

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

TUESDAY, 20 SEPTEMBER 2005
2.10 P.M.
MOTION HEARING

TRIAL CHAMBER I

Before the Judges:	Pierre Boutet, Presiding Bankole Thompson Benjamin Mutanga Itoe
For Chambers:	Ms Sharelle Aitchison Ms Roza Salibekova
For the Registry:	Mr Geoff Walker
For the Prosecution:	Mr James C Johnson Mr Joseph Kamara Mr Mohamed Bangura Mr Mohamed Stevens Ms Nina Jorgensen Ms Suzanne Mattler (intern)
For the Principal Defender:	Mr Vincent Nmehielle
For the accused Sam Hinga Norman:	Dr Bu-Buakei Jabbi Ms Claire da Silva (legal assistant)
For the accused Moinina Fofana:	Mr Arrow Bockarie Mr Victor Koppe Mr Andrew Ianuzzi
For the accused Allieu Kondewa:	Mr Charles Margai Mr Yada Williams Mr Ansu Lansana

1 [CDF20SEP05A - SV]
2 Monday, 20 September 2005
3 [The accused Fofana and Kondewa present]
4 [The accused Norman not present]
14:04:04 5 [Open session]
6 [Upon commencing at 2.10 p.m.]
7 PRESIDING JUDGE: Good afternoon, counsel for the Defence
8 and good afternoon, counsel for the Prosecution. We are here
9 this afternoon to hear comments and arguments on motions on
14:17:18 10 judgment of acquittal that has been filed by the respective
11 accused in this case, and I just want to make sure that we do
12 understand the procedure in the same way. You will recall that
13 when we issued instructions in this respect we did say that each
14 party would be given 30 minutes to give a brief summary of their
14:17:44 15 position. I shall stress that we shall not exceed 30 minutes.
16 It doesn't mean that you shall take 30 minutes and certainly not
17 more than 30 minutes if you wish to go to that extent.
18 The best way to make some better understanding, I would
19 suggest that we hear from the counsel for the first accused
14:18:09 20 first. Then we'll hear the Prosecution in respect of the first
21 accused. Then we'll go to the second accused, hear the
22 Prosecution, and then go on with the third accused and
23 Prosecution with respect to the third accused. So this is, I
24 think, the best way to deal with this matter to make sure that
14:18:30 25 things are kept in the proper perspective.
26 So is there any comments or any particular matters that you
27 want to be dealing with before you address this issue, Dr Jabbi?
28 MR JABBI: No, My Lord. We do not need to raise any
29 preliminary issues before dealing with the matter.

1 PRESIDING JUDGE: So you are ready to address the Court?

2 MR JABBI: Yes, indeed, My Lord.

3 PRESIDING JUDGE: And you are the one that will be making
4 the representation on behalf of the first accused.

14:19:05 5 MR JABBI: Yes, My Lord.

6 PRESIDING JUDGE: So, please proceed. Again, before you
7 do, Dr Jabbi, we have seen and read what has been filed by each
8 and every party in these proceedings and I would appreciate if
9 you could summarise and give us -- and now your position has been
14:19:23 10 responded to by the Prosecution. There might be some issues that
11 you wish to raise because of that. Fine. If you want to do that
12 in the representation, it would be most welcome. But I ask you
13 just not to repeat and read from your motion because we can do
14 that. So we would expect a presentation that is a summary of
14:19:45 15 what you have presented up to this moment.

16 JUDGE ITOE: And I think this remark by the Presiding Judge
17 holds good for everybody, including the Prosecution, of course.
18 So we don't need to come back to that remark each time we are
19 taking on the submissions in respect of each of the accused
14:20:06 20 persons. Thank you.

21 MR JABBI: My Lord, is the preliminary question that was
22 posed to me intended to be also posed to the other Defence teams
23 before I proceed?

24 PRESIDING JUDGE: No, no.

14:20:24 25 MR JABBI: Thank you.

26 PRESIDING JUDGE: Please proceed.

27 MR JABBI: Yes. My Lords, we intend to be very, very brief
28 indeed, and in compliance with the views just expressed. Indeed,
29 the motion has been filed for quite some time and you are

1 expected to be fully au fait with its details. In view of that
2 we will not spend a long time. We will be very brief indeed.

3 My Lords, over and above our client's insistence that he
4 has not been served with an indictment and that he has not been
14:21:38 5 arraigned before this Court, we have endeavoured to be as
6 detailed and systematic in presentation of the motion, and we
7 have certainly concentrated on the issues pertinent to the
8 Rule 98 requirements. We intend to rely on the motion, on the
9 details of it, which, as I say, we have presented as
14:22:20 10 systematically as possible and also in as much detail as
11 possible.

12 We would want to emphasise, however, first of all, that
13 notwithstanding the amendment to Rule 98 on 14th May 2005, we
14 submit that the test is still one essentially of sufficiency of
14:22:59 15 evidence and that the authorities on the earlier formations of
16 that Rule which we have referred to are still applicable. We
17 wish to emphasise in particular that no new test of the presence
18 of some evidence has been introduced by that amendment. The
19 amendment does not import that the test is the presence of some
14:23:51 20 evidence likely to support a conviction. The test, we submit,
21 still remains sufficiency of the evidence that has been adduced
22 and the totality of the evidence with respect to each count. My
23 Lord, it is with that framework that we have referred to various
24 counts and the evidence that has been adduced in respect of those
14:24:32 25 counts.

26 There are one or two issues we just would like to mention
27 purely in passing. It may well be that at this stage detailed
28 treatment of those issues may not be very pertinent. One is what
29 we consider to be an extended version of the joint criminal

1 enterprise liability that has been used by the Prosecution in
2 this matter without having specifically pleaded it. We call
3 attention to this matter only to awaken or, rather, to direct the
4 attention of Your Lordships to the need to keep the rights of the
14:26:27 5 accused persons in mind. A certain vagueness and generality with
6 respect to that mode of liability may be apparent in the evidence
7 and the Prosecution presentations on this matter.

