "to provide intelligence or other information that did not originate [...]" with that State or international organization.[24]

10. The Appeals Chamber notes that clearly, the Impugned Decision does relate to the powers of the International Tribunal—specifically, the power of a Trial Chamber to issue a binding order to States for the production of documents or information at the request of a party to proceedings before the International Tribunal. Moreover, the extent and nature of the power to order production of information are issues of general importance in light of Article 29(2) of the Statute of the International Tribunal. Therefore, the Appeals Chamber now turns to consider the merits of the United States' Request.

B. The Requirements of Specificity, Relevance and Necessity under Rule 54*bis*

11. The first issue to be decided by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić's Application met the requirements of specificity, relevance and necessity in making his request for information and documents under Rule 54*bis*. Under those requirements, a party must: (1) identify as far as possible the documents or information to which the application

[20] *Cf. Milošević* Decision of 6 April 2006, para. 19; *Milošević* Rule 70 Decision, para. 7; *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Decision on the Notice of State Request for Review of Order on the Motion of the Prosecutor for the Issuance of a Binding Order on the Republic of Croatia for the Production of Documents and Request for Stay of Trial Chamber's Order of 30 January 1998, 26 February 1998 ("*Blaškić* Review Decision"), para. 8; *Blaškić* Decision on Admissibility, para. 13.

[21] The Appeals Chamber notes that Ojdanić agrees that the United States' Request is admissible and does not object to the Appeals Chamber reviewing the Impugned Decision. *See* Submission on Admissibility, para. 3.

[22] Request, p. 3.

[23] *Ibid.*

relates; and (2) indicate how they are relevant to any matter in issue before the Judge or Trial Chamber and necessary for a fair determination of that matter.[25]

12. The Appeals Chamber recalls that in the Impugned Decision, the Trial Chamber ordered the United States to produce the documents and information requested in paragraphs (A) and (B) of Ojdanić's Application as follows:

> (A) Copies of all recordings, summaries, notes or text of any intercepted communications (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanić was a party and which:
>
> (1) General Ojdanić participated in the communication from Belgrade, Federal Republic of Yugoslavia;
>
> (2) the communication was with one of the persons listed in Attachment "A";
>
> (3) may be relevant to one of the following issues in the case:
>
> a) General Ojdanić's knowledge or participation in the intended or actual deportation of Albanians from Kosovo or lack thereof;
>
> b) General Ojdanić's knowledge or participation in the intended or actual killing of civilians in Kosovo or lack thereof;
>
> c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government; and
>
> d) General Ojdanić's efforts to prevent and punish war crimes in Kosovo or lack thereof.
>
> (B) Copies of all recordings, summaries, notes or text of any intercepted communications (electronic, oral, or written) during the period 1 January 1999 and 20 June 1999 in which General Dragoljub Ojdanić was mentioned or referred to by name in the conversation and which:
>
> (1) took place in whole or in part in the Federal Republic of Yugoslavia;
>
> (2) at least one party to the conversation held a position in the government, armed forces, or police in the Federal Republic of Yugoslavia or the Republic of Serbia
>
> (3) may be relevant to one of the following issues in the case:
>
> a) General Ojdanić's knowledge or participation (or lack thereof) in the intended or actual deportation of Albanians from Kosovo;
>
> b) General Ojdanić's knowledge or participation (or lack thereof) in the intended or actual killing of civilians in Kosovo or lack thereof;

[24] *Id.*, p. 4.
[25] Rule 54*bis* (A).

c) whether the formal chain of command on matters pertaining to Kosovo was respected within the FRY or Serbian government; and

d) General Ojdanić's efforts to prevent and punish war crimes in Kosovo or lack thereof.

13. First, the United States claims that the Application lacks specificity in its request for access to intercepted communications over a six-month period involving Ojdanić and any of 23 other individuals as well as to any communication involving a government or military official of Serbia or Yugoslavia that mentions Ojdanić and "'may be relevant to' one of four broadly framed issues in the case."[26] The United States submits that Ojdanić has drawn these categories merely on the basis of "a particular method of collection" and that they are devoid of substance.[27] According to the United States, the Trial Chamber therefore erred in granting the Application without requiring that Ojdanić "specify the time, place, date, or content of a single one of the alleged conversations that he was seeking" or "any topic, incident, or action that might narrow the categories he describes."[28] As a consequence, the Trial Chamber's Rule 54*bis* order "turns the carefully focused production mechanism of Rule 54*bis* into a sweeping discovery tool more akin to that found in U.S. civil litigation."[29]

14. The Appeals Chamber notes that with respect to paragraph (A), the Trial Chamber found that Ojdanić identified as precisely as possible the specific documents sought given the lapse of time since the communications took place. The Trial Chamber noted that in this paragraph, the request is temporally circumscribed, geographically limited, and is narrowed to communications involving himself and any of 23 people specifically listed in Annex "A" to the Application. The Trial Chamber also noted that the Applicant made attempts to recall the dates of some of the conversations with these people and stated that he spoke with Slobodan Milošević and his subordinates during the period indicated almost on a daily basis. Finally, the Trial Chamber found that the requested information was limited to those communications touching upon four important issues in the case. Similarly, with regard to paragraph (B), the Trial Chamber found that the request for information was sufficiently specific in that it was temporally confined to the most significant period in the indictment; limited to material relating to one of four important issues in the case; and

