1320) SCSL-04-15-A (5145-5166) 5145

SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

Before: Justice Renate Winter, Presiding
Justice Jon M. Kamanda
Justice Emmanuel Ayoola
Justice George Gelaga King
Justice Shireen Avis Fisher

Acting Registrar: Ms. Binta Mansaray

Date filed: 19th October 2009

THE PROSECUTOR against **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO

Case No.SCSL-2004-15-A

Public

KALLON REPLY TO PROSECUTION RESPONSE BRIEF

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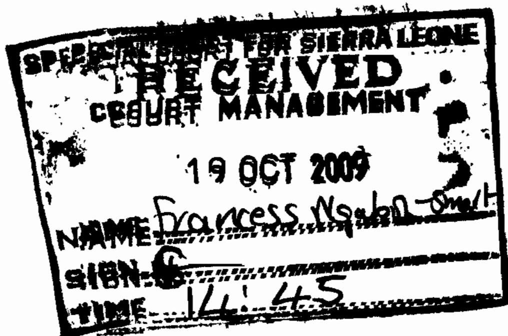

Prejudice to the Accused

1. In his Response Brief the Prosecution persistently contends that the 2nd Accused has not demonstrated prejudice in respect of the issues raised in his Appeal Brief. The Tribunal has considered the doctrine of "irreparable prejudice," finding it to be intrinsically connected to the interests of justice and to the right of further appeal. Indeed, "the concept of irreparable prejudice refers to the inability to cure any prejudice suffered."[1] Before the International Court of Justice, the concept is applied to preserve the rights of either party in a judicial proceeding,[2] and requires analysis of whether a breach of the rights at issue "might be capable of reparation by appropriate means."[3] Indeed, looking historically at the concept of prejudice, Justice Boutet has noted that the history "clearly links the concept of prejudice to a right of appeal, where there is an inability to cure such prejudice through the final disposition of the trial, including any post-judgment appeal."[4]

2. Accordingly, an important determination of whether an Accused has been prejudiced is whether the harm occasioned can be further appealed. In this case, the Appellant's *final* remedy for the issues raised is before

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[1] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on the Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa para 19 (Aug. 5, 2004).
[2] *Nuclear Tests Case* [1973] ICJ REP. at 103, para. 20.
[3] *Continental Shelf* [1976] ICJ REP. 11, para. 32.
[4] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on the Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa para 13 (Aug. 5, 2004); *Prosecutor v. Norman, Fofana and Kondewa*. SCSL-04-14-T, Decisions on Motion by the First and Second Accused for Leave to Appeal the Chamber's Decision on their Motions for the Issuance of a Subpoena to the President of the Republic of Sierra Leone, 28 June 2006, para. 13; Decision on Joint Request for Leave to Appeal against Decision on Prosecution's Motion for Judicial Notice, 19 October 2004, para. 23; *Prosecutor v. Sesay, Kallon, Gbao*, Case No. SCSL-04-15-T, Decision on Defence Application for Leave to Appeal 2nd March 2007 Decision para 23 (June 4, 2007).

this Appeals Chamber. The role, therefore, of the Appeals Chamber is not only to look retrospectively to determine whether prejudice has been occasioned, but, more importantly, to ensure that no further prejudice results. The Appeals Chamber represents the ultimate forum for fairness, the last bastion of reparation, and the final bulwark of justice, and is tasked with the responsibility of mitigating past harms and ensuring that justice, and not prejudice, is the legacy of the day. Accordingly, there should be no requirement that the Appellant demonstrate any specific prejudice other than the prejudice of the conviction itself- the Appeal itself is a response to the prejudice already felt, for which there is only one remedy- the judgement of the Appeals Chamber.

3. The ripeness of an issue for appeal depends not only on an evaluation of prejudice, but also on the importance of the issue to the tribunal or to international law generally.[5] Accordingly, the very weighty and legally important issues in this Appeal should be considered alongside the issue of prejudice, which, at this final stage of the proceedings, is essentially a foregone conclusion, for no further appeal of any issue is possible.

4. In addition there is agreement that "trials will continue to their conclusion without delay or diversion caused by interlocutory appeals on procedural matters, and that any errors which affect the final judgement will be corrected in due course by this Chamber on appeal."[6]

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[5] *Prosecutor v. Kvocka et al*, Case No. IT-98-30/1-A, Decision on Motion of the Accused Zoran Zigic for Leave to Appeal the Decision of the Trial Chamber I of 13 October 2000 (Nov. 22, 2000); *see also Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-04-14-T, Dissenting Opinion of Judge Pierre Boutet on the Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa para 12 (Aug. 5, 2004).

