



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

THURSDAY, 19 JANUARY 2006
10.05 A. M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Pierre Boutet, Presiding Bankole Thompson Benjamin Mutanga Itoe
For Chambers:	Ms Roza Salibekova Ms Anna Matas
For the Registry:	Mr Geoff Walker
For the Prosecution:	Mr Desmond de Silva Mr Joseph Kamara Mr Mohamed Bangura Mr Kevin Tavener Ms Bianca Suci u (Case Manager)
For the Principal Defender:	Mr Vincent Nmehelle Mr Ibrahim Mansaray (Legal assistant)
For the accused Sam Hinga Norman:	Dr Bu-Buakei Jabbi Mr John Wesley Hall Mr Alusine Sesay
For the accused Moinina Fofana:	Mr Arrow Bockarie Mr Michel Pestman Mr Andrew Ianuzzi
For the accused Allieu Kondewa:	Mr Yada Williams

1 [CDF19JAN06A - CR]
2 Thursday, 19 January 2006
3 [Open session]
4 [The accused present]

09:38:00 5 [Upon commencing at 10.05 a.m.]

6 PRESIDING JUDGE: Good morning. I would like first to
7 apologise for this delay in starting the proceedings this
8 morning. We clearly intended to start at 9.30, as we had said
9 yesterday, to hear the oral arguments on the motion that is
10:06:44 10 pending in front of this Chamber.

11 However, I was informed and the Chamber was informed just
12 before coming to Court this morning that the Attorney-General had
13 filed some documentation requesting the right to be heard on this
14 motion. The document had been forwarded to the Registrar and not
10:07:09 15 filed with the Court. So that's why we were not informed except
16 for this morning.

17 The Attorney-General is requesting to be heard on behalf --
18 that is President Kabbah is requesting to be heard through the
19 Attorney-General and make submission on this particular motion.
10:07:29 20 Before, as we briefly discussed yesterday, we felt and it is felt
21 that it is of the utmost importance that the President or his
22 representative in this case, the Attorney-General, be given that
23 opportunity.

24 So to clarify, at least, the file on this, I would ask that
10:07:48 25 the letter that was sent by the Attorney-General to the
26 Registrar, a letter that was received by the office of the
27 Registrar on 17th January, be filed as part of the Court record
28 on these motions, as such. This will be filed together with the
29 letter that was sent to the Attorney-General by the Registrar

1 yesterday to answer this letter, to reply to this letter.

2 Which puts us, obviously, in a different scenario this
3 morning, because to allow the proper discussion and the proper
4 assessment of this situation, it is only proper that we allow, in
10:08:35 5 those circumstances, the Attorney-General and the President of
6 the republic to make appropriate arguments. They have not, after
7 verification this morning, provided any written response to the
8 motion. They have been served upon the instruction of my brother
9 Justice Thompson with the motions. They have not responded in
10:09:01 10 writing to this.

11 What we will do now, in addition to ask that these
12 documents be filed with the Court to be part of the documentation
13 on this motion, we'll instruct the Attorney-General to file their
14 positions and their arguments in writing within seven days of
10:09:19 15 today. At that time, we will fix a date to hear the oral
16 arguments again, and it is usual to do this at this particular
17 moment unless we see if and what the response is. From that
18 response, obviously the parties will have the right to reply, and
19 from there on we will fix a date.

10:09:37 20 So that changes a bit the plan we had in mind yesterday and
21 we were intending to proceed with this morning. So, this is the
22 position that we are taking this morning. Therefore, we will not
23 proceed to hear any oral arguments on that particular motion this
24 morning.

10:10:05 25 Given that this is a motion that has been filed first by
26 the counsel for the second accused, I will ask Mr Pestman if you
27 have any comments on that. I know you, yesterday, were
28 suggesting that the Attorney-General should be informed at least.
29 Now you know he has been informed, that he intends to intervene.

1 Any comment?

2 MR PESTMAN: We can only encourage his intervention, so I
3 request the Court to allow him to intervene. As soon as
4 possible. We would like to clarify this matter. It is a shame
10:10:33 5 we cannot discuss the issue today, but the sooner we can discuss
6 it, the better.

7 PRESIDING JUDGE: We agree with you entirely. That is why
8 we were intending to proceed with that today.

9 MR PESTMAN: Is it possible to take a decision today on his
10:10:46 10 request to join this particular procedure or to intervene in this
11 procedure, or is it necessary to await his written response
12 first?

13 PRESIDING JUDGE: We should await his written response to
14 see what it is that he's raising, otherwise we are going to be
10:10:59 15 speculating at this particular moment. You will have copies of
16 the documents, obviously, once it is filed with the Registry.

17 MR PESTMAN: Yes.

18 PRESIDING JUDGE: I can read to you the very last paragraph
19 of the letter to the Registrar which says, "I hereby give notice
10:11:15 20 that it is the Attorney-General's intention to apply for such a
21 subpoena if and when issued to be set aside on constitutional and
22 other legal bases".

23 MR PESTMAN: Is it possible to get a copy of it?

24 PRESIDING JUDGE: Yes.

10:11:32 25 MR PESTMAN: Is it possible to have it now so we can have a
26 look at it?

27 JUDGE ITOE: Please wait. Don't be in a hurry.

28 PRESIDING JUDGE: I just said it will be filed with the
29 court Registry and copies will be made and distributed to all the

1 parties.

2 MR PESTMAN: I'm too curious.

3 PRESIDING JUDGE: This is the only paragraph. It has three
4 paragraphs. The other paragraphs are just descriptive.

10:11:54 5 MR PESTMAN: I can only encourage the Attorney-General --
6 the President to intervene.

7 PRESIDING JUDGE: Thank you. Dr Jabbi?

8 MR JABBI: My Lord, certainly it is very necessary that the
9 Court grants the request for the intervention by the
10:12:10 10 Attorney-General. The last paragraph that was read is also very
11 indicative, indeed. We give our entire support to it. That is
12 to say, the acceptance of the request for the intervention.

13 However, My Lord, it seems that this issue is going to
14 affect the question of the giving of testimony by the Defence on
10:12:42 15 behalf of the first accused. My Lord, I don't know whether --
16 what the plan for the rest of today's session is going to be, but
17 depending on --

18 PRESIDING JUDGE: The plan was to deal with this issue
19 first and then we will see.

10:13:00 20 MR JABBI: There will be some implications of our dealing
21 with it which we would want to raise later on today.

22 PRESIDING JUDGE: Fine.

23 MR JABBI: Thank you very much, Your Honour.

24 PRESIDING JUDGE: Thank you. Mr Williams, you wish to say
10:13:15 25 anything?

26 MR WILLIAMS: Nothing, My Lord.

27 PRESIDING JUDGE: Mr Prosecutor, welcome. Pleased to see
28 you in this Court.

29 MR De SILVA: Well, I am pleased to be seen, My Lord. Of

1 course, in the light of what your Lordship has told us this
2 morning, we clearly cannot proceed on the basis we had originally
3 intended to this morning, so we will await developments in that
4 regard. There is little I can add to what I have already said.

10:14:04 5 PRESIDING JUDGE: Thank you very much. So the oral hearing
6 is postponed until further notice. In the meantime, as I say, I
7 will repeat the instruction for the Attorney-General to file the
8 written response to the application. The motions have been filed
9 within seven days of today's date and from there on, we will see
10:14:25 10 what happens and we will obviously advise the parties
11 accordingly. The documents in question, Mr Officer of the Court,
12 are given to you for proper filing with the Registry. As soon as
13 they are filed, that copy should be made available to all the
14 parties. Yes, Mr Pestman.