8 MR KAMARA: Excuse me, Your Honours, I'm sorry that I have
9 to interrupt my learned friend but this seems to be a new ground
14:27:04 10 outside the motion of the Defence. As such, it is my belief that
11 it is a rule of practice that when you have submitted your motion
12 and it has been fully responded to on the other side, and it is
13 time for oral submissions on the issue of the motion, you are
14 restricted to those issues as raised in your motion, except the
14:27:25 15 judges. Your Lordships could in propria motu raise issues for
16 which we, the Prosecution, would be prepared to respond to. But
17 the issue that my learned friend is currently raising has not
18 been pleaded in their motion equally, and it is the position of
19 the Prosecution that the motion and response are specific to the
14:27:41 20 issues.

21 PRESIDING JUDGE: I thought I had indicated in my
22 preliminary remarks to all that it might be appropriate for the
23 applicant to use this time to, as well, deal with the reply --
24 the response that has been provided by the Prosecution. I'm not
14:27:58 25 arguing with you that you have or you have not responded in this
26 way, but I just want to make sure that your comments are made in
27 the context of what I have described. That is, obviously, it was
28 a procedure whereby the motion was filed, Prosecution responded,
29 there was no reply to anything. There was just --

1 MR KAMARA: Yes.

2 PRESIDING JUDGE: That way it is. So these are the
3 comments I've made. Now, whether these observations made by your
4 learned colleague are along these lines or it is totally a new
14:28:30 5 ground, I don't know. I thought it was along with the lines that
6 I have just indicated.

7 MR KAMARA: It is for guidance, because at the end of the
8 day, if we have to respond to several issues that have not been
9 raised in the motion for which the Prosecution have responded,
14:28:40 10 then where will we stand as prosecutors if we have 10 or more new
11 legal issues that have been raised? We may be in a position to
12 call and ask for a day to come back to respond fully,
13 exhaustively to those issues. That's why I'm asking. At this
14 point in time can we entertain fresh grounds or new issues?

14:29:03 15 JUDGE THOMPSON: Even if the issue is collateral to
16 something already adverted to in the pleadings, in the
17 submissions?

18 MR KAMARA: I'll agree with you, Your Honour. If it is an
19 issue that is collateral and it is contemplated within a motion,
14:29:10 20 that, as I understand, you will accept.

21 JUDGE THOMPSON: Because the distinction here being made
22 between collateral and an entirely new issue, a novel --

23 MR KAMARA: A novel issue. Yes, I agree with Your Honour.

24 PRESIDING JUDGE: Because you've raised on the issue that
14:29:24 25 was being addressed by learned counsel for the first accused
26 dealing with joint common enterprise, saying that the position
27 taken by the Prosecution is an extended version of that. They
28 have dealt with that in their application. You have dealt with
29 that. I'm not saying you have dealt with what is meant or not

1 meant by extended duplication, but the notion of joint criminal
2 enterprise is very much part of both pleadings.

3 JUDGE THOMPSON: And that's the point. I mean, whether we
4 probably here are embarking upon a distinction without a
14:29:56 5 difference. That clearly whether a particular form of JCE is in
6 fact extended or not extended seems to be germane to the entire
7 submissions that we've seen on both sides. That's saying that
8 something that may be vague and may raise matters of generality
9 by reason of its extended nature would not seem to be an entirely
14:30:28 10 unanticipated concept or position if one side has already put
11 forth submissions in respect of the very notion of extended joint
12 criminal enterprise. Again perhaps it's a way -- depends on how
13 one looks at it.

14 MR KAMARA: That is my argument here. We have pleaded --
14:30:57 15 the movement of this motion, they've made certain pleadings based
16 on the motion and the Prosecution has responded specifically to
17 those issues. And even though the concept of joint criminal
18 enterprise is all embracing, but there are certain issues that
19 are pleaded specifically. And if one goes beyond the issues
14:31:16 20 pleaded in the JCE -- my expectation is we're limited by the
21 issues that we've pleaded, but if we go beyond what we plead,
22 both sides plead in the JCE --

23 JUDGE THOMPSON: But it seems to make the issue being put
24 forward now an entirely new issue.

14:31:33 25 PRESIDING JUDGE: That's right.

26 MR KAMARA: Yes, it's new. Even though it might appear to
27 be an extended issue, but it's still new and novel based on the
28 motion.

29 JUDGE THOMPSON: But suppose it's a branch of a tree that's

1 already in existence on both sides.

2 MR KAMARA: I'll concede if we consider it as a branch.

3 But then my worry is where do we draw the line of when we start
4 considering branches?

14:31:55 5 JUDGE THOMPSON: Perhaps that should be a matter for
6 judicial control.

7 MR KAMARA: Thank you, Your Honour. I'll rest my --

8 JUDGE ITOE: Is the thrust of your preoccupation that since
9 the issue he's raising has not been raised in his submissions, he
14:32:08 10 can't raise them at all?

11 MR KAMARA: Your Honour, if it is collateral or it's an
12 extension of the argument.

13 JUDGE ITOE: You remember -- I do remember, anyway, that
14 when we were asking for written submissions, the Chamber never
14:32:24 15 envisaged an exhaustive presentation in the written submissions.

16 MR KAMARA: You're right.

17 JUDGE ITOE: And that is why we coupled instructions with
18 oral submissions to back up certain issues which may not have
19 been raised in the submissions and which are pertinent, which are
14:32:48 20 on the table, like joint criminal responsibility. I mean, it is
21 in this context that this is being raised. I mean, you have
22 raised an important point; that maybe, if the issues that are now
23 being raised were not anticipated by you, you might probably, you
24 know, ask for time to reply. Why don't you leave that to the
14:33:16 25 Court to appreciate the necessity for this?

26 But as far as I am concerned, I don't see any problem with
27 these issues being visited exhaustively by counsel not only in
28 the written submissions but also in the oral submissions, because
29 they are very important and the JCE is a very, very important

1 aspect of this prosecution. You would agree with me, wouldn't
2 you?

3 MR KAMARA: I would agree with you, Your Honours. The only
4 area of disagreement is the fact that if even it is still, as I
14:33:55 5 said, an extension, but the caution here is the principle of
6 where does it stop?