[6] *Prosecutor v. Norman, Fofana, Kondewa*, Case No. SCSL-2004-14-AR73, Decision on Amendment of the Consolidated Indictment para 43 (May 16, 2005); *Prosecutor v. Taylor*, Case No. SCSL-03-01-T, Decision on Defence Application for Leave to Appeal the Decision on Urgent Defence Motion Regarding a Fatal Defect in the Prosecution's Second Amended Indictment Relating to the Pleading of JCE (March 18, 2009). Indeed, a final appeal is the opportunity to correct the various errors that may have occurred throughout the course of trial. *See also Prosecutor v. Karadzic*, Case No. IT-95-5/18-PT, Decision on Prosecution Motion to Reconsider the Trial Chamber's Decision on the Motion to Amend the First Amended Indictment para 13 (Feb. 26, 2009) ("when determining whether granting an amendment [to an indictment] would cause unfair prejudice to the Accused" a Tribunal requires that "the amendment must not deprive the Accused of an

Prejudice Stemming from Antagonistic Defence

5. An important consideration in the Appeal is the fact that the Appellant also suffered serious prejudice by virtue of the Trial Chamber's admission and reliance on the antagonistic defence proffered by Appellant's co-defendants. In this case, serious prejudice has been occasioned by virtue of the mutually exclusive and antagonistic defenses proffered by Appellant's Co-Accused.

6. In addition to the prejudice that has resulted as a consequence of the antagonistic defence adopted by the Co-Accused, the Appellant was further prejudiced by the Trial Chamber's use of such evidence despite prior representations that it would not rely on such evidence. Indeed, during the course of the trial, the Trial Chamber made affirmative representations that, considering the high risk for prejudice, the evidence offered by the Co-Accused would not be considered in evaluating the guilt of the Accused. Relying upon such representations, the Defence for the Appellant did not consider such evidence in preparing its defence.

Defects in the indictment and lack of notice.

7. The Prosecution alleges 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*. Rather, it is the standard of review that applies to alleged errors in the exercise of a discretion by the Trial Chamber and that the function of the Appeals Chamber in such a case is not to determine how the Appeals Chamber itself considers that the

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adequate opportunity to prepare an effective defence, and second, it must not adversely affect the Accused's right under Article 21 of the Statute to be tried without undue delay"); *Prosecutor v. Stanisic*, Case No. IT-03-69-PT, Decision on Prosecution Motion for Leave to Amend the Amended Indictment (Dec. 16, 2005) ("two factors in particular are considered when determining whether amending an indictment would cause unfair prejudice: (1) notice, or whether the Accused is given an adequate opportunity to prepare an effective defence; and (2) whether granting the amendments will result in undue delay").

situation should have been handled, but rather, to determine whether the Trial Chamber was, in its discretion, entitled to handle the matter in the way that it did..[7]

8. The Prosecution refers to no authority. The Defense submits that the Prosecution here attempts to set a standard unknown in International Criminal Jurisprudence. It is further submitted that contrary to the Proseeution contention, issues relating to defective pleading are legal in Character and any Trial Chamber decisions flowing there from may be reviewed only in the context of the error of law standard.

9. Indeed Article 20 of the Statute of the Special Court which is similar in wording to the Statutes of both the ICTY and ICTR, provides for Appeal on only 3 grounds:- Procedural error, an error on a question of law invalidating the decision and an error of fact which has occasioned a miscarriage of justice.

10. Article 20 does not provide for a fourth category being "error in the exercise of discretion by the Trial Chamber" as implied by the prosecution in its submission at par 2.2 of the Response.

11. Errors of fact essentially deal with the evaluation of evidence and the test on Appeal is the "reasonableness" of the Trial Chamber's decision.[8] On the contrary, errors of law, under which rubric defects in the indictment fall, the test on appeal is not ***reasonableness*** but rather the *correctness* of the impugned decision[9].

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[7] Par 2.2 of the Prosecution Response Brief

[8] See Rutaganda v Prosecutor case no ICTR- 96-3-A Judgment of 26 May 2003 par 22 where the Appeals Chamber stated that: "Therefore, with regard to errors of fact the Appeals Chamber applies the standard of the "unreasonableness" of the impugned finding. In other words, "it is only when the evidence relied on by the Trial Chamber eould not have been aecepted by any reasonable person" or where "the evaluation of the evidence is 'wholly erroneous" that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.

[9] At par 20, of the Rutaganda Judgment above, the Appeals Chamber stated as follows regarding errors of fact "with regard to the burden of proof specifically associated with allegations of errors of law, the Appeals

12. The Defence therefore submits that issues of defects in the indictment and the possible prejudice caused to an Appellant constitute errors of law that have the potential of invalidating the Trial Chamber's judgment and are not simply matters of the exercise of the "reasonableness" standard, or the Chambers discretion.

13. The Appellant contends that the instances of defects in the indictment outlined in his Appeal Brief and the erroneous decisions made by the Chamber in the Trial Judgment regarding those defects all constitute errors of law that invalidate the Appellant's conviction for the various crimes specified.