10:14:46 15 MR PESTMAN: Just one question, please, Your Honour. Will
16 we be allowed to answer in writing to the response?

17 PRESIDING JUDGE: That's what I have said. I said will
18 respond in writing and then the parties will be allowed normally
19 to file a reply.

10:15:04 20 MR PESTMAN: Okay, I am sorry. Thank you.

21 PRESIDING JUDGE: So that concludes the proceedings about
22 this particular motion this morning. We are coming back to the
23 next step and what we had said we would be doing today, which was
24 to proceed with the opening statements. But before we were to go
10:15:17 25 there, I would just like to ask you, Mr Pestman, you had
26 indicated yesterday that you would be ready on behalf of the
27 second accused and that your opening statement would be of about
28 20, 25 minutes, am I right?

29 MR PESTMAN: Yes, I think 25 minutes would be the time we

1 require.

2 PRESIDING JUDGE: Are you ready to proceed with that this
3 morning?

4 MR PESTMAN: I have to ask my colleague on the left,

10:15:42 5 because he will give the opening statement.

6 MR BOCKARIE: Yes, Your Honour.

7 PRESIDING JUDGE: Mr Bockarie, you are ready?

8 MR BOCKARIE: Yes, Your Honour.

9 PRESIDING JUDGE: Fine. The third accused. Mr Williams,

10:15:50 10 on behalf of the third accused, are you ready to proceed with

11 your opening statement this morning?

12 MR WILLIAMS: Yes, My Lord.

13 PRESIDING JUDGE: How long can we expect your statement to
14 be?

10:16:00 15 MR WILLIAMS: 20 to 25 minutes, Your Honour.

16 PRESIDING JUDGE: You will be ready to deliver that as soon
17 as possible this morning?

18 MR WILLIAMS: Certainly, My Lord.

19 PRESIDING JUDGE: Thank you. Mr Jabbi, you were raising

10:16:13 20 some issues about this particular procedure, was it?

21 MR JABBI: Yes, My Lord.

22 PRESIDING JUDGE: Can we hear what you have to say?

23 MR JABBI: My Lord, first of all, with respect to the topic

24 we are just dealing with, the opening statements by the accused

10:16:31 25 persons, I am aware that yesterday your Lordships indicated your

26 firm conclusions on this, and I would just want it to be noted as

27 a preliminary point in the giving of opening statements by the

28 accused persons that it is as a result of what transpired in

29 Court on 14th and 15th June 2004, that the first accused is not

1 being allowed to exercise his right under Rule 84. I just want
2 that to go into the record as a preliminary point in the giving
3 of opening statements.

4 PRESIDING JUDGE: I should correct you on this issue to say
10:17:46 5 that the accused has already exercised his right and he did that
6 at that time. So that is why he is not allowed now to repeat and
7 exercise his right once more. So he has been afforded that
8 opportunity at the time. He decided to exercise his right at
9 that time. He had been warned at that time that if he were to do
10:18:04 10 it now, he would not be able to do it at a time of opening his
11 defence and therefore, that is why he is not allowed to proceed
12 with an opening statement this morning. I want the record to be
13 very clear in this respect as well, Dr Jabbi. Obviously your
14 comments are noted and they are on the record.

10:18:26 15 MR JABBI: My Lord, I am conceding to the version your
16 Lordship --

17 PRESIDING JUDGE: Dr Jabbi, I don't want to get into
18 arguments about that. We have disposed of it yesterday. I told
19 you yesterday twice and I have repeated it again and we are not
10:18:39 20 intending to pursue discussion on this particular issue. Your
21 comments are properly noted.

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

23 My Lord, the second issue I would want to raise this
24 morning relates to the time when the first accused may have to
10:18:59 25 give evidence. My Lord, I believe there are two issues which now
26 affect that situation.

27 The first, My Lord, is the procedural point that when the
28 first accused is giving evidence, he's now handed over to the
29 Court, as it were, and interaction with him on his evidence would

1 not be advisable or permitted without further reference to the
2 Prosecution. This matter was raised yesterday by your Lordship.
3 Now, My Lord, in our particular circumstance, the first accused
4 has not hitherto given a clear indication that he is going to
10:20:01 5 give evidence. It is only recently, that is from about a day or
6 two ago, that some definite idea has appeared emerging. As a
7 result of that delay in specifying whether he's going to give
8 evidence, the team has not been able to go through the evidence
9 he intends to give. It is extremely necessary, more particularly
10:20:40 10 because he has also been away from the Court during the time most
11 of the evidence has been given, it is very necessary that time be
12 allowed so that the preparation of the evidence he intends to
13 give can be effectively done in co-operation with court appointed
14 counsel on his behalf.

10:21:11 15 My Lord, it therefore would now seem that if, as we
16 proposed yesterday, the Court proposed yesterday, that the first
17 accused commence his evidence on Friday, tomorrow --

18 PRESIDING JUDGE: Tomorrow.

19 MR JABBI: Yes, My Lord. It would then, in effect, deprive
10:21:35 20 him of co-operation, interaction, collaboration with his defence
21 team in order to chart out the evidence that he proposes to give.
22 My Lord, this is a very practical situation of having to lead a
23 certain witness. If time is not allowed for that interaction, it
24 may well be that the witness and the counsel leading him may be
10:22:09 25 at variance as to the sequence of the evidence to be given. It
26 is, I submit, necessary --

27 PRESIDING JUDGE: I'm listening.

28 MR JABBI: So I submit, Your Honours, that it is necessary
29 that ample time be allowed for that collaboration between the

1 first accused and his defence team in the preparation of his
2 evidence. My Lord, the other thing that I believe affects this
3 situation is what we have already dealt with in relation to the
4 subpoena to the President to give evidence. It is clear, in all
10:23:18 5 the circumstances, as your Lordship has already just expressed,
6 that adequate time has to be allowed for the interactions and
7 interventions necessary from that end.

8 My Lord, I believe this is tied in with the question of the
9 first accused giving evidence. It may therefore endorse and
10:23:52 10 enhance the suggestion that ample time be granted within which
11 the first accused can also collaborate with his defence team for
12 the preparation of the evidence he will give. I would like to
13 stop there and see how your Lordships' minds are working on that
14 suggestion and I will make more specific suggestions or
10:24:16 15 applications thereafter.

16 PRESIDING JUDGE: Before I ask the Prosecution to speak
17 about this issue, I do have a few questions. As to how our mind
18 is working on this, we'll let you know later, but obviously we
19 have to consult on this matter. But I do have some questions for
10:24:35 20 you, if only to allow us to be able to understand your position
21 more clearly. You're asking for additional time; what do you
22 mean by this?

23 MR JABBI: I mean time beyond Friday, tomorrow.

24 PRESIDING JUDGE: So what does that mean?

10:24:51 25 MR JABBI: May I specify how much time?

26 PRESIDING JUDGE: Yes. I mean, you're asking for more
27 time.

28 MR JABBI: Okay. I thought I could have led that later,
29 but I don't mind proposing it. My Lord, in all practical

1 reality, it would be necessary to grant at least seven days for
2 that collaborative exercise to be done.

3 PRESIDING JUDGE: In other words, you're saying with seven
4 additional days for preparation, the accused will be able to
10:25:31 5 testify next Friday; not tomorrow, but Friday next?

