SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBER

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

Acting Registrar: Binta Mansaray

Date: 26 October 2009

PROSECUTOR **Against** **ISSA HASSAN SESAY**
MORRIS KALLON
AUGUSTINE GBAO
(Case No. SCSL-04-15-A)

JUDGMENT

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The **APPEALS CHAMBER** of the Special Court for Sierra Leone ("Appeals Chamber") comprised of Hon. Justice Renate Winter, Presiding, Hon. Justice Jon Moadeh Kamanda, Hon. Justice George Gelaga King, Hon. Justice Emmanuel Ayoola and Hon. Justice Shireen Avis Fisher;

SEISED of appeals from the Judgment rendered by Trial Chamber I ("Trial Chamber") on 2 March 2009, in the case of *Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao*, Case No. SCSL-04-15-T ("Trial Judgment");

HAVING CONSIDERED the written and oral submissions of the Parties and the Record on Appeal;

HEREBY RENDERS its Judgment.

I. INTRODUCTION

A. The Special Court for Sierra Leone

1. The Special Court for Sierra Leone ("Special Court") was established in 2002 by an agreement between the United Nations and the Government of Sierra Leone ("Special Court Agreement").[1] The mandate of the Special Court is to prosecute those persons who bear the greatest responsibility for serious violations of international humanitarian law and Sierra Leonean law committed in the territory of Sierra Leone since 30 November 1996.[2]

2. The Statute of the Special Court ("Statute") empowers the Special Court to prosecute persons who committed crimes against humanity, serious violations of Article 3 Common to the 1949 Geneva Conventions for the Protection of War Victims and of Additional Protocol II, other serious violations of international humanitarian law and specified crimes under Sierra Leonean law.[3]

B. Procedural and Factual Background

1. The Armed Conflict

3. Sierra Leone gained independence from Britain on 27 April 1961.[4] It is comprised of the Western Area and the Northern, Eastern and Southern Provinces which are divided into districts and chiefdoms.[5] In the decades following independence, the country suffered several military coups and a one-party State was established in late 1978.[6]

4. The Revolutionary United Front ("RUF") was formed in the late 1980s with the aim of overthrowing the one-party rule of the All Peoples Congress ("APC") Government.[7] In March 1991 the RUF attacked Sierra Leone from Liberia through the Kailahun District.[8] Foday Saybana Sankoh, a former member of the Sierra Leone Army ("SLA"), was the leader of the RUF.[9] The

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[1] Special Court Agreement.
[2] *See* Article 1 of the Special Court Agreement; Article 1.1 of the Statute.
[3] Articles 2-5 of the Statute.
[4] Trial Judgment, para. 7.
[5] Trial Judgment, para. 7.
[6] Trial Judgment, para. 8.
[7] Trial Judgment, para. 9.
[8] Trial Judgment, para. 12.
[9] Trial Judgment, para. 9.

RUF claimed to be fighting in order to realise the right of every Sierra Leonean to true democracy and fair governance.[10]

5. By the end of 1991, the RUF held consolidated positions in the east in Kailahun District and in parts of Pujehun District in the south.[11] In April 1992, the APC government of President Joseph Momoh was overthrown in a military coup by Captain Valentine Strasser who formed the National Provisional Ruling Council ("NPRC") and ruled until January 1996 when he was overthrown by his deputy, Brigadier Julius Maada Bio.[12]

6. By 1995, the RUF controlled the southern and eastern districts of Kailahun, Pujehun, Bo and Kenema.[13] The RUF also attacked areas in Port Loko District, Kambia District and the Western Area. From their south-eastern stronghold the RUF moved into Bonthe and Moyamba Districts and northwards into Kono District eventually occupying Koidu Town.[14] Local pro-Government militias emerged due to the RUF's success.[15] These militias were collectively known as the Civil Defence Forces ("CDF"), and were comprised of Kamajors, Donsos, Gbettis or Kapras and Tamaboros, who were traditional Sierra Leonean hunters.[16] From 1995 to 1996, the SLA with the assistance of the CDF and other pro-government forces was able to push back the RUF into the provinces and gained ground in many districts held by the RUF.[17] The RUF however maintained control of most of Kailahun District.[18]

7. In February 1996, democratic elections were held and Ahmad Tejan Kabbah, the head of the Sierra Leone People's Party, ("SLPP") was elected President of Sierra Leone.[19] Despite its professed commitment to democracy, the RUF boycotted the elections and continued active hostilities.[20] Tension between the SLA and the Government also began over the increased importance of the CDF.[21] In September 1996, Johnny Paul Koroma, an SLA officer, was alleged to have attempted a coup d'état and was put on trial.

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[10] Trial Judgment, para. 652.
[11] Trial Judgment, para. 12.
[12] Trial Judgment, para. 13.
[13] Trial Judgment, para. 15.
[14] Trial Judgment, para. 15.
[15] Trial Judgment, para. 16.
[16] Trial Judgment, para. 16.
[17] Trial Judgment, para. 17.
[18] Trial Judgment, para. 17.
[19] Trial Judgment, para. 18.
[20] Trial Judgment, para. 18.
[21] Trial Judgment, para. 18.

8. On 30 November 1996, President Kabbah and Foday Sankoh signed the Abidjan Peace Accord, which called for among other things a cease-fire, disarmament and demobilisation, with the Government extending amnesty to RUF members in return for peace.[22] However, in January 1997, hostilities erupted again between the Government and the RUF,[23] and Foday Sankoh was arrested in Nigeria for alleged weapons violations while returning to Sierra Leone from Côte d'Ivoire in February 1997.[24]

9. On 25 May 1997, members of the SLA overthrew the Government of President Kabbah in a coup d'état and released Johnny Paul Koroma from prison. He became the Chairman of the Armed Forces Revolutionary Council ("AFRC").[25] The AFRC suspended the 1991 Constitution of Sierra Leone, dissolved Parliament and banned all political parties.[26] Johnny Paul Koroma invited the RUF to join the AFRC and to form a governing alliance.[27] Under arrest in Nigeria, Foday Sankoh accepted the invitation and after his announcement by radio broadcast that they were joining forces with the AFRC, the RUF joined the AFRC in Freetown.[28] The governing body of the Junta regime included both AFRC and RUF members, and was known as the Supreme Council.[29]

10. Throughout 1997, the Junta regime seized control of major towns throughout the country including Freetown, Bo, Kenema, Koidu, Pujehun and Bonthe.[30] The addition of Kailahun District, which was controlled by the RUF, extended the Junta's control over the country.[31] The Junta also controlled the diamond mines in Tongo Fields in Kenema District, proceeds from which were used to finance the objectives of the Junta Government.[32]

11. On 14 February 1998, the ECOWAS Ceasefire Monitoring Group ("ECOMOG") and CDF forces attacked the AFRC/RUF contingent in Freetown taking control of the city, reinstating President Kabbah and eventually establishing control over two-thirds of Sierra Leone.[33] The AFRC/RUF Junta forces withdrew from Freetown eventually stationing themselves in parts of

[22] Trial Judgment, para. 19.
[23] Trial Judgment, para. 20.
[24] Trial Judgment, para. 20.
[25] Trial Judgment, para. 21.
[26] Trial Judgment, para. 21.
[27] Trial Judgment, para. 22.
[28] Trial Judgment, para. 22.
[29] Trial Judgment, para. 22.
[30] Trial judgment, para. 23.
[31] Trial Judgment, para. 23.
[32] Trial Judgment, para. 23.
[33] Trial Judgment, para. 28.

Kono District.[34] Following the attack on Freetown of 6 January 1999, the international community put pressure on President Kabbah to enter into a peace agreement with the armed opposition groups.[35] Negotiations began between the RUF and the Government and a ceasefire was entered into on 24 May 1999.[36] On 7 July 1999, the Lomé Peace Accord was signed, resulting in a power sharing arrangement between the Government of President Kabbah and the RUF, represented by Foday Sankoh.[37]

12. Hostilities resumed shortly after the signing of the Lomé Peace Accord and on 22 October 1999, the UN Security Council passed Resolution 1270 authorising the deployment of 6000 UN peacekeepers to Sierra Leone ("UNAMSIL").[38] However, several groups refused to disarm and hostilities recommenced shortly thereafter.[39] In May 2000, hundreds of UNAMSIL peacekeepers were abducted and detained by RUF units that had not yet disarmed.[40] A ceasefire agreement was signed in Abuja on 10 November 2000 and a final cessation of hostilities was declared by President Kabbah in January 2002.

2. The Indictment

13. Three persons, Issa Hassan Sesay, Morris Kallon and Augustine Gbao, members of the RUF, (the "Appellants") were charged in this case. The initial indictments against Sesay and Kallon were confirmed on 7 March 2003, and the initial indictment against Gbao was confirmed on 16 April 2003. The indictments were later consolidated, amended and corrected.[41]

14. The Corrected Amended and Consolidated Indictment ("Indictment") comprising a total of 18 Counts charged the Accused with:

(i) Eight Counts of crimes against humanity, pursuant to Article 2 of the Statute namely: extermination, murder, rape, sexual slavery, other inhumane acts and enslavement in Counts 3, 4, 6, 7, 8, 11, 13 and 16;

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[34] Trial Judgment, para. 30.
[35] Trial Judgment, para. 41.
[36] Trial Judgment, para. 41.
[37] Trial Judgment, para. 41.
[38] Trial Judgment, para. 43. Pursuant to its mandate, UNAMSIL was tasked to cooperate with the Government of Sierra Leone and the RUF in the implementation of the Lomé Peace Accord; to assist in the disarmament, demobilization and reintegration of combatants; to monitor adherence to the ceasefire; and to facilitate the delivery of humanitarian assistance: UN SC Res. 1270, para. 8.
[39] Trial Judgment, para. 44.
[40] Trial Judgment, para. 44.
[41] *Prosecutor* v. *Sesay et al.*, SCSL-04-15-T, Corrected Amended Consolidated Indictment, 2 August 2006.

(ii) Eight Counts of violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, pursuant to Article 3 of the Statute namely: violence to life, health and physical or mental well-being of persons in particular acts of terrorism, collective punishments, murder, outrages upon personal dignity, mutilation, pillage and taking of hostages in Counts 1, 2, 5, 9, 10, 14, 17 and 18; and

(iii) Two Counts of other serious violations of international humanitarian law, pursuant to Article 4 of the Statute namely: conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities and attacks against UNAMSIL peacekeepers in Counts 12 and 15.

15. The Indictment charged the Appellants with individual criminal responsibility pursuant to Articles 6(1) and 6(3) of the Statute,[42] alleging among other things:

> The RUF, including **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO,** and the AFRC, including ALEX TAMBA BRIMA, BRIMA BAZZY KAMARA and SANTIGIE BORBOR KANU, shared a common plan, purpose or design (joint criminal enterprise) which was to take any actions necessary to gain and exercise political power and control over the territory of Sierra Leone, in particular the diamond mining areas. The natural resources of Sierra Leone, in particular the diamonds, were to be provided to persons outside Sierra Leone in return for assistance in carrying out the joint criminal enterprise.
>
> The joint criminal enterprise included gaining and exercising control over the population of Sierra Leone in order to prevent or minimize resistance to their geographic control, and to use members of the population to provide support to the members of the joint criminal enterprise. The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.[43]

3. Summary of the Trial Judgment

16. The trial commenced with the Prosecution's opening statement on 5 July 2004 and closing arguments were heard on 4 and 5 August 2008. The Trial Chamber delivered an oral summary of its Judgment on 25 February 2009 and filed its written Judgment on 2 March 2009.

