



Case No. SCSL-2004-14-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA

WEDNESDAY, 29 NOVEMBER 2006
9.35 A.M
TRIAL

TRIAL CHAMBER I

Before the Judges:

Bankole Thompson, Presiding
Pierre Boutet
Benjamin Mutanga Itoe

For Chambers:

Ms Anna Matas
Ms Roza Salibekova

For the Registry:

Mr Thomas George

For the Prosecution:

Mr Christopher Staker
Mr Kevin Taverner
Mr Joseph Kamara
Mr Mohamed Bangura
Ms Lynn Hintz (Case manager)
Ms Patricia Corriigan (intern)

For the accused Sam Hinga
Norman:

Dr Bu-Buakei Jabbi
Mr Alusine Sesay
Mr Kingsley Belle (legal assistant)

For the accused Moinina Fofana:

Mr Arrow Bockarie
Mr Michel Pestman
Mr Andrew Ianuzzi
Mr Steven Powles

For the accused Allieu Kondewa:

Mr Yada Williams

1 [CDF29NOV06A_SM]

2 Wednesday, 29 November 2006

3 [The accused present]

4 [Closing Statements]

09:34:08 5 [Open session]

6 [Upon commencing at 9.35 a.m.]

7 PRESIDING JUDGE: Dr Jabbi, may we continue. But before
8 you continue, let me just indicate that despite the judicial
9 concession yesterday as to the balance of your allotted time, we
09:35:18 10 do expect and decide some kind of reciprocal gesture in the form
11 of a quid pro quo so you do not exploit the concession to limits
12 that may be considered a little impermissible. Right. You will
13 proceed then.

14 MR JABBI: I will endeavour to comply, My Lord. My Lord, I
09:35:48 15 broke off yesterday considering some areas of the evaluation of
16 evidence which I had set out, and I have briefly dealt with the
17 first one in some detail. I do not wish to be in any detail with
18 the others today, but I would like to refer the Court to our
19 submissions in the Norman final trial brief, paragraphs 128 to
09:36:36 20 131 on hearsay.

21 It sets out our view of the law and the evidence, and we do
22 give examples of hearsay evidence in paragraph 131 and citations
23 as to the approach the Court may adopt towards the assessment of
24 hearsay evidence. I would also, on that particular area, want to
09:37:28 25 draw the attention of the Court to leading questions, which I
26 also listed, and is to be found in our final trial brief,
27 paragraphs 142.

28 JUDGE ITOE: But, Dr Jabbi, we have been there yesterday.

29 MR JABBI: Yes, My Lord.

1 JUDGE ITOE: We have been there yesterday. You took us
2 through corroboration, paragraphs 124 to 127; hearsay evidence,
3 128 to 131; witness credibility, 132 to 138; and the leading
4 questions, 142 to 144.

09:38:04 5 MR JABBI: Yes. Those are just references I gave, My Lord.
6 I started with corroboration and made some comments on it and I
7 just want to round off briefly with these two I've mentioned.

8 JUDGE BOUTET: But, Dr Jabbi, if I may, we have your final
9 brief.

09:38:21 10 MR JABBI: As Your Lordship pleases.

11 JUDGE BOUTET: And we will read it in due course.

12 MR JABBI: Thank you very much.

13 JUDGE BOUTET: And what I was expecting you would do would
14 be adding, as necessary, to your final brief, not repeat what you
09:38:29 15 have in there. I mean, you have spelled it out in the brief and
16 it is well detailed; I can assure you we are going to read it.

17 MR JABBI: Thank you.

18 JUDGE BOUTET: So I thought this time would be better used
19 for you to add to it or to make some additional proposition to
09:38:42 20 the Court, rather than just repeat what you have in your written
21 brief. Thank you.

22 MR JABBI: I wasn't intending to do that at all. But I
23 appreciate the very helpful observation Your Lordship has made.

24 My Lord, may I next draw the attention of the Court still
09:39:11 25 to another area of the trial brief on command responsibilities
26 under Article 6(3) and, once more, My Lords, I refer, in
27 particular, to paragraphs 185 to 306. Paragraphs 185 to 306.

28 Taking the cue from the Bench, in regard to the depth of
29 possible detail reference, I would just want to say that the

1 paragraphs I have referred to are a very detailed analysis of the
2 issues involving command responsibility. The Prosecution gave
3 the impression that the first accused was in supreme command of
4 the CDF and, of course, they also made allegations that he
09:40:56 5 provided -- he was the principal provider for the CDF.

6 My Lord, I would want to draw the attention of your
7 Lordships to Exhibit 158; Exhibit 158. Exhibit 158, My Lords, is
8 a letter from the President of Sierra Leone to CSO Mustapha of
9 Nigeria reporting certain discussions and decisions with --
09:42:13 10 between General Abacha, President of Nigeria and President Kabbah
11 of Sierra Leone, in connection with the need to enhance the
12 capacity of the Kamajors and the necessity of ECOMOG commanders
13 to work closely with President Kabbah's deputy minister of
14 defence.

09:42:51 15 That was, indeed, the time when the first accused was also
16 appointed national co-ordinator of the CDF.

17 My Lord, Exhibit 158, shows very clearly that at all times
18 material to the conflicting question, the government of Sierra
19 Leone and ECOMOG were in command and control of the Kamajors and
09:43:20 20 the CDF, especially for the period after June 1997. This is a
21 period that the Prosecution concentrated on as if it was in fact
22 the total period of the indictment, which it is not, of course,
23 and it is their submissions on the command responsibility of the
24 first accused, although focused on this period, indeed seemed to
09:44:10 25 refer to the entire period of the indictment.

26 I would just want, My Lords, to say that indeed there are
27 phases of the period of the indictment about which some of the
28 things that can be said about a certain period, even as
29 allegations, would be completely inapplicable not nearly untrue

1 but actually inapplicable to those other phases; for example, the
2 phase from the beginning of the war or even from 30 November 1996
3 to June 1997, all the submissions made by the Prosecution as to
4 the command responsibility of the first accused cannot even begin
09:45:09 5 to be considered for application to that first phase.

6 So one needs to be very careful when assessing submissions
7 in respect of the indictment period. I think it is also true
8 that after March 1998 all the submissions made about command
9 responsibility of the first accused by the Prosecution can also
09:45:47 10 not even begin to be applicable.

11 My Lords, considering those submissions only in respect of
12 the period from, roughly, June 1997 to March 1998, we also submit
13 that there is no basis in the evidence of the command
14 responsibility allegations made by the Prosecution in respect of
09:46:40 15 the first accused.

16 My Lords, if I may specifically point out paragraphs 216 to
17 223 which deal specifically with those allegations by the
18 Prosecution, and again I will want to refer to certain exhibits
19 which prove the contrary of those submissions.

09:47:32 20 In our paragraph 220, My Lords, paragraph 220, we refer to
21 Exhibits 137, 138, 139 and 140 concerning requests for ammunition
22 being processed through ECOMOG for supply to CDF as the main
23 source of supply. So also in paragraph 224, where Exhibits 137,
24 139, 140 and 158 are also referred to on the question of supply
09:48:51 25 of arms and ammunition to CDF through ECOMOG or at least from
26 ECOMOG.

27 On the question of command responsibility, therefore, of
28 the first accused, for any period of the indictment, we submit
29 that there is no basis of foundation for attributing command

1 responsibility to the first accused in respect of the CDF.

2 My Lords, I would also want to refer to paragraphs 291 to
3 298 of the trial brief on the question of whether the CDF was an
4 organised military force and, here, the evidence of the
09:50:52 5 Prosecution expert witness, Colonel Richard Iron, should be
6 viewed against the analysis and assessment by the second
7 accused's expert witness, Dr Hoffman. Without doubt, Dr Hoffman
8 has given a proper evaluation of the evidence of Colonel Iron to
9 show that it was inaccurate to refer to the CDF as an organised
09:51:49 10 military force and, indeed, that Colonel Iron did not have
11 sufficient basis for the conclusions he reached in view of his
12 very sparse and scanty contact with the CDF organisation and his
13 stay in Sierra Leone to study it.

14 My Lord, I would just want to draw your attention to those
09:52:34 15 paragraphs and save time and not go into any details there. I am
16 also sure that the expert evidence of Dr Hoffman will receive
17 further attention in these submissions.

18 And just before leaving that particular area, the nature of
19 the CDF response to the attack on the country by the RUF rebels
09:53:40 20 from early in the period of the indictment. It has been
21 demonstrated that that was, indeed, not so much the response of a
22 military force or organisation, or what has been characterised as
23 living en mass, where the people are forced by circumstance and
24 necessity to take up any instruments of resistance against an
09:54:17 25 invading force, even without necessarily organising themselves
26 into a general force, but on the spur of the moment, lay hands on
27 what is available and resist. If it turns out to be against a
28 military force, so be it, but not as an organised army or
29 military organ.

1 My Lords, I would also want to draw the attention of the
2 Court to our analysis of the counts, all the counts, on
3 paragraphs 370 to 452. This is both an analysis of the law in
4 respect of the counts.

09:55:39 5 JUDGE ITOE: What paragraphs?

6 MR JABBI: Paragraphs 370, on page 113, to paragraph 452
7 which once more set out to analyse the law in respect of the
8 counts, and the systematic analysis of the evidence of the
9 Prosecution and also, of course, of that of the Defence in
10 respect of the various geographic locations which the Prosecution
11 characteristically calls crime basis.

12 My Lord, on the cue of the Bench, these submissions are
13 dated clear and categorical and I have no doubt that your
14 Lordships will do due justice to them, and I would want to just
15 submit them to you in that way. And so we will want to submit,
16 or we do submit, that based on the discussion in the final trial
17 brief of both the law and the evidence presented against the
18 accused, the first accused, we submit that the Prosecution has
19 failed to prove beyond a reasonable doubt that the first accused
20 is guilty of any of the crimes charged under any theory of
21 liability asserted by the Prosecution in respect of the first
22 accused.

23 My Lords, if I may conclude on the review of the evidence
24 with the issue of child soldiers and to, particularly, refer to
25 paragraphs 442 to 452.

26 One point I would like to make straight away is that the
27 evidence and the exhibits invariably refer merely to child
28 soldiers without particularising the age group of children which
29 are the subject matter of the indictment. Most of the evidence

1 that has been given in this respect does not specify that it
2 refers to children below the age of 15 but rather just child
3 soldiers and, indeed, quite a few of them mention age 18 as the
4 end of childhood.

10:00:35 5 So, My Lords, most of that evidence is obviously
6 inapplicable in that it does not specify the relevant age
7 bracket. I would also want to draw attention to a certain
8 clarification in this field where it may be assumed that merely
9 being initiated into the Kamajor society meant that you were
10:01:19 10 being recruited for combat purposes.

11 PRESIDING JUDGE: Is this under the rubric of child
12 soldiers or generally speaking?

13 MR JABBI: My Lord, I'm dealing with child soldiers in
14 respect of that issue.

10:01:41 15 PRESIDING JUDGE: Yes. All right. Thanks. Yes.

16 JUDGE BOUTET: Dr Jabbi, I know you are very familiar with
17 the language and certain linguistics; in your understanding is
18 there any difference because you are using your term recruitment
19 and there is no such charge in existence. So the charge -- the
10:02:01 20 count as such is making reference to "use of" or "enlisting."
21 Nowhere does it say, "and talk of recruitment." So is, in your
22 own estimate, enlisting and recruiting the same? That is has the
23 same meaning? I say this because you've just used the word
24 "recruiting".

10:02:18 25 MR JABBI: Yes, indeed, My Lord. I appreciate your
26 observation which is a very fine linguistic distinction I would
27 like to adopt and henceforth use "enlisting" instead of
28 "recruitment," whatever synonymous relationship the two concepts
29 may have.

1 JUDGE BOUTET: I am not trying to put it to you that it
2 means the same, I am just asking you the question if, in your own
3 appreciation and understanding, it means the same and has the
4 same meaning?

10:02:49 5 MR JABBI: My Lord, I would like to confine myself to
6 "enlistment."

7 JUDGE BOUTET: Fine. Thank you.

8 MR JABBI: Thank you, My Lord.

9 Now, as I was saying, because people were initiated into
10:03:07 10 the society it may sometimes be felt and, indeed, evidence has
11 been given to that effect that they were thereby enlisted or used
12 to participate in hostilities, actively in hostilities, as
13 children.

14 Now I want to refer, in particular, to the evidence of
10:03:43 15 PC Joseph Ali-Kavura Kongomoh II who testified on 1st of June,
16 transcript of 1st of June, page 56 up to page 57, and this is
17 seen in paragraph 446 of the final trial brief -- it is short
18 enough to be read.

19 There are witnesses who testified why they were initiated.
10:04:55 20 PC Joseph Ali-Kavura Kongomoh II, testified that during the
21 January 6, 1999 invasion, until the end of the war, initiation
22 went on, and even he was initiated. For protective reasons, the
23 witness said, he joined two of his children, one eight years and
24 the other seven into the Kamajor society. He further testified
10:05:37 25 that he did that so that they were immunized for fear of stray
26 bullets.

27 Now, the immunization aspect of initiation into the Kamajor
28 society was certainly not necessarily connected with becoming a
29 combatant in the war, and so, even those who could not possibly

1 be combatants were initiated just for the immunization aspect of
2 that initiation ceremony. This included children as young as
3 possible and women and, of course, others and old people who
4 could not be possibly eligible for combat.

10:06:38 5 So, My Lord, that brings me to --

6 PRESIDING JUDGE: Are you saying there is not common ground
7 between your side and the Prosecution on that issue? Are you
8 saying that all initiation amounted to enlistment or conscription
9 for combat purposes? Is that the Prosecution's theory?

10:07:09 10 MR JABBI: My Lord, I have advanced the few submissions I
11 have just made --

12 PRESIDING JUDGE: Merely to clarify --

13 MR JABBI: Just to -- yes.

14 PRESIDING JUDGE: In case there is any lingering doubts
10:07:15 15 somewhere?

16 MR JABBI: Yes, My Lord.

17 PRESIDING JUDGE: All right. I take the point.

18 MR JABBI: Yes. Thank you, My Lord.

19 Now, My Lords, I want to deal with two issues in concluding
10:07:39 20 which affect the very status of the Court.

21 PRESIDING JUDGE: I think it is appropriate to remind you
22 that you have ten minutes of your time; you are running out.

23 MR JABBI: More?

24 PRESIDING JUDGE: Just ten more minutes to run out.

10:08:01 25 MR JABBI: Thank you very much, My Lord. The first issue,
26 My Lord, relates to the use of the phrase which states the
27 purpose for which the Special Court was brought into being and
28 that is the phrase "to prosecute those who bear the greatest
29 responsibility for the commission of offences, criminal offences,

1 both of an international nature and also in the laws of Sierra
2 Leone. "

3 My Lord, this phrase is used in the agreement, preamble at
4 paragraph 2 and Article 1(1) of the agreement. It is also used
10:09:22 5 in the Statute in Articles 1(1) and 15(1), and I would like to
6 draw your Lordships' attention to the concept of gradation,
7 things being taken in qualitative or degree stages, taken in
8 degrees.