[26] *Id.*, p. 6.
[27] Reply, p. 2.
[28] Request, pp. 6-7.
[29] *Id.*, p. 7.

required that at least one party to the conversation hold a position specifically in the government, the armed forces or the police of the Federal Republic of Yugoslavia or Serbia.[30]

15. The Appeals Chamber considers that the Trial Chamber did not err in finding that Ojdanić's Application met the specificity requirement under Rule 54*bis*. The Appeals Chamber recalls that a request for production under Rule 54*bis* should seek to "identify specific documents and not broad categories"[31] but that the use of categories is not prohibited as such.[32] This is because "[the] underlying purpose of the requirement of specificity is to allow a State, in complying with its obligation to assist the Tribunal in the collection of evidence, to be able to identify the requested documents for the purpose of turning them over to the requesting party."[33] Therefore, a category of documents may be requested as long as it is "defined with sufficient clarity to enable ready identification" by a State of the documents falling within that category.[34]

16. In this case, the United States has failed to demonstrate that the categories of information and documents requested by Ojdanić were insufficiently clear such that it was unable to identify the requested materials or that the requested search was unduly burdensome. This is especially the case in light of the specific limitations placed upon the material sought. The Appeals Chamber does not agree that the categories of materials requested were based upon a method of intelligence collection without any reference to their content or were devoid of any substance when considering *inter alia* the four main issues to which those materials are to relate as found in sub-paragraphs (A) and (B) of the Application.

17. Furthermore, the Trial Chamber did not err in granting Ojdanić's Application even though he could not specify the exact time, place, date or content of any one of the intercepted communications for which he seeks information. "The Trial Chamber may consider it appropriate, in view of the spirit of the Statute and the need to ensure a fair trial [...] to allow the omission of those details if it is satisfied that the party requesting the order, acting bona fide, has no means of providing those particulars."[35] The Trial Chamber found this to be the case here and did not err given that Ojdanić made an attempt to provide such particular information and identified the categories of documents and information requested in as precise a manner as was possible in light of the passage of time.

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[30] Impugned Decision, paras. 20-21, 25.
[31] *Prosecutor v. Blaškić*, Case No. IT-95-14-AR108*bis*, Judgement on the Request of the Republic of Croatia for Review of the Decision of Trial Chamber II of 18 July 1997, 29 October 1997 ("*Blaškić* Judgement on Review Request"), para. 32.
[32] *Kordić and Čerkez* Review Decision, para. 38.
[33] *Id.*

18. Second, the United States claims that Ojdanić failed to establish how the documents requested in his Application are relevant to his case. Instead, he requests broad categories of information "corresponding to the four main counts of the indictment rather than by establishing the relevance of specific information sought."[36] Thus, the Trial Chamber, in granting the Application, erred by approving "what amounts to a circular exercise: allowing the relevance requirement to be satisfied by the artifice of asking for any documents or information that pertain to the charges in the indictment."[37] The United States contends that because Ojdanić was not required to specify the content of the documents and information sought, there could be no proper assessment by the Trial Chamber of whether or not they were relevant to the main charges in Ojdanić's case.[38]

19. Third, the United States contends that Ojdanić failed to show in his Application in any meaningful sense how the materials he requested are necessary for a fair determination of his case due to the fact that he did not give a concrete articulation of the information he was seeking, offer a showing that the information actually exists, or demonstrate that the materials are relevant to his case. Thus, the Trial Chamber erred in its "conclusory" finding that, on the face of it, the documents requested are necessary simply because of the significance of the four issues in the indictment raised by Ojdanić in his Application. Furthermore, the United States argues that the necessity requirement means that Ojdanić should have demonstrated that he had exhausted all other available sources for the requested information, which he did not. Finally, the United States claims that the Trial Chamber erred in dismissing the "extraordinary effort" of the United States to be as responsive as possible to Ojdanić's Application when it informed him that after conducting a search of all of its holdings, it had not located any exculpatory information falling within the four categories of the indictment highlighted therein. The United States claims that its "focus on exculpatory information was consistent with the focus of Rule 54*bis* on information 'necessary' for a determination of the matters in question."[39]

20. The Appeals Chamber notes that with regard to the requirements of relevance and necessity, the Trial Chamber found that the information and documents requested in paragraphs (A) and (B) of the Application met these requirements because they were limited to those pertaining to the four most important issues in Ojdanić's case that were clearly identified in the Application. Furthermore,

[34] *Id.*, para. 39.
[35] *Blaškić* Judgement on Review Request, para. 32.
[36] Request, pp. 7-8.
[37] *Id.*, p. 8.
[38] Reply, p. 3.
[39] Request, pp. 8-10.

in light of the significance of those issues, the Trial Chamber found that any documents or information relating to them were necessary for a fair determination of those issues at trial.[40]

21. The Appeals Chamber considers that the Trial Chamber did not err with regard to applying the relevancy and necessity requirements under Rule 54*bis*. First, the Appeals Chamber recalls that "the State from whom the documents are requested does not have *locus standi* to challenge their relevance" to a trial.[41] Under this rule, a State may not challenge whether, on the basis of the request, the Trial Chamber was able "to accurately determine the relevance of the documents sought."[42] Such a determination is an integral part of the Trial Chamber's competence to determine relevancy. The Appeals Chamber holds that the same rule applies with regard to challenging the necessity of documents or information for a fair determination of the trial.[43]