17. The Trial Chamber found that attacks were directed against the civilian population of Sierra Leone from 30 November 1996 until at least the end of January 2000, that these attacks were both

[42] Indictment, paras 36, 38-39.
[43] Indictment, paras 36, 37.

widespread and systematic and that the perpetrators acted with the requisite intent within the meaning of Article 2 of the Statute.[44] The Trial Chamber also took judicial notice of the fact that there was an armed conflict in Sierra Leone from March 1991 until January 2002, and found that there was a nexus between alleged violations and the armed conflict within the meaning of Articles 3 and 4 of the Statute.[45]

18. The Trial Chamber further found that during the AFRC/RUF Junta period a joint criminal enterprise existed between senior leaders of the AFRC and RUF including the Accused,[46] and that Sesay, Kallon and Gbao participated in the joint criminal enterprise, with Justice Boutet dissenting with respect to Gbao's participation.[47]

4. The Verdict

19. The majority of the Trial Chamber found all three Appellants guilty under Counts 1 through 11 and 13 through 15 for extermination, murder, rape, sexual slavery, other inhumane acts (in particular forced marriages and physical violence) and enslavement pursuant to Article 2 of the Statute; and for violence to life, health and physical or mental well-being of persons (in particular acts of terrorism, collective punishments, murder, outrages upon personal dignity, mutilation, and pillage) pursuant to Article 3 of the Statute; and for intentionally directing attacks against peacekeepers pursuant to Article 4 of the Statute[48]

20. Justice Boutet partially dissented in respect of Gbao on the Counts for which he was found responsible pursuant to his participation in a joint criminal enterprise.[49] Justice Boutet however found Gbao responsible for planning enslavement under Count 13[50] and for aiding and abetting attacks against peacekeepers under Count 15.[51]

21. Sesay and Kallon were also found guilty under Count 12, for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities, pursuant to Article 4 of the Statute, and under Count 17 for violence to life, health and

[44] Trial Judgment, paras 942-963.
[45] Trial Judgment, paras 968, 990.
[46] Trial Judgment, paras 1985, 2054, 2072, 2159-2160.
[47] Trial Judgment, paras 2002, 2008, 2009, 2049, 2055-2056, 2057-2061, 2082-2091, 2093-2103, 2104-2110, 2161-2163, 2164-2172.
[48] Trial Judgment, Disposition pp. 677-687.
[49] Dissenting Opinion of Justice Pierre G. Boutet, para. 23.
[50] Dissenting Opinion of Justice Pierre G. Boutet, para. 23.
[51] Dissenting Opinion of Justice Pierre G. Boutet, para. 24.

physical or mental well-being of persons for the murder of UNAMSIL peacekeepers pursuant to Article 3 of the Statute. Sesay and Kallon were found not guilty under Counts 16 and 18. Gbao was found not guilty under Counts 12, 16, 17 and 18.[52]

5. The Sentences

22. The Sentencing Judgment was delivered on 8 April 2009. The Trial Chamber sentenced Sesay to a total term of imprisonment of fifty-two (52) years and Kallon to a total term of imprisonment of forty (40) years. The majority of the Trial Chamber sentenced Gbao to a total term of imprisonment of twenty-five (25) years, Justice Boutet dissenting.[53] The Trial Chamber ordered the sentences to run concurrently for all the Counts for which the Accused were found guilty,[54] and also ordered that credit be given for any time already served in custody.[55]

C. The Appeal

1. Notices of Appeal

23. The Prosecution and the Appellants filed Notices of Appeal on 28 April 2009.[56] Sesay filed forty-six (46) main Grounds of Appeal, Kallon filed thirty-one (31) main Grounds of Appeal, Gbao filed nineteen (19) main Grounds of Appeal and the Prosecution filed three (3) main Grounds of Appeal. In addition, Sesay, Kallon and Gbao filed thirty-nine (39), fourty-four (44) twenty-three (23) sub grounds of appeal respectively.

2. The Grounds of Appeal

(a) Common grounds of appeal

24. Many of the grounds raised by the Appellants are common. For the sake of expediency the Appeals Chamber has dealt with the grounds according to common issues, where applicable. Alleged defects in the Indictment were raised by Sesay in Grounds 6-8, 10-13, 44 (Sesay abandoned Ground 9); Kallon in Grounds 1, 3-6, 9-16, 19-30, and Gbao in Grounds 4 and 8(a). Issues pertaining to fair trial and the assessment of evidence were raised in Sesay's Grounds 1-5, 14-18,

[52] Trial Judgment, Disposition, pp. 677-687.
[53] Sentencing Judgment, Disposition, pp. 93-98.
[54] Sentencing Judgment, Disposition, p. 98.
[55] Sentencing Judgment, p. 98.
[56] Sesay Notice of Appeal; Kallon Notice of Appeal; Gbao Notice of Appeal; Prosecution Notice of Appeal.

20-22, 45; Kallon's Grounds 1 and 7, and Gbao's Grounds 2, 6, 8(a), 7 and 14 (Gbao abandoned Grounds 1, 3, 5, 13, 15). Alleged errors pertaining to the JCE were raised by Sesay in his Grounds 24-34 and 37; by Kallon in his Grounds 2, 8-11A and 15 and by Gbao in his Grounds 8(b)-(d), 8(e)-(m) and 8(o)-(s) (Gbao abandoned Ground 8(n)).

25. All three Accused raised issues pertaining to their liability for attacks on UNAMSIL peacekeepers, in particular, Sesay's Grounds 28 and 44; Kallon's Grounds 26-27, 29 and Gbao's Ground 16 (Gbao's Ground 17 was abandoned). The Prosecution appealed the Appellants' acquittals for the taking of UNAMSIL peacekeepers hostage in Ground 3 of its Appeal. Both Kallon and Gbao in Grounds 30 and Ground 19 respectively, appealed against their convictions for extermination and murder as crimes against humanity, for the same acts, as being impermissibly cumulative. All three Accused appealed against their sentences: Sesay's Ground 46, Kallon's Ground 31 and Gbao's Ground 18.

(b) Individual grounds of appeal

(i) Sesay

26. Under Grounds 23, 29-31 and 33, Sesay argued that he did not have the specific intent for the crimes of acts of terrorism and collective punishment pursuant to Article 3 Common to the Geneva Conventions. Sesay appeals his liability for the crime of enslavement under Grounds 32, 35, 36 and 40. In addition, he appealed his conviction for his role in the attacks directed at civilians in Kailahun (Ground 38), sexual violence crimes (Ground 39) and the use of child soldiers (Ground 43). The Appeals Chamber notes that Sesay abandoned Ground 19 (errors on adjudicated facts Rule 94), Ground 41 (acts of terror with respect to unlawful killing of 63 suspected Kamajors in Kailahun) and Ground 42 (acts of terror with respect to sexual slavery and forced marriages in Kailahun).

(ii) Kallon

27. Kallon appealed the following convictions: for instigating murder in Ground 12, as a superior for forced marriages in Ground 13, as a superior for enslavement in Ground 14, for acts of terrorism in Ground 16, for physical violence in Ground 19, for planning the use of child soldiers in Ground 20, for abductions and forced labour in Ground 21, for pillage in Ground 22, and lack of specific intent for Counts 15 and 17 in Ground 25.

(iii) Gbao

28. Gbao appealed his conviction for aiding and abetting murder in Kailahun District under Ground 9, the reliability of witnesses with respect to sexual violence in Ground 10, sexual violence as acts of terrorism in Ground 12, and for abductions and forced labour in Ground 11.

(iv) The Prosecution

29. The Prosecution complained in Ground 1 that the Trial Chamber erred in finding that the JCE did not continue after April 1998. In Ground 2, the Prosecution appealed Gbao's acquittal under Count 12 for conscripting or enlisting children under the age of 15 years into armed forces or groups, or using them to participate actively in hostilities.[57]

[57] The Prosecution's Ground 3 is referred to in paragraph 25 above in the Grounds of Appeal pertaining to the Appellants responsibility for attacks on UNAMSIL peacekeepers.

II. APPELLATE REVIEW

A. Standard of Review on Appeal

30. Before the Appeals Chamber embarks on a detailed consideration of the Parties' Grounds of Appeal, it is expedient to recall at the threshold, albeit in general terms, some of the principles of appellate review that will guide it.[58]

31. **In regard to errors of law**: Where the appellant alleges an error of law pursuant to Article 20 of the Statute and Rule 106 of the Rules of Procedure and Evidence ("Rules"), only arguments relating to errors in law that invalidate the decision of the Trial Chamber would merit consideration. The appellant must provide details of the alleged error and state with precision how the legal error invalidates the decision.[59] In exceptional circumstances, the Appeals Chamber may consider legal issues raised by a party or *proprio motu* although they may not lead to the invalidation of the judgment, if they are nevertheless of general significance to the Special Court's jurisprudence.[60]

32. **In regard to errors of fact**: On appeal where errors of fact are alleged also pursuant to Article 20 of the Statute and Rule 106 of the Rules, the Appeals Chamber will not lightly overturn findings of fact reached by a Trial Chamber; the error of fact must have resulted in a miscarriage of justice.[61] The appellant must provide details of the alleged error and state with precision how the error of fact occasioned a miscarriage of justice. A miscarriage of justice is defined as "[a] grossly unfair outcome in judicial proceedings, as when a defendant is convicted despite a lack of evidence on an essential element of the crime."[62] For an error to be one that occasioned a miscarriage of justice it must have been "critical to the verdict reached."[63] Where it is alleged that the Trial Chamber committed an error of fact, the Appeals Chamber will give a margin of deference to the Trial Chamber that received the evidence at trial.[64] This is because it is the Trial Chamber that is best placed to assess the evidence, including the demeanour of witnesses.[65] The Appeals Chamber will only interfere in those findings where no reasonable trier of fact could have reached the same

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[58] *See Fofana and Kondewa* Appeal Judgment, paras 32-36.
[59] *Norman et al.* Subpoena Decision, para. 7.
[60] *Fofana and Kondewa* Appeal Judgment, para. 32. *See* also *Galić* Appeal Judgment, para. 6; *Stakić* Appeal Judgment, para. 7; *Kupreškić et al.* Appeal Judgment, para. 22; *Tadić* Appeal Judgment, para. 247.
[61] *Fofana and Kondewa* Appeal Judgment, para. 33, *Kupreškić et al.* Appeal Judgment, para. 29.
[62] *Kupreškić et al.* Appeal Judgment, para. 29, *citing Furundzija* Appeal Judgment, para. 37.
[63] *Kupreškić et al.* Appeal Judgment, para. 29.
[64] *Fofana and Kondewa* Appeal Judgment, para. 33.
[65] *Fofana and Kondewa* Appeal Judgment, para. 33.

finding or where the finding is wholly erroneous.[66] The Appeals Chamber has adopted the statement of general principle contained in the ICTY Appeals Chamber decision in *Kupreškić et al.*, as follows:

> [T]he task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber.[67]

The Appeals Chamber applies the same reasonableness standard to alleged errors of fact regardless of whether the finding of fact was based on direct or circumstantial evidence.[68]

33. The same standard of reasonableness and deference to factual findings applies when the Prosecution appeals against an acquittal,[69] however, the Appeals Chamber endorses the view that:

> Considering that it is the Prosecution that bears the burden at trial of proving the guilt of the accused beyond reasonable doubt, the significance of an error of fact occasioning a miscarriage of justice is somewhat different for a Prosecution appeal against acquittal than for a defence appeal against conviction. A convicted person must show that the Trial Chamber's factual errors create a reasonable doubt as to his guilt. The Prosecution must show that, when account is taken of the errors of fact committed by the Trial Chamber, all reasonable doubt of the convicted person's guilt has been eliminated.[70]

34. **In regard to procedural errors**: Although not expressly so stated in Article 20 of the Statute, not all procedural errors vitiate the proceedings. Only errors that occasion a miscarriage of justice would vitiate the proceedings. Such are procedural errors that would affect the fairness of the trial. By the same token, procedural errors that could be waived or ignored (as immaterial or inconsequential) without injustice or prejudice to the parties would not be regarded as procedural errors occasioning a miscarriage of justice.