9 The use of the words "must have the greatest
10:10:06 10 responsibility" is obviously a concept of gradation or degree and
11 of the highest portion of that degree. My submission, My Lords,
12 is that to legislate that a court is set up to prosecute persons
13 who bear the greatest responsibility for the commission of
14 serious violations of international humanitarian law et cetera et
10:10:41 15 cetera is to imply that there is already a group of persons who
16 bear responsibility for those -- for the commission of those
17 offences. The Statute is set up to try those bearing the
18 greatest responsibility. The presumption is that there is
19 already a group adjudged, known or decided to bear responsibility
10:11:10 20 out of which group the greatest is investigated by the process of
21 prosecution prescribed.

22 If, indeed, that reading is plausible, then I submit that
23 in the very setting up of this Court there has been a breach of
24 the presumption of innocence because if the accused persons are
10:11:44 25 being prosecuted for bearing the greatest responsibility then it
26 is already presumed that they are among those who bear
27 responsibility. And the effort is just to mark them off as the
28 greatest.

29 My Lords, even the Statute does not have any offence of

1 that nature; that is the nature of those who bear the greatest
2 responsibility. It only has those who bear responsibility, and I
3 submit that that is usually a discretionary power of the
4 Prosecutor which would nonetheless have been exercised in the
10:12:50 5 process of selecting those to be prosecuted, without necessarily
6 objectively legislating that it must be those who bear the
7 greatest responsibility.

8 So my submission is that the prescription for the setting
9 up of this Court is already founded upon a breach of the
10:13:16 10 presumption innocence, and to that extent it is prejudicial,
11 severely prejudicial to the accused persons. My Lords, I hope to
12 deal next --

13 PRESIDING JUDGE: Perhaps you need to develop that a little
14 for me because are you suggesting that the formula for those who
10:13:46 15 bear the greatest responsibility, that formula or that concept,
16 if you want to call it a concept, displaces the presumption of
17 innocence? Is that what you're saying in the context of the
18 tribunal? Let's call it a concept, and we are familiar with the
19 tenet that all persons are presumed innocent who are charged with
10:14:09 20 offences until they are proven guilty.

21 MR JABBI: Yes, My Lord.

22 PRESIDING JUDGE: Is your submission, shortly, that the
23 concept of those who bear the greatest responsibility grafted
24 into the jurisdiction of this Court displaces the presumption of
10:14:29 25 innocence?

26 MR JABBI: I would just want to displace the word
27 "displace."

28 PRESIDING JUDGE: Right, try and do that.

29 MR JABBI: I would say it breaches the presumption of

1 innocence.

2 PRESIDING JUDGE: Right. All right. Thanks.

3 MR JABBI: Thank you, My Lord.

4 My Lord, the last point I want to raise is also concerned
10:14:53 5 with the status and standing of this Court, and I hope the few
6 minutes I have will allow me to lay the basic foundation.

7 PRESIDING JUDGE: There is precisely about four-and-a-half
8 minutes.

9 MR JABBI: My Lord, in that case I will want, before I say
10:15:16 10 what I want to say --

11 JUDGE ITOE: You are taking more time by saying what you
12 want to say.

13 MR JABBI: Well, in any case, also that it is accepted, I
14 want to distribute this document.

10:15:31 15 PRESIDING JUDGE: Mr Thomas, please help.

16 MR JABBI: My Lord, very briefly, if I will make the point
17 I want to make in this area, my submission is that this Court did
18 not, with the agreement, establish --

19 JUDGE ITOE: Would this, Dr Jabbi, be an annexure to your
10:16:18 20 final trial brief or what?

21 MR JABBI: My Lord, this is just for instead of my saying
22 it and people don't see it, the items listed there so that they
23 have it in front of them, I'm going to say them out, My Lord.

24 JUDGE ITOE: What's the status of this document?

10:16:30 25 MR JABBI: It's just a sort of a -- it is an end to the
26 memory of --

27 JUDGE ITOE: In fact, it is part of your brief, isn't it?

28 MR JABBI: My Lord, I would in that case seek your
29 indulgence to adopt it as part of the brief, but I do intend to

1 make it that, because I intend to say orally everything there but
2 it is just to have the memory that I have given it.

3 JUDGE ITOE: All right. Yes. But it has come in writing.

4 MR JABBI: I don't wish to have it submitted -- I don't
10:17:16 5 wish to have it filed or tendered.

6 JUDGE ITOE: I will stop there.

7 MR JABBI: Thank you very much, My Lord.

8 My Lord, my submission is that the agreement established in
9 this Court did not enter into force either -- did not enter into

10:17:50 10 force either lawfully or in accordance with Article 21 of the
11 agreement itself and, to that extent, the agreement in question

12 is at this present moment, and for all time it has been in

13 operation, it is in unlawful operation and, by the same token,

14 the operation of this Court has, accordingly, been equally

10:18:46 15 unlawful. The main reason for saying this, My Lord, is that

16 Article 21 of the agreement requires that it shall be

17 incorporated into the laws of Sierra Leone as the basis for its

18 entry into force. That is the prerequisite and it is *sine qua*

19 *non* of the agreement coming into force. It has to be

10:19:21 20 incorporated into the laws of Sierra Leone and indeed --

21 PRESIDING JUDGE: That's a submission of law you're putting
22 forward, is that it?

23 MR JABBI: Pardon, My Lord?

24 PRESIDING JUDGE: It's a submission of law you're putting
10:19:30 25 forward?

26 MR JABBI: Yes, My Lord.

27 PRESIDING JUDGE: Do you have any authority to support you?

28 MR JABBI: My Lord, if I may just develop it --

29 PRESIDING JUDGE: Very well.

1 MR JABBI: -- a little bit for the time factor.

2 PRESIDING JUDGE: Yes. Right. Please.

3 MR JABBI: If I may refer to paragraph 9 of the report of
4 the UN Secretary General, dated October 4, 2000, in UN document
10:20:07 5 number S200/915 where he said of the agreement, I quote paragraph
6 9, "Its implementation at the national level would require that
7 the agreement is incorporated in the national law of Sierra Leone
8 in accordance with constitutional requirements. Its applicable
9 law includes international as well as Sierra Leone law."

10:20:52 10 Now, if, indeed, that is the case, then we go to the
11 relevant Sierra Leonean law applicable in the case and, indeed,
12 actually attempted to be invoked.

13 That takes us, My Lords, to Subsection (4) of Section 40 of
14 the Constitution of Sierra Leone about international agreements
10:21:25 15 with the government of Sierra Leone, and how they come into force
16 or are ratified.

17 PRESIDING JUDGE: Counsel?

18 MR JABBI: Yes, My Lord.

19 PRESIDING JUDGE: Will you treat this Court with some
10:21:36 20 candour?

21 MR JABBI: Yes, My Lord.

22 PRESIDING JUDGE: Are you seeking to litigate here a matter
23 that may well have been litigated elsewhere --

24 MR JABBI: My Lord, I'm not --

10:21:46 25 JUDGE ITOE: -which relates to the status and jurisdiction
26 --

27 PRESIDING JUDGE: Of this Court.

28 JUDGE ITOE: Of the Special Court.

29 PRESIDING JUDGE: And may well have been, in fact,

1 pronounced upon authoritatively. If that is the case, why not
2 treat this Court with candour and let us know where this issue
3 has arisen, and what was the outcome of the decision? Because
4 I'm -- I say, it all sounds familiar to me.

10:22:25

5 MR JABBI: Indeed, My Lord. The subject matter as the
6 subject matter is quite familiar. My Lord --

7 PRESIDING JUDGE: And that some of those arguments that you
8 are putting forward seem to have been made short shrift of in
9 another forum and, perhaps, this Court may be encouraged into
10 some kind of postmortem of another forum's decision. If you give
11 us the decision then, and guide us, then we'll probably just look
12 at the decision.

10:22:45

13 MR JABBI: Yes, indeed, My Lord.

14 PRESIDING JUDGE: Rather than you making these as mere
15 submissions because, as I said, this is all familiar ground.

10:23:02

16 MR JABBI: Yes, My Lord. I refer to the Appeals Chamber
17 decision on constitutionality and lack of jurisdiction.

18 PRESIDING JUDGE: This appeals -- the Appeals Chamber of
19 this Court?

10:23:36

20 MR JABBI: Of this Court.

21 PRESIDING JUDGE: Yes. Right.

22 MR JABBI: I'm making a reference to it --

23 PRESIDING JUDGE: Yes.

24 MR JABBI: -- as earlier stating that it is the same issue.

10:23:43

25 PRESIDING JUDGE: Yes. Quite right. And also it is a
26 higher tribunal.

27 MR JABBI: Yes, indeed, My Lord. On that note, My Lord, I
28 should also point out that the decision in question is the
29 Appeals Chamber decision on a motion before the Trial Chamber

1 which, by operation of Rule 72(E), is not decided or adjudicated
2 upon by the Trial Chamber but is referred --

3 PRESIDING JUDGE: The reference mechanisms straight to the
4 Appeals Chamber?

10:24:26 5 MR JABBI: Yes. Straight to the Appeals Chamber.

6 PRESIDING JUDGE: Because it raises jurisdictional issues.

7 MR JABBI: Yes, indeed, My Lord.

8 PRESIDING JUDGE: Quite right.

9 MR JABBI: The distinction that I want to -- I want to
10:24:36 10 draw --

11 PRESIDING JUDGE: Yes.

12 MR JABBI: -- is that decision by the Appeals Chamber --

13 PRESIDING JUDGE: Yes.

14 MR JABBI: -- is not a decision on appeal from the Trial
10:24:46 15 Chamber.

16 PRESIDING JUDGE: Yes, we're familiar with that --

17 MR JABBI: Yes.

18 PRESIDING JUDGE: -- by a Defence mechanism.

19 MR JABBI: Yes.

10:24:48 20 PRESIDING JUDGE: Just as you have it in a national system.

21 MR JABBI: Yes.

22 JUDGE ITOE: Are you then suggesting that because it went
23 by reference mechanism and was decided upon by the Court of

24 Appeal we can now relitigate the issues that were determined by

10:25:09 25 the Court of Appeal in that decision?

26 MR JABBI: No, My Lord.

27 JUDGE ITOE: Or that we can reverse the Court of Appeal?

28 MR JABBI: No. No. No, My Lord. I am just characterise
29 the date.

1 PRESIDING JUDGE: Yes.

2 MR JABBI: I want to refer to it. In fact, my submission
3 is that the point I am raising --

4 PRESIDING JUDGE: Yes.

10:25:26 5 MR JABBI: -- was not the point determined in that
6 decision. Although, indeed, it is relevant, pertinent, and in
7 general terms, deals with constitutionality and jurisdiction.

8 PRESIDING JUDGE: But you're attacking -- but your point is
9 that this Court, and your submission is, that this Court is
10 unlawful.

11 JUDGE ITOE: It's unlawful, yes.

12 PRESIDING JUDGE: So wasn't that an issue before the
13 Appeals Chamber in that particular decision, the
14 constitutionality of this Court?

10:25:57 15 MR JABBI: The reason and the criteria for my making that
16 submission were not before that court in that application,
17 although the general issue was --

18 JUDGE ITOE: Jurisdiction.

19 MR JABBI: Yes, indeed, My Lord.

10:26:16 20 JUDGE ITOE: And the legality of the existence of this
21 Court, isn't it?

22 MR JABBI: Yes, indeed, My Lord. But, My Lord, there
23 are various --

24 JUDGE ITOE: But you are trying to make a difference where
10:26:24 25 there is no difference, Dr Jabbi.

26 MR JABBI: If I just explain why the difference, you may be
27 in a position to decide whether there is, indeed, a difference.

28 JUDGE ITOE: Yes. We will listen to you. It's just
29 because up to now we are not -- I don't appear to be perceiving

1 the difference.

2 MR JABBI: Thank you very much, My Lord.

3 PRESIDING JUDGE: Yes. And counsel, perhaps, you see, you
4 may take points, as I say, you must treat the Court with candour.

10:26:47

5 You may take points that you likely feel will carry seasoned

6 judicial minds and I'm not sure whether it's -- one needs to

7 advise oneself as to whether some of the arguments that you are

8 canvassing in the question of -- on the issue of

9 constitutionality is something that you need to pursue too much

10:27:08

10 knowing that this Court is bound by decisions of a higher

11 tribunal, and I also think that this very issue that you are

12 raising may well have arisen in the highest court in the national

13 system where it was argued, forcefully, as to whether the

14 ratification agreement was in accordance with constitutional

10:27:35

15 provisions. And the Supreme Court did say that everything was

16 regularly done.

17 MR JABBI: My Lord, I am aware of the Supreme Court

18 decision that Your Lordship has referred to. Just as, indeed,

19 I'm also aware of the Appeals Chamber decision that we've already

10:27:57

20 mentioned, but what I am saying, My Lord, is that the basis for

21 my making that general proposition of law is not the same as the

22 basis on which that general proposition was argued in either our

23 Supreme Court or the Appeals Chamber.

24 PRESIDING JUDGE: I think I read this -- I read the

10:28:20

25 decision of the Supreme Court very carefully. The issue of

26 noncompliance with constitutional provisions for ratification was

27 very much an issue there. Very much an issue.

28 MR JABBI: My Lord, I have specific provisions of the

29 constitution which I want to draw to Your Lordship's attention.

1 PRESIDING JUDGE: Right. Well, I will let you wind up this
2 particular aspect.

3 MR JABBI: Yes.

4 PRESIDING JUDGE: And since it seems like it's a new
10:28:45 5 matter, I don't think this is an issue which forms part of your
6 brief and perhaps what we're doing now is granting you the
7 indulgence to raise some issue which really did not come within
8 the four corners of your brief and probably might have to give
9 the Prosecution an opportunity to respond to it. But just try
10:29:10 10 and see if you can put everything in a nutshell.

11 MR JABBI: So, My Lord --

12 PRESIDING JUDGE: When you say that this Court -- submit
13 that this Court is illegal, that's your general submission by
14 using of the arguments that you put forth already? Are we right?

10:29:43 15 MR JABBI: That it is operating unlawfully, My Lord.

16 PRESIDING JUDGE: That the Special Court, for the reasons
17 already advanced, is operating unlawfully --

18 MR JABBI: Since the agreement established in it did not
19 enter in to force lawfully or in accordance with Article 21
10:30:22 20 thereof.

21 PRESIDING JUDGE: Yes.

22 MR JABBI: And this is because of certain stipulations in
23 the three instruments involving the Special Court, the three main
24 instruments involving the Special Court. That is the agreement,
10:30:49 25 the statute to it, and Sierra Leonean Ratification Act that
26 incorporated them into the laws of Sierra Leone.

27 PRESIDING JUDGE: Yes.

28 MR JABBI: Certain stipulations in those instruments are --

29 PRESIDING JUDGE: Could you give us the sections, just the

1 sections.