7 JUDGE THOMPSON: Well, the difficulty for me, and I join my
8 brother in his own thoughts on this matter, that if we were in a
9 civil court, I would uphold you straightaway. Where everything
14:34:12 10 in a civil court needs to be by way of pleadings and submissions
11 need to be specifically pleaded. But I would have thought that
12 one of the advantages of the practice of the international
13 tribunals is that we've always favoured a more flexible approach
14 rather than the rigid technical approaches of the national
14:34:38 15 systems, and I don't think at this stage it's easy to say that
16 your side would be prejudiced by that submission as it has been
17 made at this point in time. But as my learned brother has said,
18 if the time comes and we think that your side is disadvantaged,
19 we will control it and be as fair as we can.

14:35:07 20 MR KAMARA: I'll take that, Your Honour. Thanks.

21 PRESIDING JUDGE: So your objection is denied, if that was
22 an objection, but we will take into consideration your comments.

23 MR KAMARA: Thank you, Your Honour.

24 PRESIDING JUDGE: Dr Jabbi, obviously that will not be
14:35:24 25 taken as part of your 30 minutes if you were concerned about
26 that.

27 JUDGE ITOE: We don't even know how many minutes Dr Jabbi
28 has taken [overlapping speakers].

29 MR JABBI: It may well turn out --

1 JUDGE ITOE: [Overlapping speakers] Mr Kamara has taken.

2 PRESIDING JUDGE: I had written that down but that's okay.

3 MR JABBI: It may well turn out that my learned friend's
4 intervention may be very much longer than my presentation.

14:35:48 5 Yes, My Lords, as I said, the intention was to draw the
6 attention of Your Lordships to that dimension of joint criminal
7 enterprise so it can be borne in mind in determining the issues
8 that have been raised before this Court. I would like to put my
9 learned friend's mind at ease; that I do not intend to go beyond
14:36:18 10 that observation on the question of joint criminal enterprise.

11 My Lords, briefly also - very, very briefly - we want to
12 draw attention to the aspect of terrorism. And here we just want
13 to raise the issue of the imprecision and uncertainty as to the
14 elements of terrorism and therefore their application in this
14:36:56 15 matter. But we are satisfied that we have adequately dealt with
16 it in the motion, and the difficulties that may arise from that
17 imprecision and uncertainty as to the elements is again just
18 being brought to the attention of Your Lordships so that due
19 consideration can be given to it during the determination of the
14:37:31 20 issues under Rule 98.

21 My Lords, as I said at the beginning, we are satisfied that
22 we have been detailed and systematic enough in the motion. It is
23 very clear indeed on various issues. There is no confusion of
24 issues therein and we do not think we need even to summarise it
14:38:06 25 for your benefit. We accordingly rely fully and entirely on the
26 motion and we consider this a sufficient contribution on the oral
27 argument in respect of the motion by the first accused.

28 Thank you very much, My Lords.

29 PRESIDING JUDGE: Well, you were true to your words,

1 Dr Jabbi, and we thank you. Mr Prosecutor, are you ready to
2 respond?

3 MR KAMARA: Yes, Your Honour. There are basically two
4 issues raised by my learned friend and that is the test, the
14:39:03 5 standard, for Rule 98; and, secondly, the extended version of the
6 JCE; and I think, thirdly, the issue of terrorism.

7 PRESIDING JUDGE: So you're not confused either, so we
8 avoid any misinterpretation of what we have said, you are not
9 limited to respond only to what has been raised in the oral
14:39:25 10 presentation. The first accused has saw fit to rely essentially
11 on their written submission. If you want to do that too, you're
12 welcome. I just want to make sure that there is no
13 misunderstanding, that's all.

14 MR KAMARA: Thank you, Your Honour. I'll start off by
14:39:44 15 relying entirely on our response to the motion for the Defence.
16 And, Your Honours, the Prosecution do not disagree with the test
17 of the standard as laid down or as reiterated by my learned
18 friend, that it is still on the sufficiency of evidence. And as
19 a reminder to ourselves, Rule 98 states that where there is
14:40:19 20 evidence, if accepted, upon which a tribunal of fact could - Your
21 Honours - be satisfied beyond reasonable doubt of the guilt of
22 the accused on a particular charge.

23 It is our submission, My Lord, that the Prosecution sees
24 certain principles intertwined in this concept. Firstly, we will
14:40:49 25 start with the purpose of Rule 98. Your Honours, Rule 98's
26 purpose is to save time and allow the streamlining of a case, and
27 wherein no evidence on which a Trial Chamber could convict. And
28 this is an issue that applies to both factual and legal issues;
29 that the Rule 98 process is not an exhaustive, detailed study of

1 the entire evidence. Particularly it refers to counts and not to
2 proof of individual paragraphs in the indictment.

3 The pillar of the Prosecution's submission as regards the
4 Rule 98 standard is that sufficient evidence has been produced
14:42:14 5 before this Court for this Chamber to be satisfied beyond
6 reasonable doubt that there is a case for the first accused to
7 answer on each and every particular charge.

8 Your Honours, if I may proceed then to discuss the issue of
9 the extended version of the JCE. I am tempted here, Your
14:42:52 10 Honours, to discuss the JCE in its entirety. The jurisprudence
11 of international tribunals has established that persons who
12 contribute to the perpetration of crimes in the execution of a
13 common criminal purpose may be subject to criminal liability as a
14 form of commission pursuant to Article 6(1) of the Statute, Your
14:43:37 15 Honours. As we indicated in our motion the relevant case in
16 point is the Tadic decision. The elements for the JCE we still
17 have outlined in our motion; the plurality of persons, the
18 existence of a common plan, the participation of the accused.

19 MR JABBI: My Lords, I hope I am not unnecessarily
14:44:01 20 intervening but I think my learned friend in fact is reading from
21 his submission, and the issues as you have said have been fully
22 stated and the Court is okay with them. The design is to save
23 time to ensure that we don't repeat all of the points that have
24 already been -- paragraph 37 is the relevant paragraph, My Lord.

14:44:31 25 MR KAMARA: Thank you, Your Honour. As I indicated
26 earlier, that I am treating the JCE issue in its entirety to just
27 fish out the extended version may not be very appropriate in the
28 circumstance, and I was giving the elements involved so that I
29 could give the evidence to support those elements. If I were

1 just to give the evidence to support those elements without
2 highlighting what those elements are, except if Your Lordships
3 would waive the element aspect and let me go direct to the
4 evidence. But I thank my learned friend for the comments and I
14:45:02 5 will try to support the evidence straightforward.