35. **In regard to appellate review of the exercise of discretionary powers by the Trial Chamber**: The guiding principles can be stated succinctly. The Trial Chamber's exercise of

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[66] *Fofana and Kondewa* Appeal Judgment, para. 33; *Ntakirutimana* Appeal Judgment, para. 12; *Kupreškić et al.* Appeal Judgment, para. 30.
[67] *Fofana and Kondewa* Appeal Judgment, para. 34, *quoting Kupreškić et al.* Appeal Judgment, para. 30.
[68] *See Galić* Appeal Judgment, para. 9, fn. 21; *Stakić* Appeal Judgment, para. 219; *Čelebići* Appeal Judgment, para. 458. Similarly, the standard of proof at trial is the same regardless of the type of evidence, direct or circumstantial.
[69] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.
[70] *Muvunyi* Appeal Judgment, para. 10; *Mrkšić and Sljivančanin* Appeal Judgment, para. 15; *Martić* Appeal Judgment, para. 12.

discretion will be overturned if the challenged decision was based: (i) on an error of law; or (ii) on a patently incorrect conclusion of fact; or (iii) if the exercise of discretion was so unfair or unreasonable as to constitute an abuse of the Trial Chamber's discretion. The scope of appellate review of discretion is, thus, very limited: even if the Appeals Chamber does not agree with the impugned decision, it will stand unless it was so unreasonable as to force the conclusion that the Trial Chamber failed to exercise its discretion judiciously.[71] Where the issue on appeal is whether the Trial Chamber correctly exercised its discretion in reaching its decision the Appeals Chamber will only disturb the decision if an appellant has demonstrated that the Trial Chamber made a discernible error in the exercise of discretion.[72] A Trial Chamber would have made a discernible error if it misdirected itself as to the legal principle or law to be applied, took irrelevant factors into consideration, failed to consider relevant factors or failed to give them sufficient weight, or made an error as to the facts upon which it has exercised its discretion.[73] Provided therefore that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal even though the Appeals Chamber itself may have exercised the discretion differently.

B. Defective submissions

36. The Appeals Chamber has the inherent discretion to find that any of the Parties' submissions do not merit a reasoned opinion in writing and summarily dismiss arguments that are evidently unfounded. In particular, the Appeals Chamber cannot effectively and efficiently carry out its mandate without focused submissions by the Parties. In order for the Appeals Chamber to assess a Party's arguments, the Party is expected to set out its Grounds of Appeal clearly, logically and exhaustively.[74] Accordingly, submissions that are obscure, contradictory, vague or suffer from other formal and obvious insufficiencies may be, on that basis, summarily dismissed without detailed reasoning.[75]

37. In the instant proceeding, the Appeals Chamber has identified the following seven types of deficiencies in the Parties' submissions.

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[71] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4; *Karemera* Decision on Leave to File Amended Indictment, para. 9.
[72] *Norman* Subpoena Decision, para. 5, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 4.
[73] *Norman* Subpoena Decision, para. 6, *citing Milošević* Decision on Appeal from Refusal to Order Joinder, para. 5.
[74] *Brima et al.* Appeal Judgment, para. 34.
[75] *See Krajišnik* Appeal Judgment, para. 16; *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Orić* Appeal Judgment, para. 14.

38. First, some submissions are vague. An appellant is expected to identify the challenged factual finding and put forward its factual arguments with specificity.[76] As a general rule, where an appellant's references to the Trial Judgment or the evidence are missing, vague or incorrect, the Appeals Chamber will summarily dismiss that alleged error or argument.[77] The Appeals Chamber has summarily dismissed a number of the Parties' argument on this basis.[78]

39. Second, some submissions merely claim a failure to consider evidence. A Trial Chamber is not required to refer to the testimony of every witness and to every piece of evidence on the record, and failure to do so does not necessarily indicate lack of consideration.[79] This holds true as long as there is no indication that the Trial Chamber completely disregarded any particular piece of evidence. Such disregard is shown "when evidence which is clearly relevant to the findings is not addressed by the Trial Chamber's reasoning."[80] Where the Appeals Chamber finds that an appellant merely asserts that the Trial Chamber failed to consider relevant evidence, without showing that no reasonable trier of fact, based on the totality of the evidence, could have reached the same conclusion as the Trial Chamber did, or without showing that the Trial Chamber completely disregarded the evidence, it will, as a general rule, summarily dismiss that alleged error or argument.[81] The Appeals Chamber has summarily dismissed the arguments suffering from this type of deficiency.[82]

40. Third, some submissions merely seek to substitute alternative interpretations of the evidence. As a general rule, mere assertions that the Trial Chamber erred in its evaluation of the evidence, such as claims that the Trial Chamber failed to give sufficient weight to certain evidence, or should have interpreted evidence in a particular manner, are liable to be summarily dismissed.[83] Similarly, where an appellant merely seeks to substitute its own evaluation of the evidence for that

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[76] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20. *See* also *Halilović* Appeal Judgment para. 13; *Blagojević and Jokić* Appeal Judgment, para. 11; *Brđanin* Appeal Judgment, para. 15; *Gacumbitsi* Appeal Judgment, para. 10.
[77] *Martić* Appeal Judgment, para. 18; *Strugar* Appeal Judgment, para. 20.
[78] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 80 (Sesay Ground 23 in its entirety), 149 (in Ground 29), 169 (in Ground 32), 276-279 (in Ground 35); Kallon Appeal, paras 77-85 (Kallon Ground 7 in its entirety), 98 (in Ground 9), 147 (in Ground 15), 194 (in Ground 20), 198 (in Ground 20), 203 (in Ground 20); Gbao Appeal, para. 163 (in Ground 8(m)).
[79] *Strugar* Appeal Judgment, para. 24; *Kvočka et al.* Appeal Judgment, para. 23; *Kupreškić et al.* Appeal Judgment, para. 458.
[80] *Strugar* Appeal Judgment, para. 24; *Limaj* Appeal Judgment, para. 86.
[81] *See Brđanin* Appeal Judgment, para. 24; *Galić* Appeal Judgment, paras 257-258.
[82] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 109 (in Ground 24), 113 (in Ground 24), 142 (in Ground 29), 169 (in Ground 31); Kallon Appeal, para. 142 (in Ground 13).
[83] *See Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21; *Brđanin* Appeal Judgment, para. 24.

of the Trial Chamber, such submissions may be dismissed without detailed reasoning. The same applies to claims that the Trial Chamber could not have inferred a certain conclusion from circumstantial evidence, without further explanation.[84] An appellant must address the evidence the Trial Chamber relied on and explain why no reasonable trier of fact, based on the evidence, could have evaluated the evidence as the Trial Chamber did, and the Appeals Chamber may summarily dismiss arguments that fail to make such a minimum pleading on appeal. The Appeals Chamber has summarily dismissed the arguments that fail to comply with this rule.[85]

41. Fourth, some submissions fail to identify the prejudice. Where the Appeals Chamber considers that an appellant fails to explain how the alleged factual error had an effect on the conclusions in the Trial Judgment, it will summarily dismiss that alleged error or argument. The arguments of the Parties suffering from this deficiency have been summarily dismissed.[86]

42. Fifth, some submissions are mere repetitions of arguments at trial. The Appeals Chamber will, as a general rule, summarily dismiss submissions that merely repeat arguments that did not succeed at trial unless it is shown that their rejection by the Trial Chamber constituted an error warranting the intervention of the Appeals Chamber.[87] The Appeals Chamber emphasizes that an appellant must contest the Trial Chamber's findings and conclusions, and should not simply invite the Appeals Chamber to reconsider issues *de novo*. Submissions that merely put forward an appellant's position without addressing the Trial Chamber's allegedly erroneous finding or conclusion therefore fail to properly develop an issue for appeal. Some of the Parties' arguments have been summarily dismissed on this basis.[88]

43. Sixth, many submissions are otherwise incomplete. Submissions may be dismissed without detailed reasoning where an appellant makes factual claims or presents arguments that the Trial

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[84] *Martić* Appeal Judgment, para. 19; *Strugar* Appeal Judgment, para. 21.

[85] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 164 (in Ground 31), 177-182 (in Ground 28), 196-203 (in Ground 33), 219 (in Ground 33), 221 (in Ground 33), 222 (in Ground 33), 240 (in Ground 34), 248 (in Ground 34), 309 (in Ground 40), 310 (in Ground 40), 334 (in Ground 43); Kallon Appeal, paras 168 (in Ground 16), 194 (in Ground 20), 196 (in Ground 20), 197 (in Ground 20), 199 (in Ground 20), 201 (in Ground 20), 202 (in Ground 20), 204 (in Ground 20), 209 (in Ground 20), 217 (in Ground 20), 218 (in Ground 20); Gbao Appeal, paras 405-415 (in Ground 18(c)).

[86] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 113 (in Ground 24), 169 (in Ground 32), 276-279 (in Ground 35), 292 (in Ground 38); Kallon Appeal, paras 41 (in Ground 2), 196-198 (in Ground 20), 201-203 (in Ground 20), 223 (in Ground 21); Gbao Appeal, para. 140 (in Ground 8(i)).

[87] *Martić* Appeal Judgment, para. 14; *Strugar* Appeal Judgment, para. 16; *Halilović* Appeal Judgment para. 12; *Blagojević and Jokić* Appeal Judgment, para. 10; *Brđanin* Appeal Judgment, para. 16; *Galić* Appeal Judgment, paras 10 and 303; *Simić* Appeal Judgment, para. 12; *Gacumbitsi* Appeal Judgment, para. 9.

Chamber should have reached a particular conclusion without advancing any evidence in support. Indeed, an appellant is expected to provide the Appeals Chamber with an exact reference to the parts of the trial record invoked in support of its arguments.[89] As a general rule, in instances where this is not done, the Appeals Chamber will summarily dismiss the alleged error or argument.[90] Similarly, the Appeals Chamber will, as a general rule, summarily dismiss undeveloped arguments and alleged errors, as well as submissions where the appellant fails to articulate the precise error committed by the Trial Chamber.[91] The Appeals Chamber has, therefore, summarily dismissed numerous arguments because they are unsupported,[92] undeveloped,[93] or fail to articulate the precise error alleged.[94]

44. Lastly, some submissions exceed the applicable page limit. The Parties are obliged to comply with the page limits for their appeal briefs set out in Article 6(E) of the Practice Direction on Filing Documents before the Special Court for Sierra Leone, as amended, and to seek authorisation pursuant to Article 6(G) of the said Practice Direction before filing appeal briefs which exceed that page limit. In the present case, the Parties were granted extensions of pages for

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[88] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 248 (in Ground 34), 339-346 (in Ground 44).

[89] *Martić* Appeal Judgment, para. 20; *Strugar* Appeal Judgment, para. 22. *See* also *Halilović* Appeal Judgment, para. 13; *Blagojević and Jokić* Appeal Judgment, para. 11; *Brđanin* Appeal Judgment, para. 15; *Gacumbitsi* Appeal Judgment, para. 10.

[90] *Martić* Appeal Judgment, para. 20.

[91] *Galić* Appeal Judgment, para. 297.

[92] These arguments are found in parts of the following paragraphs of the Parties' Appeals and Notices of Appeal: Sesay Appeal, paras 80 (Sesay Ground 23 in its entirety), 143 (in Ground 29), 150 (in Ground 29), 151 (in Ground 29), 182 (in Ground 28), 240 (in Ground 34), 307 (in Ground 40), 308 (in Ground 40), 311 (in Ground 40), 334 (in Ground 43), fn. 712 (in Ground 27); Kallon Appeal, paras 38 (in Ground 2), 48 (in Ground 2), 64 (in Ground 2), 147 (in Ground 15), 154 (in Ground 15), 168 (in Ground 16), 193 (in Ground 20), 194 (in Ground 20), 203 (in Ground 20), 209 (in Ground 20), 212 (in Ground 20), 216 (in Ground 20),331-334 (in Ground 31), fn. 263 (in Ground 9); Kallon Notice of Appeal, paras 10.15 (in Ground 9), 10.16 (in Ground 9), 10.18 (in Ground 9); Gbao Appeal, paras 24-26 (Gbao Ground 7 in its entirety).