6 MR JABBI: Yes, My Lord.

7 PRESIDING JUDGE: Is that what you're saying?

8 MR JABBI: The time is not as ample as we would want, but
9 we will endeavour, because the program of the session has already
10:25:44 10 been set, we will endeavour to ensure that we can work within
11 that time.

12 PRESIDING JUDGE: I will refrain from making comments. I
13 am just asking questions. You will obviously get my comments and
14 the comments from the Bench shortly. I need to discuss and
10:26:04 15 consult with my brother judges on this matter. I'm highly
16 concerned, suffice to say, at this particular moment you are
17 making such a representation this morning, the very day before
18 the accused is to give evidence, when you knew and the accused
19 knew that this is the way we intended to proceed all along.
10:26:22 20 Having said that, I will not say any more. We'll see what the
21 Prosecution has to say in this respect and we will take this
22 matter under advisement and we will come back on it.

23 MR JABBI: Certainly.

24 PRESIDING JUDGE: Thank you. Mr Prosecutor.

10:26:38 25 MR De SILVA: This is an astonishing application.
26 Astonishing for three reasons. It is astonishing that the
27 defence team does not seem to be properly acquainted with the
28 defendant's case, if he's got one. Secondly, it is astonishing
29 that the defendant has failed in all this time to acquaint his

1 defence team adequately with his defence. So the fault is his
2 own. He is the author of his own misfortune, if this is the
3 case. Thirdly, if responsible counsel acting for the first
4 accused have failed adequately in all this time to take proper
10:28:02 5 instructions from their client, it is difficult to see how they
6 could appropriately advance an application for this Court to
7 indulge them with more time.

8 Looking at it as an outsider, regardless of whether I'm a
9 prosecutor, it is our submission that it is conduct and delays of
10:28:48 10 this kind that can bring the administration of international
11 justice into disrepute. I must say, of all the surprises I
12 expected this morning - perhaps I ought to have expected it --
13 well, there it is, I won't say any more.

14 PRESIDING JUDGE: Thank you. You wish to reply, Mr Jabbi?

10:29:20 15 MR JABBI: Very briefly, My Lord. My Lord, surprise, if
16 there is in this matter, may well be the seeming unawareness of
17 the Prosecutor of the constraints that this team has constantly
18 expressed in this Chamber in handling the situation of the first
19 accused who had raised various submissions to this Court and put
10:30:15 20 his own general attitude in line with those submissions. It is
21 the accused person who has to cooperate with the demands of the
22 Court before responsible counsel, to use the phrase of my learned
23 colleague, can adequately and effectively do the work of
24 representation within the parameters of the Court appointed
10:31:06 25 counsel scheme that have been adopted here.

26 My Lord, the accused has his own reasons why he adopted
27 certain attitudes which affected this relationship. One of those
28 reasons has been, for instance, from his perspective, that having
29 not been served with an indictment or arraigned --

1 PRESIDING JUDGE: Mr Jabbi, please, we don't want to go
2 into this again.

3 JUDGE ITOE: Please.

4 PRESIDING JUDGE: We have heard enough of this.

10:31:47 5 MR JABBI: I'm just saying that there are these factors
6 that have affected the interaction between the accused and his
7 defence team. The effectiveness with which that defence team
8 could have operated has been affected by that situation and it is
9 because of that that this application has been made, My Lord. So
10:32:19 10 I believe that the very demands of justice, whether in the
11 international field or not, require that more emphasis be given
12 to the rights of the accused and to the need for justice to be
13 seen to be done, not just cosmetically dramatised. Those are the
14 requirements that make it necessary that if in these
10:33:04 15 circumstances it has not been possible for the defence team for
16 the first accused to effectively interact with him for the
17 purposes of preparing his defence, then the Court may be
18 requested to allow what is, I believe, a minimal amplitude of
19 time for that which could have been done for so long to be, in
10:33:31 20 fact, done now. It is all in the interest of ensuring that the
21 administration of international criminal justice is seen, indeed,
22 to be truly fair in all the circumstances. Thank you very much,
23 My Lord.

24 PRESIDING JUDGE: Thank you, Mr Jabbi.

10:34:02 25 JUDGE THOMPSON: Mr Prosecutor, you allege that the instant
26 application is an example of conduct that may amount to bringing
27 the administration of international criminal justice into
28 disrepute.

29 MR De SILVA: It could do.

1 JUDGE THOMPSON: Do you want to elaborate on that? Because
2 I would have thought that the concept of bringing international
3 criminal justice -- the administration of international criminal
4 justice into disrepute is a very grave concept. The threshold is
10:34:41 5 a very high threshold. In other words, to what extent would an
6 application by an accused person for some more time be seen to be
7 come within that very, very delicate and carefully crafted
8 concept of bringing the administration of criminal justice into
9 disrepute?

10:35:11 10 MR De SILVA: It is not a very -- [Overlapping speakers]

11 JUDGE ITOE: Let me put it the other way around,
12 Mr Prosecutor.

13 MR De SILVA: Of course.

14 JUDGE ITOE: Have you addressed the other side of the coin,
10:35:23 15 where refusing such an application would indeed bring the conduct
16 of international justice into disrepute?

17 MR De SILVA: My Lord, I have. I invite your Lordships to
18 consider a proper analysis of the present application, which
19 amounts to this --

10:35:45 20 JUDGE THOMPSON: Perhaps I would be enlightened if you were
21 to articulate the concept of bringing the administration of
22 justice into disrepute. In other words, on the decided
23 jurisprudence, what kinds of conduct have been held to be conduct
24 of such a nature that would bring the administration of justice
10:36:05 25 into disrepute?

26 MR De SILVA: My Lord, the administration of justice,
27 whether international or domestic, can be brought into disrepute
28 in the sense that people lose confidence in it if justice isn't
29 seen to be expeditiously attended to. I'm not going to go --

1 JUDGE THOMPSON: Would it be brought into disrepute if
2 people see that the doctrine of equality of arms, which should,
3 in fact, invade the entire process of international criminal
4 justice, is not seen to be maintained?

10:37:00 5 MR De SILVA: Quite so. I entirely agree with Your
6 Lordship, and to pick up on a phrase used by my friend Mr Jabbi a
7 few minutes ago, he said there should be more emphasis for the
8 rights of the accused - more emphasis. The rights of the accused
9 must at all times be protected by a Court and nobody for one
10:37:15 10 single solitary moment should suggest otherwise. The rights of
11 the Prosecution have also got to be protected. Because the
12 Prosecution represents not just the public, not just the
13 international community in an international criminal court, but
14 all those people who suffered and were done to death in
10:37:41 15 circumstances in which they could cry out for justice and speedy
16 justice. There are balancing forces.

17 I cannot understand, and this is a personal view, how, in
18 the next seven days, there is going to be some remarkable
19 transformation in the relationship that has existed between the
10:38:07 20 first defendant and his counsel that hasn't existed in the past
21 seven days.

22 JUDGE THOMPSON: Resist the temptation to speculate on that
23 matter.

24 MR De SILVA: Well, I'm simply trying to be logical. I
10:38:23 25 cannot help it. I'm simply trying to be logical. If we are
26 assured -- if your Lordships are satisfied in your own minds that
27 in the next seven days there are going to be revelations to the
28 Defence team that, for some reason, haven't been made in the past
29 seven days, well, of course, it's entirely a matter for your

1 Lordships.

2 JUDGE THOMPSON: And their Lordships will refuse to
3 entertain this kind of invitation into a speculative kind of
4 arena.