22. In this case, the United States challenges the Trial Chamber's ability to determine the relevancy of the requested information on grounds that Ojdanić's Application requests "a broad category of information that is defined not by its content but by its method of collection" and therefore, the Trial Chamber was unable to conduct a "meaningful relevance inquiry" requiring "a link between specific information requested and issues relevant to the defense."[44] Similarly, the United States submits that the Trial Chamber was unable to determine whether the requested materials in the Application are necessary for a fair determination of matters at issue in Ojdanić's trial. Because the United States lacks standing to bring these particular arguments, the Appeals Chamber dismisses them.

23. Furthermore, the Appeals Chamber does not agree with the United States that the necessity requirement under Rule 54*bis* stipulates that an applicant must make an additional showing that the requested materials in fact exist.[45] The necessity requirement obliges the applicant to show that the requested materials, if they are produced, are necessary *for a fair determination of a matter at trial*. Requiring an additional showing of actual existence would be unreasonable and could impinge upon the right to a fair trial given that these materials are State materials, often of a confidential

[40] Impugned Decision, paras. 21, 25.
[41] *Kordić and Čerkez* Review Decision, para. 40.
[42] *Id.*
[43] This rule does not, however, prevent a State from challenging the necessity of the requested information or documents on grounds demonstrating that there was no real necessity for the applicant to request the material from it because, for example, the material could have been or has already been obtained elsewhere. A State simply may not challenge whether the requested material is relevant or necessary for a fair trial in the circumstances of a particular case.
[44] Reply, p. 3.
[45] Request, p. 8. The Appeals Chamber cautions that its rejection of such an obligation under the necessity requirement should not be interpreted in any way to undermine the overriding principle with regard to Rule 54*bis* orders to produce that they should "be reserved for cases in which they are really necessary," *Blaškić* Judgement on Review Request, para. 31 (internal citation omitted).

nature. In many cases, it would be impossible for an applicant to prove the existence of these materials. All that is required is that an applicant make a reasonable effort before the Trial Chamber to demonstrate their existence. Ojdanić made such an effort in this case when he submitted media reports and an expert witness declaration to the Trial Chamber on intercepted conversations by NATO and its member States during the Kosovo conflict.

24. The Appeals Chamber also rejects the United States' argument that the necessity requirement under Rule 54*bis* obliges an applicant to demonstrate that it has exhausted all other possible sources for the requested materials.[46] The United States contends that "[m]ost, if not all, of the information the Applicant is seeking, if it exists at all, can be provided by the Applicant himself, his Government and its archives, subordinates who received and executed his commands, or other former or current Serbian officials. In addition, having identified a list of interlocutors in his request, the Applicant has the responsibility to seek corroboration from those sources or to explain why he cannot."[47] Thus, the United States submits that Ojdanić should have made a showing that he has sought and failed to obtain the requested information from all of these other, more direct sources, when making his Rule 54*bis* request.[48]

25. The Appeals Chamber considers that requiring an applicant to make a showing that he has exhausted all other possible avenues that may provide access to the information is too onerous and could inhibit the right to a fair trial. However, the Appeals Chamber recalls that it has held that a Trial Chamber's binding order to a State to produce documents or information must be "strictly justified by the exigencies of the trial"[49] in light of the reliance of the International Tribunal on "the bona fide assistance and cooperation of sovereign States."[50] Therefore, the Appeals Chamber holds that it is reasonable under the necessity requirement for an applicant to demonstrate either that: 1) it has exercised due diligence in obtaining the requested materials elsewhere and has been unable to obtain them; or 2) the information obtained or to be obtained from other sources is insufficiently probative for a fair determination of a matter at trial and thus necessitates a Rule 54*bis* order.

26. In this case, the Appeals Chamber finds that Ojdanić has made the requisite showing. As the former Chief of the General Staff of the army of the Federal Republic of Yugoslavia in 1999, he represents that he knows of no other available sources for recordings of the conversations indicated in paragraphs (A) and (B) of his Application than NATO and its Member States. He claims that the

[46] Request, pp. 8-9.
[47] *Id.*, p. 9.
[48] *Ibid.*
[49] *Kordić and Čerkez* Review Decision, para. 41 (internal citation omitted).
[50] *Blaškić* Judgement on Review Request, para. 31 (internal citation omitted).

only sources available to him are his own imprecise recollection and that of his superiors and subordinates of conversations taking place six to seven years ago, and that the Prosecution will certainly mount an attack as to the credibility of that testimony. Thus, he argues that "[t]he existence of a verbatim, contemporaneous recording, made by and in the custody of the party opposing General Ojdanić in the war, will eliminate the issue of credibility over what was said and provide the Trial Chamber with reliable evidence from which it can accurately determine the facts of the case."[51]