14. At paragraph 2.28, of its Response Brief, the Prosecution correctly submits that the rules on the pleading requirements for indictments exist to ensure that the trial of the Accused is fair. However, the Prosecution's further submission that these rules do not exist to enable an Accused who has been convicted after a fair trial to be acquitted, is irrelevant to the issue raised by the 2nd Accused which is that his trial and eventual conviction were wholly unfair as they were based on a hopelessly defective indictment. The Defence of the 2nd Accused reiterates its submission in the Appeal Brief that the Prosecution's failure to present a properly pleaded indictment rendered the trial unfair.

15. Further, the Chamber erred by deciding that despite the numerous defects in the indictment and the Prosecutor's failure to advance any explanations for a defective indictment, the trial was nevertheless not

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Chamber recalls that in its capacity as the final arbiter of the law of the International Tribunal, it must, in principle, determine whether an error of procedural or substantive law was indeed made, where a party raises an allegation in this connection. Indeed, case law recognizes that the burden of proof on appeal in respect of errors of law is not absolute. In fact, the Appeals Chamber does not cross-check the findings of the Trial Chamber on matters of law *merely to determine whether they are reasonable, but indeed to determine whether they are correct.*"(Emphasis added)

rendered unfair. The prosecutor's argument that the Accused's trial could possibly have been fair even with the scale of defects in the indictment against him is misconceived.

16. The Prosecution alleges that there is no suggestion that its failure to provide more specificity in the indictment was deliberate[10]. The failure by the Prosecution to provide any explanation, when the Prosecution was all along aware of its obligation to provide such explanation is inexcusable and can only mean that:- either there was never an explanation and/or there was a deliberate attempt to gain an unfair advantage over the defence and indeed to deny the Accused his fair trial rights. Either way, the Prosecution should not be rewarded for its omissions which; as demonstrated by the Defence rendered the trial unfair through the prejudice suffered by the Appellant in the preparation of his defence.

Burden of Proof in Relation to prejudice caused by defective pleading

17. In relation to issues raised in the Kallon Appeal Brief relating to defects in the indictment, the Prosecution again misleadingly contends that this is the first time that the Kallon Defenee alleges lack of notiee due to a failure to plead in the Indietment the facts referred to[11] and that accordingly, the burden is on the Kallon Defence to demonstrate how Kallon's ability to prepare his defence was materially prejudiced[12].

18. This is not the first time the Defenee is raising issues of defects in the indictment that would be relevant to the 2nd Accused's submissions in relation to paragraphs 122,125 and 127 of the Appeal Brief,[13] or indeed

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[10] Par 2.29

[11] The Prosecution refers to the Kallon Appeal Brief, paras 122, 125, 127.

[12] See Paragraph 3.41 of the Prosecution Response Brief

[13] The 2nd Accused made several challenges to the indictment during Trial-Prosecutor v Sesay et al SCSL-2004-15 –Kallon Motion On Challenges to the Form of the Indictment and for Reconsideration of Order Rejecting Filing And Imposing Sanctions, 7 Feb 2008, Kallon Motion to Exclude Evidence outside the scope of the Indictment 14 March 2008, and Kallon Final Brief 18 August 2008. In the Final Brief paras 83-104, the

any other defects in the indictment generally. The 2nd Accused reiterates his submission that in line with the Jurisprudence, the burden of demonstrating that the Accused suffered no prejudice resulting from an indictment that the Trial Chamber itself found to be defective, lies with the Prosecution. The Prosecution has failed to discharge this burden and thus the Defence submission of prejudice remains un-rebutted.

19. The Prosecutor's submission that the pleading issues raised at paras 122 -127 of the Kallon Appeal Brief are a matter of evidence that did not have to be specifically pleaded in the indictment, is misconceived[14]. The general reference to alleged summaries in the Prosecution Supplemental Pre-trial Brief is useless as no particulars of these alleged summaries are provided. Regarding disclosure of witness statements[15], the Defense has sufficiently demonstrated that they cannot be a substitute for a properly pleaded indictment.

Kallon's ground 5, 11 and 23 (para 2.39 of the Prosecution Response)

20. The Defence reiterates its arguments in the Appeal Brief in relation to these grounds.The Defence further notes that in its Response Brief, the Prosecution acknowledges that the Trial Chamber found that in respect of the crimes allegedly committed personally by Kallon, the defects in the indictment were cured in relation to one single incident.[16]

Accused challenged the indictment's vagueness and over breadth, failure to particularize acts of physical and personal commission and failure to particularize material facts generally. At Para 104 of his final brief the 2nd Accused notably submitted that the Indictment was defective in its pleading of all material facts for vagueness and over breadth and that the Chamber cannot permit convictions on the basis of an Indictment which seeks to maintain avenues of prosecution capable of accommodating evidence as it became available in the course of ongoing investigations and, as such, is in clear breach of the Accused's right to be informed with precision of the nature of the case with which he stands charged and the corresponding duty on the Prosecution to know its case before going to trial. It was further submitted that the defects demonstrated in the 2nd Accused's Final Brief pervaded all the allegations pleaded in support of Count 1 to 18 in the Indictment and that the Indictment was therefore defective in its entirety and should be dismissed.