10:38:56 5 MR De SILVA: There it is, My Lord. I've made my comments
6 in relation to what Your Lordship has asked of me.

7 PRESIDING JUDGE: Thank you, Mr Prosecutor. We will take
8 this matter under advisement now and we will come back as soon as
9 we have reached a decision about this particular application.

10:39:26 10 The opening statements, as such, will follow our decision.

11 [Break taken at 10.40 a.m.]

12 [CDF19JAN06B - EKD]

13 [Upon resuming at 11.45 a.m.]

14 PRESIDING JUDGE: Before proceeding with the opening
11:45:47 15 statements, we will issue the oral ruling on matters that have
16 been raised this morning.

17 [Ruling]

18 Trial Chamber I of the Special Court for Sierra Leone,
19 composed of Honourable Justice Pierre Boutet, Presiding Judge,
11:45:59 20 and Honourable Justice Bankole Thompson and Honourable Justice
21 Benjamin Mutanga Itoe, grants leave for the Attorney-General and
22 Minister of Justice for the Republic of Sierra Leone to intervene
23 in the following proceedings: The Fofana motion for issuance of
24 a subpoena ad testificandum to President Ahmad Tejan Kabbah filed
11:46:27 25 by court appointed counsel for the second accused,
26 Moinina Fofana, on 15th December 2005 and called Fofana motion,
27 and Norman motion for issuance of a subpoena ad testificandum to
28 His Excellency Ahmad Tejan Kabbah, President of the Republic of
29 Sierra Leone, filed by court appointed counsel for first accused,

1 Sam Hinga Norman, on 15th December 2005, and hereby issues the
2 following orders:

3 The Attorney-General and Minister of Justice of the
4 Republic of Sierra Leone shall file with the Court a written
11:47:03 5 response to the Norman motion and Fofana motion within seven days
6 of the receipt of this order but no later than Thursday,
7 26th January 2006 at 4 p.m.;

8 Counsel for Fofana and counsel for Norman shall file a
9 reply to the said response of the Attorney-General, if any,
11:47:24 10 within five days of the receipt of such response, but no later
11 than Tuesday 31st January 2006 at 4 p.m.;

12 The Attorney-General and Minister of Justice for the
13 Republic of Sierra Leone may present arguments, if he so wishes,
14 at the oral hearing before the Chamber on a date to be
11:47:42 15 communicated to him;

16 Four, the Court Management is to serve the Attorney-General
17 and Minister of Justice for the Republic of Sierra Leone with the
18 certified copies of the Norman motion, Fofana motion, Prosecution
19 response to Norman motion, Prosecution response to Fofana motion,
11:48:00 20 Norman reply and Fofana reply.

21 Done at Freetown, Sierra Leone, this 19th day of January
22 2006.

23 This oral ruling will be transcribed into a written ruling
24 later on today.

11:48:25 25 The other issue that we had deal with has to do with the
26 application made by counsel for the first accused for a
27 postponement of the testimony of the first accused.

28 [Ruling]

29 After careful consideration and deliberation of this

1 application for a postponement of the commencement of the
2 testimony of the first accused, the Chamber orders as follows:
3 The first accused is to commence his testimony on Tuesday next
4 week at 9.30 a.m. This is the extension that we are prepared to
11:49:09 5 grant at this particular moment. We are satisfied that in those
6 circumstances that should allow counsel to properly organise the
7 preparation of the evidence of the first accused. So that
8 concludes this aspect of the proceedings.

9 Going back to what we had said will be this morning the
11:49:37 10 opening statements, before I ask Mr Bockarie to make the opening
11 statement on behalf of the second accused, I would like first to
12 acknowledge the presence in court this morning as well of the
13 Principal Defender, and I would like to ask Mr Principal Defender
14 to identify himself and introduce himself to the Court.

11:49:58 15 MR NMEHIELLE: Thank you, Your Honour. Vincent Nmehielle.

16 PRESIDING JUDGE: Thank you, Mr Principal Defender.

17 Mr Bockarie, are you now ready --

18 MR JABBI: [Microphone not activated].

19 PRESIDING JUDGE: Open your mic, please.

11:50:17 20 THE INTERPRETER: Microphone.

21 MR JABBI: As a result of the ruling just given in respect
22 of the postponement of the Norman testimony, I wish to refer to
23 an order given in the consequential order filed yesterday. That
24 is Order 5. "Counsel for Norman to disclose to the Prosecution
11:50:47 25 and file with the Court any statement that may reflect counsel's
26 general understanding of the prospective testimony of the first
27 accused as soon as possible, but no later than Thursday, 19th
28 January" --

29 PRESIDING JUDGE: Mr Jabbi, you're going too fast.

1 MR JABBI: Sorry.

2 PRESIDING JUDGE: Could you go back in time and just take
3 what you were just quoting, and slowly please, because the
4 interpreters are unable to follow what you say.

11:51:17 5 MR JABBI: Sorry, My Lord. I just want to refer to the
6 fifth order in the consequential order that was filed yesterday
7 as a result of the ruling on the postponement of the Norman
8 testimony. If I may just read that fifth order of yesterday's
9 consequential orders. It is Order 5, which reads as follows:

11:52:00 10 "Counsel for Norman to disclose to the Prosecution and file
11 with the Court any statement that may reflect counsel's general
12 understanding of the prospective testimony of the first accused
13 as soon as possible, but no later than Thursday, 19th January
14 2006, 12.00 p.m. "

11:52:45 15 PRESIDING JUDGE: Mr Jabbi, to facilitate your concerns at
16 this particular moment, we are quite prepared to grant an
17 extension of this order so that it be compatible with our
18 decision this morning. So it shall be ready and delivered by
19 next Tuesday, which is 24 January, rather than the specified date
11:53:02 20 of 19 January.

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

22 PRESIDING JUDGE: Does that satisfy your requirement?

23 MR JABBI: That's right, My Lord.

24 JUDGE ITOE: Otherwise you're just about five minutes away
11:53:12 25 from the date limit that was set.

26 MR TAVENER: Perhaps that order could be changed to the
27 Monday. I understand Mr Norman will be testifying on the
28 Tuesday, so perhaps if we can have the day before. My
29 understanding is your order was --

1 PRESIDING JUDGE: Yes, it is Tuesday, 24 January that the
2 first accused is to commence his testimony, at 9.30. You are
3 quite right. This is the order.

4 MR TAVENER: That's correct. Therefore, could we have the
11:53:39 5 summary prior to that time? I understand the order was set to
6 Tuesday. We need it on the Monday.

7 PRESIDING JUDGE: Dr Jabbi, it might facilitate the trial
8 if it was possible for you to have that delivered. I said we
9 were prepared to grant an extension to Tuesday, but to make sense
11:54:01 10 it might be better if it was delivered some time the previous day
11 rather than the date that the witness is to start giving
12 evidence.

13 MR JABBI: My Lord, may we ask for 3 o'clock, then, the
14 previous day.

11:54:13 15 PRESIDING JUDGE: Three o'clock is granted.

16 MR JABBI: Thank you very much.

17 PRESIDING JUDGE: So 3 o'clock on Monday 23rd January.

18 MR JABBI: Yes, My Lord.

19 PRESIDING JUDGE: That's fine.

11:54:19 20 MR JABBI: Thank you very much.