6 It is the case for the Prosecution that there is a
7 plurality of persons to sustain one of the criteria for JCE; that
8 the first accused, and the second accused and the third accused
9 participated together, planned and acted in concert to defeat the
14:45:42 10 RUF and AFRC forces, and to gain and exercise complete control
11 over the population of Sierra Leone, and also to defeat the
12 supporters, sympathisers and anyone who did not actively support
13 or resist the RUF and AFRC occupation of Sierra Leone.

14 JUDGE THOMPSON: Just a minute. Were you dealing with the
14:46:15 15 law in respect of the JCE, the extended joint criminal
16 enterprise? Does your methodology imply dealing with the law
17 first and then relating the law to the evidence as from a
18 prosecutorial perspective?

19 MR KAMARA: That is it, Your Honour.

14:46:41 20 JUDGE THOMPSON: So then what did you -- you highlighted
21 that in the case of the plurality of persons was one of the
22 elements.

23 MR KAMARA: Yes.

24 JUDGE THOMPSON: That's your first element?

14:46:48 25 MR KAMARA: The first element and that is where I mentioned
26 the first, second and third accused.

27 JUDGE THOMPSON: And you related -- yes, quite. And then
28 your second element is what?

29 MR KAMARA: The shared intent.

1 JUDGE THOMPSON: Shared intent.

2 MR KAMARA: And that is where I was giving what this intent
3 is; overthrowing and eliminating sympathisers, supporters, and
4 that is the shared common intent.

14:47:12 5 JUDGE THOMPSON: And that is to say, you say to defeat the
6 RUF and do what? Do what again? What else?

7 MR KAMARA: To defeat the RUF and AFRC and gain complete
8 control of the population of Sierra Leone.

9 JUDGE THOMPSON: Okay, now I am following you.

14:47:29 10 PRESIDING JUDGE: I may be missing or misunderstanding what
11 you're stating but the second limb of that or aspect is existence
12 of a common plan, design or purpose which amount to or involve
13 the commission of a crime listed in the Statute. To defeat RUF,
14 AFRC is certainly not a crime.

14:47:48 15 MR KAMARA: And the sympathisers, supporters. These are
16 persons that it falls under the Statute for murder. The
17 supporters, sympathisers and anyone who actively resist -- who
18 did not actively resist the RUF and AFRC. That is why I was
19 trying to give the elements and then come to give the evidence to
14:48:11 20 support this element, but my learned friend was wanting me to go
21 straight to the evidence, and I will give the evidence. Because
22 we have led evidence here before this Court wherein specific
23 instructions, in pursuit of the common plan, were given to kill
24 certain individuals. And in the general concert of the plan we
14:48:25 25 did not name the individuals, and that is where the evidence
26 comes in. For example, wherein we say supporters, sympathisers,
27 we have evidence where the first accused has given direct
28 instructions and orders for certain people that are meant to be
29 sympathisers, collaborators or supporters to be killed, and that

1 is how the unlawful aspect of the order comes in and that is what
2 makes the --

3 JUDGE THOMPSON: That's why I was a little troubled myself,
4 whether this exercise now that you are embarking upon, it is not
14:48:58 5 complicating your position. If this is already in your written
6 brief, then perhaps a reference to the paragraph and the page
7 might help. But now you seem to be developing something out of
8 what you have written and which may well be the controversial
9 issue and which my learned brother -- my mind was working the
14:49:33 10 same way, whether there's any statutory prohibition which outlaws
11 defeating the RUF --

12 MR KAMARA: That is where --

13 JUDGE THOMPSON: -- or makes it criminal for -- I mean,
14 that's --

14:49:47 15 MR KAMARA: That is where I come in with the evidence to
16 suggest -- and Your Honours, if you will bear with me a few
17 minutes. That is where I come in with the evidence. The initial
18 approach has been to lay out the elements and then give the
19 evidence to support those elements. In the issue of the second
14:50:04 20 aspect of shared intent - and I've given Your Honours what was
21 this intent - I went further to respond to the Presiding Judge's
22 comment about what is the offence here. I said the offence is
23 wherein someone gives orders for supporters of the AFRC or RUF to
24 be killed, sympathisers, and it is the Prosecution's position
14:50:22 25 that these are innocent civilians.

26 JUDGE THOMPSON: The thing is where is the joint criminal
27 purpose? In other words, where is the common plan which, of its
28 own very nature, must be criminal?

29 MR KAMARA: Yes, Your Honour. The common plan here is, as

1 I indicated earlier on, that it includes gaining complete control
2 over the population of Sierra Leone and the complete elimination
3 of the RUF/AFRC, its supporters, sympathisers and anyone who
4 actively resists the AFRC occupation. Your Honours, this is the
14:50:56 5 common plan because these three accused persons were together in
6 the planning and execution of this plan.

7 And not only that, we do have evidence before this Court
8 where instructions have been given in pursuit of this plan. It
9 is the Prosecution's position that an order or a plan for people
14:51:14 10 to be killed and the plan to occupy the country -- not just the
11 country, but the means by which the occupation is to be made,
12 clearly will involve unlawful means. And that is the
13 Prosecution's position; that it involved unlawful means and
14 unlawful orders within those plans. And if we could get the
14:51:37 15 evidence, we have; I will show the paragraph in the motion so you
16 could rely on that for further clarification.

17 Your Honours, paragraphs 36 to 37 of our response deals
18 with the issue of the intent. 37(D) talks about the shared
19 intent and (E) is the one that talks about the foreseeable
14:52:28 20 consequence. I believe that is what my learned friend was
21 talking about.

22 If I may state a position of law here, Your Honours. That
23 there is no necessity for the criminal purpose to have been
24 previously arranged or formulated, and that it could arise, or it
14:52:52 25 may materialise extemporaneously, and that the issue of the JCE
26 could also be inferred from the facts. The case in point for
27 that is The Prosecutor v Elizaphan Ntakirutimana. The spelling
28 is E-L-I-Z-A-P-H-A-N and N-T-A-K-I-R-U-T-I-M-A-N-A.