[93] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 2-22 (in Grounds 1, 2, 3 and 14), 58 (Sesay Grounds 1, 2, 3, 14 and 15 in their entirety) 27-30 (in Ground 6), 33 (in Ground 6), 35-37 (in Ground 6), 46-48 (Sesay Ground 10 in its entirety), 80 (Sesay Ground 23 in its entirety), 142 (in Ground 29), 144 (in Ground 29), 145 (in Ground 29), 148 (in Ground 30), 150 (in Ground 29), 151 (in Ground 29), 164 (in Ground 31), 169 (in Ground 31), 182 (in Ground 28), 196-203 (in Ground 33), 288 (in Ground 38), 292 (in Ground 38), 296 (in Ground 39), 298 (in Ground 39), 301 (in Ground 39), 307 (in Ground 40), 308 (in Ground 40), 309 (in Ground 40), 310 (in Ground 40), 311 (in Ground 40), 334 (in Ground 43); Kallon Appeal, paras 1-22 (Kallon Ground 1 in its entirety), 28 (in Ground 2), 38 (in Ground 2), 42 (in Ground 2), 64 (in Ground 2), 68-69 (Kallon Ground 4 in its entirety), 77-85 (Kallon Ground 7 in its entirety), 147 (in Ground 15), 142 (in Ground 13), 154 (in Ground 15), 193 (in Ground 20), 194 (in Ground 20), 199-204 (in Ground 20), 209 (in Ground 20), 212 (in Ground 20), 216 (in Ground 20), 231 (in Ground 21), 331-334 (in Ground 31), fn. 263 (in Ground 9); Kallon Notice of Appeal, paras 5.2 (in Ground 4), 5.5 (in Ground 4), 9.4 (in Ground 8), 10.15 (in Ground 9), 10.16 (in Ground 9), 10.18 (in Ground 9). Gbao Appeal, paras 24-26 (Gbao Ground 7 in its entirety), 133 (in Ground 8(i)), 140 (in Ground 8(i)).

[94] These arguments are found in parts of the following paragraphs of the Parties' Appeals: Sesay Appeal, paras 189 (in Ground 28), 232 (in Ground 25, 27, 34, 36), 247 (in Ground 34); Kallon Appeal, paras 28 (in Ground 2), 42 (in Ground 2), 155 (in Ground 15), 193 (in Ground 20), 200 (in Ground 20), 203 (in Ground 20), 204 (in Ground 20).

their appeal and response briefs.[95] Additional arguments of the Parties presented in annexes to their Appeals in violation of the page limit thus imposed have been summarily dismissed.[96]

45. In addition to the abovementioned formal deficiencies in the pleadings, the Appeals Chamber observes that large parts of the Parties' Grounds of Appeal are, in general, poorly structured and organised. For instance, rather than making distinct challenges under separate grounds of appeal, the Parties arrange different parts of different grounds to support a variety of arguments without indicating which portion of each argument develops which ground of appeal. Similarly, in other instances the Parties group a range of disparate arguments, each concerning a substantial issue, under a single ground of appeal. The Parties also frequently raise the same argument in numerous grounds of appeal. Finally, the Parties have often used "sub-grounds" of appeal to designate apparently new grounds of appeal, rendering meaningless the practice of pleading distinct errors as distinct grounds of appeal. In the interests of justice, the Appeals Chamber has endeavoured to fully consider these problematic submissions, subject to the summary dismissals outlined above. We note, however, that the poorly structured and disorganized grounds of appeal failed to assist the Appeals Chamber in its consideration of the issues and arguments.

46. Finally, the Appeals Chamber observes that the tone and language of some submissions do not meet the standard expected of those appearing before the Special Court. Although zealous advocacy is encouraged, Counsel should nevertheless maintain a respectful and decorous tone in their submissions.

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[95] Decision on "Kallon Defence Motion for Extension of Time to File Appeal and Extension of Page Limit", 4 May 2009, pp. 3, 4.

[96] This ruling applies to the arguments made in Annexes A, B, C1-C9, E, G, H, I, J to the Sesay Appeal, and Annexes III and V to the Gbao Appeal. The Appeals Chamber notes that Sesay refers to "Annex D" to his Appeal (*see e.g.* Sesay Appeal, paras 31, 48), but that no "Annex D" to his appeal was filed.

III. GROUNDS OF APPEAL RELATING TO THE INDICTMENT

A. Principles applicable to the pleading of an Indictment

1. Specificity

47. In order to guarantee a fair trial, the Prosecution is obliged to plead material facts with a sufficient degree of specificity.[97] The Appeals Chamber has on previous occasions set out the principles regarding the pleading of an indictment and hereafter reiterates these principles.

48. The question whether material facts are pleaded with the required degree of specificity depends on the context of the particular case.[98] In particular, the required degree of specificity varies according to the form of participation alleged against an accused.[99] Where direct participation is alleged, the Prosecution's obligation to provide particulars in an indictment must be adhered to fully.[100]

49. Where joint criminal enterprise ("JCE") is alleged, the Prosecution must plead the nature or purpose of the JCE, the time at which or the period over which the enterprise is said to have existed, the identity of those engaged in the enterprise so far as their identity is known, but at least by reference to their category or as a group, and the nature of the participation by the accused in that enterprise.[101]

50. Where superior responsibility is alleged, the liability of an accused depends on several material factors such as the relationship of the accused to his subordinates, notice of the crimes and that the accused failed to take necessary and reasonable measures to prevent the crimes or to punish his subordinates. These are material facts that must be pleaded with a sufficient degree of specificity.[102]

51. In considering the extent to which there is compliance with the specificity requirements in an indictment, the term specificity should be given its ordinary meaning as being specific in regard

[97] *Brima et al.* Appeal Judgment, para. 37.
[98] *Brima et al.* Appeal Judgment, para. 37.
[99] *Brima et al.* Appeal Judgment, para. 38.
[100] *Brima et al.* Appeal Judgment, para. 38.
[101] *Brima et al.* Appeal Judgment, fn. 146; *Taylor* Appeal Decision on JCE Pleading, para. 15.
[102] *Brima et al.* Appeal Judgment, para. 39.

to an object or subject matter. An object or subject matter that is particularly named or defined cannot be said to lack specificity.[103]

2. Exception to Specificity

52. The pleading principles that apply to indictments at international criminal tribunals differ from those in domestic jurisdictions because of the nature and scale of the crimes when compared with those in domestic jurisdictions. For this reason, 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.[104]

B. Challenges to an Indictment on appeal

53. Challenges to the form of an indictment should be made at a relatively early stage of proceedings and usually at the pre-trial stage pursuant to Rule 72(B)(ii) of the Rules which provides that it should be made by a preliminary motion.[105] An accused, therefore, is in the ordinary course of events expected to challenge the form of an indictment prior to the rendering of the judgment or at the very least, challenge the admissibility of evidence of material facts not pleaded in an indictment by interposing a specific objection at the time the evidence is introduced.[106]

54. Failure to challenge the form of an indictment at trial is not, however, an absolute bar to raising such a challenge on appeal.[107] An accused may well choose not to interpose an objection when certain evidence is admitted or object to the form of an indictment, not as a means of exploiting a technical flaw, but rather because the accused is under the reasonable belief that such evidence is being introduced for purposes other than those that relate to the nature and cause of the charges against him.[108]

55. Where an accused fails to make specific challenges to the form of an indictment during the course of the trial or challenge the admissibility of evidence of material facts not pleaded in the

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[103] *Brima et al.* Appeal Judgment, para. 40.
[104] *Brima et al.* Appeal Judgment, para. 41; *Kvočka* Form of the Indictment Decision, para. 17.
[105] *Brima et al.* Appeal Judgment, para. 42; Rule 72(B)(ii) expressly provides that preliminary motions by the accused include "[o]bjections based on defects in the form of the indictment."
[106] *Brima et al.* Appeal Judgment, para. 42; *Niyitegeka* Appeal Judgment, para. 199.
[107] *Brima et al.* Appeal Judgment, para. 43.
[108] *Brima et al.* Appeal Judgment, para. 43.

indictment, but instead raises it for the first time on appeal, it is for the Appeals Chamber to decide the appropriate response.[109] Where the Appeals Chamber holds that an indictment is defective, the options open to it are to find that the accused waived his right to challenge the form of an indictment, to reverse the conviction, or to find that no miscarriage of justice has resulted notwithstanding the defect.[110] In this regard, the Appeals Chamber may also find that any prejudice that may have been caused by a defective indictment was cured by timely, clear and consistent information provided to the accused by the Prosecution.[111]

56. The Appeals Chamber will ensure that a failure to pose a timely challenge to the form of the indictment did not render the trial unfair.[112] The primary concern at the appellate stage therefore, when faced with a challenge to the form of an indictment, is whether the accused was materially prejudiced.[113]

C. Sesay's Appeal

1. Exceptions to mandatory pleading requirements and notice of liability pursuant to Article 6(3) (Sesay Ground 6)

(a) Application of exceptions to mandatory pleading requirements

(i) Trial Chamber's findings

57. The Trial Chamber found that failure to plead the material facts underlying the offences in the Indictment would render it vague and unspecific, and in several instances defective.[114] It noted the narrow exception to pleading requirements[115] that in some cases, "the widespread nature and

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[109] *Brima et al.* Appeal Judgment, para. 44.
[110] *Brima et al.* Appeal Judgment, para. 44; *Niyitegeka* Appeal Judgment, paras 195-200.
[111] *Brima et al.* Appeal Judgment, para. 44; *Kupreškić et al.* Appeal Judgment, para. 114 ("The Appeals Chamber, however, does not exclude the possibility that, in some instances, a defective indictment can be cured if the Prosecution provides the accused with timely, clear and consistent information detailing the factual basis underpinning the charges against him or her. Nevertheless, in light of the factual and legal complexities normally associated with the crimes within the jurisdiction of this Tribunal, there can only be a limited number of cases that fall within that category."). *See* also *Ntakirutimana* Appeal Judgment, para. 27.
[112] *Brima et al.* Appeal Judgment, para. 45.
[113] *Brima et al.* Appeal Judgment, para. 45; *Kupreskic et al.* Appeal Judgment, para. 115.
[114] Trial Judgment, para. 329.
[115] *Brima et al.* Appeal Judgment, para. 41, *citing Kupreškić et al.* Appeal Judgment, para. 89.

sheer scale of the alleged crimes make it unnecessary and impracticable to require a high degree of specificity" (*i.e.* the "sheer scale" exception).[116] The Trial Chamber considered that:

> [T]he particular context in which the RUF trial unfolded is a pertinent factor to consider when determining the level of specificity with which it was practicable to expect the Prosecution to plead the allegations in the Indictment. The fact that the investigations and trials were intended to proceed as expeditiously as possible in an immediate post-conflict environment is particularly relevant.[117]
>
> Nevertheless, in an indictment, the Prosecution must 'indicate its best understanding of the case against the accused.' The Prosecution may not rely on weakness of its own investigation to justify its failure to plead material facts in an Indictment. Nor may the Prosecution omit aspects of its main allegations in an Indictment 'with the aim of moulding the case against the accused in the course of the trial depending on how the evidence unfolds.' An Indictment must provide an accused with sufficient information to understand the nature of the charges against him and to prepare his defence. Therefore, a Chamber must balance practical considerations relating to the nature of the evidence against the need to ensure that an Indictment is sufficiently specific to allow an accused to fully present his defence.[118]

(ii) Submissions of the Parties

58. Sesay argues that the Trial Chamber erred in law in its application of the "sheer scale" exception to mandatory pleading requirements.[119] He argues that even when the exception applies, the Prosecution is required to plead all the material facts at its disposal, and in this case the omitted facts were available to the Prosecution and should have been in the Indictment.[120] Sesay argues that the "sheer scale" exception is designed to take account of "practical considerations relating to the *nature of the evidence* against the need to ensure that an Indictment is sufficiently specific to allow an accused to fully present his defence" and is limited to circumstances outside the control of the Prosecution.[121] Sesay further argues that the Trial Chamber erred in considering as a relevant factor that the trials were "intended to proceed as expeditiously as possible in an immediate post-conflict environment" because his right to know the case against him cannot be sacrificed because of the urgency of prosecution.[122]

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[116] Trial Judgment, para. 329, *quoting Brima et al.* Appeal Judgment, para. 41.
[117] Trial Judgment, para. 330.
[118] Trial Judgment, para. 331.
[119] Sesay Appeal, para. 31.
[120] Sesay Appeal, para. 31.
[121] Sesay Appeal, para. 32, *quoting* Trial Judgment, para. 331 (emphasis added in the Sesay Appeal).
[122] Sesay Appeal, para. 32, *quoting* Trial Judgment, para. 330.