2 MR JABBI: Inconsistent or incompatible with both ordinary
3 and entrenched provisions of the Sierra Leone Constitution as
4 follows -- those provisions, in respect of ordinary provisions of
10:31:48 5 the Constitution and it is those that are inconsistent with
6 ordinary provisions of the Constitution are as follows:

7 Article 17(2)b of the agreement is inconsistent and incompatible
8 with Section 144 (1) and (2). Article 17(2)a, c and d, Article
9 17(2)a, c and d of the agreement is incompatible with Section 1
10:32:42 10 and Section 5(2)a of the Constitution. Article 6(2) of the
11 statute is inconsistent and incompatible with section 48(4),
12 Section 98, Section 99(1) and Section 100 of the Constitution and
13 Section 29 of --

14 JUDGE ITOE: Dr Jabbi, may we be rounding up, please.

10:33:22 15 MR JABBI: My Lord --

16 PRESIDING JUDGE: Can we have your final submissions now.

17 MR JABBI: [Overlapping speakers].

18 JUDGE ITOE: We have a queue, you know, of colleagues who
19 are waiting to address.

10:33:33 20 PRESIDING JUDGE: Yes. [Indiscernible] why not just wind
21 up and give us your final submission?

22 MR JABBI: Well, I was worried about the observations that
23 were made earlier. That we will proceed in order. With these
24 provisions --

10:33:49 25 PRESIDING JUDGE: Yes. Go ahead.

26 MR JABBI: The incorporation of the agreement into the laws
27 of Sierra Leone was not in accordance with the procedure
28 prescribed under the Constitution in respect of those provisions
29 inconsistent with entrenched provisions of the Constitution.

1 There are two sets of them

2 PRESIDING JUDGE: Yes.

3 MR JABBI: And those provisions, inconsistent with ordinary
4 provisions of the Constitution, there is a very good distinction
10:34:48 5 there, My Lord, those provisions inconsistent with ordinary
6 provisions of the Constitution are null and void in terms of
7 Section 171 (1) subsection 15 of the constitution of Sierra Leone
8 which says --

9 PRESIDING JUDGE: No. I don't think you need read it.

10:35:17 10 MR JABBI: It's very short, My Lord.

11 PRESIDING JUDGE: No, there is no need.

12 MR JABBI: Thank you. 117, 171 --

13 PRESIDING JUDGE: Yes, we are familiar with it.

14 MR JABBI: Subsection 15 of the Constitution.

10:35:28 15 PRESIDING JUDGE: Yes.

16 MR JABBI: In view of these, the Ratification Act that
17 brought the agreement and this Court into operation was and is
18 unconstitutional.

19 PRESIDING JUDGE: Yes. That's it.

10:35:48 20 MR JABBI: And it accordingly affects the status of the
21 agreements and the Court as well --

22 PRESIDING JUDGE: Thank you. The Supreme Court said you
23 are wrong. The Supreme Court ruled against you on that. They
24 ruled against all of you in this matter. The very issues were
10:36:02 25 before the Sierra Leone Supreme Court and that Court by unanimous
26 decision said those points are clearly meretricious.

27 JUDGE ITOE: And why do you have to raise them here?

28 [CDF29NOV06B - CR]

29 MR JABBI: Well, My Lord --

1 PRESIDING JUDGE: Thank you very much.

2 MR JABBI: -- let me just stop there. I have a lot to say
3 on that.

4 PRESIDING JUDGE: Well, I told you that --

10:36:25 5 JUDGE ITOE: Maybe in academic circles.

6 PRESIDING JUDGE: Yes, you might want to go back and read
7 that Supreme Court decision and see how it carefully went into
8 all these points you made. In fact, you were one of the counsel
9 appearing before that Court.

10:36:40 10 MR JABBI: Sorry, My Lord, I wasn't.

11 PRESIDING JUDGE: Are you sure?

12 MR JABBI: Nor was the first accused a party in it.

13 PRESIDING JUDGE: The very issues were canvassed before the
14 Supreme Court of Sierra Leone, and they ruled on every point.
15 Quite.

16 MR STAKER: Your Honour, my understanding is the
17 Prosecution normally would have no right of response to a closing
18 argument. But, in fact, I think what we've just heard, the last
19 two points, were in fact not part of a closing argument, which is
10:37:07 20 to deal with the evidence and the substantive law.

21 In effect, what we've heard are two motions for a ruling
22 that this Court lacks jurisdiction. To that, as Your Honour has
23 pointed out, I think we do have a right to respond.

24 PRESIDING JUDGE: You want leave to do that?

10:37:24 25 MR STAKER: My understanding is we don't need leave. If a
26 motion is made at any stage in the proceedings alleging lack of
27 jurisdiction, there is a right to respond to that.

28 PRESIDING JUDGE: Let's not argue that. It's just that we
29 remain in control, the judges.

1 MR STAKER: Certainly, Your Honour.

2 PRESIDING JUDGE: If we think points are being made before
3 us that, perhaps, in a sense, may well be *res judicata* in another
4 jurisdiction and that we, in fact, may not find these points
10:37:51 5 [indiscernible] here, we don't even need to call upon the
6 Prosecution, but we don't mind being enlightened in short.

7 MR STAKER: I can give the response now orally and it may
8 be the most convenient. The first point that was raised concerns
9 the wording, "Those bearing the greatest responsibility." It was
10:38:09 10 suggested these were inconsistent with the presumption of
11 innocence, because they presume there must be somebody who's
12 guilty to bear the greatest responsibility. The short answer to
13 that, of course, is that the presumption of innocence is well and
14 truly entrenched in the Statute. I don't think there can be any
10:38:25 15 question of this.

16 My recollection, also, is this argument has been raised
17 previously before the Yugoslav Tribunal, perhaps, also, the
18 Rwanda Tribunal, I'm not sure. Those Statutes speak of those
19 responsible for serious violations of international humanitarian
10:38:40 20 law. It was argued there is an inconsistency with the
21 presumption of innocence there. I believe there is a case law
22 ruling that is certainly not the case.

23 I think the simplest thing might be, in our list of
24 authorities we said we'd be providing, either perhaps this
10:38:52 25 afternoon or tomorrow, we could include some references to those
26 cases as well. I don't think anything more needs to be said. In
27 our submission, it is quite obvious the presumption of innocence
28 is spelled out expressly, explicitly. There is no question of
29 that.

1 PRESIDING JUDGE: Right.

2 MR STAKER: The second matter that was raised concerned the
3 inconsistency of the Special Court Statute, the --

4 PRESIDING JUDGE: The whole issue is the legality of the
10:39:17 5 Court by reason of alleged inconsistency.

6 MR STAKER: Yes, with the Constitution of Sierra Leone.
7 The starting point, as has been pointed out, is that this has
8 already been ruled upon by the Appeals Chamber of the Special
9 Court in this very case. Although it was not previously decided
10:39:35 10 on by the Trial Chamber, it is quite clear a decision by the
11 Appeals Chamber in this case, pursuant to the Rule 72 referral
12 mechanism, is binding on this Court.

13 I would take issue with what my friend Mr Jabbi has said
14 about this being a new point that wasn't part of that previous
10:39:54 15 decision. My understanding of the *ratio decidendi* or *ratio*
16 *decidendi* - depending on what school of Latin pronunciation we
17 are from - of that Appeals Chamber decision, was that the Special
18 Court was created by, and exists and operates in this sphere of
19 international law. It is a creature of international law. It is
10:40:15 20 not part of the judiciary of Sierra Leone. It is not part of the
21 Sierra Leonean national legal system and, therefore, it is not
22 subject to provisions of the Constitution of Sierra Leone.

23 This would mean, in fact, that the decision of the Supreme
24 Court of Sierra Leone has significance for Sierra Leonean
10:40:34 25 national law. The question was whether the national implementing
26 legislation was valid. That, of course is required in national
27 law to enable national authorities to discharge their duties that
28 they have under international law, pursuant to the Special Court
29 agreement. But, the Court itself, is independent of Sierra

1 Leonean law and, therefore, the question of compatibility or
2 incompatibility with the Constitution is an issue that simply
3 does not arise before us.

4 PRESIDING JUDGE: Indeed, in fact, the very Supreme Court
10:41:06 5 said, also, that in fact the Court is an international tribunal
6 and was not subject. So there is agreement between the Appeal
7 Chamber's decision and Appeal Court decision on the international
8 personality and character of this Special Court. I was inviting
9 counsel to treat the Court with candour, because I'm sure he has
10:41:26 10 read the decision, because he made some very fine and interesting
11 distinctions.

12 MR STAKER: Yes. Thus, it appears there is agreement both
13 at the international and national level on this question.

14 PRESIDING JUDGE: Yes.

10:41:38 15 MR STAKER: The final point that was made was an argument
16 that the Special Court Statute, or the Special Court Agreement,
17 has not entered into force pursuant to its Article 21 because the
18 Sierra Leonean implementing legislation was unconstitutional.
19 Again, that point was dealt with by the Appeal Chamber in that
10:42:00 20 decision. That is res judicata in this case. It held that it
21 wasn't the implementing legislation that brought the agreement
22 into force, it was an exchange of notes and the implementing
23 legislation was something separate that was required for national
24 law purposes. Again, we can conclude --

10:42:15 25 PRESIDING JUDGE: If my recollection is correct, it was
26 also dealt with by the Supreme Court and found completely without
27 merit.

28 MR STAKER: I'm grateful for that, Your Honour. Again, we
29 have nothing more to say. We have no need to respond at any

1 great length.

2 PRESIDING JUDGE: Thanks very much.

3 MR STAKER: We can include any relevant authorities in our
4 list of authorities.

10:42:34 5 PRESIDING JUDGE: We can ask Dr Jabbi, too, if he has any
6 relevant authorities to enlighten his submissions further to
7 submit them.

8 MR JABBI: I will do so, My Lord.

9 PRESIDING JUDGE: Very well. We'll now move to the second
10:42:45 10 accused, and we'll start, Mr Powles. I'm sure you've been
11 waiting to take your turn.

12 MR POWLES: Thank you very much.

13 PRESIDING JUDGE: It is your turn now.

14 MR POWLES: There are some exhibits that we would like to
10:42:59 15 hand up. They don't form annexes, they were exhibits before the
16 Court.

17 PRESIDING JUDGE: Very well.

18 MR POWLES: There was one short authority attached to the
19 back of them. I was wondering if they could be passed up to
10:43:13 20 Your Honour while I just get the podium. Your Honours, I shan't
21 be getting to those just yet.

22 PRESIDING JUDGE: Very well. Let's proceed.

23 MR POWLES: May it please Your Honour, we begin this
24 closing by recalling the opening lines of another, one delivered
10:44:18 25 by Robert Jackson, who was, at that time, an associate justice at
26 the US Supreme Court. But as he spoke these words, he was lead
27 counsel for the Prosecution, standing now some 60 years ago
28 before the International Military Tribunal in Nuremberg, and he
29 said this: "An advocate can be confronted with few more

1 formidable tasks than to select his closing arguments where there
2 is a great disparity between his appropriate time and his
3 available material. "

4 Well it has been 156 days that Your Honours have been
10:44:59 5 hearing and receiving a huge amount of detailed evidence, and
6 we've just got a short time to summarise and present it all to
7 you. So, what shall we do? Well, we will attempt, as precocious
8 as it may be, to do precisely that as Justice Jackson attempted
9 to do 60 years ago, to lift this case out of the morass of detail
10:45:30 10 put before you and to present to you, in bold outlines, the case
11 for and on behalf of Moinina Fofana.

12 The Prosecution confidently claimed to be able to predict
13 to Your Honours what the Defence will argue before you. At
14 paragraph 504 of their final brief they say this: "The Fofana
10:45:53 15 Defence will argue that it is clear from the evidence that
16 Moinina Fofana does not belong to the category of those bearing
17 the greatest responsibility. They will argue that the evidence
18 points to other persons who bear greater responsibility. "

19 Well, the Prosecution are, not for the first time, as we
10:46:10 20 shall see, wrong. Let me assure you, Your Honours, we will not
21 be arguing that Fofana does not bear the greatest responsibility.
22 We say, confidently, on the basis of the evidence presented
23 before you, he bears absolutely no responsibility for the crimes
24 and allegations leveled against him.

10:46:36 25 How do we propose to demonstrate this? First of all, we
26 will highlight and comment upon what we consider to be the main
27 points for and against Fofana, as set out in final briefs of both
28 sides. Secondly, we will demonstrate how and why Your Honours
29 can and should find that the case against him has failed.

1 Thirdly, we will demonstrate that that failure has come about
2 because, in respect of each and every count on the indictment,
3 there is either no evidence or such evidence that there is,
4 either taken alone or with other evidence, is either unreliable
10:47:21 5 or suffers from such inherent weakness, or is contradicted by
6 other evidence so as to render the entire case against Moinina
7 Fofana fatally flawed. Bold claims. Justifiable ones, we
8 submit. A mountain to climb? We shall see.

9 Your Honours, may I indicate what I'm hoping to achieve
10:47:48 10 here with this closing. I'm hoping that, should you want to look
11 at a transcript of this closing speech later, you might be able
12 to put it alongside the Prosecution's final brief and go through
13 their headings and see, we hope in crystallised form, how we
14 respond to each of the arguments put forward by them by way of
10:48:15 15 distillation of and we hope, perhaps with a little amplification
16 of, where appropriate, that which we set out at some length in
17 our final brief.

18 The parts of the Prosecution brief that we aim to consider
19 are these: The introduction, the brief history, the section on
10:48:34 20 crimes against humanity, Fofana's alleged responsibility under
21 Article 6(1) of the Statute with a separate sub-issue under joint
22 criminal enterprise. Thereafter, Fofana's alleged responsibility
23 under Article 6(3) of the Statute, command responsibility and,
24 finally, the Prosecution's purported analysis of Fofana's
10:49:01 25 Defence.

26 Starting, then, with the introduction. The Prosecution
27 remind you, Your Honours, at paragraph 3 of their closing brief,
28 as they did yesterday in oral argument, that a common law jury is
29 traditionally encouraged by the judge to appeal to their

1 commonsense, to assess the evidence on one's ordinary life
2 experiences, and to consider the issues in light of the evidence
3 in the case as a whole. But you, Your Honours, are not, as has
4 been observed more than once in the last 156 days, a raw jury.
10:49:47 5 You are not amateur debutantes in this process. You are
6 professional judges, appointed as such, to sit as a jury of
7 jurists.

8 As part of their introduction, the Prosecution assert that
9 Norman, Fofana and Kondewa were a united command, a team,
10:50:12 10 sometimes referred to as the Holy Trinity. Now two witnesses
11 referred to this Holy Trinity, TF2-011 and Albert Nallo. Well,
12 Your Honours, we hope you will not have the same difficulty in
13 rejecting Albert Nallo's version of the Holy Trinity that Sir
14 Isaac Newton had back in the 1700s for advocating Unitarianism;
10:50:41 15 the rejection of the Holy Trinity. Rest assured, Your Honours,
16 in rejecting the Holy Trinity, according to Nallo, you would not
17 be branded heretics. Far from it. We would submit, that when it
18 comes to the likes of him, and to use another biblical metaphor,
19 when it comes to the likes of him, you would need a very long
10:51:04 20 spoon to dine, but more of that later.