29 Your Honours, if I still may dilate on the issue of the

1 JCE, it is the Prosecution's submission that where there is
2 evidence, as we've put forward before this Court, that members of
3 a group acting with a common criminal purpose and members of that
4 group knowingly participate in and directly or substantially
14:54:30 5 contribute to the realisation of that purpose, those persons may
6 be held criminally responsible for the results of those acts
7 which are done, Your Honours, in furtherance of that common
8 design.

9 It is the submission of the Prosecution that to meet the
14:55:04 10 Rule 98 standard sufficient evidence has been led before this
11 Court that the common design, which is to eliminate the RUF/AFRC,
12 its supporters and sympathisers, constitutes a criminal offence
13 against the Statute and for which we invite this Court to make a
14 finding for sufficient evidence against the three accused persons
14:55:47 15 based on the Rule 98 standard.

16 Your Honours, the Prosecution is not saying that the
17 defence of one's homeland or to liberate one's country from an
18 aggressor, be it internal or external, is a crime in itself.
19 Your Honours, it is our position that wherein it goes beyond by
14:56:26 20 giving specific instructions for the killing of innocent
21 civilians, for the attack of civilian populations in pursuit of
22 that plan, it changes the character of that plan and makes it
23 criminal. We, therefore, submit that a liberation effort fuelled
24 by an intention to kill and resulting in the actual killing of
14:57:14 25 persons referred to as collaborators, and involving the
26 destruction and looting of towns with large civilian populations,
27 is clearly unlawful and entails criminal responsibility.

28 Your Honours, as regards to the plan, the evidence is
29 before this Court and I will refer to the evidence of TF2-005,

1 TF2-011, TF2-014, TF2-222, TF2-201, TF2-008. The testimonies of
2 those witnesses clearly portray that the Prosecution has been
3 able to meet a Rule 98 standard as to the sufficiency of evidence
4 beyond reasonable doubt for the satisfaction of this Tribunal.

14:58:35 5 Your Honours, I will stop so far on the JCE because it is
6 the Prosecution's argument that a Rule 98 process is not the
7 exhaustive story for which the Trial Chamber should come to a
8 conclusive end on issues raised. These are matters that we could
9 dilate properly at the time of closing addresses and for now we
14:59:01 10 do believe that we have already presented sufficient evidence to
11 meet the Rule 98 standard.

12 I will venture to move forward to the third issue raised by
13 my learned friend, the one of terrorism. Your Honours, my
14 learned friend mentioned that there is an imprecision of element.
14:59:24 15 The Prosecution submits, Your Honours, that Rule 98 is not the
16 vehicle for jurisdictional matters to be raised. The fact of
17 terrorism, as raised by my learned friend, about the elements
18 that constitute terrorism is a jurisdictional matter, and Rule 72
19 of the Rules clearly states what the party needs to do on the
14:59:51 20 issue of a jurisdictional matter. There is case authority
21 clearly showing that when it's an issue that affects the
22 jurisdiction of the Court, it doesn't fall within the purview of
23 a Rule 98 proceeding.

24 So we will invite the Court to discount that argument about
15:00:25 25 the issue of terrorism and the element as to the proof being an
26 issue that affects the jurisdiction of the Court and also as to
27 the charge. These are matters that should have been raised
28 pursuant to Rule 72. Also, there is an opportunity for the
29 Defence to raise this issue again at the close based on appeal or

1 otherwise, and it does not mean that if this Court at this stage
2 finds that there is sufficient evidence it necessarily follows
3 that there will be a conviction on that count.

4 What the Prosecution says here is that we have laid enough
15:00:55 5 evidence before this Tribunal for a finding of a fact that we've
6 been able to meet the Rule 98 standard and an argument that
7 affects the jurisdiction of a charge or as to the elements of
8 Rule 98 is not a proper vehicle for that.

9 Notwithstanding that, Your Honours, if I am invited to
15:01:23 10 comment on my learned friend's issue that terrorism has been
11 found to be part of international customary law, and time and
12 again even in our motion it was clearly stated that it has been
13 factored into several other charges for which there has been
14 convictions and acquittals, and the elements of terrorism are
15:01:47 15 clearly spelled out and they're defined, and we did define the
16 elements of terrorism in our motion. So if the Defence are
17 incommoded by a non-comprehension of the elements, we're sorry
18 about that, but it is there. At this stage, it is not as much as
19 the comprehension of the elements as the presence of the evidence
15:02:10 20 that we have adduced before this Court to the satisfaction beyond
21 a reasonable doubt, and I think we have done that. That is, if I
22 am to venture to respond to the issue of terrorism outside the
23 aspect of jurisdiction.

24 JUDGE THOMPSON: But in your submission is there any
15:02:27 25 vagueness or imprecision about how the international tribunals
26 have articulated the ingredients of terrorism as a crime against
27 humanity?

28 MR KAMARA: No, Your Honours. I would say there has not
29 been vagueness but, rather, that the practice of prosecutors in

1 other tribunals has been that it is subsumed in other charges,
2 but there is no prohibition that it could not stand as a charge
3 on its own. It might appear that in this situation here, as we
4 have in the Special Court, that we have decided to charge it as
15:03:04 5 an independent crime on its own.

6 JUDGE THOMPSON: I think counsel, except I got him wrongly,
7 was complaining about lack of precision and lack of what you
8 might call certainty as to the elements, which I take to mean the
9 ingredients, of the offence of terrorism.

10 MR KAMARA: Yes, and that is why I responded that those are
11 issues of jurisdiction. Those are issues on the form of the
12 indictment. They are not for Rule 98 processes.

13 JUDGE THOMPSON: Quite right. In other words, this ought
14 to have been raised during some attack on the defects in the form
15:03:41 15 of the indictment.

16 MR KAMARA: And which they still have an opportunity if
17 they want to. But this is not the time for that and the fact
18 that we're here for expedited processing, we wouldn't want to
19 dilate on the technical issues of that. And we are prepared.
15:03:53 20 That is why I ventured to say it is clear, and the case law is
21 Galic, the Galic case. We cited it in our motion and that we
22 stated the elements as clearly as we can.

23 JUDGE THOMPSON: In other words, there is a limit in this
24 so called expedited process to which one can multiply the legal
15:04:12 25 issues that can be raised.