[14] Para 3.41 of the Prosecution Response Brief.

[15] Ibid

[16] Par 2.42. of the Prosecution Brief

21. The Defence reiterates its submission that even with the attack on Salahuedin, the indictment was never cured. Contrary to the Prosecution's submission; there is nothing in the Prosecution's motion filed on 12 July 2004 that provided any notice to the Defendant regarding the attack on Salahuedin.

22. Moreover, the Chamber failed to make any findings touching on the other attacks for which the 2nd Accused was convicted and concerning which the indictment was defective. The 2nd Accused was thus convicted for crimes of personal commission never pleaded in the indictment and in respect of which he had absolutely no notice.

Evidence of identification relating to Kallon

23. In his Response, the Prosecution misleadingly alleges that the Kallon Appeal Brief makes no submissions on the issue of the identification evidence relating to Kallon and therefore there are no submissions made in support of the claim or in respect of how the alleged error invalidates the decision to which the Prosecution could respond[17]. Para 80 of the Kallon Appeal Brief clearly stated that for the issue of identification, the Appellant would rely on the explanations and references provided in the Amended Notice of Appeal and the discussions of the issue in relation to the events at Cyborg pit in Tongo, the testimony of witness TFI-263 in relation to Count 12 and UNASMIL attacks in relation to Counts 5, 15 and 17.

24. In relation to events in Tongo, the Appellant submitted in his Appeal Brief that there was no basis for the Chamber's conclusion that the Appellant substantially contributed to the crimes in Tongo Field[18].The Appellant submitted that it was erroneous for the Trial Chamber to have relied on the identification evidence of witness TF1-035 and that no

[17] Paragraph 4.19 of the Prosecution Response
[18] Paragraph 111 of The Kallon Appeal Brief

reasonable trier of fact would have arrived at the conclusion that the Appellant was at Tongo Field during the relevant period of the crimes committed there, not to mention his personal involvement in such crimes.[19]

25. The Appellant made reference to his Closing Brief during trial, where the testimony of TF1-035 relied upon by the Trial Chamber to arrive at its findings on the crimes against the Appellant at Tongo,[20] was challenged on several grounds, including the admission by the witness that he did know and had never seen the Appellant and did not know that the Appellant was based in Bo between August and December 1997 when the crimes in Tongo were perpetrated;[21] the non-identification of the Appellant by the witness during his testimony and the fact that the witness's reference to the Appellant regarding his alleged involvement in the crimes in Tongo were based on hearsay evidence passed on to him by his friends and colleagues after his release from detention in Tongo.[22]

26. Regarding the testimony of witness TF1-263 on whom the Chamber partly relied to convict the Accused in relation to count 12, the Appellant in his Appeal Brief[23] submitted that the Chamber erred by failing to find that the Prosecution had not established beyond reasonable doubt that witness TF1-263 sufficiently identified the Accused Kallon, and that this issue of identification had been raised by the Defence during cross-examination. The Appellant further submitted that from the witness's testimony it was not established that the person he named as "colonel Morris Kallon" and whom he met during the rainy season in Koidu was indeed the 2nd Accused.[24] It was further submitted that in cross-

[19] See paras. 962-966 and 956-959 of the Kallon Defence Final Trial Brief.
[20] See paras. 1084-1086, pp.334-335 & paras. 1127-1130, pp.346-347 of the Trial Judgement.
[21] Transcript of 7 July 2005, p.27, pp.35-37 & Transcript of 5 July 2005, pp.89-90 (TF1-035).
[22] Id.,Transcript of 7 July 2005, p.27 pp.35-37 & Transcript of 5 July 2005, pp.89-90 (TF1-035).
[23] Paragraph 198 of the Kallon Appeal Brief
[24] Transcript of 8 April 2005 p 101 lines 28-29, p 102

examination, Counsel for the Appellant had put to the witness that there were several Kallons in Kono at the time but the witness stated he knew none of them,[25] and that during further cross- examination it was clear, the witness did not know the Accused Kallon at all, never spoke to him at the time and never spoke to or saw him again subsequently.[26] The witness admitted he knew nothing about the RUF. [27]

27. At paras 257-259 of the Appellant's Appeal Brief the issue of identification is further dealt with. In those paragraphs of his Appeal Brief, the Appellant challenged the Trial Chamber's reliance on the identification testimony of UNAMSIL witness Ganese Jaganathan to convict the Appellant for his alleged attack of Salahuedin who was not called to testify about the alleged attack on him. Witness Jaganathan acknowledged that he did not know the Appellant because he had never seen him before and that it was later that he was told by one Major Maroa that it was Brigadier Morris Kallon who perpetrated the attack.[28]