21 The Prosecution further assert in their introduction that
22 whoever controlled the supply of materials was in a powerful
23 position. The Prosecution claim that control of the organisation
24 was organised through the mechanism of supply. Fofana, claim the
10:51:25 25 Prosecution, under the instruction of Norman and Kondewa,
26 exercised that control. That's at paragraph 12 and, of course,
27 Your Honours will note there is no footnote for that proposition.

28 What I would stress, however, is that the Prosecution
29 assert Fofana's position of authority by virtue of that control,

1 because he was under the instruction of someone else. We would
2 submit that that's incompatible, to exercise control by virtue of
3 someone else's instruction.

4 But, of course, Fofana, to the extent that he did exercise
10:52:04 5 any such control was indeed not the only person to do so. The
6 evidence has shown that ECOMOG also supplied materials, that
7 materials were obtained from Base One, that Kabbah, and the
8 government in exile, also supplied materials.

9 Can the Prosecution really assert that any of these
10:52:31 10 occupied a powerful position? Did any of these control the
11 organisation, the CDF? It's fanciful, of course. Control of
12 materials does not, and cannot, entail control of an
13 organisation. And that, it would seem, is the Prosecution's
14 theory of its case; fundamentally flawed at its heart.

10:53:01 15 It should be noted, and we would submit this is important,
16 that at paragraph 14 of their final brief, the Prosecution state
17 that they do not dispute that the CDF was fighting for the return
18 of the constitutionally elected Government of Sierra Leone. They
19 do not suggest that the CDF was a joint criminal enterprise, nor
10:53:28 20 was every member a participant in a joint criminal enterprise.

21 They further acknowledge that not every member of the CDF
22 committed crimes. Those are, of course, crucial concessions
23 because it recognises that there were some in the CDF who were
24 part of the force for good, who had nothing less than the most
10:54:00 25 noble aims in fighting with the CDF. There were some, and a good
26 majority, we would submit, that were not involved in the matters
27 that you, Your Honours, have been hearing about over the last
28 150-odd days of evidence.

29 Your Honours, there is no dispute that Fofana was a member

1 of the CDF. The crucial question for you, we would submit, is:
2 Have the Prosecution proved beyond reasonable doubt Fofana's
3 involvement in any crime, and to the extent that he was in
4 command of anyone in the CDF; were they a part of that force for
10:54:47 5 good, that force for democracy, that force to end the suffering
6 in Sierra Leone?

7 The Prosecution end their introduction by saying that, for
8 convenience and brevity, that every piece of evidence relevant to
9 each accused is recited against each individually. The
10:55:09 10 Prosecution emphasise that in relation to each issue, the
11 evidence has to be considered in the context of all the evidence
12 in the case as a whole; no dispute with that.

13 But it is also worth remembering, and I don't think it has
14 been said by anyone yet, there are three defendants on trials
10:55:25 15 here. Three separate trials, we submit, heard together for
16 obvious reasons of convenience and economy, but three cases
17 nonetheless. Separate defendants demand and require separate
18 consideration and separate verdicts. A finding for or against
19 one does not, and cannot, and will not inevitably lead to a
10:55:57 20 finding for or against another.

21 So, we move on to deal with the next aspect of the
22 Prosecution's brief, entitled "Brief History," not a history of
23 the Prosecution's final brief, I would hope, although that would
24 be a story that would be fascinating to hear. No, it is a brief
10:56:24 25 history of the conflict in Sierra Leone and Fofana's alleged role
26 in it. Your Honours will be pleased to hear that, as it's a
27 brief history, we can deal with it quite briefly. We would
28 simply ask you to draw a line through it, to ignore it, to strike
29 it from the record. The section runs to some 16 paragraphs,

1 makes some quite sweeping assertions, but it should be noted that
2 not one of them is documented with a single footnote in relation
3 to any of the claims against Moinina Fofana.

4 PRESIDING JUDGE: Specifically which paragraphs are those?

10:57:05 5 MR POWLES: Your Honours, it's the section entitled "Brief
6 History" in the Prosecution's final brief.

7 PRESIDING JUDGE: Very well. All right.

8 MR POWLES: Moving on, then, to crimes against humanity,
9 crimes under Article 2 of the Statute of the Special Court for
10:57:23 10 Sierra Leone. This is, perhaps, the section of the Prosecution
11 final brief that is best presented in that it is clear, logical
12 and well argued, and thankfully so. Because the question of
13 whether the CDF can be categorised as an organisation that
14 committed crimes against humanity is as important as it is
10:57:52 15 difficult. Important, we would say, not only for the victims of
16 the alleged crimes, not only for the accused, not only for the
17 CDF, not only for the people of Sierra Leone, but for history,
18 and for the international community as a whole. Difficult, we
19 would submit, because the arguments are potentially some of the
10:58:17 20 most finely balanced to be considered in this case.

21 As difficult as the questions are, however, ultimately, we
22 would submit that commonsense should prevail. When you look at
23 the alleged crimes of the CDF and, of course, there were some,
24 when you look at those crimes against those of the RUF and the
10:58:36 25 AFRC, it is clear there is no comparison. There were crimes
26 against humanity in Sierra Leone, there was a policy to wreak
27 havoc on the lives of the civilian population of this country,
28 but it was not that of the CDF; it was that of the RUF and the
29 AFRC.

1 The RUF and AFRC were: "Led by commanders of an army of
2 evil, a core of destroyers and a brigade of executioners, bent on
3 the criminal takeover of Sierra Leone." The quote continues,
4 "Make no mistake, this brutality was not a mere happen stance of
10:59:14 5 the conflict that gripped Sierra Leone through the 1990s, it was
6 not a by-product of military combat. The RUF commanders were not
7 fighting a just war. The brutality was intended, it had purpose,
8 it was designed. The RUF took aim and launched a campaign of
9 terror directed against the innocent, unarmed civilians of this
10:59:38 10 country. "

11 Eloquent words, certainly, and Your Honours may be thinking
12 that you've heard them before, and you'd be right. They were the
13 choice words of the Prosecution when they opened the RUF case to
14 you, Your Honours, back in July 2004. What they described on
10:59:59 15 that day, we would submit, was a clear and unequivocal widespread
16 and systematic attack on the civilian population; a clear policy
17 by the RUF and AFRC to ravage this country. Clear, we would
18 submit, crimes against humanity.

19 And why do we raise this? Not to justify what may or may
11:00:24 20 not have been done in the name of the CDF, not to attempt to
21 raise any *tu quoque* defence; namely, that the crimes of the CDF
22 are excusable because their opponents did worse. That's not our
23 aim at all.

24 We raise these matters to do two things. Firstly, to
11:00:44 25 juxtapose what we would submit is a real widespread and
26 systematic attack with what is alleged against the CDF, to help
27 you, Your Honours, make the comparison, to compare the CDF as an
28 organisation with its primary aim, the protection of the civilian
29 population, with two organisations that had the destruction of

1 the civil populace at their very core. That, we say, will assist
2 you in making the right and commonsense decision in relation to
3 the CDF. The second reason why we raise those points is to put
4 the alleged crimes of the CDF in context.

11:01:26 5 Dealing then with context. The importance of context is
6 stressed in the ICTY Trial Chamber's decision in *Limaj* said this,
7 and it is set out at paragraph 74 of the Defence final brief:
8 "History confirms, regrettably, that wartime conduct will often
9 adversely affect civilians. Nevertheless, the Trial Chamber
11:01:51 10 finds that even if it be accepted that those civilians of
11 whatever ethnicity believed to have been abducted by the KLA in
12 and around the relevant period were in truth so abducted, then,
13 nevertheless," and this is the crucial part, "in the context of
14 the population of Kosovo as a whole, the abductions were
11:02:13 15 relatively few in number and could not be said to amount to a
16 widespread occurrence for the purposes of Article 5 of the ICTY
17 Statute."

18 Similarly, we would submit, that the alleged crimes of the
19 CDF should be viewed in the context of the population of Sierra
11:02:30 20 Leone as a whole. In the context of the war in Sierra Leone as a
21 whole, the number of deaths at the hands of the CDF cannot be
22 said to have endangered the international community or shocked
23 the conscience of mankind. This only happens, as the Trial
24 Chamber in *Tadic* explained, where the attacks are not isolated,
11:02:53 25 not random acts of individuals, but rather result from a
26 deliberate attempt to target a civilian population.

27 We would say that is now why, at the International Criminal
28 Court, at least, in order for there to be a finding of a crime
29 against humanity, by virtue of either a systematic or a

1 widespread attack, it must be proved, by the Prosecution, that
2 the attack was in furtherance of either a state or an
3 organisational policy to commit such an attack. The CDF, as an
4 organisation, never had such a policy. At most, it can be said
11:03:35 5 that there were certain individuals within it who had their own
6 agenda.

7 We would submit, in determining whether the CDF committed
8 crimes against humanity, it would be helpful for Your Honours to
9 consider in detail the Trial Chamber's reasoning and judgment and
11:03:52 10 conclusions in the case of *Limaj*. The similarities between the
11 two cases are striking. In both cases, you have a country
12 gripped by relentless and systematic human rights abuses by one
13 party to the conflict over the other. In *Limaj*, the Serbs had
14 subjected the Kosovo Albanian population of Kosovo to many years
11:04:17 15 of systematic human rights abuse. In Sierra Leone, that mantle
16 fell to the RUF and the AFRC.

17 In both cases, a grassroots civil militia effectively rose
18 up to attempt to defend the civil population from such abuses.
19 In *Limaj*, it was the Kosovo Liberation Army. In Sierra Leone, it
11:04:42 20 was the CDF. In *Limaj*, the Prosecution alleged that by virtue of
21 the KLA's policy to target alleged collaborators with the Serb
22 regime, and by virtue of the number of civilian casualties at the
23 hands of the KLA, that the KLA had committed crimes against
24 humanity. The allegations in this case against the CDF and
11:05:02 25 crimes against humanity are identical.

26 Incidentally, it should be pointed out that the numbers of
27 deaths in the *Limaj* case and the numbers in this case are
28 virtually identical as well. In *Limaj*, the number of civilian
29 casualties during the period under consideration, in that case,

1 was approximately 300 to 400. Similarly in this case, we
2 estimate that approximately 300 to 400 casualties can be
3 identified, and we get that figure by totalling the number of
4 alleged deaths that we set out in annex A to our final brief, the
11:05:42 5 crime base by crime base analysis, and the number of crimes
6 alleged to have been committed in each one of those crime bases.

7 It should be noted, however, that the 300 abductions and
8 ultimate deaths that occurred in *Limaj* occurred in much smaller
9 time frame, three to four months, and in a much smaller
11:06:02 10 geographical area than Sierra Leone. So the context in Kosovo,
11 the crimes of the KLA are certainly more significant than the
12 crimes of the CDF in Sierra Leone.

13 Nonetheless, the Trial Chamber in *Limaj*, and, again, it is
14 set out in paragraph 76 of the Defence final brief, rejected the
11:06:26 15 notion that crimes against humanity had been committed. They
16 said this:

17 "Upon consideration of the evidence before it, the Trial
18 Chamber finds that at the relevant times of the indictment,
19 there was no attack by the KLA directed against a civilian
11:06:44 20 population, whether Kosovo-Albanian or Serbia and no attack
21 that could be said to indicate widespread scale. However,
22 as indicated earlier, there is evidence of a level of
23 systematic or co-ordinated organisation to the abduction
24 and detention of certain individuals. While the KLA
11:07:06 25 evinced a policy to target those Kosovo-Albanians suspected
26 of collaboration with the Serbian authorities,."

27 This is the crucial part, "The Chamber finds there was no
28 attack directed against a civilian population." We would submit
29 the circumstances here are identical. The Prosecution in *Limaj*

1 did not appeal that finding of the Trial Chamber.

2 There was one major difference between the way that crimes
3 against humanity were dealt with in the *Limaj* case, and the way
4 that they are dealt with in this case. The major difference, we
11:07:46 5 would say, is that it appears that, in the *Limaj* case, the
6 Prosecution gave some thought to how they might prove the
7 widespread and systematic nature of the attack, notwithstanding,
8 of course, they ultimately failed to do that.

9 In *Limaj*, the Prosecution called a plethora of witnesses
11:08:08 10 before the Trial Chamber to try to demonstrate a widespread and
11 systematic attack. They called an expert from Human Rights
12 Watch, they called an OSC monitor and a British military attache,
13 both of whom were on ground in Kosovo during the conflict. They
14 called a member of the Serb intelligence forces, they called the
11:08:27 15 KLA's official spokesperson, who produced a large number of KLA
16 official communiqés dealing with the question of collaborators.
17 The Defence, of course, during that trial were able to explore
18 and challenge all of that evidence in cross-examination. In this
19 case, the Prosecution have adduced no such evidence.

11:08:52 20 In their final brief, the Prosecution say they can support
21 the allegations against the CDF and the widespread and systematic
22 nature of the attack in Sierra Leone by a number of exhibits.
23 Those are the exhibits that have been handed up to Your Honours
24 already. What I propose to do, briefly, if I may, is take
11:09:12 25 Your Honours through them

26 The first exhibit, Exhibit 86, is a situation report. It
27 deals with essentially two matters that could be said to amount
28 to deaths. The first at paragraph 6, and the second at paragraph
29 9, deaths of civilians or captured enemy combatants.

1 The second exhibit, Exhibit 104, reports of the UN
2 Secretary-General, in a sense, is dealing in the main with
3 children and child combatants. We would submit that the question
4 of the use of child soldiers is not something that can be taken
11:10:04 5 into consideration and viewed when dealing with the question of a
6 widespread and systematic attack against a civilian population.
7 Because, of course, the use of child soldiers is not one of those
8 crimes that falls within Article 2 of the Special Court Statute.
9 It is a separate crime and amounts to a separate issue under a
11:10:23 10 separate Article.

11 The third document is Exhibit 105. It talks of, "The Civil
12 Defence Force is normally under the command and control of
13 ECOMOG, and reports continue to be received of unruly criminal
14 behaviour on the part of some members of that force outside of
11:10:44 15 their home districts." The section goes on, "Some members of the
16 force have also been accused of human rights violations and
17 criminal acts, including looting, confiscation of vehicles and
18 civil disturbances, although allegations of summary killings and
19 the torture of prisoners have dropped sharply since the end
11:11:02 20 of May." So we would submit it is clearly not up there with the
21 sorts of crimes and allegations leveled against the RUF and the
22 AFRC, not across the threshold of widespread or systematic.