26 MR KAMARA: Certainly.

27 JUDGE THOMPSON: That's your position.

28 MR KAMARA: That's my position, Your Honour. And over and
29 above that, we are certain that the elements are clearly defined

1 and they have been identified even in other jurisdictions in the
2 other tribunals. Your Honours, I wouldn't want to go in depth
3 into the evidence unless you would call upon me to do that.

4 JUDGE ITOE: It is you who are guided by the time that is
15:04:48 5 imparted in these proceedings, so it is not for us to guide you
6 on this or that. Keep to your timing; that's it.

7 JUDGE THOMPSON: Perhaps I should add that you were
8 cautioning us not, in fact, to embark upon any in-depth thing
9 that might transform this process into something that it's not
15:05:05 10 intended to be.

11 MR KAMARA: I couldn't agree with you more, Your Honour.
12 That is exactly what I'm trying to say here. Except if you call
13 upon me to address on any specific issue, I believe I have
14 responded to the issues as raised by my learned friend on the
15:05:21 15 other side and we are confident and we rely on the entirety of
16 our response. Thank you, Your Honours.

17 PRESIDING JUDGE: Mr Prosecutor, I do have two short
18 questions for you on your submission in response to the first
19 accused, and maybe you will come back in the other submission.

15:05:48 20 One is I want to make sure that I understand clearly what
21 you are stating - and I know it is part of your pleadings as well
22 - is that Rule 98 refers to the counts, not to the individual
23 paragraph with reference to one count. To ensure that I
24 understand, in other words, even though there is no evidence with
15:06:18 25 reference to paragraph X as to one location specified in that
26 count, are you saying that we may not make findings in respect of
27 that paragraph? I'm not talking of the count, I'm talking
28 paragraphs and allegations in support of the count, as such. Do
29 you follow my question and my comments?

1 MR KAMARA: Yes, Your Honour. I had already anticipated
2 that comment, and the position on that, Your Honour, is that
3 there is no requirement to do so.

4 PRESIDING JUDGE: There's no requirement but there's no
15:06:50 5 prohibition either.

6 MR KAMARA: Yes, I agree with you. And practice in some
7 other jurisdiction, for example in the ICTY, where you've seen
8 certain aspects, certain paragraphs in the motion, a decision
9 being taken but still the count continues till the end. And my
15:07:07 10 position here is, or the position of the Prosecution is that
11 there is no requirement that Your Lordships are bound to take a
12 decision as to that particular paragraph. But I will concede to
13 you that there is no prohibition either.

14 PRESIDING JUDGE: Thank you. The other question I have is
15:07:25 15 also in relation to Rule 98. Are you suggesting that the Court
16 must be satisfied, because I heard you to say must be satisfied
17 at this stage, beyond reasonable doubt that the elements are
18 there? The test is obviously, as you know, should we accept that
19 the evidence adduced is credible and so on at the end of the
15:07:44 20 trial. At this stage it is if the evidence were to be believed
21 that we would be satisfied.

22 MR KAMARA: Yes, and that is why I think I reiterated the
23 case that the issue on Rule 98 that could be satisfied beyond
24 reasonable doubt, not that you are satisfied at this time but
15:08:04 25 that you could be satisfied.

26 PRESIDING JUDGE: That's fine. That answers my concern
27 about that.

28 MR KAMARA: Thank you very much, Your Honour.

29 PRESIDING JUDGE: I don't know if I --

1 JUDGE ITOE: You said that the arguments raised by learned
2 counsel for the first accused on the charge for terrorism, which
3 you said was imprecisely pleaded, borders on jurisdiction of the
4 Court and that such an objection cannot be raised at this stage.
15:08:43 5 How do you convince us -- how do you address the issue of
6 jurisdiction and a count which appears on the indictment and
7 which there is an objection that there is some imprecision in the
8 pleadings? How does that relate to the jurisdiction of this
9 Court which you feel should have been raised earlier?

15:09:10 10 MR KAMARA: Yes, Your Honours, the issue of jurisdiction
11 here is not as to the constitution of the Court itself, but as to
12 the fact of the Court looking into that matter of terrorism. For
13 example, it's a matter of the indictment. It's an issue of the
14 defect of the indictment. In other words, at the initial stage
15:09:28 15 they could have come forward and said, "Your Lordships, you do
16 not have jurisdiction on this matter because it's not" - and I
17 think they pleaded it - "it's not law". That is in that sense
18 that I was using the word jurisdiction. Not as to the
19 constitution of the Court, but as to the fact that the Court does
15:09:43 20 not have the ability to look into this issue of terrorism because
21 it's not law or any other issue. The fact that it is an issue to
22 the defect of the indictment. That is how I relate it --

23 JUDGE ITOE: Are you suggesting that because it was not
24 raised earlier on as a defect on the indictment, they are
15:10:07 25 foreclosed from raising it at any stage?

26 MR KAMARA: They can raise it at some other stage but
27 Rule 98 is not a stage for that process, Your Honours, and I have
28 case authority to support it. We did mention that in the motion.
29 We have several cases to show that issues of jurisdiction, Rule

1 98 is not the vehicle for the address of those issues. Or issues
2 that affect the indictment Rule 98 is not the proper time to
3 address those issues.

4 JUDGE THOMPSON: But my difficulty now that you seem to be
15:10:34 5 raising or opening a Pandora's box, because your submissions here
6 would seem to suggest that all defects that go to the form of the
7 indictment go to the jurisdiction of the Court. Is that what you
8 are saying? I do not understand the law to be that.

9 MR KAMARA: I agree with that.

10 JUDGE THOMPSON: I do not understand the law to be that all
11 defects as to the form of indictment necessarily go to the route
12 of jurisdiction.

13 MR KAMARA: You're quite right, Your Honour.

14 JUDGE THOMPSON: I would say that in the context of
15:11:07 15 duplicity and multiplicity of counts, by reason of such duplicity
16 of count or multiplicity of counts or even possibility of
17 vagueness a court may be deprived of jurisdiction in trying those
18 offences. But there may be other forms of defect that do not
19 touch and concern jurisdiction.