28. During cross-examination the witness admitted that apart from what he was told by Maroa, he could not for sure confirm that the person who abducted him was Brigadier Kallon.[29] Witness TF1-044 also stated that Ganese told him that it was Brigadier Morris Kallon who assaulted Salahucdin.[30]

29. At Paragraph 267 of the Appellant's Appeal Brief the issue of identification is further dealt with. The Chamber erred in failing to exercise caution in the assessment of the uncorroborated identification of the Appellant by Witness Edwin Kasoma whom the Chamber relied on

[25] Transcript of 11 April 2005 pp 34-35
[26] Transcript of 11 April 2005 p 36
[27] Transcript of 11 April 2005 p 38
[28] Transcript of 20 June 2006 p24-25
[29] Transcript of 20 June 2006 p 87
[30] Transcript of 27 June 2006 p 10

to convict the 2nd Accused in relation to the UNAMSIL abductions at Moria near Makeni. The Trial Chamber found that although at the time of his abduction the witness did not know the commander who led the abductions at Moria, the Appellant was identified to the witness by Monica Pearson at Yengema in about four occasions. There is no clear evidence on record to support such an unequivocal finding of identification.

30. In respect of all the above instances, the Appellant submitted that no reasonable trier of fact would have relied on the inconclusive identification evidence of the witnesses in question to convict the Appellant and that reliance on such identification evidence had occasioned a miscarriage of justice. The 2nd Accused submits that the foregoing were submissions open to the Prosecution to respond to and since it opted not to, the 2nd Accused should not be the scape-goat.

Adverse testimony of a Co-Accused

31. In his Response Brief, the Prosecutor misconstrues the issue submitted by the Appellant for determination, by submitting 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.[31] The issue is not about adducing adverse Co-Accused testimony, as it was already adduced in this case, through DAG111 and Exhibit 212. The problem the Prosecutor does not address is whether after the Chamber ruled repeatedly that it will not rely on adverse or incriminating Co-Accused evidence in the making of a determination of guilt against the Appellant, leading him to proceed on those decisions in preparation of his defence, is it then appropriate for the Trial Chamber to make findings of guilt and criminal responsibility under Counts 15 and 17?

[31] Para 3.18 of the Prosecution Response Brief

32. In making its submission above, the Prosecution fails to understand the point made by the Appellant which is that in leading the Appellant to believe that no adverse testimony of a Co-Accused would be used against him and then reneging on this position- taken throughout the trial proceedings- the Chamber committed an error of law that invalidates the Appellant's conviction on counts 15 and 17, which was based essentially on the adverse testimony of a Co-Accused.

33. Apart from the testimony of Gbao witness DAG-111 whom the Chamber adversely relied on to establish the 2nd Accused's alleged presence at Makump on 1st of May 2000,[32] the Chamber further relied on Exhibit 212 tendered by a Co-Accused (Sesay), and in respect of which the Appellant had no proper notice,[33] to determine the Appellant's superior responsibility for UNAMSIL events under Counts 15 and 17.[34] In its response, the Prosecutor makes no submissions regarding the improper use of Exhibit 212.

Consistent pattern of conduct

34. The Prosecution alleges that the Appellant's grievance about the Trial Chamber's reliance on evidence of a consistent pattern of conduct lacks merit[35] and that 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,[36] the Appellant Kallon does not identify the specific evidence of which it did not have notice.

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[32] Para 609 of the TCJ

[33] In the Transcript of 30 May 2007, at p.3, the Sesay Defence, which tendered Exhibit 212, noted that they were using the document merely as an 'exculpatory radio message' for the defence of the 1st Accused and that the said Exhibit, which was disclosed by the Prosecution only to the Sesay team, was in fact only given to that team after the close of the Prosecution's case.

[34] See paras. 2267-2292, pp.662-669 of the Trial Judgement. It was therefore improper for the Chamber to use evidence tendered by a co-Accused after the close of the Prosecution's case to convict Kallon for UNAMSIL crimes.

[35] Paragraph 3.28 of the Prosecution Response

[36] Trial Judgement, paras 1293, 1354, 1356, 1493, 1615, 1707, 1745.

35. Under Rule 93 of the Rules of Procedure and evidence, the Prosecution is under the obligation to disclose to the Defense pursuant to Rule 66, Acts tending to show a pattern of conduct. The Chamber purported to rely on patterns of eonduet in violation of Rule 93. None of the evidence relied on was ever disclosed to the Defense as required. Such evidence relied on by the Chamber is clearly speeified in the Appellant's Appeal Brief by reference to the impugned parts of the Trial Chamber's Judgment. The fact that "the finding of a "consistent pattern of conduet" was an inference that the Trial Chamber drew from the evidence as a whole" does not mean the Chamber was absolved of the obligation to ensure that the evidence it relied upon as making up a consistent pattern of conduet was properly diselosed to the Defence in accordanee with the mandatory provision of Rule 93.[37]