23 Exhibit 106, again, dealing with child soldiers; we would
24 submit not relevant. Exhibit 107, again, dealing with child
11:11:28 25 soldiers; we would submit not relevant. Exhibit 108, another UN
26 report, says the following: "In spite of the goodwill exhibited
27 by ECOMOG High Command, there have been a few reports," and I
28 stress a few reports, "of ill treatment of the civilian
29 population by ECOMOG, CDF and civil defence units. It is also

1 reported that detainees from rebel-controlled areas face a high
2 risk of intimidation and even execution as alleged rebel
3 collaborators. "

4 They then talk of the execution of up to 30 escapees by
11:12:07 5 Civil Defence Forces, Kapras, and, in a separate report, they
6 talk of a woman from the Moyamba District in the south-west who
7 provided detailed information of an alleged attack on the town of
8 Bradford by Civil Defence Forces in which at least six civilians
9 are believed to have lost their life. Then, of course, there is
11:12:25 10 another reference to the use of child soldiers.

11 Then there is the Human Rights Watch report, Exhibit 110.
12 It deals with humanitarian agency vehicles frequently being
13 commandeered by Kamajors, then under the heading "Killings and
14 Mutilations" significantly says this: "The scale and nature of
11:12:47 15 abuses committed by Kamajors and other members of the CDF differ
16 significantly from atrocities carried out by the AFRC and RUF,
17 but the abuses are no less horrific." They then go on to talk
18 about some ritual killings. The remainder of that exhibit deals
19 with, again, the use of child soldiers.

11:13:08 20 Finally, Exhibit 111, the report "From Combat to
21 Community - Women and Girls of Sierra Leone," dated January 2004.
22 There are some interesting parts in this document. Again,
23 reference to the RUF, perpetrating a widespread violence across
24 southern and eastern Sierra Leone, violence against women and
11:13:32 25 children and general terror in rural urban centres quickly
26 becoming the cornerstones to the movement and were encouraged by
27 RUF leaders. They go on, "Subjected to violence by both the RUF
28 and the SLA, local militias, known as Civil Defence Forces (CDF)
29 emerged." They conclude that paragraph by saying, "Combining

1 skill and valour, these groups, at times, thwarted RUF offences."
2 They then go on to deal on the next page with women and girls and
3 fighting forces, and the fact that they did appear in the CDF.
4 Again, we would submit not relevant to the question of crimes
11:14:15 5 against humanity and whether a widespread and systematic attack
6 occurred. They conclude on the last page by observing that they
7 did observe widespread human rights violations by members of the
8 CDF, including cannibalism, human sacrifice and sexual abuses,
9 et cetera.

11:14:39 10 That, in a nutshell, is the evidence of the Prosecution put
11 before you as evidence of a widespread and systematic attack. We
12 would submit that those documents clearly do not make out any
13 sort of CDF policy to target and attack civilians. Nor do they
14 disclose the numbers of the sorts of casualties that should be
11:15:06 15 present and evident for a finding that a widespread and
16 systematic attack has occurred.

17 The Defence evidence in relation to this matter is clear.
18 It is set out in our final brief, and if I may briefly take
19 Your Honours through it. It's at paragraph 77 onwards in the
11:15:42 20 Defence final brief where our analysis of the evidence in
21 relation to whether there is a widespread and systematic attack
22 and policy of the CDF is set out.

23 Colonel Iron sums it up quite well. He said, "All CDF
24 operations, as far as I can see, appear to be driven by the
11:16:01 25 central strategic idea of the CDF, which was to defend their
26 homelands." Other Prosecution witnesses confirm that the primary
27 goal of the CDF was the defence of their homelands and the
28 protection of civilians. Even Prosecution witnesses confirm that
29 one of the primary aims of the CDF was being the restoration of

1 the democratically elected government of this country.

2 "Notwithstanding the massive growth of the Kamajor/CDF
3 movement between the period 1995 and 2000, its aims and
4 objectives of defending the civilian population from threat did
11:16:47 5 not significantly change." That was the conclusion of
6 Dr Hoffman, or should I perhaps say the young Dr Hoffman who is,
7 incidentally, the same age as me, and I can assure Pa Tavener
8 that his comments yesterday were taken as the compliment that I'm
9 sure they were meant to be.

11:17:08 10 JUDGE ITOE: And he was not just an ordinary photographer
11 in good photography.

12 MR POWLES: At paragraph 88 of the Defence closing brief,
13 Dr Hoffman confirmed that rape, extrajudicial killings,
14 cannibalism, et cetera, these things did not relate to the aim of
11:17:37 15 defending the community. They were contrary to CDF aims at their
16 core. He confirmed that there was simply nobody in a position to
17 make declarations that could and would be considered the word of
18 the movement as a whole.

19 In response to a question from the presiding judge,
11:18:03 20 Dr Hoffman said -- the question being, "Does it amount to say
21 there was no centre from which pronouncements came, namely, on
22 behalf of the whole of the CDF?" Dr Hoffman said this, "Yes, My
23 Lord, that's what I would maintain and, logistically, there was
24 nobody who could occupy that position, and there was nothing
11:18:23 25 logistically that could have facilitated it."

26 So there was no one at the heart of the CDF who could
27 announce and dictate its aims and objectives. There was no one
28 who could set out and state what the policy of the CDF was. That
29 is why we say, even if it can be shown that there were

1 individuals in the CDF who may have said, "Do X," or, "Y to
2 collaborators," that does not give rise to a policy for the part
3 of the CDF. There was no one who could do that.

4 So what are the conclusions that can be drawn? Well, we
11:19:04 5 say, firstly, the CDF had, as its primary aim, the protection of
6 the civilian population from human rights abuse and the
7 restoration of the legitimate government. We would say it is
8 totally, totally incompatible on the one hand to have the defence
9 of the civilian population as the primary aim on one hand and, at
11:19:27 10 the same time, be said to be launching a widespread and
11 systematic attack against it. The two simply do not go together.

12 Secondly, the targeting of civilians was contrary to the
13 philosophy and training of the CDF, contrary to the very core and
14 *raison d'etre* of the CDF movement.

11:19:51 15 Thirdly, even if this Trial Chamber finds that some members
16 of the CDF had, as an objective, the targeting of collaborators,
17 no one in the CDF could articulate and claim to be making the
18 policy of the CDF. In that regard, this case again is slightly
19 different from the situation of the KLA in *Limaj*. Of course, in
11:20:13 20 that case, there were a large number of KLA communiques that were
21 purporting to be made on behalf of KLA central command. But we
22 simply do not have a corresponding situation here with the CDF.
23 Crucially, as the Prosecution note in their closing brief, this
24 is not a case against all in the CDF.

11:20:34 25 Fourthly, and finally, if collaborators were targeted, they
26 were targeted as in *Limaj* as individuals rather than as members
27 of a larger targeted population. They were not targeted on the
28 grounds of their race, et cetera, they were targeted as
29 individuals. If the targeting of collaborators occurred, it was,

1 we would submit, given the primary aim of the CDF of protecting
2 the civilian population, because such individuals were perceived,
3 rightly or wrongly, to be actively working against the civilians
4 the CDF were trying to protect.

11:21:20 5 From all of this, Your Honours, we say it is clear on the
6 evidence that the Prosecution have not made out the requisite or
7 widespread or systematic attack against the civilian population
8 of this country and, accordingly, the three accused must be found
9 not guilty of counts 1 and 3 in the indictment.

11:21:50 10 Your Honours, I'm looking at the clock. I don't know what
11 time you normally take a morning break. I'm coming onto another
12 section; namely, Fofana's alleged responsibility under
13 Article 6(1) of the Statute. I wonder whether now might be a
14 convenient time for Your Honours to break.

11:22:07 15 PRESIDING JUDGE: We agree with you. We'll take the usual
16 morning break at this time.

17 MR POWLES: I'm grateful, Your Honours.

18 [Break taken at 11.25 a.m.]

19 [Upon resuming at 11.50 a.m.]

11:44:10 20 PRESIDING JUDGE: Mr Powles, please continue.

21 MR POWLES: Thank you, Your Honours. I indicated before
22 the break that I would be coming on to Mr Fofanah's alleged
23 responsibility and matters before you. And when it comes the
24 Prosecution's allegations with regards to him, we would say in
11:52:25 25 relation to the Prosecution brief it is not necessarily a
26 question of common sense but a matter of making any, or at least
27 some sense of what the Prosecution actually assert against him

28 We would say that the way the Prosecution put its case
29 against him in the indictment was vague. It was vague in the

1 pre-trial and supplementary pre-trial brief and now, over --
2 after 150 days of evidence, the Prosecution's case against him,
3 we would say, is still no clearer, still difficult to understand
4 from the final brief precisely what the case of the Prosecution
11:53:03 5 is against Moinina Fofana.

6 In our respectful submission, it is a bit of a mish-mash.
7 I don't know if that can be translated in Mende; I hope someone
8 can try. There are lots of disparate and vague allegations in
9 the Prosecution's brief, making them hard to decipher and to
11:53:27 10 respond to. But decipher them we have, because the issue here,
11 and what is at stake for Mr Fofana, would make it too important
12 not to. So what we have tried to do is distill and make some
13 sense of what the Prosecution assert against him so that we can
14 make robust and clear responses to them.

11:53:55 15 JUDGE BOUTET: Mr Powles, are you still talking crimes
16 against humanity, or have you moved on to different --

17 MR POWLES: I have moved on to the allegations against
18 Moinina Fofana.

19 JUDGE BOUTET: You're looking at all the counts now?

11:54:06 20 MR POWLES: Your Honours, yes. I shall go through the
21 counts.

22 The Prosecution pick up the cudgels against Moinina Fofana
23 in their final brief with a section entitled "Fofana's position
24 of authority." Well, the first point to make, of course, is that
11:54:22 25 a position of authority does not in and of itself give rise to
26 any criminal responsibility. It must be shown that the person
27 used that authority to commit crimes. Putting aside whether or
28 not Fofana was in a position of authority, we would say the
29 Prosecution have not proved that he used that authority and such

1 authority that he had to commit any crimes as alleged.

2 The Prosecution makes six points in the section entitled
3 "Fofana's position of authority," and we'll consider them each in
4 turn.

11:54:58 5 Firstly, at paragraph 381 they state that his believed age
6 and where he is from and the source for that information, when
7 one looks at the footnotes, is the indictment. So the very first
8 allegation against Fofana, an allegation of fact, it would seem
9 emanates from the indictment where the allegations against him
11:55:21 10 are set out. We would submit that is hardly appropriate.

11 Secondly, at paragraph 382, the Prosecution assert that
12 Fofana was in a high position with power and responsibility,
13 working with Norman and Kondewa, with all major decisions being
14 taken in consultation together. The source, according to the
11:55:45 15 brief, of that assertion is Colonel Iron's military expert
16 report. He, however, based his conclusions and assessment on
17 discussions with a limited range of Prosecution witnesses, all of
18 whom testified before you. We would submit that the conclusions
19 to be drawn from what they had to say about Fofana should not be
11:56:14 20 made by Colonel Iron after what they said to him in private, but
21 by you after hearing what they had to say about him in public
22 before this Court.

23 Just as an aside, we would, of course, compare
24 Colonel Iron's methodology with that of Dr Hoffman. Dr Hoffman
11:56:36 25 interviewed some 200 plus people during the course of his
26 academic research. He lived with the Kamajors. He did most of
27 that and reached many, if not all of the conclusions that he
28 ultimately came to, before, and this is crucial, before he was
29 even approached or instructed by the Defence. He was, we submit,

1 a true expert witness.

2 Thirdly, at paragraph 383 of the Prosecution brief, they
3 claim that "Fofana was perceived by the majority of witnesses as
4 being an important person, someone from whom orders originated
11:57:15 5 and were enforced." That is a quote. Interestingly, when one
6 looks at the source or the footnote for that assertion,
7 notwithstanding the fact that it said that he was perceived by
8 the majority of witnesses, there is no reference at all to any
9 witness. Instead there is a reference to Exhibit 112. Exhibit
11:57:36 10 112, of course, is the CDF calendar. So of course we are not
11 sure how that assertion is made.

12 In any event, the Prosecution refer to the CDF calendar so
13 early on in the section of the final brief against Fofana,
14 indicates that, we submit, that they place some significant
11:57:55 15 reliance upon it. So it is perhaps worth just having a quick
16 look at it. There you go. Mr February, Mr Fofana, looking
17 magnificent with pen in hand, notwithstanding the fact that he is
18 an illiterate man. And under the picture is a caption, and it
19 says this:

11:58:15 20 "As far as the Sierra Leonean Civil Defence Forces are
21 concerned, they don't say war unless he says war" -- "unless he
22 says they say war." Whatever, of course, that is supposed to
23 mean. The first point to make about this calendar was that it
24 was prepared in the United States by persons not directly
11:58:37 25 involved in the war and, as Reverend Samforay stated in the
26 Defence 92bis email, there was no verification of the information
27 in the calendar. End of story.

28 The CDF calendar, as a number of witnesses confirmed before
29 you, was a farce, a joke, empty bluff. Its evidential value, we

1 would submit, is nil.

2 One wonders whether the decision to have Fofana as the
3 second accused on the indictment was taken by the Prosecution by
4 virtue of the fact that he appears as the second person in the
11:59:15 5 calendar, Mr February. The first accused is, of course,
6 Mr January and the third, Mr March.

7 The fourth assertion that the Prosecution make is that by
8 his own admission Fofana was in charge whenever Norman was not
9 there. Fofana may or may not have said that, but it doesn't
11:59:42 10 prove, of course, that any crimes were committed during those
11 periods that he was in charge of Base Zero. Even if he were, it
12 does not demonstrate what his role actually was during any such
13 periods in charge. And, importantly, it does not specify how
14 often or when he spent time in charge. Certainly, no crimes were
12:00:10 15 committed or reported during the two days that TF2-079 was at
16 Base Zero when he says that Fofana says that he was in charge.

17 During that period, it seems that all that happened was
18 that Fofana received a situation report, a sitrep report, which
19 he, of course, could not read. So he held on to it to await
12:00:39 20 Norman's return. Hardly an indication, we would submit, of a man
21 of great authority.

22 The fifth point, at paragraph 385 of the Prosecution final
23 brief, that the Prosecution make is that Fofana was in charge of
24 CDF headquarters in Kenema and Zimmi, and that Fofana was the
12:01:00 25 highest authority in Zimmi during the attack and for the months
26 following. The months following, of course, being crucial.

27 According to the Prosecution, the source of this assertion
28 is witness TF2-223 at pages 41, 95 and 100 of that witness's
29 testimony. Well, at page 41 there is no mention of Fofana. The

1 first mention of Fofana is during pages 95 to 100 on 30 September
2 2004, the testimony of that day.

3 What is established from that testimony is that Arthur
4 Koroma was the administrator of Kenema District, six to seven
12:01:39 5 months after the capture of Kenema. Before Arthur Koroma, the
6 witness said, in the first place it was Chief Kondewa and the
7 witness then mentioned Fofana, who later gave the position to
8 Jambawai. TF2-223 -- 223, could not and did not state how long
9 Fofana was in charge for, whether it was two weeks, one month,
12:02:05 10 two months or three months. Why? Because the witness says he
11 was at SS Camp; he, being the witness, not Fofana.