21 PRESIDING JUDGE: Mr Tavener, it is better than 9.30 on the
22 24th, so it is a good compromise.

23 MR TAVENER: It is an improvement; thank you, Your Honour.

24 PRESIDING JUDGE: So that disposes of these matters. Now
11:54:34 25 we are to you, Mr Bockarie. Are you prepared now to deliver the
26 opening statement on behalf of the second accused?

27 MR BOCKARIE: Yes, Your Honour.

28 PRESIDING JUDGE: We are listening to you.

29 MR BOCKARIE: Good morning again, Your Honours. Your

1 Honours, over the course of the next few months, through the
2 production of both testimony and documentary evidence, we shall
3 endeavour to emphasise that which we submit has been clear from
4 the outset of this case. Namely, that Moinina Fofana --

11:55:07 5 JUDGE THOMPSON: Before the intervention of the
6 interpreters, would you moderate your pace, please.

7 MR BOCKARIE: I will, Your Honour.

8 PRESIDING JUDGE: Go ahead.

9 MR BOCKARIE: Namely, that Moinina Fofana, the so-called
11:55:24 10 Director of War of the CDF, is not an individual who bears the
11 greatest responsibility for serious violations of international
12 humanitarian law committed in the territory of Sierra Leone, as
13 charged in the Prosecution's indictment.

14 It is an interesting document, this indictment. For many
11:55:51 15 reasons, not that least of which because it may be the very
16 first charging instrument --

17 JUDGE ITOE: Mr Bockarie, are you sure you are moving at a
18 pace that is acceptable to the translators?

19 MR BOCKARIE: I will slow down, Your Honour.

11:56:11 20 PRESIDING JUDGE: We can follow but you are about to be
21 interrupted by the translators again. So please slow down. Try
22 it again.

23 MR BOCKARIE: I will, Your Honour.

24 It is an interesting document, this indictment. And for
11:56:35 25 many reasons, not least of which because it may be the very first
26 charging instrument in the albeit short history of modern
27 international criminal law in which the prosecuting authority has
28 sought to provide certain individuals of their liberty, not only
29 because they have allegedly committed acts which offend the law,

1 but because they have purportedly done so in such an aggravated
2 way as to mark them as somehow exceptionally culpable. Mr Fofana
3 and his co-accused, we are told by the Prosecution, are the very
4 cause of Sierra Leone's present misery. Their exceptional
11:57:24 5 culpability somehow commensurates in magnitude with the equally
6 exceptional features of this Special Court.

7 Indeed, much has been written and spoken about the novel
8 aspect of this Tribunal; its hybrid nature; the fact it sits
9 proudly, safely in the country where the alleged crimes were
11:57:55 10 committed; the creation of a so-called fourth pillar to protect
11 the rights of the accused. But far less trumpeting has signaled
12 the arrival of a further innovation, if that is the right word.

13 One whose import and reach is perhaps belied by its rather subtle
14 entry into the stage of international criminal law. We refer, of
11:58:31 15 course, to the concept of comparative liability embedded in the
16 Statute of this Special Court. Greatest responsibility; an
17 intriguing phrase, no doubt. But what exactly does it mean? We
18 have heard from the Prosecution that the concept exists merely as
19 a check on its discretion, whereas we, the Defence, having
11:59:04 20 insisted that it amounts to a strict jurisdictional requirement.

21 Not surprisingly, this Chamber has hewn to a rather judicious
22 middle ground, holding that the notion is best understood as an
23 evidentiary one, whose contours and true meaning will be revealed
24 at this trial stage. Your Honours, as we are about to begin part
11:59:43 25 two, so to speak, of this trial stage, we submit that it is
26 useful - in fact, imperative - to direct our attention and energy
27 to the significance of that phrase.

28 Your Honours, the fundamental premise of this Special Court
29 is a qualified one. That premise, articulated in the very first

1 article of this Court's Statute implicitly holds that while many
2 atrocities have been committed in this country by a variety of
3 actors, there must exist an identifiable subgroup of perpetrators
4 who, by virtue of certain as-yet-undetermined criteria, bear a
12:00:31 5 heightened level of culpability. The guiltiest amongst the
6 guilty. International justice in Sierra Leone, it seems, is not
7 absolute, but rather a comparative concept. Greatest
8 responsibility, Your Honours, as a theory of liability, a truly
9 novel one indeed. One that, as applied by the Prosecution to
12:01:06 10 Mr Fofana's case, we have urged and continue to urge this Chamber
11 to reject.

12 Your Honours, in his seminal work, A Theory of Justice,
13 John Rawls wrote, "A theory, however elegant and economical, must
14 be rejected and revised if it is untrue." Of course, it is
12:01:39 15 Your Honours, compelled as you are to ensure that a just, that is
16 to say a fair --

17 THE INTERPRETER: Your Honours, can learned counsel go a
18 little slowly for the interpreters to follow.

19 PRESIDING JUDGE: You heard that, Mr Bockarie? The
12:01:51 20 interpreter is asking that you slow down, please.

21 MR BOCKARIE: I will.

22 PRESIDING JUDGE: Please proceed.

23 MR BOCKARIE: In his seminal work, A Theory of Justice,
24 John Rawls wrote, "A theory, however elegant and economical, must
12:02:21 25 be rejected and revised if it is untrue." Of course, it is
26 Your Honours, compelled as you are to ensure that a just, and
27 that is to say, a fair outcome results from this Special Court
28 proceedings, who will assess the Prosecution theory of liability,
29 you will shoulder the difficult, some might say the enviable

1 [sic] task of looking back over a decade of senseless misery and
2 bloodshed involving countless individuals, a variety of
3 governments, as well as domestic, regional and international
4 organisations; and ultimately you will determine whether

12:03:45 5 Mr Fofana should be called to account or whether Mr Fofana should
6 forfeit his liberty. We submit, as we have from the onset of
7 this case, as we reiterated at the close of the Prosecution's
8 case, and as our own evidence before that illustrates, that the
9 Prosecution's theory, however elegant and economical, is
12:04:36 10 rhetorical packaging, is simply untrue. As a matter of fairness,
11 you must reject it.

12 PRESIDING JUDGE: Mr Bockarie, I don't want to interrupt
13 you, but I would like to direct your attention to the content of
14 Rule 84, which spells out what an opening statement is to be
15 about as such. Unless you tell me that what you are talking
16 about now is sort of an introduction to what you are about to
17 launch into, as such, it's fine. But I just want to make sure
18 that you are complying with Rule 84, which provides that at the
19 opening of its case a party may make an opening statement

12:05:00 20 confined to the evidence he intends to present in support of his
21 case. So presumably this is -- I say presumably, because from
22 what you are saying at this particular moment I am not sure that
23 is where you are leading to. I want to make sure we are indeed
24 moving in that direction. The opening statements is not the
12:05:44 25 arguments at the end of the trial, as such. It is essentially to
26 assist the Court in appreciating the position of your client and
27 the position that you will be taking with reference to the
28 evidence you intend to lead. Again, I don't want to cut you off
29 on this.

1 JUDGE THOMPSON: I would like to echo what the learned
2 Presiding Judge has said. Clearly myself looked at Rule 84 and
3 thought perhaps we should keep within the statutory requirements
4 of 84, and perhaps keep John Rawls and his theory of justice for
12:06:16 5 some later stage.

6 MR BOCKARIE: Yes, Your Honour. I am trying to keep within
7 the confines of the Rules.

8 JUDGE ITOE: We only hope that these comments are
9 preliminary to the main thrust of the exercise you are
12:06:31 10 undertaking.