36. As the 2nd Accused noted in his Appeal Brief, all evidence of alleged consistent pattern had never been disclosed to him in accordanee with the Rule 93 which rule the Chamber acknowledged but surprisingly failed to apply.[38] This violation occasioned prejudice to the Appellant as he was convicted on the basis of presumptions not proven beyond a reasonable doubt. The Accused illustrated this prejudice in relation to sexual offences in Kono, where the Chamber relied on a consistent pattern of forcing "women into conjugal relationships,"[39] which finding was critical in the Chamber's conviction of the Appellant for the crime of forced marriage.[40] Also, the Chamber relied on a consistent pattern of

[37] *See Kupreskic: Appeals Judgt. Para.323 where in relation to this issue the Appeals Chamber stated as follows* ".The Appeal Chamber stresses that the Prosecution is not at liberty to introduce similar facts evidence without proper notice to the defendant. In this connection, the Appeals Chamber notes that Rule 93, of the Rules provides specifically that the Prosecutor must disclose any evidence of a consistent pattern of conduct to the defence pursuant to Rule 66. The Appeals Chamber also observes that there is recent jurisprudenee that notice of witness statements under Rule 66 (A) that the Prosecutor will plead evidence of facts not pleaded in the indictment is not suffieient."
[38] Para 482 p165 of the Trial Judgement.
[39] Paras 1293-1294 pp 390-391 of the Trial Judgement.
[40] Para 2148 p633 of the Trial Judgment.

conduct to support its conviction of the Appellant for use of child soldiers.[41]

37. It is therefore disingenuous for the Prosecution to allege that the 2nd Accused failed to specify evidence that was not disclosed pursuant to Rule 93. Instead of attempting to avoid liability by obfuscating issues the Prosecution should have demonstrated that it indeed did comply with Rule 93. The Defense submits that none of the evidence relied on by the Chamber was ever diselosed. The Burden shifted to the Prosecution to demonstrate otherwise.

Circumstantial Evidence

38. In his Response Brief the Prosecution again misleadingly alleges that the Kallon Defence makes no submissions on its Ground of Appeal on circumstantial evidence and that therefore there are no Defense arguments to which the Prosecution could respond[42].

39. In his Appeal Brief. the 2nd Aecused elearly stated that for this ground he would rely on the references in his Amended Notice of Appeal, and further the submissions in various grounds including errors in the application of JCE, errors regarding the use of circumstantial evidenee in relation to UNASMIL attacks and errors in the use of circumstantial evidenee in relation to command authority by the Accused Kallon during the UNASMIL events (counts 15 and 17)[43]

40. In his Notice of Appeal the Appellant explained that The Chamber erred in law and fact by relying on circumstantial evidence which was not established beyond reasonable doubt while there was other evidence available on the record that negated the conclusions drawn by the

[41] Paras 1707 p508, 1745, p518 of the Trial Judgement. See also para 2231-2233 of the Trial Judgment.
[42] Paragraph 4.18 of the Prosecution Response Brief
[43] Paragraph 82 of the Kallon Appeal Brief

Chamber from the circumstantial evidence,[44] and referred to various Paragraphs of the Trial Judgment as the basis of the Appellant's grievance.[45]

41. At Paragraph 11 of the 2nd Accused Appeal Brief the Appellant submitted that the Chamber deliberately misinterpreted the evidence and erred in its conclusion that it was "highly unlikely" that the Appellant as "Battle-Ground" commander would have been afraid of arresting Kailondo in relation to the UNAMSIL events of May 2000.[46] The Chamber erred by misrepresenting the evidence and/or ignoring its own pertinent conclusions and erroneously employing circumstantial evidence to arrive at a wrong and prejudicial conclusion as one of the bases for repudiating the Appellant's Defence.[47]

42. Also at Para 281 of the Kallon Appeal Brief- it was submitted that the Chamber's finding that it was "highly unlikely"[48] that Kallon would be afraid to arrest Kailondo, acting on Sankoh's instructions, was erroneous as there is more than sufficient evidence to infer the alternative

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[44] Although the Chamber at Para 499 stated that in assessing circumstantial evidence in proof of a fact in issue, it had been careful to consider whether any conclusion other than the guilt of the Accused could reasonably be reached, it however did not apply this test to the circumstantial evidence on which it relied to convict the Accused person. The Chamber also ignored its own analysis of the CDF Appeals Judgment paragraph 200, on the application of circumstantial evidence.

[45] See Sub- Ground 8.9 of the Kallon Amended Notice Of Appeal

[46] Para 609 p202; Paras 640 p212 of the Trial Judgment.