12 Moreover, witness 223 did not describe or set out Fofana's
13 role or responsibility when it is said that he was in charge.
14 Nor could or did he tell the Court definitively how long Fofana
12:02:31 15 held the position for. On this evidence, we would say, it is
16 impossible for the Prosecution to assert, as they do, that
17 Kamajors under the command of Fofana committed a great number of
18 atrocities.

19 In paragraph 385 of their brief the Prosecution cite a
12:02:49 20 number of witnesses, none of these witnesses, however, mention
21 Fofana by name and nor was it established that these individuals,
22 and nor was it established that the individuals said to have
23 committed the crimes were his direct subordinates. So those
24 witnesses don't identify Fofana, nor do they identify any of his
12:03:13 25 direct subordinates, such of course that he had any.

26 Finally, at paragraph 386 of that section, the Prosecution
27 seem to place some significance on the fact that Fofana was
28 quoted by Prince Brima on the BBC. From the transcripts,
29 however, it is clear that the only example given is that Fofana

1 said to the Kamajors -- is that Fofana said that Kamajors had
2 captured the Sewafe bridge and were moving towards Bo Town. This
3 does not of course indicate that Fofana was in a position,
4 vis-a-vis the commission of any crimes. All it seems to suggest
12:03:55 5 is that Fofana was imparting information regarding Kamajor
6 movements and operations.

7 Moving on then to unlawful killings. The indictment and
8 Prosecution pre-trial briefs set out their allegations of
9 unlawful killings against Fofana in relation to the various
12:04:18 10 locations. Unfortunately, the section of the final brief does
11 not seem to follow that pattern. In fairness at paragraph 388
12 does footnote the various witnesses that testified to each
13 location but there is no page reference in relation to any of
14 those witnesses in the analysis thereof. So what we have tried
12:04:38 15 to do -- what we have tried to do is set out the various
16 locations and try and identify which witnesses that the
17 Prosecution refer to in that section of unlawful killings, deal
18 with those various areas. And the areas concerned are Tongo,
19 Koribundu, Bo, Kenema, and finally, the allegations made by
12:05:08 20 Albert Nallo.

21 Dealing first then with Tongo. In the actual body of the
22 brief the Prosecution rely on the following witnesses to
23 substantiate Fofana's alleged involvement in unlawful killings in
24 Tongo. TF2-005. He stated that Fofana was present in a meeting
12:05:28 25 at Base Zero where plans for the Tongo attack were discussed. At
26 that meeting Norman is said to have stressed the importance of
27 taking Tongo and that anyone found working for the junta or
28 mining should not be spared. Fofana is said by that witness to
29 then have spoken at the meeting and dished out ammunitions at

1 Norman's request. I stress there that Fofana dishing out of
2 ammunitions, as ever, was at the request of the first accused.

3 TF2-222 said this: "Norman stated that there was no place
4 to keep captured POW s or collaborators," I stress that. "Norman
12:06:10 5 said at the meeting that there was no place to keep captured
6 POW s or collaborators." Fofana is said to have told that
7 meeting, "You have heard the national co-ordinator. Any
8 commander failing to perform accordingly and losing your own
9 ground, just kill yourself there and don't come back to us."

12:06:31 10 Well, one would think that Norman's directions or speech to
11 the Kamajors would not only have dealt with the capturing of
12 POW s and collaborators. There would have been other things
13 spoken about, potentially legitimate operations. We would submit
14 that this is not evidence that Fofana had ordered the killing of
12:06:55 15 any people. All he said during that meeting, according to
16 TF2-222 was, "Just hold your ground." He did not endorse the
17 specific killing or treatment or otherwise of any collaborators.
18 The only people that Fofana told those people gathered at that
19 meeting to kill were themselves, were they to fail in their
12:07:20 20 operation. And of course suicide is not a crime within the
21 jurisdiction of this Court.

22 TF2-201 stated that Fofana was present at a meeting to
23 discuss the taking of Tongo. That witness said that Norman
24 stated the importance strategically of taking Tongo, making it
12:07:40 25 crystal clear, we would submit, that the capturing of POW s was
26 not the only thing that Norman spoke about. He spoke about the
27 strategic importance of taking Tongo and because, "It was where
28 the Rebels were getting diamonds and they were taking it to
29 Charles Taylor and they were getting more arms, ammunition and

1 food to come and destroy Sierra Leone. "

2 Now, could Fofana's words, "You have heard the national
3 co-ordinator; any commander failing to perform accordingly and
4 losing your ground, just decide to kill yourself there and don't
12:08:15 5 come and report to us," could those words by Fofana be endorsing
6 and be relating to the legitimate strategic exhortations that
7 Norman stated as just outlined. TF2-201 also stated that it was
8 Norman, not Fofana, Norman who personally went to the store and
9 gave out ammunitions, RPG bombs, AK-47's, et cetera, et cetera.

12:08:43 10 Siaka Lahai stated that there were three attacks on the
11 town of Tongo. This is from paragraph 69 of the Prosecution
12 brief. It doesn't specifically deal with Fofana but it deals
13 with the attack on Tongo. He said this: "There were three
14 attacks on the town of Tongo but it was only captured on the
12:08:59 15 third attempt. The commanders that led that third attack were
16 Kailondo, who attacked from the Tongola flank, Siaka Laha who
17 attacked from the Tongo Highway and Lansana Bockarie who was with
18 the standby team at Gelema." That is in paragraph 69 of the
19 Prosecution final brief.

12:09:16 20 TF2-078 of course stated that some of the planning for the
21 Tongo took place at Panguma and was not related or emanating from
22 Base Zero at all.

23 From all of that we submit in relation to Tongo the
24 following can be deduced: It is not clear from the evidence who
12:09:36 25 actually gave out the weapons. Was it Norman? Was it Fofana?
26 Does it matter? Even if Fofana did distribute weapons, on orders
27 of Norman it would seem, it is not clear from the evidence that
28 those weapons that he distributed were used to commit specific
29 crimes. There were a number of attacks, three separate ones and

1 other potential leaders of them

2 And I have made the point already; the words allegedly
3 spoken by Fofana could have been limited to his encouragement of
4 legitimate operations set out by Norman. There were legitimate
12:10:15 5 targets for attack in Tongo. It was a strategic position.

6 It is not clear from the evidence and from Fofana's words
7 that he actually supported the commission of any crimes
8 whatsoever. He did not say, "do those crimes" that you have just
9 heard about. He limited his references to commanders and
12:10:39 10 individuals holding their ground.

11 Finally, there is no evidence that troops at the meeting
12 that Fofana allegedly spoke at were one and the same as those who
13 ultimately committed any crimes.

14 Moving on then. Koribundu. The witness that the
12:10:57 15 Prosecution point to in their final brief as support for Fofana's
16 involvement in the Koribundu attack was TF2-190 and he stated
17 this: "That a planning meeting took place in 1998 at Base Zero,
18 where attack on the Koribundu axis was discussed." The witness
19 said that "Norman is said to have told people to retake rebel
12:11:19 20 occupied towns." I stress that is all in the final brief that
21 the Prosecution say that the witness said, that Norman said,
22 "Retake rebel occupied towns." And Fofana is then said to have
23 said, "So any commander, if you are given an area to launch an
24 attack and you have failed to accomplish that mission, do not
12:11:39 25 return to Base Zero."

26 Again, where is the evidence that those words spoken by
27 Fofana related to anything other than a legitimate mission or
28 operation? That point is made crystal clear when you look at the
29 cross-examination of TF2-190. In cross-examination he said that,

1 "Fofana only told the people present to implement what they had
2 learned. He did not tell anyone to loot, burn houses or kill
3 civilians. He did not even tell people present to kill captured
4 soldiers. "

12:12:22 5 The killing of Sheku Gbao. It is in the Prosecution's
6 final brief said to relate to an area called Moribond [sic]. I'm
7 not quite sure where that is but I suspect it is a typo and
8 refers to Koribundu. The killing of Sheku Gbao of course is a
9 misnomer; it did not occur. Sheku Gbao was never killed. So
12:12:45 10 anything that Fofana may or may not have said about asking why
11 Sheku Gbao had not been killed we would submit is irrelevant,
12 it's not evidence that can be used against him to find him guilty
13 of unlawful killings, because of course at this Court there are
14 no inchoate crimes. If the alleged victim is not dead, there is
12:13:07 15 no crime.

16 Moving on then. Bo and Kenema. At paragraph 400 of the
17 Prosecution's final brief the Prosecution refer to Albert Nallo.
18 It is said that Nallo states that Fofana and Kondewa decided in a
19 meeting at Base Zero that Mustafa Ngobeh must lead the attack on
12:13:32 20 Bo. At a meeting -- at that meeting Norman is said to have given
21 orders to loot and kill southern farmers and police officers.
22 The Prosecution say that Fofana's tacit support for these crimes
23 can be inferred. Well, that is not quite right because it should
24 be noted on the evidence Ngobeh was unable to capture Bo and
12:13:55 25 there is certainly no evidence that Ngobeh committed any crimes
26 in Bo. So for Fofana deciding at a meeting in Bo that Mr Ngobeh
27 should lead the attack on Bo, we would submit, again, is
28 irrelevant.

29 Witness TF2-201 confirms that Fofana was present at a

1 meeting, and I stress a meeting, regarding the attack on Bo and
2 Kenema. But he does not confirm that this was a meeting where
3 Norman gave an order to Nallo to carry out any crimes. TF2-201
4 testified that Norman and Fofana would direct him to supply
12:14:36 5 ammunition to commanders, but there was no evidence that crimes
6 were actually committed with any of the ammunition so supplied by
7 either of those two men.

8 In relation to Kenema, the Prosecution rely on the evidence
9 of TF2-041 in that it is said that Kamajors said to that witness
12:14:59 10 in Blama, that Norman had instructed them to kill police, wives
11 and children. The Prosecution submit that Fofana is responsible,
12 no mention of pursuant to which basis of criminal liability, but
13 they say that Fofana is responsible for the attack on the police
14 station in Kenema District because the incident was part of the
12:15:21 15 orders given by Norman and reinforced by Fofana.

16 Now, for that to be true, it presupposes A, that Fofana
17 said anything that reinforced that order given by Norman, of
18 course which there is no evidence. And it also presupposes, if
19 the Prosecution seek to rely on what he may or may not have said
12:15:41 20 at other meetings, for example, in relation Tongo, in relation to
21 Koribundu, it presupposes that those three areas Tongo, Koribundu
22 and Kenema, that the planning for all those attacks occurred at
23 the same time Norman said exactly the same things and Fofana
24 responded in exactly the same way.

12:15:58 25 But crucially, we would say there is no evidence of Fofana
26 ordering or directing or supporting or doing anything in relation
27 to the commission of crimes in Kenema from the evidence of
28 TF2-041, the witness that the Prosecution point to in support of
29 that allegation.

1 Turning then to the burning of collaborators in Kenema. At
2 paragraph 405 of the Prosecution brief, the Prosecution rely on
3 TF2-223. 223. They rely on him to support the allegation that
4 Fofana gave direct orders, "direct orders for the burning of
12:16:37 5 collaborators in Kenema." Quite a serious allegation.

6 So let us look at the testimony of TF2-223. He testified
7 on 28 September 2004 in closed session, so I will be careful as
8 to exactly what I say that witness said in closed session, but I
9 don't think I cross the boundary by saying that that witness, and
12:17:02 10 this is the crucial thing, states that Fofana and Kondewa gave
11 instructions for one corpse to be burnt; no reference to burning
12 collaborators, just the burning of a corpse.

13 Now, I am no expert when it comes to questions of human
14 biology, but even I know that you can only be killed once. You
12:17:27 15 can't kill something twice. So unless the Prosecution assert
16 that by being part of this holy trinity Fofana somehow possessed
17 the power to resurrect this individual, an instruction to burn a
18 corpse can hardly be translated as "a direct order for the
19 burning of collaborators." It is fanciful.

12:17:52 20 Moving on then to Kenema and SS camp. At paragraph 416 of
21 the Prosecution final brief, the Prosecution refer to the hearsay
22 order allegedly given to witness 223 by Commander Ngaoujia and it
23 said that Ngaoujia told 223 that Norman gave orders that were
24 dished out by Fofana for the taking of SS camp. Now, there is no
12:18:20 25 evidence that civilians were killed as part of that attack, the
26 taking of SS camp. And it would seem, at its highest, that the
27 only evidence is this hearsay notion that Norman gave orders that
28 were dished out by Fofana for an operation that ultimately there
29 is no evidence related in the record resulting in any civilian

1 casualties or any crimes being committed.

2 It is stated that Fofana allegedly handed over the camp,
3 but there is no evidence that he knew what was going on in that
4 camp thereafter. There is no evidence that he was involved in
12:18:55 5 any way in the operation of that camp thereafter. The only piece
6 of evidence that links Fofana to that camp is the evidence of 223
7 who says that there was a daily occurrence book and that Fofana
8 once saw it. Now I stress again, Fofana can't read. So unless
9 that daily occurrence book was some form of comic book, setting
12:19:23 10 out what happened at SS camp in pictorial form, we would say
11 there was no way that Fofana could have known, on the evidence,
12 what was going on in SS camp.

13 Moving on, then, to Bo and the killing of TF2-057's
14 brother. We deal with it in Defence brief at paragraphs 132, 134
12:19:54 15 and 136. You would, of course, recall the evidence of TF2-057.
16 He states that he was taken to an office at 88 Mahoi Boima Road
17 and was put in an office. He saw -- he said he had seen Fofana
18 once some years before where - I think 1993/94 - where Fofana was
19 at that time identified to him as the director of war. Of course
12:20:24 20 that can't be right, because at that time Fofana wasn't the
21 director of war.

22 He saw Fofana, he says, in the early 1990's, 1995, 1993.
23 He then saw Fofana very briefly as he was taken into the offices
24 at Mahoi Boima Road, 88 Mahoi Boima Road. He was then held there
12:20:45 25 for some 15 days. He heard Fofana's voice initially, only very
26 shortly. And on the second occasion when that witness says that
27 Fofana came to the cellar in which he was being kept. He says
28 that he could not see the person outside the door and he says
29 that he heard someone outside that door giving an order for his

1 brother to be taken away and his brother, of course, was never
2 seen again.

3 Now, from that first encounter when the witness was first
4 taken to 88 Mahoi Boima Road, he did not have much of an
12:21:23 5 opportunity to get to know Fofana's voice. There is a good
6 chance that he would have been speaking different languages. The
7 witness was not a Mende. Fofana, of course, would have been
8 speaking in Mende. And then 15 days later, it would seem, under
9 a situation of some great stress, that witness claims that he was
12:21:43 10 able to recognise Fofana's voice on the basis of what he had
11 heard before and say that the man that then came to the cell and
12 asked for his brother to be taken away, was one and the same as
13 the person that he had first seen when he was taken to that
14 office 150 days earlier.