11 MR BOCKARIE: Yes, Your Honour. I'm just taking the cue
12 from the Prosecutor's opening statement. He was given very wide
13 latitude and he really went to town. Yes, Your Honour.

14 JUDGE ITOE: Not this one. Not this one.

12:06:46 15 MR BOCKARIE: Your Honour, in his opening statement the
16 Prosecutor urged the Court to bar politics from these
17 proceedings. At first blush, such admonition has the deceptive
18 appeal of its simplicity. But as we enter this Chamber, we
19 cannot close our eyes to the reality that exists beyond his
12:07:20 20 words. For better or for worse, politics is never far from any
21 trial and these proceedings are no exception.

22 JUDGE THOMPSON: Could you repeat that, please?

23 MR BOCKARIE: In his opening statement the Prosecutor urged
24 the Court to bar politics from these proceedings. At first
12:07:50 25 blush, such admonition has the deceptive appeal of its
26 simplicity. But as we enter this Chamber, we cannot close our
27 eyes to the reality that exists beyond these words. For better
28 or for worse, politics is never far from any trial, and these
29 proceedings are no exceptions. It was politics that created the

1 Special Court, through negotiations between the government of
2 President Ahmad Tejan Kabbah and the United Nations, and it is
3 politics that sustains it through continued negotiations with a
4 small group of donor nations who fund this Tribunal. Rather than
12:08:44 5 asking, Your Honours, our client, or indeed the people of
6 Sierra Leone, to ignore these realities, we take comfort in the
7 knowledge that you shall not allow this undeniable, perhaps
8 unavoidable, political aspect to stand in the way of your
9 responsibility to act fairly. For in the final analysis, it is
12:09:11 10 some measure of fairness, and not the avoidance of plain truths,
11 that justice should hope to achieve.

12 While it will not be helpful at this point to canvass
13 various political factors and practical considerations that gave
14 rise to the inclusion in the Court's Statute the phrase "greatest
12:09:37 15 responsibility", we would be negligent in our duty if we did not
16 emphasise that in this case, indeed in all cases before this
17 Tribunal, are bound to that phrase, a phrase which undeniably
18 represents a political compromise reached by the drafters of the
19 Special Court's Statute. Either these words have a paramount
12:10:03 20 overreaching significance or they have no significance at all.
21 As we proceed with our defence, we urge the Chamber, as well as
22 those members of the public following the proceedings, to bear
23 that close in mind.

24 We will not tarry long with a lengthy resume of what we
12:10:23 25 consider to be the weakness of the Prosecution's case, for we are
26 confident that those deficiencies will present themselves as we
27 proceed with our case. Our present task is to set about
28 clarifying our position, namely, that Moinina Fofana bears no,
29 let alone the greatest responsibility for the charges alleged in

1 the Prosecution's indictment.

2 Most importantly, our defence case will highlight the
3 significant divergence between the allegations contained in the
4 indictment and the actual state of evidence against Mr Fofana.
5 Our evidence will reveal that Mr Fofana, despite his admittedly
6 impressive sounding title, was in reality a figure of relatively
7 minor importance within the CDF. And the actual and effective
8 superior authority was vested in figures of much greater
9 responsibility --

12:11:33 10 THE INTERPRETER: Your Honours, can learned counsel take it
11 slowly again, please.

12 PRESIDING JUDGE: Mr Bockarie, can you go back a bit to
13 this last part, because you are going too fast again. The
14 interpreters are unable to follow with you. Take it back to the
12:11:50 15 evidence will show that Fofana --

16 MR BOCKARIE: Okay, sorry.

17 Most importantly our defence case will highlight the
18 significant divergence between the allegations contained in the
19 indictment and the actual state of evidence against Mr Fofana.
12:12:36 20 Our evidence will reveal that Mr Fofana, despite his admittedly
21 impressive sounding title, was in reality a figure of relatively
22 minor importance within the CDF; and that actual and effective
23 superior authority was vested in figures of much greater
24 responsibility, including members of the SLPP leadership in exile
12:13:31 25 and other CDF officials and commanders in Sierra Leone, some of
26 whom, we might add, are not facing trial before this Court.

27 Mr Fofana will not attempt to deny his membership in the
28 CDF. How could he? Indeed, why should he? He is proud of the
29 legitimate role he played in defending his country, restoring its

1 democratically elected government and working towards the
2 attainment of its peace and stability.

3 Additionally, our defence case will reveal that the
4 Prosecution's theory of command responsibility, pursuant to
12:14:57 5 Article 6.3 of the Statute, is not only premised upon assertion
6 far too vague to satisfy the strict elements of the relevant
7 legal test, but is also propped up by equally vague and
8 irrelevant evidence, evidence which fails to demonstrate that
9 Mr Fofana ever achieved the level of effective control over the
12:16:25 10 alleged perpetrators of the underlying offences charged in this
11 indictment.

12 We will further show that Mr Fofana does not bear
13 individual criminal responsibility under Article 6.1 of the
14 Statute, through evidence which reveals that he never planned,
12:17:04 15 instigated, ordered, or committed any of the alleged crimes, nor
16 did he otherwise aid or abet their perpetration. In part, the
17 Defence will accomplish this by exposing the Prosecutor's key
18 witness, Mr Albert Nallo, for who he is: A calculating,
19 self-interested, opportunist whose testimony --

12:18:08 20 PRESIDING JUDGE: But again, Mr Bockarie, you are arguing.
21 This is an argument that you can put forward at the time of your
22 closing arguments. Not in the opening statement. I mean,
23 opening statements --

24 MR BOCKARIE: Sorry, Your Honours, I'm on the channel with
12:18:22 25 the interpreters. Sorry.

26 PRESIDING JUDGE: To argue about the validity and
27 trustworthiness or otherwise of a witness for the Prosecution is
28 not part of what is normally contained in an opening statement,
29 as such. It is to be confined to the evidence you intend to

1 lead. If you intend to lead evidence to show this witness should
2 not to be trusted, fine. But now you are arguing this witness is
3 not to be believed and so on, which I suggest to you is quite
4 proper for you to do and fully in your closing arguments, not in
12:18:52 5 opening arguments. So I would like you to confine your comments
6 to what are expected to be opening statements, as such.

7 MR BOCKARIE: Yes, I will take the cue, Your Honour.

8 Finally, Your Honour, we'll show that Mr Fofana did not
9 share an illegal common plan --

12:19:13 10 PRESIDING JUDGE: Did not share what?

11 MR BOCKARIE: An illegal common plan, purpose or design
12 with either of the other accused persons or any other members of
13 the CDF. That is to say, that he did not participate in any
14 joint criminal enterprise. On the contrary, our evidence will
12:20:28 15 describe Mr Fofana's participation in the execution of legitimate
16 military goals. Our evidence will reveal that the violations
17 alleged in the indictment, to the extent they occurred, were the
18 fault of renegade commanders and individual Kamajors who did not
19 adhere to the stated rules, which mandated the protection of
12:21:40 20 civilians and forbade such acts as looting and harassing the
21 population. Our evidence will show that such isolated
22 transgressions were not the fault of a general criminal policy,
23 but rather the fault of certain offenders acting outside the
24 authority.

12:22:36 25 Your Honour, by way of concluding this opening statement
26 the Prosecution chose to quote a passage attributed to the late
27 Steve Biko of South Africa:

28 "There exists among men, because they are men, a solidarity
29 through which each shares responsibility for every injustice and

1 every wrong committed in the world."