59. The Prosecution submits that Sesay does not appear to address whether the Trial Chamber was "legitimately entitled to apply [the "sheer scale"] exception."[123] The Prosecution notes that in fact "the Trial Chamber *expressly* relied upon" this exception in the pre-trial *Sesay* Decision on Form of Indictment,[124] and that in light of the fact that the crimes in this case are manifest from a reading of the Trial Judgment, it was an "appropriate exercise of the Trial Chamber's discretion to apply the exception at the pre-trial stage."[125] It further submits that there is no legal basis for Sesay's argument that the exception does not apply "in circumstances where the Prosecution *could* have given more specificity than it did."[126] According to the Prosecution, the factor identified by the Trial Chamber and to which Sesay objects is "merely ... one of the practical considerations to be weighed in [the] balancing exercise," and therefore the Trial Chamber did not err.[127] Sesay does not submit additional arguments in reply.

(iii) Discussion

60. Sesay argues that the Trial Chamber erred in considering that the trials were "intended to proceed as expeditiously as possible in an immediate post-conflict environment" as a "particularly relevant" factor when determining the Prosecution's pleading requirements.[128] In fact, the Trial Chamber held that the failure to plead the material facts underlying offences would render the Indictment vague and unspecific, and in many cases defective.[129] It recognised that the widespread nature or sheer scale of the alleged crimes may make it unnecessary and impracticable to require a high degree of specificity. It also observed that the intent that trials proceed as expeditiously as possible could affect the Prosecution's ability to plead with specificity; however, it expressly stated that "[*n*]*evertheless*, in an indictment, the Prosecution must 'indicate its best understanding of the case against the accused'"[130] and may not "rely on weaknesses of its own investigation to justify its failure to plead material facts in an Indictment."[131] In the Trial Chamber's view, it had to "balance practical considerations relating to the nature of the evidence against the need to ensure that an

[123] Prosecution Response, para. 2.26.
[124] Prosecution Response, para. 2.26, *citing Sesay* Decision on Form of Indictment, paras 7(xi), 8(iii), 9, 20, 22-24.
[125] Prosecution Response, para. 2.26.
[126] Prosecution Response, para. 2.27.
[127] Prosecution Response, para. 2.30.
[128] *See* Trial Judgment, para. 330.
[129] Trial Judgment, para. 329.
[130] Trial Judgment, para. 331, *quoting Kvočka et al.* Appeal Judgment, para. 30.
[131] Trial Judgment, para. 331.

Indictment is sufficiently specific to allow an accused to fully present his defence."[132] Sesay has not shown an error in the Trial Chamber's application of the law in this regard.

(b) Pleading of Sesay's liability for command responsibility

(i) Submissions of the Parties

61. Sesay argues that the Trial Chamber erred in finding that the pleading of command responsibility was sufficient. He contends that paragraph 39 of the Indictment did not plead his "precise relationship to his alleged subordinates, how he was alleged to know of the crimes, ... nor, with any precision, his alleged *mens rea*."[133]

62. Sesay makes related arguments in his Grounds 13, 36 and 44. He argues that the Trial Chamber erred in finding that he had notice that he was alleged to have failed to prevent or punish the perpetrators of enslavement of civilians at the military base at Yengema.[134] In relation to this crime, he contends that he was unaware throughout the trial who his alleged subordinates were and what measures he was alleged to have failed to take to prevent or punish them.[135] Sesay also argues that the failure of notice caused the Trial Chamber to err in law in inconsistently finding "that recruits that had been captured in Kono District were trained at [Yengema] base" and "that recruits from Kono and Bunumbu base were trained at Yengema."[136] Sesay further argues in relation to the attacks against UNAMSIL peacekeepers, that the Trial Chamber failed to require the Prosecution to plead "the relationship of the accused to his subordinates, his knowledge of the crimes and the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates with a sufficient degree of specificity."[137]

63. The Prosecution disputes Sesay's submission that it did not plead with sufficient specificity Sesay's relationship to his subordinates and his knowledge or reason to know of the crimes.[138] The Prosecution notes that the Trial Chamber found it sufficient that the Prosecution described the nature of the relationship between Sesay and his subordinates by reference to Sesay's command

[132] Trial Judgment, para. 331.
[133] Sesay Appeal, para. 34.
[134] Sesay Appeal, para. 281.
[135] Sesay Appeal, para. 281.
[136] Sesay Appeal, para. 281, *citing* Trial Judgment, paras 1262, 1646.
[137] Sesay Appeal, para. 338, *quoting Brima et al.* Appeal Judgment, para. 39 (interal quotation omitted).
[138] Prosecution Response, para. 2.48.

position.[139] The Prosecution further submits that the case law relied upon by Sesay "merely outlines the elements that must be proved beyond a reasonable doubt in order to establish superior responsibility,"[140] and that it is "illogical" to suggest that the Prosecution should plead precisely a fact that never occurred, that is, the measures that Sesay never took to prevent or punish subordinates.[141] Sesay offers no additional arguments in reply.

(ii) Discussion

64. The Trial Chamber, relying on the Appeals Chamber's statement of the law in the *Brima et al.* Appeal Judgment, considered the following material facts concerning liability pursuant to Article 6(3) of the Statute were required to be pleaded in the Indictment: (i) the relationship of the accused to his subordinates, (ii) his knowledge of the crimes[142] and (iii) the necessary and reasonable measures that he failed to take to prevent the crimes or to punish his subordinates.[143]

65. In relation to pleading *mens rea* for superior responsibility, the Trial Chamber found that because the "*mens rea* of the Accused for the liability as a superior is pleaded explicitly in paragraph 39 of the Indictment and incorporated into each Count by paragraph 40, ... [t]he Accused's knowledge of the crimes and his failure to prevent or punish those crimes, therefore, is adequately pleaded in the Indictment."[144]

66. Sesay challenges the pleading of (i) his relationship with his alleged subordinates, (ii) his *mens rea* with respect to the alleged crimes, and (iii) the necessary and reasonable measures that he failed to take. As a preliminary matter, the Appeals Chamber notes that Sesay was convicted of the following crimes pursuant to Article 6(3) of the Statute:

(i) Enslavement (Count 13) in relation to events in Yengema in Kono District;

(ii) Intentionally directing attacks against the UNAMSIL peacekeeping operations (Count 15) in relation to events in Bombali, Port Loko, Kono and Tonkolili Districts;

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[139] Prosecution Response, para. 2.49, *citing* Trial Judgment, para. 408.
[140] Prosecution Response, para. 2.49.
[141] Prosecution Response, para. 2.50.
[142] Although the Appeals Chamber in *Brima et al.* expressed the requisite *mens rea* as knowledge, the requisite *mens rea* is "knew or had reason to know." *See e.g.*, *Blaškić* Appeal Judgment, para. 62; *Bagilishema* Appeal Judgment, para. 28; *Čelebići* Appeal Judgment, paras 216-241.
[143] Trial Judgment, para. 407, *citing Brima et al.* Appeal Judgment, para. 39.
[144] Trial Judgment, para. 409.

(iii) Violence to life, health and physical or mental well-being of persons, in particular murder, (Count 17) in relation to events involving UNAMSIL peacekeepers in Bombali and Tonkolili Districts.[145]

In the circumstances, the Appeals Chamber will only consider Sesay's submissions in relation to the pleading of crimes for which Sesay was convicted.

67. In relation to enslavement at Yengema in Kono District, the Trial Chamber found that "Sesay had actual knowledge of the enslavement of civilians at Yengema due to his visits to the base and the fact that he received reports pertaining to its operation. The Chamber therefore [found] that Sesay knew that an unknown number of civilians were enslaved there between December 1998 and January 2000."[146]

68. In relation to the attacks against peacekeepers, the Trial Chamber found that "Sesay knew of the attacks on 1 and 2 May 2000 in Makeni and Magburaka as he was specifically sent by Sankoh to investigate them."[147] It also found that the evidence established that he "knew of the abductions of peacekeepers on 3 May 2000, due to his personal interaction with the captive peacekeepers at Makeni and subsequently at Yengema."[148] In relation to the attack on the ZAMBATT peacekeepers at Lunsar on 3 May 2000 and the attacks on 7 and 9 May 2000, the Trial Chamber found that "given the effective functioning of the chain of command and the regular reporting of Commanders to Sesay on matters pertaining to UNAMSIL personnel, the only reasonable inference to be drawn is that Sesay was informed of these events."[149] The Trial Chamber therefore concluded that "Sesay had actual knowledge of the attacks on UNAMSIL personnel."[150]

69. The Trial Chamber found that Sesay's *mens rea* as a superior with respect to these crimes was "pleaded explicitly in paragraph 39 of the Indictment and incorporated into each Count by paragraph 40 [and therefore Sesay's] knowledge of the crimes and his failure to prevent or punish those crimes ... is adequately pleaded in the Indictment."[151] Paragraph 39 of the Indictment states:

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[145] Trial Judgment, pp. 677-680.
[146] Trial Judgment, para. 2131; *see also* Trial Judgment, para. 2128 ("Sesay visited Yengema on several occasions and the training Commander there reported to him.").
[147] Trial Judgment, para. 2280.
[148] Trial Judgment, para. 2280.
[149] Trial Judgment, para. 2280.
[150] Trial Judgment, para. 2280.
[151] Trial Judgment, para. 309.

> In addition, or alternatively, pursuant to Article 6.3. of the Statute, ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, while holding positions of superior responsibility and exercising effective control over their subordinates, are individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute. Each Accused is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.[152]

70. The case law of the ICTY Appeals Chamber suggests that there are at least two ways in which the *mens rea* for superior responsibility can be adequately pleaded in an indictment.[153] In the *Blaškić* Appeal Judgment, the ICTY Appeals Chamber summarized these possible approaches as follows:

> With respect to the mens rea, there are two ways in which the relevant state of mind may be pleaded: (i) either the specific state of mind itself should be pleaded as a material fact, in which case, the facts by which that material fact is to be established are ordinarily matters of evidence, and need not be pleaded; or (ii) the evidentiary facts from which the state of mind is to be inferred, should be pleaded.[154]

71. The Appeals Chamber notes that the form of pleading in the Indictment is consistent with the first formulation, and endorses the view that this is sufficient in the circumstances of some cases. Sesay has not offered any argument that specific acts or conduct relied upon by the Trial Chamber to infer his *mens rea* constituted material facts that should have been pleaded in the Indictment. The facts relied upon by the Trial Chamber are related to the functions of the RUF command, the nature of which was sufficiently pleaded in the Indictment.[155] The Appeals Chamber therefore dismisses this part of Sesay's submissions.

72. In relation to enslavement of civilians at the military base at Yengema, Sesay argues that he lacked notice of the identity of his alleged subordinates and what measures he was alleged to have failed to take to prevent or punish them.[156] The Trial Chamber found that (i) "RUF rebels enslaved an unknown number of civilians at the military training base at Yengema between December 1998 and January 2000";[157] (ii) Sesay was a RUF superior Commander during this period, and that he exercised effective control over RUF subordinates at Yengema;[158] (iii) the training Commander at

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[152] Indictment, para. 39.
[153] *Blaškić* Appeal Judgment, para. 219, *citing Brdanin & Talić* 26 June 2001 Decision, para. 33; *Mrkšić* Decision on Form of the Indictment, paras 11-12.
[154] *Blaškić* Appeal Judgment, para. 219.
[155] *See* Indictment, paras 20-23, 34, 39, 40.
[156] Sesay Appeal, para. 281.
[157] Trial Judgment, p. 611.
[158] Trial Judgment, paras 2126-2128.