12:22:01 15 Well, you don't need to be an expert to know that that
16 identification is very, very, very tenuous, very, very weak.
17 Now, of course, there is no need for corroboration in
18 international tribunals but, of course, when it comes to
19 questions of identification, and weak identification, we would
12:22:22 20 say there does need to be some sort of corroboration. And of
21 that incident there is none. The proposition for need for
22 corroboration of weak identification evidence comes from the case
23 of *Limaj* at paragraph 17 of the Trial Chamber's Judgment. It is
24 fair to say that all the authorities dealt with in *Limaj* -- and
12:22:45 25 the issue in *Limaj* was a question of visual identification.
26 This, of course, is voice recognition, an even harder and less
27 precise area of identification, particularly when dealing with
28 someone speaking in a difference language, particularly when you
29 don't know that individual very well, particularly when, on the

1 evidence, it seems that, and it is set out very fully and clearly
2 in our final brief, that the office that the witness was taken
3 to, 88 Mahoi Boima Road, was probably not Fofana's office at all,
4 in any event. It was the office of Kosseh Hindowa. To the
12:23:21 5 extent that Fofana had an office in Bo, it is at 42 Mahoi Boima
6 Road. So it would seem there is a very real question mark and
7 very real doubt over the evidence of TF2-057's identification of
8 Fofana's voice and his incurred responsibility thereafter for the
9 incidents that occurred at that office.

12:23:45 10 At paragraph 406 of the final brief, the Prosecution's
11 final brief, they rely on Nallo's assertion that Fofana was
12 present when Norman gave him a mission to target collaborators in
13 villages in and around Base Zero.

14 The first point to make, of course, is that those
12:24:07 15 allegations were not properly pleaded. Nor were the allegations
16 of ritual killings in relation to Fallon and Kanu. And the
17 Prosecution yesterday said that no prejudice arises from their
18 failure to properly plead those issues because, of course, the
19 Defence could deal with them during the course of the trial.

12:24:27 20 Well, I can tell Your Honours some great prejudice was caused,
21 certainly to Mr Ianuzzi and Mr Bockarie who sit either side of me
22 in relation to the allegation in relation to the killing of
23 Mr Fallon, because they trekked some six hours to go and try and
24 find his brother. They had to walk through swamp waters with
12:24:48 25 computers on head to go and track down that witness, had to strip
26 down to their underpants. I don't invite you to envisage it, and
27 go and interview this witness, the witness who ultimately came
28 and testified before you.

29 Now, it wasn't properly pleaded in the indictment. It

1 wasn't properly set out in the pre-trial brief, in the
2 supplementary pre-trial brief. It arose during the course of the
3 evidence and from the witness's testimony. How were the Defence
4 to know what emphasis would be placed on that witness? We went
12:25:22 5 through great lengths to try and rebut that evidence and now we
6 are told that those ritual killings are only relied upon to the
7 extent to which they demonstrate authority.

8 I will come back to that in a moment but we would say,
9 certainly to my two colleagues, substantial prejudice was caused
12:25:41 10 in the obtaining of the evidence to rebut that evidence.

11 Nallo sets out in his evidence or gave evidence of his
12 involvement in three attacks at Norman's behest; one in Dodo
13 village where 15 people were killed, a killing in Baoma Kpengeh
14 and a killing in Sorgia. Interestingly and in the final brief
12:26:03 15 the Prosecution only deal with the killings in Dodo and Baoma
16 Kpengeh. They totally dropped the allegations in relation to
17 Sorgia, Sorgia Village. And why do they drop that? We would say
18 it is because we called Joseph Lansana. Joseph Lansana came and
19 totally disavowed, totally undermined the truthfulness and
12:26:25 20 veracity of Nallo's evidence. He came and he said "Yes, it was
21 the CDF who killed my mother but not when Nallo said it happened,
22 some years before. And "No, they didn't cut off my ears, here
23 they are, two ears for Your Honours to see"; undermines Nallo's
24 evidence and his credibility and we would say the fact that the
12:26:53 25 Sorgia incident is totally undermined that also undermines and
26 puts outside the relevant period of the indictment that Dodo and
27 Baoma Kpengeh incidents as well because they're all part of, it
28 seems, the same operation; all part of the same directions by
29 Norman to go and deal with alleged collaborators in those areas.

1 The two ritual killings. The killing of Kanu and Fallon.
2 Just before moving on, of course I haven't set out all the
3 arguments in relation to those issues for reasons of time. They
4 are fully set out in our final brief at paragraphs 241 and 246 to
12:27:35 5 248 for Dodo and Baoma Kpengeh respectively. Sorgia is dealt
6 with at paragraphs 243 and 244.

7 In relation to the ritual killings, that of Fallon and
8 Kanu. Dealing first with Fallon. Of course, Your Honours were
9 presented with the -- we would submit quite persuasive testimony
12:27:52 10 of his brother who says that he saw his brother being killed with
11 his own eyes by rebels, not as part of some sort of CDF ritual
12 ceremony.

13 In relation to the evidence of the killing of Kanu from
14 Nallo, of course and it is set out in our, the Defence final
12:28:11 15 brief. That is totally contradicted by the evidence of TF2-017
16 who says that Fofana was not present at that incident. And I
17 stress that Fofana was not present at that incident because all
18 Nallo says, of course, in relation to both of those incidents is
19 that Fofana was present. He doesn't say that he was involved in
12:28:34 20 any way, shape or form other than simply being present with them.
21 Of course Nallo was present at those incident as well.

22 On Nallo's own evidence he is a cold-blooded murderer. He
23 expressed absolutely no remorse or contrition for his actions
24 when he appeared before this Court. I was not present, sadly,
12:29:03 25 for his testimony but on reading the transcript such was the
26 frenzied and frantic way in which Nallo was naming and
27 implicating other members of the CDF, we would say in order to
28 save his own skin. Such was the frenzy that I could not help
29 thinking that I was reading from Arthur Miller's, "The Crucible."

1 I half expected Nallo to then go on to implicate John Proctor
2 himself for the alleged crimes of the CDF here in Sierra Leone
3 but seriously, Nallo was and is a reprehensible, cold-blooded,
4 murderous liar.

12:29:46 5 We submit that this Court should not believe a word that
6 came from his poisonous mouth unless the evidence is somewhere
7 corroborated by another witness. And that approach would be
8 entirely consistent with the approach of the Trial Chamber in
9 *Limaj*.

12:30:12 10 With respect to a similarly reprehensible witness, the
11 Trial Chamber held that they would not rely on the evidence of
12 that witness unless that witness's testimony was corroborated in
13 some way, shape or form by another witness. In relation to
14 another witness, a witness who has shown to have given false
12:30:31 15 testimony before the Tribunal, they similarly said they would not
16 believe that witness unless that witness's testimony was
17 corroborated. And on two counts Nallo falls into that count --
18 that category; he lied and he was a murderer. And for those two
19 reasons we would say there must be corroboration of his evidence
12:30:48 20 before it can be relied upon.

21 The law in relation to that is fully set out in relation to
22 corroboration of witnesses evidence in the Defence final brief so
23 I won't rehearse it with Your Honours now.

24 The Prosecution, generally, allege Fofana's involvement in
12:31:05 25 unlawful killings by virtue of his distribution of arms. That is
26 set out in paragraph 413 to 415 of the Prosecution final brief.

27 But it is important to recall again that arms and
28 ammunition were also supplied by ECOMOG. They were also supplied
29 by President Kabbah and they were also obtained from places other

1 than Base Zero, they were -- such as Base One - they were brought
2 to Base Zero by Norman and director of logistics, Mustapha Lumeh.

3 Fofana, it seems, only dished out weapons when ordered to
4 by Norman. For this reason we say Fofana can, in many ways, be
12:31:53 5 said to be the glorified storekeeper, shopkeeper, key master,
6 door opener; call him what you will. The man was a relative
7 nobody.

8 In conclusion, the Prosecution allege that Fofana was
9 responsible for one of the most serious crimes that exist in the
12:32:15 10 Special Court Statute: Murder.

11 Unlawful killing. We would say it is shocking in the
12 extreme that the evidence to support such a serious claim has not
13 been properly presented, either during the trial or now during
14 the Prosecution's closing arguments. As set out the Defence
12:32:38 15 final brief, there is no evidence or no such evidence that can be
16 believed that Fofana planned, instigated, ordered, committed or
17 aided and abetted unlawful killings.

18 Yesterday, the Prosecution stated to you that where orders
19 were given to kill civilians and civilians were subsequently
12:33:05 20 killed, commonsense tells you that you can be satisfied beyond
21 reasonable doubt that that was done at the accused's order.

22 Well, with regards to Fofana there is not a single example
23 of him giving a direct order to kill anyone. There is a
24 reference to him giving an indication to burn a corpse; of course
12:33:32 25 that is not murder. There is a reference to him telling men to
26 kill themselves if they fail in their operations. Again, suicide
27 is not a crime. He gave no orders to kill. The Prosecution's
28 case against him in relation to unlawful killings is groundless.

29 His greatest responsibility for willful killing? No. We

1 say no responsibility for willful killing.

2 Moving on then to physical violence and mental suffering.

3 At paragraph 424 of the Prosecution's final brief the Prosecution
4 state that many witnesses made reference to Fofana in relation to
12:34:13 5 the offences charged under counts 3 and 4. They refer to
6 witnesses TF2-05, 014, 017, 079 and 222 but with not a single
7 footnote setting out where that evidence and information can be
8 obtained from.

9 The Prosecution say that these witnesses gave evidence of
12:34:34 10 direct evidence from Norman for the attack on civilian
11 collaborators, supported and reinforced by comments, remarks,
12 exultations by Fofana. They refer specifically with footnotes to
13 TF2-190 in relation to Koribundu. I've already dealt with that
14 in relation to unlawful killings. They refer specifically to
12:34:55 15 TF2-222 for Tongo. Again, already considered that in relation to
16 unlawful killings.

17 From paragraphs 426 to 430, the Prosecution say that many
18 witnesses described how they suffered at the hands of Kamajors.
19 Fofana is only mentioned in relation to one such attack, the
12:35:17 20 attack on TF2-041 in relation to Blama. Again, I have dealt with
21 that already in relation to willful killings.

22 The only other possible mention of Fofana in this section
23 on physical violence and mental suffering is in paragraph 428 of
24 the Prosecution final brief, when it is said that, "The accused
12:35:42 25 was able to show the marks sustained from these wounds to the
26 Court." I will read that again. "The accused was able to show
27 the marks sustained from these wounds to the Court." And I think
28 that must be a typo. I think what the Prosecution meant to say,
29 his witness, it's revealing that potentially one of the most

1 significant mentions of the accused in this section on physical
2 violence and mental suffering actually turns out to just be a
3 typo. A typo, we would submit, sums up the Prosecution brief
4 and, in many ways, sums up the Prosecution's case.

12:36:26

5 The greatest responsibility for physical violence and
6 mental suffering or no responsibility for physical violence and
7 mental suffering.

12:36:46

8 Moving on then: Pillage or looting and burning. The only
9 direct evidence, according to the Prosecution, of Fofana's
10 involvement in looting comes from the following witnesses. In
11 relation to Tongo, it comes, and is set out at paragraph 433 of
12 the Prosecution's final brief, from TF2-005. He gave evidence
13 that Norman ordered the attack on Tongo which would determine the
14 winner of the war. And at that time, it is said, that Norman is
15 said to have authorised the commandeering of properties. But
16 from that witness there is no mention at all of Fofana. So it is
17 difficult to see how and why the Prosecution rely on him

12:37:09

18 In relation to Bo, paragraph, again, 433 of the
19 Prosecution's final brief. They say that direct criminal
20 responsibility for looting and burning in Bo were made manifest
21 in the testimonies of several witnesses. Now, the footnote is
22 770 and it says Bo, not Koribundu. In fact the witness that is
23 referred to in the footnotes is witness TF2-198 who does, in
24 fact, deal with Koribundu and not Bo. So it seems that the
25 evidence the Prosecution rely on in relation to Bo, in fact,
26 deals with Koribundu. In any event, it is immaterial because
27 TF2-198 does not deal with Fofana. He only mentions Chief
28 Norman.

12:37:54

29 The other witness that is referred to in that footnote is

1 TF2-157. Again, it deals with Koribundu and not Bo. Again, it
2 doesn't mention Fofana. It only mentions the first accused.

3 Paragraph 434. The Prosecution say the hand of command of
4 Fofana was apparent in evidence that Norman gave direct orders to
12:38:31 5 burn houses and loot big shops and pharmacies in Bo, but the
6 footnote refers to witness TF2-017, who makes absolutely no
7 reference to Fofana. No reference to Fofana at all, only Norman.

8 So it seems that the hand of command of Fofana comes,
9 according to the Prosecution, from this witness, TF2-222, and his
12:39:04 10 claim that Fofana addressed a meeting and said, it is the same
11 quote: "You have heard the national co-ordinator. Any commander
12 failing to perform accordingly and losing your own ground, just
13 decide to kill yourself there and don't come and report to us."
14 Now, I've made the point already. Where in that statement is an
12:39:23 15 exultation by Fofana to carry out looting, burning or pillage?
16 It is not there and it is fanciful.

17 We would also say that the Prosecution must show that
18 Fofana actually said that at the meeting, in which it is said
19 that Norman allegedly gave unlawful commands. It must be shown
12:39:44 20 that what Fofana said actually related to any eventual crimes
21 that were committed in Bo or, indeed, ordered by Norman, such
22 that they were. The evidence, we would submit, is weak and
23 equivocal. Fofana makes reference to commanders - again I made
24 this point - "not losing your ground," and this would suggest
12:40:04 25 that the extent to which he was referring to Norman's speeches,
26 he was referring to legitimate operations and not unlawful ones.

27 Looting and burning in Koribundu. It is dealt with in
28 paragraph 435 of the Prosecution's final brief.

29 The Prosecution contend that there is strong evidence of

1 looting in Koribundu by virtue of Fofana sending a letter,
2 sending a letter to TF2-082 who, according to the Prosecution,
3 was one of the commanders appointed by Norman to lead the attack
4 on Koribundu. The basis of the Prosecution claim, the letter
12:40:44 5 states that Fofana said to TF2-082, whatever thing -- in
6 evidence, TF2-082 said this. He said that Fofana said in this
7 letter, "Whatever thing you capture, whoever you captured, you
8 should send them to him, Fofana". That is the evidence of the
9 witness who received this letter and, of course, both are
12:41:09 10 illiterate; the recipient of the letter and Fofana were
11 illiterate. But the witness understood the instruction to be,
12 "Whatever thing you capture, whoever you captured, you should
13 send them to Fofana." And I stress "whoever," and I will come
14 back to that in a moment.

12:41:23 15 This is a slightly unfair way to describe the exhibit that
16 the witness was referring to because if you look at the letter,
17 Exhibit 11, the letter, first of all, makes no reference to
18 sending captured people to CDF HQ. It only relates to vehicles
19 and other items. Crucially, the letter states the importance of
12:41:52 20 registration is for TF2-082's own protection in case the owners
21 take action regarding them in the future.