27. Finally, the Appeals Chamber disagrees with the United States' unsupported argument that the necessity requirement allows for it, as a non-party to the trial proceedings, to unilaterally narrow a request for documents or information under Rule 54*bis* to materials that it deems to be exculpatory for the applicant on grounds that this is the only information that would be necessary for a fair hearing.[52] The Trial Chamber correctly held that "[a] State cannot arrogate to itself the right to limit the request of an applicant to material that it considers to be favourable to the Applicant's case."[53] Rather, it is "for the Applicant to determine which documents, if any, of those produced should be used in his case"[54] given that it is the requesting party under Rule 54*bis* who is best placed to determine whether certain material, even seemingly inculpatory material, may be useful for its case. That being said, the Appeals Chamber emphasizes that Rule 54*bis* orders to produce are to "be reserved for cases in which they are really necessary."[55]

C. The Reasonable Steps Requirement under Rule 54*bis* and its Relationship to Rule 70

28. The next issue to be considered by the Appeals Chamber is whether the Trial Chamber erred in finding that Ojdanić demonstrated that he met the "reasonable steps" requirement under Rule 54*bis* (A)(iii) and (B)(ii) for making a request. Pursuant to that requirement, a party must explain the reasonable steps that it has taken to secure the State's assistance prior to making a Rule 54*bis* request.

29. The United States submits that although the Trial Chamber properly recognized this requirement in the Impugned Decision, it erred in applying it. In particular, the United States claims that the Trial Chamber erred in finding that Ojdanić satisfied his burden to take bona fide,

[51] Response, para. 70.
[52] Request, pp. 9-10; Reply, p. 4.
[53] Impugned Decision, para. 23.
[54] *Ibid.*
[55] *Blaškić* Judgement on Review Request, para. 31(internal citation omitted).

reasonable steps when he rejected information offered by the United States under the conditions of Rule 70.[56]

30. The Trial Chamber found in the Impugned Decision that, "under the circumstances" of the case, Ojdanić's steps towards securing voluntary cooperation from the United States were reasonable under Rule 54*bis*.[57] The Trial Chamber noted that the United States had offered to provide Ojdanić certain requested material pursuant to Rule 70. However, the Trial Chamber held that an applicant is "not required to accept information that the States are empowered to prevent from being disclosed at trial."[58] The Trial Chamber reasoned that "[w]here the material is relevant to and necessary for a fair determination of the issues at trial, an applicant is entitled to seek an order pursuant to Rule 54*bis* rather than be dependent on the willingness of a State to agree to the use at trial of material over which it has the final say under Rule 70."[59]

31. The Appeals Chamber considers that the Trial Chamber erred in making this statement and holds, for the reasons that follow, that an applicant may not be found to have met the reasonable steps requirement under Rule 54*bis* where he or she refused the same requested documents or information when they were volunteered by a State under Rule 70.

32. The Appeals Chamber recalls that the basis for a Trial Chamber's power to issue a binding Rule 54*bis* order against a State to produce is found in Article 29(2) of the Statute and paragraph four of Security Council resolution 827 (1993), which provides that "States shall comply without undue delay with [...] an order issued by a Trial Chamber" for various kinds of judicial assistance.[60] The binding force for such an order derives from the provisions of Chapter VII and Article 25 of the United Nations Charter.[61] However, Article 29 encompasses "two modes of interaction [by a State] with the International Tribunal" in fulfilling its obligations: cooperative and mandatory

[56] Request, pp. 10-11.
[57] Impugned Decision, paras. 22, 26.
[58] *Id.*, para. 22.
[59] *Ibid.*
[60] *Blaškić* Judgement on Review Request, para. 26. The Appeals Chamber notes that the content for a binding order under Article 29 as laid out in this decision was later codified in Rule 54*bis*.
[61] *Ibid.* Article 25 of the Charter of the United Nations, which entered into force on 24 October 1945 ("UN Charter"), states that "[t]he Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter." Article 39, Chapter VII, of the UN Charter provides that "[t]he Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall [...] decide what measures shall be taken in accordance with Articles 41 [not requiring the use of force] and 42 [requiring the use of force], to maintain or restore international peace and security." This International Tribunal was established as "a measure not requiring the use of force" for restoring international peace and security by decision of the Security Council under Chapter VII of the UN Charter.

compliance.[62] The Appeals Chamber has held that it is sound policy for the Prosecutor as well as defence counsel to first seek the assistance of States through cooperative means.[63] This is due to the fact that "the International Tribunal may discharge its functions only if it can count on the bona fide assistance and cooperation of sovereign States" due to its lack of a police power.[64] Only after a State declines to lend the requested support should a party make a request for a Judge or a Trial Chamber to take mandatory action as provided for under Article 29.[65]

33. The Appeals Chamber notes that "[i]t is clear that the Tribunal's Rules have been intentionally drafted to incorporate safeguards for the protection of certain State interests in order to encourage States in their fulfilment of their cooperation obligations under the Tribunal's Statute and Rules."[66] One such rule is Rule 70, which allows for a person or an entity, such as a State, to provide information to either the Prosecutor or the Defence on a confidential basis.[67] In providing that information, a State is not required to justify the reasons for its confidentiality on national security interests grounds or otherwise. Consequently, the Rule encourages States to share a broad range of information with parties "by guaranteeing information providers that the confidentiality of the information they offer and of the information's sources will be protected"[68] and that this protection will not be lifted without their consent. Thus, where the provided information is being used solely for the purpose of generating new evidence, it shall not be disclosed to the other party without the consent of the State providing the information.[69] Where the Prosecutor or the Defence "elects to present as evidence any testimony, document or other material so provided" before a Trial Chamber and must disclose it to the other party, they are required to first obtain the consent of the State.[70] In examining the evidence, the Trial Chamber may not: (i) order either party to produce additional evidence received from the State providing the initial information; (ii) summon a person or a representative of that State as a witness or order their attendance for the purpose of obtaining additional evidence; (iii) order the attendance of witnesses or require production of documents in order to compel the production of additional evidence; or (iv) compel a witness introducing into