[47] The Chamber noted at Para 609 p202 of the Trial Judgment that the Appellant had testified that in May 2000 he had been afraid to arrest Kailondo who was acting on Sankoh's orders. The Chamber found this " highly unlikely" as Kallon was Battle Ground (sic) Commander at the time. This reasoning by the Chamber contradicts several other findings in the Judgment that would support Kallon's testimony, to wit, that Sankoh was at times authoritarian if not dictatorial – he had paramount responsibility over all activities within the RUF and determined its political and military goals (para. 658); Vanguards were powerful (para 667) and the Vanguards included Mike Lamin, Sesay, Kallon, Gbao Bockarie, Kailondo, Co Rocky etc (para. 668); that a Vanguard could not obstruct the orders or activities of a fellow Vanguard (para 667); Ranks in the RUF did not necessarily have the same meaning as ranks in a conventional army (para 670): while ranks were used and respected by the RUF, they were not strictly followed. An individual's assignment superseded rank and was the more important factor in seniority (para. 672). The Chamber illustrates this point by noting that Foday Sankoh, the RUF leader, remained a Corporal throughout the conflict (footnote 1239) (para 649); that the RUF command structure was determined by other factors than simply rank. See also para. 672 at p.222, where the Chamber concludes that while ranks were used and respected by the RUF, they were not always strictly followed.

[48] Paragraph 609 p 202 of the Judgement.

reasonable inference that Kallon had no effective control over him and so could not and had no authority defacto or dejure to arrest him.

43. At Paras 213-218 of the 2nd Accused's Appeal Brief the issue of the use of circumstantial evidence in relation to the Chamber's conclusion regarding the Accused's presence at Moria near Makeni where UNAMSIL abductions took place is also addressed. The Accused submitted that the Chamber erroneously relied on circumstantial evidence to conclude that the Accused Kallon was the Commander at Moria, where Zambian UNAMSIL personnel were abducted[49] 1834-1858 and where fighters as young as 10 years were allegedly among those involved in the abduction.[50]

44. As part of it JCE findings the Chamber relied on the crime of terrorizing the civilian population in various parts of Sierra Leone to convict the 2nd Accused. In challenging the 2nd Accused's conviction on these crimes, the Accused in his Brief submitted that among other errors the Chamber erroneously employed the use of circumstantial evidence. At paragraphs 161-168 of the Kallon Appeal Brief, the 2nd Accused argued that even if one were to assume that terrorism was a recognized crime during the relevant time period, the Trial Chamber's conviction was erroneous because the evidence at trial was susceptible to multiple reasonable inferences as to intent. Under the Trial Chamber's own formulation, to be found guilty of terrorism, the Accused must have the "specific intent of spreading terror among the civilian population."[51] "In order to draw [that] inference (..), it must be the only reasonable inference available from the evidence."[52] However, the evidence presented at trial was susceptible to multiple inferences on intent. The Prosecution is therefore

[49] Para 1638
[50] Para 1687
[51] Trial Judgment, para. 113.
[52] *Prosecutor v. Brdjanin*, It-99-36-T, September 1, 2004, para. 353.

wrong in concluding that there were no submission to which he would respond in relation to the 2nd Appellants ground on Circumstantial Evidence.

PARA.3.20 OF PROSECUTOR'S RESPONSE.

45. The Prosecutor submits that the Trial Chamber in its finding on the presence at the DDR Camp at Makump, the Trial Chamber did not rely on the testimony of DAG 111 and that regardless of the finding made at paragraph 609, with regard to witness DAG111, the Chamber would have made the finding that it made at paragraphs 1789-1794. The Prosecutor misunderstands the fair trial issue raised by the Appellant herein:-

i) The Chamber making a predetermined finding of guilt on count 15 based on the evidence adduced through this witness and in respect of which the Prosecutor has not demonstrated the contrary.

ii) Throughout the trial the Appellant proceeded on the understanding that Co-Accused evidence would not be used against him. The use of this witness testimony and other adverse Co-Accused evidence against him prejudiced his defence preparations.

iii) The Prosecutor has failed to demonstrate the basis for his submissions at paragraph 3.20 and why he seeks to excise the findings at paras 575, 578, 609, from those at paragraphs 1789-1794 of the Trial Judgment

Para.5.9.

46. The Prosecutor submission that the Trial Chamber did not have to be satisfied that a crime was committed with specific intent to terrorize or collectively punish in order to conclude that that crime was within a JCE is unsupported by any authority.

Para.5.23 of the Prosecution Response.

47. The submission and finding that Kallon had a supervisory role over Rocky in Kono District is unsupported by the evidence on which the

Trial Chamber relied on to make the impugned finding:- The Prosecution refers to the findings at paras 1225-1231 of the Trial Judgement. These paragraphs concern an event at Kaidu where TF1-078 allegedly sought the assistance of Kallon to issue a pass for him to go to the bush and bring out his family. The Trial Chamber drew inferences from this act as well the fact that Kallon allegedly advised Rocky against hostilities towards civilians as indicia of Kallon's supervisory role over Rocky.