22 Now, that is hardly an exultation to commit looting. He is
23 simply asking TF2-082 to register any items he may have taken in
24 case the owners take action regarding them in the future,
12:42:20 25 anticipating, perhaps, that there may be some lawful process to
26 be gone through. Of course I make the point again, the extent to
27 which that letter can actually be said to have originated, of
28 course, it must be a question mark over that.

29 There was one additional point and I said I would come back

1 to it. TF2-082 said, of course, that Fofana said whoever is
2 captured should be taken to Base Zero or to him. This apparently
3 contradicts Norman's statement or order that there was no room
4 for POWs at Base Zero. So it would seem in relation to that,
12:42:59 5 that the father and son do not always speak with the same voice,
6 if I can put it like that.

7 Moving on. Paragraph 436. The Prosecution state that
8 TF2-068 testified that a looted truck of coffee and Mercedes were
9 brought to Base Zero. The Mercedes was not given to Fofana. The
12:43:24 10 evidence, such that there is any, suggested it was Kondewa who
11 was seen driving the Beemer.

12 In relation to the coffee and cocoa, although there is
13 evidence that it was unloaded by Fofana, there is no evidence as
14 to where it actually came from and no evidence that it was
12:43:42 15 actually looted and, crucially, no evidence that Fofana knew or
16 would have known that it was looted and all he did was unload it.

17 Paragraph 437. The Prosecution assert that TF2-223 stated
18 that while in Kenema under the watch of Fofana and Kondewa, they
19 looted cocoa from the premises of FT Saad. However, the evidence
12:44:10 20 of TF2-223, which is far from clear, and certainly one way of
21 reading it suggests something quite different. One reading, and
22 we would say the most reasonable reading of TF2-223's evidence,
23 is that Fofana and Kondewa were actually discouraging looting
24 from FT Saad's premises. I won't go through the transcripts now.
12:44:37 25 I will simply invite Your Honours to go back and look at it in
26 more detail and care later.

27 Paragraph 438 of the Prosecution's brief. The evidence of
28 TF2-073 and a Mercedes relates -- relates to Mercedes again. It
29 relates only to Mr Kondewa. The Prosecution assert that this was

1 an incident well within the knowledge of Fofana, but there is no
2 evidential basis for that allegation at all; no evidential basis
3 at all for saying why Fofana must have known that any Mercedes
4 Benz, being driven by Kondewa, was looted and/or that Fofana had
12:45:13 5 any involvement in that.

6 Paragraph 439 of the Prosecution's final brief. They rely
7 on the evidence of Borbor Tucker that, on the instructions of
8 Norman, three cars were removed and located in the special
9 security, HQ.

12:45:30 10 It is claimed that three cars were given to Fofana, Kondewa
11 and Prince Brima. So it seems, on the face of it, that this
12 Court is being asked to deal and being left with an allegation of
13 car theft. Not, it would seem, an allegation of the greater
14 responsibility.

12:45:46 15 In any event, what is clear from the evidence of TF2-190 is
16 that this incident, if it occurred, this incident occurred here
17 in Freetown. The Prosecution assert nowhere in their indictment,
18 in the pre-trial brief, or anywhere, that the CDF and/or the
19 accused were responsible for any alleged crimes here in Freetown.

12:46:16 20 Crucially, there is no evidence that Fofana knew or should
21 have known or had any knowledge as to where this car came from.
22 The greatest responsibility for looting, no. We say, no
23 responsibility for looting.

24 Terrorism The civilian population and collective
12:46:38 25 punishment. I can deal with this quite quickly. In the ten
26 paragraphs in the original Prosecution final brief, in the eight
27 additional paragraphs in the annex of the Prosecution final
28 brief, there is only one specific mention to Fofana and that is
29 at paragraph 442 and it relates to what Fofana allegedly said in

1 relation to the attack on Tongo. Now, I have dealt with that
2 quite extensively already and I don't propose to go through it
3 again. We would say that was a legitimate direction to men to
4 hold their ground.

12:47:15 5 The Prosecution make a general allegation against Fofana in
6 the opening paragraph of the section on terrorising the civilian
7 population where they say -- where they refer to eight insider
8 witnesses. There is not a single footnote to a single specific
9 piece of evidence or incident and, however, we would submit that
12:47:35 10 a careful consideration of those witnesses testimony does not
11 demonstrate that Fofana actively engaged, for all the reasons
12 that we have already outlined in relation to other crimes, his
13 involvement in the terrorising or collective punishment of the
14 civilian population. Again, no responsibility.

12:47:56 15 The use of child soldiers. May we start this section by
16 emphasising the very clear elements that are required for a
17 finding against someone for the commission of this crime?
18 Firstly, that the perpetrator conscripted or enlisted one or more
19 persons into the armed force or group or used, or use, and I
12:48:22 20 stress used, one or more persons to participate actively in
21 hostilities. So I stress that; the use of the under age person
22 to participate actively in hostilities; that is first
23 requirement.

24 The person of course must be under the age of 15 and the
12:48:39 25 perpetrator, the third requirement, should have either known or
26 have reason to know that the person was under 15. There are two
27 further requirements but they're not necessarily apposite here
28 but I'll deal with them quickly. The conduct took place in the
29 context of an armed conflict and the perpetrator was aware of the

1 factual circumstances in relation to the armed conflict. But it
2 is those first three requirements that we would submit are
3 crucial; that the person used a person under 15; they were under
4 15 and that the person knew that they were under 15. With that
12:49:11 5 at the back of my mind, let us look at the evidence presented in
6 relation to Fofana, in relation to the use of child soldiers.

7 Now, of course there is evidence that children were used in
8 the Kamajor movement. The Prosecution's expert witness was clear
9 on that. We would also, however, ask Your Honours to bear in
12:49:35 10 mind and recall the evidence of Dr Hoffman. I'll briefly
11 summarise his evidence as follows: He stated that one achieved
12 adult by being instilled in the knowledge and values of the
13 community. That is the point at which one is recognised as an
14 adult in Mende culture. You don't sort of progress into
12:50:02 15 adulthood based solely on the accumulation of years. What you
16 are, what marks your progression is your accumulation of a
17 certain kind of knowledge of what it means to be a viable member
18 of your community, and it is often instilled through this process
19 of initiation. So the initiation process itself, in Mende
12:50:21 20 culture, marks someone becoming an adult.

21 In relation to how individuals ended up in the CDF, he said
22 local communities put them forth. In some cases that included
23 children. So the putting forth of children to work and act
24 within the CDF came from local communities.

12:50:42 25 The final point I would draw from Professor Hoffman's
26 testimony is in relation to the comparison he made of the use of
27 children in the CDF with the use of children in the RUF. He said
28 this:

29 "From academic literature that has emerged on this question

1 there is fairly substantive literature on child soldiers in
2 this region. One of the distinctions that comes out is
3 this idea -- is this idea that the RUF seems to have fairly
4 systematically used abduction as a method of bringing
12:51:21 5 children in and, in fact, were sort of deliberately
6 targeting children for membership in the organisation".
7 And I -- he said this: "You just do not see that with the
8 CDF".

9 There is a clear and marked distinction.

12:51:40 10 The crucial issue, on behalf of Fofana of course, is
11 whether children were being used in the CDF at his behest or by
12 him. That is the crucial issue. And on that issue we say the
13 issue is scant.

14 At paragraph 452 of the Prosecution --

12:52:04 15 PRESIDING JUDGE: Before you continue, as a matter of law
16 which, can you address me briefly on which particular or specific
17 affairs that count charges?

18 MR POWLES: My understanding, and I'll be corrected if I am
19 wrong --

12:52:25 20 PRESIDING JUDGE: In terms of -- yes, go head.

21 MR POWLES: Well, the ones that are set out in the elements
22 of course are the perpetrator conscripted.

23 PRESIDING JUDGE: No, not the elements. I am asking
24 [overlapping speakers] as it's charged. As charged. Which
12:52:40 25 particular offence is being, has been led in the indictment, so
26 to speak.

27 MR POWLES: Off the top of my head, Your Honour, it is not
28 something that I am able to deal with off the top of my head. I
29 can certainly come back to that and address Your Honours on it.

1 PRESIDING JUDGE: Right, okay.

2 MR POWLES: In relation to the elements of the crime,
3 however, we would submit that in relation to all the elements of
4 the crime, leaving aside how it is charged, and if it has been
12:53:03 5 charged or pleaded improperly on a very limited basis and of
6 course that is a point that we will come back and take. I am
7 being, as ever, helpfully assisted by my learned legal assistant.

8 PRESIDING JUDGE: No. Continue with your submissions.

9 MR POWLES: Your Honours, as I understand it, it is charged
12:53:23 10 as recruitment. Of course there is no evidence of Fofana
11 recruiting any children into the CDF and there is certainly no
12 evidence of him using child soldiers in the CDF. I am going to
13 come through and deal with such evidence as there is in relation
14 to him and children and let Your Honours draw your own
12:53:41 15 conclusions as to whether it satisfies any of the potential
16 charges, be it recruitment, be it use or any other form of
17 connection with the use of child soldiers.

18 MR KAMARA: I'm sorry to interrupt at this point, My Lords.
19 Just a point of clarification here. We have been patient with
12:53:59 20 factual errors but I think that pool is overflowing now. The
21 count 8, My Lord, the question does not relate in any way to
22 recruitment.

23 PRESIDING JUDGE: That answers part of my question, but
24 I'll be asking further questions, but it is helpful. In other
12:54:10 25 words, no offence is charged. Right.

26 MR KAMARA: And, moreover, I didn't understand what to do,
27 because there are a lot of fact actual errors, but I didn't want
28 to interrupt the smooth flow of my learned friend and I hope as
29 he continues he will be cautious of that; otherwise, I would have

1 to be getting up now and interrupt.

2 PRESIDING JUDGE: And these factual --

3 JUDGE ITOE: Not getting up and interrupting. I think he
4 is noting the alleged factual errors and maybe he is reserving
12:54:58 5 the right to clarify. [Overlapping speakers] Because you have to
6 allow your learned colleague to proceed the way he has conceived
7 his submissions.

8 MR KAMARA: That is why I have been so patient.

9 PRESIDING JUDGE: Thanks. Counsel, yes. You could just
12:55:15 10 wind up.

11 MR POWLES: Thank you. I am very grateful as ever to my
12 learned friend for his interjection and look forward to anything
13 he may or may not have to say. In relation to the allegation in
14 the indictment, count 8, is set out as enlisting children under
12:55:27 15 the age of 15 years into the armed forces, or groups using them
16 to participate actively in hostilities. Enlisting, recruitment,
17 dancing on the head of a pin, I would submit. But in any event,
18 there is no evidence which we would submit of enlisting,
19 recruitment, use, put it how you will, of Fofana with child
12:55:47 20 soldiers.

21 PRESIDING JUDGE: Right.

22 MR POWLES: Coming on to the evidence. Paragraph 452.
23 According to the Prosecution brief, witness TF2-201 stated that
24 Joe Tami dey had four boys as security. He states that while in
12:56:03 25 Bo he met Fofana. The footnote reference given is TF2-021, 2
26 November 2004, page 86. That, in fact, does not relate to the
27 issue at all. It happens to be a discussion on some legal or
28 factual matter between counsel and the Trial Chamber.

29 It seems that the Prosecution in that footnote are in a bit

1 of a muddle. The reference, we suspect, was meant to refer to
2 the testimony of TF2-140 on 14 September 2004, at page 86. A
3 credit to the Prosecution, they got the page number right. The
4 incident he describes at page 86, at its highest, at its highest,
12:56:47 5 can be said to him staying in Fofana's home while in Bo. That is
6 it, at its highest. And that is at its highest from his
7 examination-in-chief. It was elicited in cross-examination for
8 the second accused, at page 141 of the transcript, that the
9 witness saw Fofana in Bo. Well, it does not follow from that
12:57:12 10 that Fofana also saw the witness. And it is even more far
11 stretched and even more remote that Fofana was on notice of what
12 TF2-140 may or may not have been doing at any other time
13 vis-a-vis hostilities.

14 TF2-021 does, in fairness to the Prosecution, also deal
12:57:38 15 with Fofana at page 60 of his testimony on 2 November 2004.

16 He stated that he saw big men at Base Zero. This does not
17 mean, of course, that Fofana similarly saw him and knew of his
18 activities.

19 At paragraph 455 the Prosecution rely on TF2-017, who
12:58:03 20 stated that Norman was at a meeting and praised children at that
21 meeting and Fofana was merely present. Again, if you look at the
22 elements of the crime, we would submit that Fofana's presence at
23 that meeting does not give rise to him conscripting, enlisting or
24 using one or more persons to participate actively in hostilities.
12:58:29 25 No evidence that he knew the age, no evidence that he enlisted,
26 and no evidence that he used.

27 I have already dealt with witness TF2-140, set out at
28 paragraph 456 of the Prosecution's final brief and the
29 Prosecution say this at paragraph 458: At its highest, at its

1 highest, the Prosecution put their case against Fofana for count
2 8 by saying that Fofana tacitly encouraged such acts. Even if
3 true, tacitly encouraging something does not even come close to
4 lending substantial assistance to the commission of a crime and
12:59:12 5 that, of course, is the test for aiding and abetting.

6 In any event, in relation to aiding and abetting, presence
7 at a meeting is clearly not enough to give rise to criminal
8 liability, pursuant to that mode of liability. So Fofana's
9 presence at any meeting where Norman may have spoken about the
12:59:34 10 issue of child soldiers, we submit, cannot, and is not, evidence
11 of Fofana's guilt in relation to count 8.

12 The Prosecution further refer to Fofana's alleged knowledge
13 of the use of child soldiers. There is, for reasons already
14 outlined, not necessarily any evidence of this. In any event,
12:59:56 15 there can be no basis of criminal liability by virtue of
16 knowledge alone.

17 Now, of course, knowledge is one of the component parts of
18 command responsibility, but I stress, one of the component parts,
19 and for reasons we'll come to, there is insufficient evidence to
13:00:15 20 substantiate that basis of liability, vis-a-vis Fofana, for child
21 soldiers or, indeed, anything. So in relation to count 8, again,
22 we would say no responsibility.

23 Your Honours, I see the time.

24 PRESIDING JUDGE: Well, counsel, we will reserve the
13:00:36 25 balance of 80 minutes of your time until tomorrow and the
26 proceeding will be adjourned to --

27 MR POWLES: I won't use them all. I can assure Your
28 Honours. [Overlapping speakers]

29 PRESIDING JUDGE: Yes, indeed, you're virtually allotted --

1 we will give you the outside of 180. You did ask for two and a
2 half to three hours, so, and you have used up 80 minutes.

3 MR POWLES: I am very grateful for that indication.

4 PRESIDING JUDGE: So we'll adjourn the proceedings to
5 Thursday, the 30th of November 2006 at 9.30 a.m.

13:01:14

6 [Whereupon the hearing adjourned at 1.00 p.m., to be
7 reconvened on Thursday, the 30th day of November,
8 2006 at 9.30 a.m.]

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