Yengema reported to Sesay;[159] (iv) Sesay "had actual knowledge of the enslavement of civilians at Yengema due to his visits to the base and the fact that he received reports pertaining to its operation;"[160] (v) Sesay actively monitored the prolongation of the commission of enslavement; and (vi) there was no evidence that he attempted to prevent or punish it.[161]

73. Paragraphs 20-23 of the Indictment specify the command positions held by Sesay at the relevant times as follows:

> 20. At all times relevant to this Indictment, **ISSA HASSAN SESAY** was a senior officer and commander in the RUF, Junta and AFRC/RUF forces.
>
> 21. Between early 1993 and early 1997, **ISSA HASSAN SESAY** occupied the position of RUF Area Commander. Between about April 1997 and December 1999, **ISSA HASSAN SESAY** held the position of the Battle Group Commander of the RUF, subordinate only to the RUF Battle Field Commander, SAM BOCKARIE aka MOSQUITO aka MASKITA, the leader of the RUF, FODAY SAYBANA SANKOH and the leader of the AFRC, JOHNNY PAUL KOROMA.
>
> 22. During the Junta regime, **ISSA HASSAN SESAY** was a member of the Junta governing body. From early 2000 to about August 2000, ISSA HASSAN SESAY served as the Battle Field Commander of the RUF, subordinate only to the leader of the RUF, FODAY SAYBANA SANKOH, and the leader of the AFRC, JOHNNY PAUL KOROMA.
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> 23. FODAY SAYBANA SANKOH has been incarcerated in the Republic of Sierra Leone from about May 2000 until about 29 July 2003. From about May 2000 until about 10 March 2003, by order of FODAY SAYBANA SANKOH, **ISSA HASSAN SESAY** directed all RUF activities in the Republic of Sierra Leone.

74. The above paragraphs, in addition to paragraphs 34, 39 and 44 of the Indictment indicate the subordinates subject to Sesay's command were fighters of the RUF and AFRC/RUF forces. Paragraph 34 provides that Sesay "exercised authority, command and control over all subordinate members of the RUF, Junta and AFRC/RUF forces." Paragraph 39 alleges that "while holding positions of superior responsibility and exercising effective control over [his] subordinates," Sesay is "individually criminally responsible for the crimes referred to in Articles 2, 3 and 4 of the Statute." It further alleges that he "is responsible for the criminal acts of his subordinates in that he knew or had reason to know that the subordinate was about to commit such acts or had done so and each Accused failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof." Paragraph 44 provides that "[m]embers of the AFRC/RUF subordinate to

[159] Trial Judgment, para. 2128.
[160] Trial Judgment, para. 2131.
[161] Trial Judgment, para. 2132.

and/or acting in concert with **ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO** committed the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14."

75. In relation to the specific crimes at the military training camp at Yengema, paragraph 40 incorporates the previous paragraphs. Paragraph 71 particularises the charge of enslavement in relation to Kono District, and states:

> 71. Between about 14 February 1998 to January 2000, AFRC/RUF forces abducted hundreds of civilian men, women and children, and took them to various locations outside the District, or to locations within the District such as AFRC/RUF camps, Tombodu, Koidu, Wondedu, Tomendeh. At these locations the civilians were used as forced labour, including domestic labour and as diamond miners in the Tombodu area;
>
> By their acts or omissions in relation to these events, ISSA HASSAN SESAY, MORRIS KALLON and AUGUSTINE GBAO, pursuant to Article 6.1. and, or alternatively, Article 6.3. of the Statute, are individually criminally responsible for the crimes alleged below:
>
> Count 13: Enslavement, a CRIME AGAINST HUMANITY, punishable under Article 2.c. of the Statute.

76. These paragraphs demonstrate that Sesay's command position and his relationship with his subordinates were pleaded at all the relevant times. They further show that he was alleged not to have taken the necessary and reasonable measures to prevent or to punish the crimes alleged. The manner in which these material facts were to be proven was a matter of evidence and thus not for pleading. The Appeals Chamber, therefore, dismisses Sesay's sub-ground of appeal concerning the pleading of his relationship to his subordinates.

77. Sesay's contention that the failure of notice caused the Trial Chamber to commit an "error of law" such that it found, allegedly inconsistently, "that recruits [who] had been captured in Kono District were trained at [Yengema] base" and "that recruits from Kono and Bunumbu base were trained at Yengema"[162] appears to be an alleged error of fact rather than of law. Even so, his argument is misplaced. The Trial Chamber found that the RUF training base was moved in December 1998 from Bunumbu, Kailahun District to Yengema, Kono District and that civilians from both Bunumbu in Kailahun and from Kono were trained at Yengema.[163]

[162] Sesay Appeal, para. 281, *citing* Trial Judgment, paras 1262, 1646.
[163] *See* Trial Judgment, paras 1262, 1646.

78. In relation to the attacks against UNAMSIL peacekeepers, Sesay did not state which were the material facts that should have been pleaded in the Indictment. In the absence of such clarification, the Appeals Chamber is unable to address Sesay's submission on the merits.

(c) Conclusion

79. For the foregoing reasons, the Appeals Chamber dismisses Sesay's Ground 6 in its entirety.

2. Pleading of acts of burning as acts of terrorism in Count 1 and collective punishments in Count 2 (Sesay Grounds 7 and 8)

(a) Submissions of the Parties

80. In Grounds 7 and 8, Sesay challenges the pleading of acts of burning as acts of terrorism and collective punishments. He raises related arguments with respect to each offence. He argues that the Trial Chamber erred in law and in fact in concluding that the Indictment provided adequate notice that acts of terrorism and collective punishments, as pleaded in Counts 1 and 2 respectively, included "acts or threats of violence independent of whether such acts or threats of violence satisfy the elements of any other criminal offence."[164]

81. The Prosecution argues that paragraph 44 of the Indictment alleges that the Accused are individually responsible for the crimes charged under Counts 1 and 2 "[b]y their acts and omissions in relation to *these events*," where the phrase "these events" refers to "the crimes set forth ... in paragraphs 45 through 82 and charged in Counts 3 through 14."[165] According to the Prosecution: "[e]ven 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 *charged* in relation to Counts 1 and 2."[166]

82. In reply, Sesay argues that "[i]t might well be that the interpretation advanced [by the Prosecution] ... is one of the possible interpretations. However, the common sense interpretation of this charge was clear: conduct that was the subject of Counts 3-14 would thereafter be assessed in light of the specific *mens rea* requirements that distinguish Counts 1-2 to ascertain whether the Accused could, additionally, be held responsible for those crimes."[167]

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[164] Sesay Appeal, para. 39, *quoting* Trial Judgment, para. 115.
[165] Prosecution Response, para. 2.77 (emphasis added), *quoting* Indictment, para. 44.
[166] Prosecution Response, para. 2.77.
[167] Sesay Reply, para. 22.

(b) Discussion

83. The Trial Chamber stated as a matter of law that conduct that was adequately pleaded in the Indictment would be considered under the offences of acts of terrorism and collective punishments, even if such conduct does not satisfy the elements of any other crimes charged in the Indictment.[168] In these grounds, Sesay does not contest the holding that, as a matter of law, acts not amounting to one of the offences listed in Counts 3-14 could be the basis of a conviction for acts of terrorism or collective punishments; rather, he contests the holding that the Indictment provided him with adequate notice that the acts of terrorism and collective punishments, as pleaded in Count 1 and Count 2, included such acts, and in particular acts of burning.

84. The Trial Chamber's finding that Counts 1 and 2 included acts of burning was based in part on the Appeals Chamber's decision in regard to the legal character of acts of terrorism and on the pleading of that crime in the *Fofana and Kondewa* Indictment.[169] The Appeals Chamber held that: (i) acts of terrorism need not involve acts that are otherwise criminal under international criminal law, (ii) whether the Trial Chamber should have considered acts of burning as acts of terrorism turned on the pleading in the Indictment, (iii) the material facts which supported Count 6 (acts of terrorism) of the indictment in that case were the material facts pleaded in relation to Counts 1 to 5 of the indictment, including "threats to kill, destroy and loot," and (iv) the Trial Chamber should have considered all conduct that was adequately pleaded in the Indictment, including acts of burning, irrespective of whether it satisfied the elements of any other crime.[170]

85. The material facts pleaded in relation to Counts 1 to 5 of the *Fofana and Kondewa* Indictment include "threats to kill, destroy and loot," and as a consequence of that pleading the Appeals Chamber found that the Trial Chamber erred in only considering crimes charged and found to have been committed as acts of terrorism.[171] It found that this error resulted from the *Fofana and Kondewa* Trial Chamber's exclusion of the phrase "threats to kill, destroy and loot" from its interpretation of the pleading of the count charging acts of terrorism. Since the holding in *Fofana and Kondewa* rested in part on the notice provided by the phrase "threats to kill, destroy and loot," and the Indictment in this case omits that phrase, it cannot be said that the Indictment has provided notice to the Accused in the same manner.

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[168] Trial Judgment, para. 115 (acts of terrorism); Trial Judgment, para. 128 (collective punishments).
[169] Trial Judgment, para. 450-455.
[170] *Fofana and Kondewa* Appeal Judgment, para. 359-365.
[171] *Fofana and Kondewa* Appeal Judgment, para. 364.

86. It is undisputed that the Indictment in this case charged acts of burning as a crime under Count 14.[172] Whether the Indictment also provided notice that acts of burning were charged as acts of terrorism and collective punishments turns on a reading of the Indictment as a whole, and in particular the provisions relevant to the pleading of the material fact of acts of burning.[173]

87. Paragraph 44 of the Indictment states that the Accused "committed the crimes set forth below in paragraphs 45 through 82 and charged in Counts 3 through 14, as part of a campaign to terrorize the civilian population." In the text after paragraph 44, the Indictment refers to the conduct charged as "these events" and this phrasing is used in relation to each of the counts in the Indictment which each allege that the accused incurred individual criminal responsibility for their acts or omissions in relation to "these events ... for the crimes alleged below."[174] Use of the expression "these events" in this manner indicates that it does not refer to the "crimes" themselves, since this would result in an illogical construction. Rather, the phrase "these events" as used in paragraph 45 and elsewhere in the Indictment refers to the conduct alleged under the relevant Count.

88. The Indictment provides further notice to the accused that destruction and burning are charged as acts of terrorism and collective punishments. In paragraph 42, under the heading "Charges," the Indictment alleges that:

> attacks were carried out primarily to terrorise the civilian population, but also were used to punish the population for [their conduct.] ... The attacks included ... looting and destruction of civilian property. Many civilians saw these crimes committed; others returned to their homes or places of refuge to find the results of these crimes – dead bodies, mutilated victims and looted and burnt property.

89. For these reasons, the Appeals Chamber is satisfied that the Indictment provided adequate notice to Sesay that acts of burning were charged as acts of terrorism and collective punishments.

(c) Conclusion

90. The Appeals Chamber dismisses Sesay's Grounds 7 and 8 in their entirety.

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[172] *See* Indictment, para. 37 ("The crimes alleged in this Indictment, includ[e] ... looting and burning of civilian structures."); Indictment, p. 20 ("Count 14: Looting and Burning"); Indictment, para. 77 ("At all times relevant to this Indictment, AFRC/RUF engaged in widespread unlawful taking and destruction of civilian property. This looting and burning included the following....")
[173] *Brima et al.* Appeal Judgment, para. 81.
[174] Indictment, pp. 12, 14, 16, 17, 19 and 21.

3. Notice of acts of forced labour which formed the basis for the convictions of enslavement (Sesay Ground 11)

(a) Submissions of the Parties

91. Sesay argues that the Trial Chamber erred in law and in fact in concluding that he was given adequate notice that he was charged for acts of enslavement other than "domestic labour and use as diamond miners" under Count 13 of the Indictment.[175] For relief, Sesay requests the Appeals Chamber to dismiss the charges under Count 13 concerning acts of forced military training, forced farming and forced carrying of loads.[176]

92. The Prosecution contends that it did not give an unequivocal notice that the only alleged acts of enslavement were domestic labour and use as diamond miners, and that the Indictment need not plead "all of the different tasks for which forced labour was used."[177]

(b) Discussion

93. Given the vagueness of Sesay's complaint, the Appeals Chamber will only answer the general question of whether Sesay lacked notice of the criminal acts that form the basis of his conviction for enslavement when it was only pleaded that he used forced labour as enslavement. The question on appeal is whether the particular acts of forced labour amount to "criminal acts which form the basis for a conviction" such that they are material facts and should have been pleaded in the Indictment, or if they are part of the evidence by which the Prosecution intended to prove the material fact of forced labour as enslavement. The Appeals Chamber notes that the offence charged under Count 13 is enslavement, not forced labour. In the present case, forced labour is the criminal act which the Prosecution alleges constituted enslavement. This pleading provided the particularisation that the forms of enslavement were limited to acts of forced labour amounting to the exercise of a power attaching to the right of ownership over a person. The Appeals Chamber holds that this pleading of the underlying acts of enslavement provided Sesay sufficient notice of the charge.