[62] *Id.*, para. 31. *See also* Article 29(1), which provides that States shall cooperate in the investigation and prosecution of persons, and Article 29(2), which states that States shall comply without undue delay to any "request for assistance" in addition to an order from a Trial Chamber.
[63] *Blaškić* Judgement on Review Request, para. 31.
[64] *Ibid.*
[65] *Ibid.*
[66] *Prosecutor v. Milošević*, Case No. IT-02-54AR108*bis*.2, Decision on Serbia and Montenegro's Request for Review, 20 September 2005 ("*Milošević* Decision of 20 September 2005"), para. 11.
[67] *See* Rule 70(B), (C) and (F). Contrary to Ojdanić's submission, Rule 70 is not limited in its application to "situations where a party seeks the material 'solely for the purpose of generating new evidence'" such that it does not apply to the situation, as in this case, where material is sought for the purpose of use at trial. Response, para. 42. *See Milošević* Rule 70 Decision, paras. 20-21, 25.
[68] *Milošević* Rule 70 Decision, para. 19.
[69] Rule 70(B).
[70] Rule 70(C) and (F).

evidence any information provided by a State under Rule 70 to answer any question relating to the information or its origin, if the witness declines to answer on grounds of confidentiality.[71]

34. By comparison, where confidential information and documentation are compelled from a State pursuant to Rule 54*bis*, they are not guaranteed such protections. When a party makes a Rule 54*bis* request, it is the Judge or Trial Chamber who determines whether the party has satisfied the requirements for gaining access to that material. A State may or may not have the opportunity to be heard prior to a decision being taken.[72] A State may make an objection to disclosure, but only on grounds that it would prejudice its national security interests.[73] During the hearing, the State may request that certain protective measures apply such as holding the hearing *in camera* and allowing certain documents to be submitted in redacted form.[74] If a State is not given the opportunity to be heard and a Rule 54*bis* order is served upon it, the State may apply by notice to a Judge or Trial Chamber to have the order set aside but again, only on grounds of national security interests.[75] During the hearing on this notice, the State may also request that certain protective measures apply.[76] Where a Judge or a Trial Chamber decides to proceed with ordering a State to produce the requested materials under Rule 54*bis*, it may provide that appropriate measures be applied to the materials upon disclosure in order to protect State interests.[77] However, the use of the term "interest" in sub-paragraph (I) has been interpreted by the Appeals Chamber to refer to "national security interests" only, in light of the reference therein to other subparagraphs of Rule 54*bis*, which specifically refer to a State's national security interests.[78]

35. The Appeals Chamber considers that the protections for confidential materials produced by order under Rule 54*bis* as compared to those for the same materials provided voluntarily by States under Rule 70 differ in at least two important ways that are significant for this decision. Under Rule 54*bis*, the application of protective measures to the documents or information produced by a State are at the discretion of a Judge or the Trial Chamber who may impose them only after determining that national security interests warrant them.[79] Furthermore, it is at the discretion of the party requesting the information as to the purposes for which it will subsequently be used in proceedings

[71] Rule 70 (C) and (D).
[72] Compare Rule 54*bis* (D) and (E).
[73] Rule 54*bis* (F).
[74] Rule 54*bis* (F) and (G).
[75] Rule 54*bis* (E)(i)-(iii).
[76] Rule 54*bis* (E)(v).
[77] *See* Rule 54*bis* (I).
[78] *Milošević* Decision of 20 September 2005, para. 19.
[79] *Id.*, para. 14 (holding that "it is generally for the State to present its argument to the Chamber than an interest is a national security interest that warrants a Chamber ordering non-disclosure of the material sought. It is then for the Chamber to consider whether that claim is justified and warrants an order of protective measures. It is not the case [...] that a Chamber must accept the qualification presented by a State.").

before a Judge or Trial Chamber. Whereas, under Rule 70, a State controls the confidentiality of the information it provides and makes its own determination that this material should be subject to certain protections--for national security interest reasons or otherwise. In addition, the State has control over how it may be used, whether for evidence generation purposes only or also as evidence at trial. Thus, Rule 70 allows for a State to avail itself of control and protections that it is able to maintain over that material in exchange for assisting parties before the International Tribunal in providing confidential material either of its own volition or at their request.