15:11:30 20 MR KAMARA: I agree with you, Your Honour, and that is in
21 the general context. But as to the specific context of the fact
22 of terrorism as a law or as an offence, as a form of the
23 indictment -- question of the form of the indictment affects the
24 jurisdiction of the Court in assessing or analysing that issue.
15:11:50 25 And Your Honour, I think I still stand by what I said in the fact
26 that the position of the Prosecution is that Rule 98 is not the
27 vehicle for addressing those issues and the Statute is clear.
28 Rule 72 shows under which motion -- it shows when you can come
29 before the Court on issues that touch and concern the

1 jurisdiction, that is, either the constitution of the Court
2 itself or as to the Court's power to inquire into certain
3 offences, if at all they are offences. But I'll agree with you
4 that not in the broadest sense of the word that it is every
15:12:25 5 defect of the indictment will affect the jurisdiction of the
6 Court. I will concede to that; no, it is not. But when it
7 affects the issue of inquiring into the quality of an offence as
8 the subject of a defect of the indictment, it does indeed affect
9 it and Rule 98 is not the time for that.

15:12:42 10 JUDGE THOMPSON: And it would deprive the Court of
11 jurisdiction to try the charges.

12 MR KAMARA: Not deprive the Court of jurisdiction to try
13 the charges, but there are avenues for which you can come. There
14 are avenues, but this is not the right avenue. And they can
15:12:54 15 still come. I will not tell them when.

16 PRESIDING JUDGE: Thank you. Counsel for second accused.

17 MR KOPPE: Thank you, Your Honours. I would like to make a
18 few comments on certain issues raised by the Defence in our
19 motion. I would like to start with some comments on the Rule 98
15:14:07 20 standard. Simply because an ICTY Trial Chamber has decided that
21 changes to ICTY to Rule 98 bis did not alter the standard of that
22 ad hoc tribunal does not mean that similar changes to our Rule 98
23 are insignificant. As our Appeals Chamber has said, and we've
24 emphasised that in our motion, you are not bound to slavishly
15:14:39 25 follow the rules of the ad hoc tribunals.

26 There are indeed good reasons for interpreting our Rule 98
27 differently. The ad hoc tribunals function under markedly
28 different mandates from our own Court. Those tribunals are
29 charged with trying all perpetrators from the relevant conflicts

1 and they function as semi-permanent bodies with new indictments
2 continuously issued. Whereas our Court's personal and temporal
3 jurisdictions are much more limited, and in very special ways,
4 both legal and practical. Legal, I mean with greatest
15:15:14 5 responsibility, and practical, I mean the budgetary constraints.

6 Accordingly, the extent this Court can expeditiously
7 dispense with a case unsupported by sufficient evidence, given
8 the allegation that the accused bear the greatest responsibility,
9 and our extreme budgetary constraints it should do so. An
15:15:36 10 objective standard furthers this end, and, indeed, it would be
11 contrary to the rights of the accused to continue to deprive him
12 of his liberty if it is within the Court's legal and practical
13 powers to determine the alleged culpability at this stage of the
14 proceedings.

15:15:59 15 Certainly there is no legal bar to implementing the
16 standard proposed by the Defence, nor is there any practical
17 hurdle. With the evidence already collected and sorted in the
18 CDF proceedings essentially at a standstill until January 2006,
19 there's hardly any practical reason why the Court cannot
15:16:18 20 undertake an objective review at this point. Needlessly hewing
21 to practices and procedures born of different circumstances could
22 in this case have the effect of unnecessarily depriving our
23 client of several months of his life, in a country like Sierra
24 Leone obviously where the average life expectancy is quite low.
15:16:42 25 Such practical consequences cannot be justified simply because
26 that is the way things are done elsewhere. Accordingly, we urge
27 the Chamber to apply an objective standard as it comes to Rule
28 98.

29 Then, Your Honours, the matters of personal jurisdiction.

1 The Prosecution, as I understand it, asserts that this issue has
2 been settled and that a Rule 98 motion is not an appropriate
3 vehicle for, and I quote them, "revisiting a jurisdictional
4 matter".

15:17:18 5 PRESIDING JUDGE: Mr Koppe, I don't want to interfere with
6 your presentation but I thought your position as stated in your
7 documents was that the Court should take a subjective one rather
8 than an objective one. Are you changing your position now or
9 have I misread what you've stated?

15:17:36 10 MR KOPPE: You're right, I'm mixing them up. It's the
11 subjective standard.

12 PRESIDING JUDGE: So you're saying it should be subjective.
13 So you have not changed your position?

14 MR KOPPE: No, no, no.

15:17:49 15 PRESIDING JUDGE: Okay, thank you.

16 MR KOPPE: As I was saying, Your Honours, in respect of the
17 matter of personal jurisdiction, the Prosecution asserts that
18 this issue has been settled and that the Rule 98 motion is not
19 the appropriate vehicle for revisiting a jurisdictional matter.

15:18:06 20 But for this submission I have found no authority. The question
21 of this Court's personal jurisdiction is, as you are quite well
22 aware, unique, based as it is on a comparative analysis of
23 culpability, and in this case one that Mr Fofana has never
24 conceded to. And given this Chamber's previous decision on the
15:18:29 25 Fofana preliminary motion, it is disingenuous to claim that this
26 matter has now been settled. Rather, it is our opinion that this
27 Court held that the question of greatest responsibility is in
28 part an evidentiary matter to be determined at the trial stage.

29 The Prosecution's assertion in its response to the

1 Chamber's reference to a trial stage indicates that the
2 determination must take place at the end of a trial is, as far as
3 I'm concerned, supported by neither law nor logic and is contrary
4 to the rights of the accused. Indeed, Your Honours, we are at
15:19:07 5 the trial stage, and to the extent this Court can make a
6 determination that the second accused is not comparatively
7 culpability it should and indeed must do so. To continue to
8 deprive our client of his liberty in the face of this evidence
9 presented so far by the Prosecution would amount, in our opinion,
15:19:31 10 to a miscarriage of justice. There is simply no reason to wait
11 until the end of the trial. After hearing the Prosecution's
12 evidence, no reasonable tribunal of fact could conclude that the
13 second accused is one who bears the greatest responsibility for
14 violations of international humanitarian law in Sierra Leone.