94. Our holding is supported by the fact that enslavement is not an umbrella crime, such as the broadly defined crimes of persecution or other inhumane acts, for which the Prosecution is required

[175] Sesay Appeal, para. 49.
[176] Sesay Appeal, para. 49.

to specify the conduct it will rely upon to prove the offence.[178] Forced labour is also not charged here as a violation of the law of armed conflict, in relation to which the ICTY Appeals Chamber has held that "the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact."[179] In this case, as noted above, the charge is for enslavement as a crime against humanity, and the acts of forced labour must indicate the exercise of a power attaching to the right of ownership over a person. The Appeals Chamber therefore considers that the pleading of acts of forced labour as enslavement provided notice of the underlying criminal acts with sufficient specificity to enable Sesay to prepare his defence.

(c) Conclusion

95. The Appeals Chamber dismisses Sesay's Ground 11 in its entirety.

4. Notice of the nature of the Common Purpose of the JCE (Sesay Ground 12)

(a) Submissions of the Parties

96. Sesay submits that the Trial Chamber erred in law and in fact in finding that the pleading and subsequent Prosecution filings regarding JCE provided him adequate notice and did not prejudice his defence in violation of his right to a fair trial.[180] However, he alleges that the Trial Chamber erred in finding that he was not prejudiced by "the fluctuating notice provided" concerning the JCE.[181] He contends that by disregarding the Prosecution Notice Concerning JCE and reverting to the JCE pleaded in the Indictment, the Trial Chamber significantly broadened the scope of the JCE.[182] According to Sesay, this changing notice with respect to crimes that were alleged to be within the common purpose prejudiced his ability to rebut the allegation that there was such a purpose.[183]

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[177] Prosecution Response, para. 2.90.
[178] *Kupreškić et al.* Trial Judgment, para. 626 (persecutions); *Fofana and Kondewa* Appeal Judgment, para. 442 (other inhumane act, cruel treatment); *Brima et al.* Appeal Judgment, para. 106 (any other form of sexual violence).
[179] *Naletilić and Martinović* Appeal Judgment, paras 30-32 (*Naletilić and Martinović* is distinguished from the present case because (i) the case there dealt with findings that Martinović was "personally responsible" for ordering the crime, and therefore the Prosecution "was required to set forth the details of the incident with precision" and (ii) the crime in question was forced labour as a war crime, therefore "the military character or purpose of the alleged incidents of forced labour also needed to be pleaded as a material fact.")
[180] Sesay Appeal, para. 50.
[181] Sesay Appeal, para. 51.
[182] Sesay Appeal, para. 53.
[183] Sesay Appeal, para. 54.

97. Further, Sesay submits that because the Trial Chamber determined that the Prosecution failed to give sufficient notice of allegations concerning a JCE 2,[184] and the Prosecution had submitted that forced mining and forced farming were "examples of the second form of JCE,"[185] Sesay considered that "enslavement was no longer part of the original JCE," as alleged.[186] According to Sesay, the Trial Chamber nonetheless found his principal participation in a JCE during the Junta period was planning the enslavement of civilians in Tongo.[187] For relief, Sesay requests the Appeals Chamber to reverse the Trial Chamber's finding that the pleading of JCE was proper, and to dismiss the charges of Sesay's liability pursuant to participation in a JCE.[188]

98. The Prosecution responds that Sesay was at all times charged with Counts 1 through 14 pursuant to JCE 1.[189] The Prosecution contends it consistently alleged that the crimes charged in Counts 1-14 were within the JCE and that, in the alternative, the crimes charged in Counts 1-14 were a reasonably foreseeable consequence of the JCE. The Prosecution argues that the adequacy of pleading in the Indictment was not affected by the Prosecution Notice Concerning JCE because the Prosecution 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."[190] Sesay offers no new arguments in reply.

(b) Discussion

99. The Special Court's jurisprudence and that of the other international criminal tribunals establishes that the following four elements must be present in an indictment charging an accused with JCE liability: (i) the nature or purpose of the JCE; (ii) the time at which or the period over which the enterprise is said to have existed; (iii) the identity of those engaged in the enterprise, so far as their identity is known, but at least by reference to their category or as a group; and (iv) the nature of the participation by the accused in that enterprise.[191] The Trial Chamber's statement of the

[184] Sesay Appeal, para. 55, *citing* Trial Judgment, para. 383.
[185] Sesay Appeal, para. 55, *citing* Sesay Final Trial Brief, para. 202.
[186] Sesay Appeal, para. 55.
[187] Sesay Appeal, para. 55, *citing* Trial Judgment, para. 1997.
[188] Sesay Appeal, para. 50.
[189] Prosecution Response, para. 2.6.
[190] Prosecution Response, para. 2.6.
[191] *Brima et al.* Appeal Judgment, fn. 146; *Taylor* Appeal Decision on JCE Pleading, para. 15; *Simić* Appeal Judgment, para. 22; *Ntagerura et al.* Appeal Judgment, para. 24.

law with respect to pleading requirements is consistent with the Appeals Chamber's jurisprudence and the case law of other international tribunals, and is not contested on appeal.[192]

100. In relation to the pleading of the common purpose, the Trial Chamber found that the Indictment, the Prosecution Supplemental Pre-Trial Brief, the Opening Statement, the Rule 98 Skeleton Response and the Prosecution Final Trial Brief "all articulate the purpose of the joint criminal enterprise as a plan to take control of the Republic of Sierra Leone, and particularly the diamond mining activities, by any means, including unlawful means."[193]

101. Following the *Brima et al.* Trial Judgment, the Prosecution filed a Notice Concerning JCE, which stated in part:

> The Accused and others agreed upon and participated in a joint criminal enterprise to carry out a campaign of terror and collective punishments, as charged in the Corrected Amended Consolidated Indictment, in order to pillage the resources in Sierra Leone, particularly diamonds, and to control forcibly the population and territory of Sierra Leone.
>
> The crimes charged in Counts 1 through 14 of the Corrected Amended Consolidated Indictment were within the joint criminal enterprise. The Accused and the other participants intended the commission of the charged crimes.
>
> Alternatively, from 30 November 1996 through about 18 January 2002, the following crimes were within the joint criminal enterprise: collective punishments, acts of terrorism, the conscription or enlistment or use in active hostilities of children under the age of 15 years, enslavement and pillage. The crimes charged in Counts 3 through 11 of this indictment were the foreseeable consequences of the crimes agreed upon in the joint criminal enterprise.[194]

102. According to the Trial Chamber, the Prosecution Notice Concerning JCE "specified a two-fold purpose of the common plan: (1) to conduct a campaign of terror and collective punishments in order to pillage the resources of Sierra Leone, particularly diamonds, and (2) to control forcibly the population."[195] In the Trial Judgment, the Trial Chamber found that the "formulation of the common purpose in the [Prosecution Notice Concerning JCE] differs from that originally pleaded in

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[192] The Trial Chamber stated that "in order to give adequate notice to an accused of his alleged participation in a joint criminal enterprise, an indictment should include the following information: (i) The identity of those engaged in the joint criminal enterprise, to the extent known and at least by reference to the group to which they belong; (ii) The time period during which the joint criminal enterprise is alleged to have existed; (iii) The nature or purpose of the joint criminal enterprise; (iv) The category of joint criminal enterprise in which the accused is alleged to have participated; and (v) The role that the Accused is alleged to have played within the joint criminal enterprise." Trial Judgment, para. 352 (internal citations omitted).

[193] Trial Judgment, para. 372 (internal citations omitted).

[194] Prosecution Notice Concerning JCE, paras 6-8.

[195] Trial Judgment, para. 373, *citing* Prosecution Notice Concerning JCE, para. 6.

the Indictment."[196] At trial, only Gbao filed a motion seeking leave to challenge the form of the Indictment in light of the *Brima et al.* Trial Judgment and the Prosecution Notice Concerning JCE.[197] In its decision on Gbao's motion, the Trial Chamber considered "that in all the circumstances it would be more appropriate for the Trial Chamber to address any objections to the form of the Indictment at the end of the case rather than during the course of the trial."[198]

103. In the Trial Judgment, the Trial Chamber held that the Prosecution Notice Concerning JCE "made the conduct of a campaign of terror and collective punishment one of the explicit purposes of the joint criminal enterprise, rather than the means by which the objective of gaining control of Sierra Leone was to be achieved."[199] The Trial Chamber considered this amounted to a unilateral attempt to alter a material fact in the Indictment contrary to the procedure allowed under the Rules, and stated that it would not consider the filing for the purposes of adjudicating the common purpose of the JCE.[200] The Trial Chamber concluded:

> The Chamber, however, finds that the Indictment adequately put the Accused on notice that the purpose of the alleged joint criminal enterprise was to take control of Sierra Leone through criminal means, including through a campaign of terror and collective punishments. Throughout 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 joint criminal enterprise. They were also notified 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. The Chamber does not consider that the ability of the Accused to present their defence was materially prejudiced by the alteration to the purpose of the common plan as alleged in the Prosecution Notice Concerning Joint Criminal Enterprise. The Chamber therefore dismisses this objection in its entirety.[201]

104. On appeal, Sesay submits that the shifting notice provided by the Prosecution Notice Concerning JCE prejudiced his defence because whereas originally "Counts 3-14 were within the criminal purpose or were a foreseeable consequence of it," the Prosecution Notice Concerning JCE "changed the agreement alleged and limited the crimes to those contained within counts 1, 2, 12, 13 and 14. [Thus, the] crimes charged in Counts 3 through 11 were newly alleged to be the foreseeable

[196] Trial Judgment, para. 374.
[197] Gbao Motion on Form of Indictment.
[198] Decision Gbao Motion on Form of Indictment, p. 2.
[199] Trial Judgment, para. 374.
[200] Trial Judgment, para. 374.
[201] Trial Judgment, para. 375

consequences" of the agreed crimes of the JCE, and "it was no longer being alleged that [Sesay] intended the crimes in Counts 3-11."[202]

105. In other words, Sesay's position is that, although the Trial Chamber in its judgment chose to rely on the Indictment instead of on the Prosecution Notice Concerning JCE, the fact that it did not inform Sesay of this choice until it rendered the Trial Judgment prejudiced Sesay because, in the period between the Prosecution Notice Concerning JCE and the Trial Judgment, he relied on the pleading of JCE in the Prosecution Notice Concerning JCE. The questions before the Appeals Chamber are, therefore, whether Sesay succeeds in showing a discrepancy between the Prosecution Notice Concerning JCE and the Indictment, and whether this discrepancy in notice, if found, prejudiced him to the extent that his trial was rendered unfair.

106. Contrary to Sesay's submissions, the Prosecution Notice Concerning JCE expressly stated that "[t]he crimes charged in Counts 1 through 14 of the [Indictment] were within the joint criminal enterprise" and that Sesay "intended the commission of the charged crimes."[203] The Appeals Chamber has previously ruled that the "purpose of the enterprise" comprises both the objective of the JCE and the means contemplated to achieve that objective.[204] Notice to the accused does not require the objective and the means to be separately pleaded in the indictment as long as the alleged criminality of the enterprise is made clear.[205] Regardless of whether a crime is the objective or the means, it is within the JCE. Here, the crimes charged in Counts 1 through 14 were consistently alleged to be within the JCE, and therefore the alleged criminality of the enterprise was clear.