48. The defence submits to the extent that the said advice was unconnected to an act of criminality punishable under the statute and was rather to prevent crimes, the finding, pointing to evidence as evidence of supervisory role to convict was wrong at law and invalidates the judgment. The Purpose of advising Rocky against perpetrating crimes was not criminal. The Trial Chamber did not find and so did not convict the Appellant for advising Rocky. A finding therefore that advising him against criminality against civilians constituted indicia of supervision to justify criminal responsibility for the crimes committed by non members of the JCE is simply absurd.

Para. 5.32.

49. The Prosecution submission that it is not necessary to prove a contribution in all geographic areas covered by the JCE defeats the fact that alleged crimes were alleged to have been committed within a JCE covering different counts of the indictment involving different participants and victims and varying in circumstances. This submission construes the alleged JCE as a strict liability form of perpetration. Once the common purpose is identified (even when it is not criminal) and the Accused is found to subscribe to it, he is deemed guilty even though no link is established between him and a non member of the JCE. The Prosecutor has not demonstrated the assistance or contribution by the

Appellant to the crimes committed by Rocky emanating, as it were, from the advice the 2nd Accused allegedly gave him.

50. Paras: 5.47 and 5.48. The Prosecutor has not demonstrated how Appellant contributed to the JCE as a result of his membership of the Supreme Council and has failed to demonstrate how, absent criminalizing mere membership of the Supreme Council, Kallon could have shared the criminal intent of physical perpetrators, whom he did not know, and crimes in respect of which their perpetration he neither knew or had reason to know.

Para 5.50 of the Prosecution Response.

51. The Prosecution submits that the Chamber appropriately considered Kallon's responsibility having regard to his leadership position and the evidence as a whole. This submission is unsubstantiated. The Prosecutor does not base this submission on any particular finding nor is it backed by any authority. Responsibility flows from membership of the JCE and the specific contribution of the Accused to a specific crime within the JCE and not his position or membership of any organisation.

52. **Para.6.3.** Kallon had reason to know the fighters who committed crimes at Kissi. This is not a crime per se. The point is possessing knowledge of the crimes of alleged subordinates.

53. **Para.6.14.** Alleged supervisory role over Rocky in respect of the Nigerian woman. This allegation was not within a JCE. It was personal commission on which the indictment is defective.

54. **Para.6.17.** The submissions in this respect relying on the Trial Chambers finding in para.2149 is wrong because the said finding absolved Kallon of the crime to which it refers. That paragraph states

that the Prosecution had failed to establish that Kallon knew or had reason to know of mutilations inflicted on the civilian men in Tomandu. Kallon although a senior RUF commander did not occupy a formal position within the operational command structure of the RUF and it is therefore unclear to what extent he received reports on the actions of troops throughout Kono district.

55. **Para.7.77.**Kallon was found guilty for his substantial contribution to the system of forced labour and use as a whole. The submissions underscore the fact of the absence of a reasoned opinion.

56. **Para.7.87.** The finding of the Trial Chamber and Prosecution submission impermissibly draws inferences that since it was established that there were children associated with the RUF, they must be below the age of 15 and placed the burden of ascertaining their ages on the Appellant if in doubt.

57. **Para.7.88.** The Prosecutor submits that Kallon was convicted for the act of planning the crime which is not personal commission. This submission is nonsensical and lacks any merit. Clearly planning is an act of personal commission.

58. **Para.7.140.** Prosecutor submits that Kallon fails to show prejudice due to the defects in the pleading. The burden is rather on the Prosecution.

59. **Para.7.172.**Prosecution's submission that Kallon substantially contributed to pillage in Kono, because of his alleged JCE role in BO, is inconsistent with the finding that Kallon was not in Bo and that he was not then a member of the Supreme Council, and was not shown to know about the crimes perpetrated there.

60. **Para 7.177** The Prosecution's submission is inconsistent with the notice given in the Supplementary brief about the robbery of the bank in Bo and not Koidu.

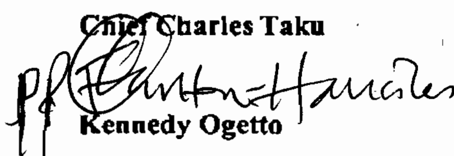
61. **Para.7.194**. The Chamber undertook to cure the defects and it turned out that the indictment was incurable hence the Trial Chamber made a finding only in two respects. The Prosecutor who was found in default and whom the Chamber found provided no reason why he could not provide better particulars is estopped from attempting at this stage of the Proceedings from relying on material the Trial Chamber considered and discounted to show that the indictment was cured.

SENTENCING:

62. **Para.9.46** Mere acknowledgment of the written submissions of the Appellant is inconsistent with the fair trial obligations to provide a written opinion on the mitigating factors submitted to the Chamber for determination. Whereas the Chamber has discretion on the assessment of mitigating factors submitted before it, it must provide a reasoned opinion, for a proper appellate review in case an allegation of an improper or abusive exercise of discretion is made.

Respectfully Submitted For Filing In Freetown This 29th Day of June 2009

Chief Charles Taku



Kennedy Ogetto