36. These distinctions are particularly important for situations, as in this case, where a State considers that the national security concerns implicated by the disclosure of certain confidential materials are so vital that the decision on disclosure or protective measures for that information cannot be appropriately determined by third parties.[80] The United States contends that Ojdanić's request for confidential information seeks to obtain the product of specific intelligence sources and methods, which "implicates national security information of the highest sensitivity."[81] It argues that answering Ojdanić's request in either the affirmative or the negative would reveal information about the scope and effectiveness of the United States' intelligence capabilities and how they are applied. Answering in the affirmative "would confirm that the United States' intelligence sources and methods enabled it to intercept specific conversation involving specific individuals in specific locations and in a particular time period" while answering in the negative "would confirm that the United States lacked this capacity or that countermeasures taken to prevent such information from being obtained had been effective."[82] Thus, the United States argues that "the ability to protect intelligence sources and methods is essential to their effectiveness."[83] It submits that although the protective measures outlined in Rule 54*bis* (F), (G) and (I) provide for important protective measures, "they are more limited in scope than and cannot supplant the more comprehensive protections and control available to a cooperating State under Rule 70," which is "expressly constructed to safeguard the sources and methods underlying information."[84]

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[80] Indeed, the United States also argues that the Trial Chamber erred in the Impugned Decision by underestimating the objections of the United States to Ojdanić's Application on grounds of national security interests. The United States claims that the Trial Chamber erred in determining that Ojdanić was not interested in the techniques that States use to gather information, but only wanted the information relevant to his request, and that any national security concerns could be appropriately protected under Rule 54*bis* (F)-(I). *See* Request, paras. 19-22. While the Appeals Chamber finds that the United States fails to demonstrate that the Trial Chamber abused its discretion here, this has no impact on this decision in light of the fact that the Appeals Chamber holds that the Rule 54*bis* order was in error because Ojdanić failed to meet the reasonable steps requirement for a Rule 54*bis* request.
[81] Request, pp. 19-20.
[82] *Id.*, p. 20.
[83] *Id.*, p. 21.
[84] *Ibid.*

37. Turning to the reasonable steps requirement under Rule 54*bis*, the Appeals Chamber considers that Ojdanić took the first reasonable step required of parties seeking confidential materials from a State—that is, he made a request to the United States for assistance. However, thereafter, Ojdanić engaged in a series of negotiations with the United States over two to three years, which were, at times, uncooperative. The lengthy negotiations were due *in* part[85] to disputes over the broad framing of Odjanić's original request, which the Trial Chamber eventually found failed to meet the specificity and relevancy requirements.[86] Throughout the negotiations, the United States made offers of assistanee in providing eertain information under Rule 70 in light of its expressed national security concems with Ojdanić's applications vis-à-vis its intelligence gathering capabilities. However, Ojdanić refused these offers and eventually terminated the process by seeking a compulsory Rule 54*bis* order on grounds that Rule 70 empowers the United States to retain control over the disclosure of the requested material and to prevent it from being used as evidence at trial.[87] While this is the case, the Appeals Chamber notes that Rule 70 does not presuppose that a State will, in fact, decide to retain all of that control at all times or prevent disclosure of all of the requested information at trial. More importantly, the Appeals Chamber considers that a State's availment of Rule 70 protections in assisting a party with requested information does not equal a State declining to "lend the requested support" such that seeking mandatory action from a Judge or Trial Chamber under Rule 54*bis* is warranted as the next step.[88] A party may not bypass a State's cooperative efforts to assist it with gaining access to eertain confidential information simply because that party does not want the State to be able to utilize thc protections afforded to it through Rule 70. Thus, the Trial Chamber erred in finding that Ojdanić met the reasonable steps requirement in his Application.

38. That being said, the Appeals Chamber emphasizes that Rulc 70 should not be used by States as "a blanket right to withhold, for security purposes, documents nccessary for trial" from being disclosed by a party for use as evidence at trial as this would "jeopardise the very function of the International Tribunal, and defeat its essential object and purpose."[89] Indeed, "those documents might prove crucial for deciding whether the accused is innocent or guilty."[90] Furthermore, such an

[85] The Appeals Chamber notes that some of the delay was also due to an indefinite stay of proceedings issued by the Trial Chamber on 14 November 2003. *See* Order Staying Rule 54*bis* Proceedings, 14 November 2003, p. 2.
[86] Decision on Application of Dragoljub Ojdanić for Binding Orders pursuant to Rule 54 *bis*. 23 March 2005.
[87] Impugned Decision, 22.
[88] *See supra* para. 32.
[89] *Blaškić* Judgement on Review Request, para. 65.
[90] *Ibid.*

interpretation of Rule 70 would be contrary to States' obligation to cooperate with the International Tribunal under Article 29 of the Statute.[91]

D. The Permissible Scope of a Rule 54*bis* Order to Produce and the Originator Principle

39. The final issue to be determined by the Appeals Chamber is whether the Trial Chamber erred in the Impugned Decision when "including in the scope of its Rule 54*bis* order information that a requested State or international organization does not own or did not originate but received from another State pursuant to express arrangements."[92] The United States claims that this was an abuse of discretion because generally, even after a State shares information with other States, the originating State "must control release of their own information" (the "originator prineiple").[93] This is due to the fact that

> [w]hen a State decides to share intelligence or other sensitive information, it typically does so under an express and binding arrangement, with specifie conditions on storage, access and use. That is, the originating State does not transmit absolute rights over the information, but retains residual rights and control. It remains the owner of the information.[94]