2 Stirring lines, to be sure, especially considering the
3 context in which they were originally delivered and the great
4 evil to which they referred. However, spoken as they were in
12:23:48 5 this Chamber, as a paean to the rule of law and in support of the
6 putative aspirations of this Court, they are contrary to one of
7 the guiding and most basic principles of contemporary criminal
8 justice. For the modern criminal law does not recognise, indeed
9 it does not tolerate, notions of collective or representative
12:24:46 10 culpability. Such notions, Your Honour, are manifestly at odds
11 with the fundamental principle of individual culpability, because
12 they raise the spectre of guilt by association.

13 Your Honour, perhaps more apt to the CDF proceedings are
14 again the words of this famous scholar, John Rawls: "Each person
12:25:50 15 possesses an inviolability founded on justice that even the
16 welfare of society as a whole cannot override. For this reason,
17 justice denies that the loss of freedom for some is made
18 right --"

19 THE INTERPRETER: Can learned counsel take the quotation
12:26:16 20 slowly for the interpreter to follow, please?

21 PRESIDING JUDGE: Mr Bockarie, can you take the quotation
22 back again, please, slowly?

23 MR BOCKARIE: Perhaps more apt to these proceedings are
24 again the words of a famous scholar, John Rawls: "Each person
12:26:36 25 possesses an inviolability founded on justice that even the
26 welfare of society as a whole cannot override. For this reason,
27 justice denies that the loss of freedom for some is made right by
28 a greater good shared by others. It does not allow that the
29 sacrifice imposed on a few are outweighed by the larger sum of

1 advantages enjoyed by many."

2 Your Honour, the Prosecution has suggested that this Court
3 represents the conscience of mankind. However, at the very
4 moment that justice is employed as a means of assuaging mankind's
12:28:09 5 guilty conscience at the expense of individual liberty, it ceases
6 to be a worthy pursuit, Your Honour.

7 PRESIDING JUDGE: I am not sure I understand what you are
8 trying to convey to the Court, honestly. I would like to
9 understand what the message you are trying to convey is. What is
12:28:43 10 this argument about?

11 JUDGE THOMPSON: Learned counsel, isn't it better that you
12 keep to the strict requirements of Rule 84? Those kinds of
13 assertions would seem to be very much appropriate in the context
14 of an academic treatise or probably in a closing speech, because
12:29:10 15 they are all about theories of justice and John Rawls' A Theory
16 of Justice was really confined to philosophising about the
17 concept of justice. It would seem to me that you do this Court
18 no service if, at a point in time, you are called upon to present
19 the evidence that you will be leading in refutation and rebuttal
12:29:39 20 of the Prosecution's evidence that has been led, you embark upon
21 a jurisprudential exploration about the concept and the ideals of
22 justice. This is a very mature bench. We all did jurisprudence.
23 We are all familiar with, in fact, what the values that inspire
24 the entire justice process are. And clearly it would not serve
12:30:09 25 any useful purpose for us to listen to a lecture on the theories
26 of justice. I have a copy of John Rawls' Theory and when I do
27 find the time I find it a very useful armchair reading. It would
28 seem to me most appropriate that you should go to the evidence
29 that you will be leading in rebuttal of what the Prosecution has

1 led. It would be unfair if this Court does not tell you that
2 that is the way to proceed in the interests of your client.
3 Rule 84.

12:30:55 4 MR BOCKARIE: Yes, Your Honour. Your Honour, it is just to
5 give an insight as to the line we contemplate in our defence,
6 Your Honour.

7 JUDGE THOMPSON: But to try to instruct the justices on the
8 concept of what justice is all about is very presumptuous.

9 MR BOCKARIE: I think I will rest my case there,
12:31:16 10 Your Honour.

11 JUDGE THOMPSON: Quite right.

12 MR BOCKARIE: Thank you, Your Honour.

13 PRESIDING JUDGE: Thank you, Mr Bockarie. Mr Williams, are
14 you ready to address the Court and make your opening statement?

12:31:28 15 MR WILLIAMS: Yes, My Lord.

16 PRESIDING JUDGE: You have just heard our comments to your
17 colleague for the second accused and, before you proceed, I would
18 like to remind you again of the nature and content of Rule 84 and
19 what an opening statement prior to the opening of a defence case
12:31:48 20 is all about. It has to be confined to the evidence that you
21 lead and bring in introductory remarks is obviously part of the
22 opening statement. But I would like to hear your comments
23 confined to the evidence you intend to lead in respect of your
24 client.

12:32:04 25 MR WILLIAMS: I will assure the Bench that I would not have
26 to be reminded about the gist of Rule 84.

27 PRESIDING JUDGE: And just a caution, Mr Williams, as you
28 know, the interpreters have to follow what you do say and try to
29 keep a tempo that is compatible with their ability to interpret

1 what you are saying.

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

3 PRESIDING JUDGE: Thank you.

12:32:40

4 MR WILLIAMS: My Lord, I wish to say that I might come out
5 a little bit inaudible because I am just recovering from a flu,
6 so I crave the indulgence of the Bench and the interpreters.

7 PRESIDING JUDGE: I do understand that.

12:33:02

8 MR WILLIAMS: Yes. May it please Your Lordships, the third
9 accused, Allieu Kondewa, stands charged on an eight count
10 indictment for various crimes against humanity, violations of
11 Article 3 common to the Geneva Conventions and of Additional
12 Protocol II and other serious violations of international
13 humanitarian law. All these offences were alleged to have been
14 committed by the third accused within the territory of
15 Sierra Leone after 30th November 1996.

12:33:39

16 It is alleged by the Prosecutor that the third accused was
17 a high-ranking member of the Civil Defence Forces; the CDF. It
18 is further alleged that the third accused was in charge of all
19 initiations performed on new members of the Kamajor; a
20 traditional hunting society. As a result of these initiations,
21 it is alleged that the third accused bears command responsibility
22 for atrocities and/or war crimes committed by CDF members.

12:34:26

23 It is the Prosecutor's view that the third accused, acting
24 in consonance with others, "Either planned, instigated, ordered,
25 committed, or otherwise aided and abetted in the planning,
26 preparation or execution of the crimes laid out in the
27 indictment."

12:35:41

28 The Prosecutor furthermore alleges that the third accused,
29 Allieu Kondewa, as high priest, had had supervision and control

1 over initiators within the CDF and was responsible for all
2 initiations within the CDF, including the initiation of children
3 under the age of 15 years.

4 Furthermore, he frequently led or directed operations and
12:36:56 5 had direct command authority over units within the CDF
6 responsible for carrying out special missions. We shall, during
7 the presentation of our defence, controvert these allegations.

8 Evidence will be adduced on behalf of the third accused
9 that will make clear to this panel the history of the Kamajors
12:37:34 10 going back several decades. We shall lead evidence to show that
11 the Kamajors derive from traditional hunter societies in
12 Sierra Leone, and that its members come from the Mende tribe.

13 The Defence for the third accused shall not gainsay that
14 the third accused was an initiator. The Prosecutor has
12:38:35 15 represented to this panel that membership of the Kamajor society
16 is one and the same with the membership of the CDF paramilitary
17 forces. We shall present evidence to this Court to show that the
18 membership of the Kamajor society is by no means synonymous with
19 membership of the CDF.