107. Paragraph 37 of the Indictment stated in part:

> The crimes alleged in this Indictment, including unlawful killings, abductions, forced labour, physical and sexual violence, use of child soldiers, looting and burning of civilian structures, were either actions within the joint criminal enterprise or were a reasonably foreseeable consequence of the joint criminal enterprise.

108. Paragraph 7 of the Prosecution Notice Concerning JCE stated:

> The crimes charged in Counts 1 through 14 of the Corrected Amended Consolidated Indictment were within the joint criminal enterprise. The Accused and the other participants intended the commission of the charged crimes.

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[202] Sesay Appeal, para. 53.
[203] Prosecution Notice Concerning JCE, para. 7.
[204] *Taylor* Appeal Decision on JCE Pleading, para. 15; *Brima et al.* Appeal Judgment, para. 76 (holding that the ultimate objective of the JCE and the means to achieve that objective constitute the common plan, design or purpose of the JCE).
[205] *Taylor* Appeal Decision on JCE Pleading, para. 25.

109. The Prosecution Notice Concerning JCE also stated in the alternative that the crimes charged under Counts 1, 2, 12, 13 and 14 were within the JCE and the crimes charged in Counts 3-11 were foreseeable consequences.[206] Accordingly, the Prosecution Notice Concerning JCE maintained notice to the accused that the crimes charged under Counts 3-11 were *either* within the JCE *or* a foreseeable consequence of the crimes that were within the JCE. This notice reflects the formulation of the JCE as provided in paragraph 37 of the Indictment, quoted above. The Appeals Chamber has previously endorsed the finding that pleading the basic and extended forms of JCE in the alternative is a well-established practice in the international criminal tribunals.[207]

110. The Appeals Chamber, therefore, finds that Sesay has failed to establish any prejudice that could have resulted from the Trial Chamber's disregard of the Prosecution Notice Concerning JCE and its reliance on the pleading of the common purpose in the Indictment. Having come to this conclusion, the Appeals Chamber dismisses the remainder of Sesay's submissions.

(c) Conclusion

111. The Appeals Chamber dismisses Sesay's Ground 12 in its entirety.

D. Kallon's Grounds of Appeal relating to the Indictment

1. Notice of the nature of the common purpose of the JCE (Kallon Ground 3)

(a) Submissions of the Parties

112. Kallon argues that the Trial Chamber erred in holding that "[i]n the Chamber's considered opinion, ... a joint criminal enterprise is divisible as to participants, time and location. It is also divisible as to the crimes charged as being within or the foreseeable consequence of the purpose of the joint enterprise."[208] According to Kallon, the Trial Chamber erred in law in holding that "JCE participants can change, or there can be different JCE time-periods, and changing locations."[209] Kallon submits that the Trial Chamber's statement that crimes may be within the JCE or the foreseeable consequence thereof demonstrates the Trial Chamber's fundamental confusion in

[206] Prosecution Notice Concerning JCE, para. 8.
[207] *Brima et al.* Appeal Judgment, para. 84 (and citations therein).
[208] Kallon Appeal, para. 70, *quoting* Trial Judgment, para. 354.
[209] Kallon Appeal, para. 70.

believing that it was not required to determine at the pleading or merits stage whether there was a JCE 1 or JCE 3.[210]

113. Kallon also argues that the Trial Chamber erred in law in finding that the Indictment adequately pleaded his personal participation in the JCE by stating that he "individually, or in concert with [others] ... exercis[ed] authority, command and control over all RUF, Junta and AFRC forces."[211] He submits that the Trial Chamber erred when it concluded that the Indictment sufficiently pleaded his personal participation because it pleaded that he participated through his leadership role.[212] Kallon argues that the "capacity" in which he allegedly participated "is not the same as the 'material facts supporting' his participation," and that the Trial Chamber erred in law in finding "that his capacity and alleged presence sufficed to state the material facts constituting his participation."[213]

114. In response, the Prosecution relies upon its submissions in relation to Sesay's Ground 12, summarized above.[214] The Prosecution further submits that the "divisibility of the JCE" described by the Trial Chamber is supported by the references cited in the Trial Judgment[215] as well as by the Trial Chamber's analysis of the applicable law.[216] The Prosecution argues that Kallon has not explained how the Trial Chamber erred.[217] It submits that contrary to Kallon's assertion, pleading the basic and extended forms of JCE in the alternative is supported in the Appeals Chamber's jurisprudence and that of the other international criminal tribunals.[218] Regarding Kallon's role in the JCE, the Prosecution argues that Kallon merely restates assertions made at trial, and that the Trial Chamber did not err in rejecting the arguments.[219] According to the Prosecution, "Kallon was clearly on notice of his alleged role in the JCE."[220]

115. Kallon offers no new arguments in reply.

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[210] Kallon Appeal, para. 70.
[211] Kallon Appeal, para. 72, *quoting* Trial Judgment, para. 393.
[212] Kallon Appeal, para. 72, *citing* Trial Judgment, para. 393.
[213] Kallon Appeal, para. 72 (internal citations omitted).
[214] *See supra*, para. 98.
[215] Prosecution Response, para. 2.11, *citing* Trial Judgment, fns 685, 686.
[216] Prosecution Response, para. 2.11, *citing* Trial Judgment, paras 251-266.
[217] Prosecution Response, para. 2.11.
[218] Prosecution Response, para. 2.11.
[219] Prosecution Response, para. 2.12, *citing* Kallon Final Trial Brief, para. 650.
[220] Prosecution Response, para. 2.12.

(b) Discussion

116. Kallon's arguments are two-fold: first, that the Trial Chamber erred in law in finding the "divisibility" of the JCE as alleged; and second, that the Trial Chamber erred in considering the pleading of his leadership roles as sufficient notice of his participation in the JCE.

117. Concerning the divisibility of the JCE, the Trial Chamber found that "the identities of all participants and the continuing existence of the joint criminal enterprise over the entire time period alleged in the Indictment" do not need to be proven beyond reasonable doubt by the Prosecution because they are not elements of the *actus reus* of the JCE and therefore they "are not material facts upon which the conviction of the Accused would rest."[221] In effect, the Trial Chamber found that where JCE liability can be found in the evidence, and the members of the JCE and temporal scope are within the material facts that are pleaded, then the accused has not suffered material prejudice. The Trial Chamber's approach is consistent with case law that demonstrates that even if some of the material facts pleaded in an indictment are not established beyond reasonable doubt, a Trial Chamber may nonetheless enter a conviction provided that, having applied the law to those material facts it accepted beyond reasonable doubt, all the elements of the crime charged and of the mode of responsibility are established by those facts.[222] As a general matter, such an approach would not result in prejudice to the accused because he is on notice of all of the material facts that result in his conviction. Kallon, in fact, does not show what prejudice resulted, or could have resulted, from the Trial Chamber's findings on the divisibility of the pleading of JCE. His submission is therefore rejected.

118. Concerning the pleading of Kallon's participation in the JCE, the Appeals Chamber notes that Kallon does not allege which of his acts found by the Trial Chamber to constitute participation in the JCE should have been pleaded in the Indictment, nor does he allege that he lacked notice that the Prosecution would rely upon the proof of those acts to establish his liability pursuant to a JCE. He, therefore, fails to argue how the alleged error invalidates the decision. It would appear that he only challenges the pleading of his role in the RUF as part of his participation in the JCE. As the Trial Chamber observed, the Indictment pleads Kallon's positions in the RUF and in the joint AFRC/RUF forces at paragraphs 19 to 33, and in paragraph 34 it states that "in [his] respective

[221] Trial Judgment, para. 353.
[222] *See e.g., Ntagerura et al.* Appeal Judgment, para. 174, n. 356 ("The Appeals Chamber considers that the 'material facts' which have to be pleaded in the indictment to provide the accused with the information necessary to prepare his defence have to be distinguished from the facts which have to be proved beyond reasonable doubt.").

positions referred to above" Kallon "exercised authority, command and control over all RUF, Junta and AFRC/RUF forces." The Indictment, therefore, provided sufficient notice that Kallon exercised authority while in command positions in the RUF and AFRC/RUF forces. The fact that the Indictment did not expressly state that he did so in furtherance of the alleged JCE does not evince a defect, since the material facts regarding his participation now at issue were nonetheless pleaded. The Appeals Chamber has already ruled on the permissibility of alleging the same acts for liability under both Article 6(3) and, command responsibility, and Article 6(1), JCE.[223]

(c) Conclusion

119. Kallon's Ground 3 is dismissed in its entirety.

2. Curing of the defective pleading of liability for personal commission (Kallon Ground 5)

(a) Submissions of the Parties

120. Kallon submits that the Trial Chamber erred in finding that the material facts concerning his personal commission of crimes were adequately pleaded, or that any related defects were cured.[224] Kallon argues that the Trial Chamber correctly found that the Indictment failed to plead the material facts underlying allegations that he personally committed crimes charged in the Indictment, but incorrectly held that all such defects were cured.[225] Kallon argues that, by convicting him based on evidence of criminal acts entirely different from those particularised in the Indictment, the Trial Chamber allowed the Prosecution to amend its original allegations without seeking leave to amend the Indictment.[226]

121. Kallon therefore argues that all purported cures with respect to his personal commission of crimes must be rejected as either (i) radically transforming the charges in the Indictment, or (ii) failing to provide him clear, consistent and timely information.[227] According to Kallon, the Indictment and Prosecution Pre-Trial Brief are "completely silent"[228] as to which crimes he is alleged to have personally committed. Kallon submits that the Prosecution provided the most

[223] *Taylor* Appeal Decision on JCE Pleading, para. 23.
[224] Kallon Appeal, para. 73.
[225] Kallon Appeal, para. 73, *quoting* Trial Judgment, paras 399-400.
[226] Kallon Appeal, para. 73.
[227] Kallon Appeal, para. 74.
[228] Kallon Appeal, para. 75.

detailed information in its Opening Statement.[229] However, even brief references in the Opening Statement were neither discussed nor proven at trial, and were insufficient to provide notice to Kallon because they did not provide the material facts such as "the identity of the victim, the time and place of the events and the means by which the acts were committed."[230] Kallon argues that the acts of personal participation contested in Grounds 9 to 15 and Grounds 23 to 30 of his Appeal were not specifically pleaded in the Indictment.[231]

122. In response to Kallon's submissions, the Prosecution states that it relies in part upon its submissions in response to Sesay's Ground 6, summarised above.[232] The Prosecution further submits that Kallon's claim is properly understood as an assertion that the Indictment was insufficiently specific rather than that the charges in the Indictment were "changed."[233] The Prosecution argues that it is misleading to suggest that Kallon was convicted of conduct with which he was not charged in the Indictment.[234] The Prosecution submits that Kallon has not explained "how the charges were 'transformed' by the addition of 'new' crimes."[235]

123. The Prosecution notes that the Trial Chamber accepted Kallon's submission that the Indictment was defective in not pleading with specificity the crimes that Kallon was alleged to have personally committed, with a single exception concerning one of the Count 15 incidents, the attack on Salaheudin.[236]

124. Kallon does not offer new arguments in reply.

(b) Discussion

125. The Appeals Chamber only considers Kallon's submissions to the extent they challenge his conviction for personally committing the attack on the UNAMSIL peacekeeper Salaheudin at the Makump DDR camp on 1 May 2000 since this was his only conviction pursuant to this mode of liability.[237]

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[229] Kallon Appeal, para. 75, *quoting* Transcript, 5 July 2004, p. 46 (Prosecution Opening Statement).
[230] Kallon Appeal, para. 75, *quoting Kupreškić et al.* Appeal Judgment, para. 89.
[231] Kallon Appeal, para. 75.
[232] Prosecution Response, para. 2.39; *see supra*, para. 59.
[233] Prosecution Response, para. 2.40, *referring to* Kallon Appeal, para. 73.
[234] Prosecution Response, para. 2.40.
[235] Prosecution Response, para. 2.41, *quoting* Kallon Appeal, para. 74.
[236] Prosecution Response, para. 2.42, *referring to* Kallon Appeal, para. 75 *and citing* Trial Judgment, paras 2242-2246.
[237] *See* Trial Judgment, paras 2242-2246.