The United States elaims that the Impugned Decision has the effect of riding "roughshod" over "such long-standing arrangements" and forces a "State to delegate decisions affecting its national seeurity" to a third-party holder of its information who is not best placed "to assess the damage that would ensue from disclosure of sensitive information and to determine which, if any, protective measures would be adequate."[95]

40. Further, the United States notes that adherence to the originator principle is of "paramount importanee to information sharing" among States and their interests in national security and

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[91] The Appeals Chamber notes that it has previously suggested possible modalities for ensuring that all documents directly relevant to trial proceedings are obtained from States while recognizing their legitimate national security concerns. Such modalities may be useful in the Rule 70 context whereby if a State withholds consent to disclosure of certain materials at trial, it may be appropriate for a Trial Chamber to allow that party to apply, *ex parte*, to the Trial Chamber sitting *in camera* for consideration of the confidential material and the party's contention that the material is necessary for a fair determination of the trial. While the Trial Chamber may not thereafter issue an order compelling the State to allow for the material at issue to be disclosed and used as evidence at trial or bypass any other Rule 70 protections, it may take measures that it deems necessary in the interests of justice in light of that material while respecting the interests of the concerned State in maintaining full confidentiality. *Cf. Blaškić* Judgement on Review Request, paras. 67-68, and Rule 68 (*iii*) and (iv). The Appeals Chamber notes that the Prosecution may similarly apply to a Chamber sitting *in camera* where it has Rule 70 material from a State provider that is exculpatory hut cannot be disclosed pursuant to the Proseeution's Rule 68 obligation due to the fact that the State has not consented. In that case, the Prosecutor shall provide the Trial Chamber (and only the Trial Chamber) with the Rule 70 information that the State seeks to keep confidential.
[92] Request, p. 16.
[93] *Ibid.*
[94] *Id.*, p. 17.
[95] *Ibid.*

international relations.[96] Its importance is widely shared by the United States, NATO and other States and is also reflected in State practice as demonstrated by its recognition in Article 73 of the Rome Statute of the International Criminal Court.[97] In conclusion, the United States argues that the Impugned Decision's Rule *54bis* order to States and NATO to provide information that did not originate with them was unnecessary[98] and, if allowed to stand, "will undermine existing information-sharing regimes and have a chilling effect on the sharing of sensitive information."[99]

41. Paragraph 38 of the Impugned Decision, which is at issue here, reads as follows:

> The target of such an Order [under Rule 54*bis*] is material that the organisation possesses. Questions of ownership and whether the material was initially obtained by another are irrelevant. As the Appeals Chamber explained in the *Blaškić* Subpoena Decision, "the obligation under consideration [that of Article 29] concerns [*inter alia*] action that States may take only and exclusively through their organs (this, for instance, happens in case of an order enjoining a State to produce documents in the *possession* of one of its officials)." This applies equally to material received by one State from another. Of course, should a third-party holder of sensitive material assert that its legitimate security interests would be adversely affected by an order for production, it may seek appropriate protective measures.

42. The Appeals Chamber considers that the holding in paragraph 38 of the Impugned Decision was made in the context of issuing a Rule 54*bis* order to produce with regard to NATO and not the United States.[100] Nevertheless, the Appeals Chamber accepts the United States' argument that this holding could directly affect it in two ways and therefore, the United States has standing to challenge it. First, it would require NATO, as a third-party holder of information originating from the United States, to provide that information to the International Tribunal. Second, because the Trial Chamber generally stipulated that its holding "applies equally to material received by one State from another" it "would require the United States to produce any responsive information in its possession that had originated with another State" in the future if served with a Rule 54*bis* order.[101]

43. The Appeals Chamber finds that the Trial Chamber erred in paragraph 38 of the Impugned Decision when summarily dismissing the issues of ownership and origination of information as irrelevant to a Rule 54*bis* order. Nothing in the text of Rule 54*bis* or the jurisprudence concerning

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[96] *Id.*, p. 16.
[97] *Ibid.*
[98] The United States claims that the order to provide such *non-originating information* was unnecessary given that Ojdanić directed his request to all NATO Member States. Thus, an order to one NATO Member State (or NATO) to produce information originating from another NATO Member State that Ojdanić could obtain directly from that State was unnecessary. *See* Request, p. 18.
[99] Request, p. 18.
[100] The Appeals Chamber does not address here whether it was proper for the Trial Chamber to issue a binding Rule 54*bis* order to an international organization. This issue is considered in a separate decision disposing of a Rule 108*bis* request for review of the Impugned Decision brought by NATO.
[101] Request, p. 16.

the International Tribunal's power to issue compelling orders to States[102] precludes consideration of these matters or indicates that the only question of concern for a Trial Chamber is whether or not the State is in possession of the requested information or documents. Furthermore, the Appeals Chamber recalls that the Rules of the International Tribunal have been intentionally drafted to take into account certain State interests and to provide safeguards for them in order to encourage States in the fulfilment of their obligation to cooperate with the International Tribunal under Article 29 of the Statute.[103] Indeed, under Rule 54*bis*, a Judge or a Trial Chamber is required to consider the national security interests raised by a State in determining whether to issue a Rule 54*bis* order or whether to direct, on national security interests grounds, protective measures for the documents or information to be produced by a State under a Rule 54*bis* order.[104]