12:39:15 20 JUDGE THOMPSON: Without meaning to disturb your rhythm,
21 would you use the term "Chamber" for us, or "the Bench", instead
22 of panel.

23 MR WILLIAMS: As My Lord pleases.

24 We will show that initiation ceremonies performed by the
12:39:50 25 third accused was not in any way equivalent to conscription or
26 enlistment into a military unit.

27 JUDGE ITOE: Let's get that again. Was not necessarily or
28 was not?

29 MR WILLIAMS: Was not in any way equivalent to conscription

1 or enlistment into a military unit.

2 JUDGE THOMPSON: That is initiation.

3 PRESIDING JUDGE: Yes.

4 JUDGE THOMPSON: You said initiation.

12:40:27 5 MR WILLIAMS: Yes, My Lord.

6 JUDGE THOMPSON: Good, thanks.

7 PRESIDING JUDGE: Initiation by the third accused, that's
8 what he said.

9 MR WILLIAMS: Yes. We shall show that the initiation
12:40:40 10 ceremonies performed by the third accused were defensive or
11 protective in nature. Their purpose was not to teach violence or
12 advocate criminal conduct. Quite the contrary. The process of
13 initiation cancelled and admonished against the killing of
14 innocent civilians and non-combatants, rape and looting of
12:41:36 15 civilian properties. We shall establish that the initiation
16 process was geared towards the protection of prospective members
17 in a manner that was far closer to tribal custom than to formal
18 or even informal military indoctrination. Evidence will be led
19 by the third accused that will reveal that it was paramount
12:42:44 20 chiefs of various chiefdoms that selected subjects of their
21 villages for initiation.

22 It would appear that the Prosecutor finds difficulty in
23 distinguishing between initiation into traditional hunter
24 societies and recruitment to fight. This distinction is vitally
12:43:26 25 important, since initiation is not the same as military
26 indoctrination or training.

27 We shall present evidence to show that the ceremony of
28 initiation involved a ritualistic cleansing and that this was
29 done by rubbing the bodies of prospective members with a mixture

1 of herbs and water. Evidence will be led that the third accused
2 painstakingly told initiates that they had to strictly adhere to
3 the initiation rules. We shall adduce evidence that after the
4 initiation, the initiates were handed back to the paramount
12:44:52 5 chiefs and that it was the paramount chiefs that decided what
6 became of the initiate.

7 During the initiation period, which lasted no longer than a
8 day or two, the third accused controlled the activities of
9 initiates in his shrine. Mr Kondewa did not have control or
12:45:35 10 command over initiates once they had left the initiation shrine.

11 The Prosecutor has presented evidence that the third
12 accused, acting in consonance with others, breached or violated
13 international humanitarian law. The Defence for the third
14 accused will call insider witnesses; Kamajors who went through
12:46:22 15 the initiation ceremonies conducted by the third accused;
16 witnesses who did not only believe but continue to believe in the
17 immunising powers of the initiation process. Evidence will be
18 called to show that as part of the ceremonies, initiates were
19 specifically warned and repeatedly educated and informed about
12:46:59 20 the laws of the Kamajor society which, inter alia, included the
21 following: One, that initiates should not kill innocent
22 civilians or combatants; two, that they should not loot or
23 pillage property; thirdly, that they should not harass civilians
24 or rape women. Evidence will be adduced to show that not all
12:48:03 25 initiates acted as soldiers or combatants.

26 The Prosecutor alleges that Samuel Hinga Norman,
27 Moinina Fofana and the third accused Allieu Kondewa individually,
28 or in concert, exercised authority, command and control over all
29 subordinate members of the CDF. We shall call witnesses of fact

1 to show that none of the three essential elements to establish
2 command responsibility were applicable to the third accused.

3 Firstly, that there was no superior-subordinate
4 relationship between the third accused Allieu Kondewa and the
12:49:21 5 perpetrators of the alleged crimes. Secondly, that the third
6 accused did not have actual or constructive knowledge that the
7 alleged crimes were about to be committed, were being committed
8 or had been committed. Finally, that even if the third accused
9 knew, he did not have the power to prevent or stop the crimes or
12:50:19 10 punish the perpetrators.

11 Evidence of hierarchical structure of the CDF and the level
12 of importance that was attached to the position of High Priest
13 will be presented to Your Lordships. The three accused persons
14 have been described by the Prosecutor as the holy trinity of the
12:51:10 15 CDF movement. That is, God the father; God the son; and God the
16 Holy Ghost, alluding to the third accused as the Holy Ghost.

17 We shall lead evidence to show that it was ECOMOG, the
18 original peacekeeping force, that, for the most part of the war,
19 had effective control over the CDF troops. Witnesses will
12:52:07 20 testify about an incident involving the third accused in Bo, a
21 report of which was made to ECOMOG. God, the Holy Ghost - that
22 is, Mr Kondewa - was arrested and locked up in a cell by ECOMOG
23 troops. This says it all about the level of authority Mr Kondewa
24 wielded as High Priest of the CDF.

12:52:55 25 The Prosecutor would want this Court to find the third
26 accused culpable for not saving or helping others when he could
27 not help or save himself. We shall present evidence to show that
28 when it was not ECOMOG, it was the War Council of the CDF that
29 was responsible for the running and management of the war on

1 behalf of the CDF. The third accused, Mr Kondewa, was not a
2 member of that War Council, never sat at its meetings, and never
3 had any business to do with that council. Evidence will be led
4 on behalf of the third accused to show that most of the
12:54:05 5 atrocities attributed to the CDF by the Prosecutor were largely
6 committed by the RUF and AFRC, that is the Revolutionary United
7 Front and members of the Armed Forces Ruling Council disguised in
8 Kamajor outfits. Witnesses will testify that before the Kamajors
9 entered Bo in 1998, the RUF and the AFRC, through one of their
12:54:51 10 patrons, Dr MB Sesay, prepared ronkos, that is a traditional
11 outfit of the Kamajor movement. These ronkos were prepared for
12 the RUF/AFRC, which they wore to wreak havoc on innocent
13 civilians. Evidence will be led that this pattern was followed
14 throughout Sierra Leone by the RUF, the AFRC and members of the
12:55:32 15 Sierra Leone Armed Forces right through the war period.

16 I am sure Your Lordships have heard about the word "sobel",
17 which means soldiers during the day and rebels at night. This
18 might be the opportune time to add another word to the war
19 lexicon of this country, and I will call it "Kamabel". That will
12:56:11 20 be rebels during the day, transformed to Kamajors at night to
21 commit the atrocities. The rationale behind this practice was
22 twofold: One, to surprise the CDF forces and, secondly, to give
23 the CDF a bad name, which to many they succeeded in doing.

24 My Lords, I will conclude by saying that justice is a
12:56:44 25 two-edged sword. Justice is demanded by the Prosecutor for the
26 untold sufferings of the victims of the war. We demand justice
27 for the third accused, who in the eyes of thousands was a
28 liberator and not a villain.

29 I thank Your Lordships for your patience and indulgence.

1 PRESIDING JUDGE: Thank you, Mr Williams. This concludes
2 this phase of the opening of the defence case. We will follow up
3 next week with the first accused who shall give evidence on
4 Tuesday, 24 January at 9.30 in the morning. So the Court is
12:57:42 5 adjourned to 9.30 next Tuesday. Thank you very much.

6 [Whereupon the hearing adjourned at 12.58 p.m.,
7 to be reconvened on Tuesday, the 24th day of
8 January 2006, at 9.30 a.m.]

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