44. In this case, the Appeals Chamber has no reason to doubt the United States' assertion that it has a strong national security interest in maintaining the absolute secrecy of the intelligence information provided to it by other States and entities. The Appeals Chamber accepts as logical the United States' claim that, were it to divulge this information without the consent of the information providers, this could lead other States to doubt the United States' willingness and ability to keep secrets entrusted to it and therefore make other States less willing to share sensitive information with the United States in the future. Application of protective measures to this information handed-over by the United States would clearly not suffice to protect this national security interest. The Appeals Chamber notes, moreover, that the Trial Chamber issued Rule 54*bis* orders to other States that might have provided the United States with information responsive to Odjanić's requests. Rule 54*bis* orders to these States provide Odjanić with an alternate means of obtaining responsive information that may have been provided to the United States.

45. The Appeals Chamber holds that in these circumstances, a properly tailored Rule 54*bis* order would necessarily avoid requiring production of information over which the United States does not have ownership. Indeed, the bona fide national security interest asserted here by the United States is one that, far from being irrelevant to whether a Rule 54bis order will issue – as paragraph 38 of the Impugned Decision implies – deserves the utmost consideration.

[102] The Trial Chamber's reliance upon *Blaškić* for this holding is inapposite. In that decision, the Appeals Chamber was considering what State actions are implicated by the Article 29 obligation on States to cooperate with the International Tribunal. The Appeals Chamber held that the obligation concerns both "action that States may take only and exclusively through their organs" and "action that States may be requested to take with regard to individuals subject to their jurisdiction." *Blaškić* Judgement on Review Request, para. 27. By way of example, the Appeals Chamber noted that a State may be enjoined to produce documents in the possession of one of its officials. *Ibid.* The Appeals Chamber was not considering the question of whether a State may be enjoined to produce documents in its possession that was shared with it by another State.

[103] *See supra* paras. 33-34.

[104] *See* Rule 54*bis* (E)(iii), (F)(i), and (I).

IV. DISPOSITION

46. On the basis of the foregoing, the Appeals Chamber **GRANTS** the Request of the United States in part as it relates to the Trial Chamber's errors in the Impugned Decision in finding that Ojdanić met the reasonable steps requirement under Rule 54*bis* and holding that a Rule 54*bis* order requires production of documents or information regardless of ownership or origination, **SETS ASIDE** paragraph (1) of the Impugned Decision's Disposition insofar as it orders the United States, pursuant to Rule 54*bis*, to produce to Ojdanić the documents and information requested in paragraphs (A) and (B) of his Application, and **INVITES** Odjanić and the United States to immediately resume their negotiations for provision of the information requested in paragraphs (A) and (B) of Odjanić's Application consistent with this Decision and to conclude them as expediently as possible in light of the pending commencement of the trial in this case.

Done in English and French, the English text being authoritative.

Dated this 12th day of May 2006,
At The Hague,
The Netherlands.

Judge Fausto Pocar, Presiding Judge

[Seal of the International Tribunal]

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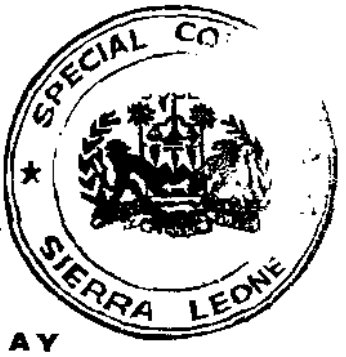
INTERNATIONAL CRIMINAL EVIDENCE



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6.83 The purpose of expert evidence is to provide a court with information that is outside its ordinary experience and knowledge. Indeed, a Trial Chamber should refrain from acting as its own expert in cases where expert evidence is appropriate.

5.1 Rules Governing Expert Evidence

6.84 The first rules concern the initial challenges to which expert evidence may be open. Such challenges may include questions as to:

(1) Whether the subject matter is a proper topic for expert evidence, or whether it is a matter within the knowledge and experience of the court. In the latter case the evidence will be rejected.
(2) Even if it is a proper subject for expert evidence, whether the evidence is relevant in the sense of assisting the Trial Chamber to determine a matter in dispute. Again, if irrelevant the evidence will be rejected.
(3) Whether the expert has the necessary qualifications and methods. Clearly, if the witness does not possess the relevant qualifications his evidence cannot be called "expert" and should be excluded. However, it is submitted that the better course is usually to admit the evidence and treat questions about qualifications as relevant to the weight of the evidence and a matter proper for cross-examination.
(4) Whether the expert is independent. The significance of the independence of experts was emphasised in *Akayesu*, where the defence wanted to call an accused in another case before the ICTR, as an historical expert to counter the evidence of an historian who had been called by the prosecution. The Trial Chamber did not allow it. Although the Trial Chamber found there was a fundamental difference between calling another accused as a direct witness or as an expert "whose testimony is intended to enlighten the Judges on specific issues of a technical nature," it held that

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ally commissioned by the examining magistrate or court (or, at the pre-trial stage, the police or prosecutor) from a pre-established list. JOHN HATCHARD, BARBARA HUBER & RICHARD VOGLER, COMPARATIVE CRIMINAL PROCEDURE, at 76–77, 149 (B.I.I.C.L. 1996).