15:19:53 15 I would like to add, as indicated in our motion, that
16 Mr Fofana is not raising a tu quo que defence. Rather than in an
17 attempt to legitimise any crimes that were committed by the CDF,
18 our motion attempts to develop the context within which the CDF
19 operated. We mentioned the atrocities of the RUF and AFRC only
15:20:23 20 to place the quality of the allegations against the CDF in a
21 comparative perspective as mandated by Article 1.1 and to
22 highlight the legitimate, rather than criminal, purpose of the
23 CDF.

24 Your Honours, I would like to turn now to some general
15:20:43 25 comments on the matter of individual criminal responsibility.
26 Contrary to the Prosecution's assertion, we submit we have
27 pointed to a variety of specific issues revealing a clear basis
28 for this in our motion. This is evidenced by our detailed and
29 comprehensive brief and extensive citations to relevant portions

1 of the trial transcripts. The Defence submits it has shown ample
2 and specific reasons for granting the instant motion.

3 Prosecution submits, as I understand it, that any evidence
4 that connects the accused to any particular count through any
15:21:21 5 mode of liability should prevent an acquittal as to that count.
6 However, the Prosecution admits that under the jurisprudence of
7 the ICTY an acquittal can be entered in relation to specific
8 incidents or modes of liability where the standard required under
9 Rule 98 is met. For example, we submit that there is absolutely
15:21:43 10 no evidence supporting a conviction on either a command
11 responsibility or joint criminal enterprise theory against
12 Mr Fofana, and that for specific reasons stated in our motion and
13 today he should be acquitted as to those modes of liability on
14 all counts.

15:22:06 15 Further, the Prosecution misconstrues our characterisation
16 of actus reus by contesting our use of the word "physically" at
17 paragraph 72 of our motion. There we indicate that basic
18 principles of criminal law require the physical participation of
19 an accused. We stand by our original submission and note that
15:22:28 20 this is not merely a matter of semantics, as the physical aspect
21 of any crime must be established. The actus reus of any crime is
22 the wrongful deed that comprises the physical components of a
23 crime and that generally must be coupled with mens rea to
24 establish criminal liability. Thus, the alleged issuance of an
15:22:48 25 order is still a physical act if done verbally, the physical act
26 being the utterance of the order. And this point should not be
27 underemphasised. As thoughts alone are not criminal,
28 participation must therefore be physical.

29 The Prosecution states that "to be guilty of planning,

1 instigating or ordering, it is not necessary to show that the
2 accused planned, instigated or ordered the specific crime or each
3 of the specific crimes alleged in the indictment." I have found
4 no support in the response of the Prosecution to this statement.
15:23:25 5 This is nothing more than, in our view, an attempt to broaden the
6 indictment which is obviously not allowed. The Prosecution's
7 view here at this stage were correct it would -- if it's correct,
8 the backdrop rule of criminal procedure which requires that
9 indictments be pleaded with specificity in order to protect
15:23:46 10 accused persons against this very type of accusation, as if joint
11 criminal enterprise weren't broad enough to suit the
12 Prosecution's purposes, it seems now that it seeks to invent an
13 entirely new mode of liability completely at odds with the rights
14 of the accused. Yet, in order to find our client guilty, the
15:24:09 15 Prosecution must show, by specific evidence and not vague and
16 unsubstantiated inferences, that he committed the crimes alleged
17 in the indictment.

18 Let me now, Your Honours, make a few comments on the matter
19 of command responsibility. The first element of a command
15:24:37 20 responsibility case requires the Prosecution to prove the
21 existence of a superior/subordinate relationship between the
22 accused and the alleged perpetrators of the underlying offences.
23 Not merely that the accused occupied a superior position in
24 general, but rather, that he held one vis-a-vis identifiable
15:25:01 25 subordinates.

26 It is with respect to this first element that the
27 Prosecution's command responsibility case falls short. Simply
28 put, there is no evidence that a legally significant
29 superior/subordinate relationship existed between Mr Fofana and

1 the alleged perpetrators. As the jurisprudence indicates, an
2 accused cannot have had command responsibility over an
3 unspecified assortment of attackers. The Prosecution's failure
4 to establish this crucial link of control is, to our opinion,
15:25:37 5 fatal to its command responsibility case.

6 Further, assuming arguendo a relevant group of identifiable
7 subordinates, the Prosecution has failed to make the necessary
8 showing that Mr Fofana had the power, either de jure or de facto,
9 to prevent the commission of crimes of alleged subordinates or to
15:26:05 10 punish the perpetrators after the fact. What, as you know, the
11 jurisprudence calls effective control, without which there can be
12 no superior responsibility. The Prosecution argues, as I
13 understand it, that the evidence indicates that Mr Fofana was in
14 a position of authority and "working side by side with Norman and
15:26:25 15 Kondewa, with whom he planned war strategies and attacks", and
16 to, "all major decisions". That Mr Norman allowed discussions of
17 objectives and tactics with a small circle of trusted advisors,
18 including Messrs Fofana and Kondewa, and that the three accused
19 "formed the nucleus of the CDF organisation".

15:26:52 20 However, Your Honours, such allegations are in our view
21 irrelevant to the Article 6.3 inquiry because they simply do not
22 support any of the elements of a command responsibility case.
23 Specifically, they fail to situate Mr Fofana within the chain of
24 command or to show that he was the superior commander of anyone
15:27:13 25 in particular. Rather, the evidence reveals only that Mr Fofana
26 was, at most, a trusted military advisor to Mr Norman, an
27 individual of some responsible influence.

28 Yet the jurisprudence is on this point quite clear. Merely
29 holding a high level position or having substantial influence

1 does not ipso facto amount to effective control over
2 subordinates. Evidence of such influence by itself is simply
3 insufficient to establish the necessary element of a
4 superior/subordinate relationship. And what is critically
15:27:59 5 lacking is any link within the subordinating structure of the CDF
6 between Mr Fofana and the alleged perpetrators of the criminal
7 facts. It seems that the Prosecution attempts to downplay this
8 lacuna but repeatedly emphasising Mr Fofana's alleged authority.
9 However, no amount of evidence that our client was a big man or
15:28:22 10 that he somehow, as you might recall certain witnesses stating,
11 he played Jesus to Hinga Norman's God will make up for the
12 Prosecution's failure to link him to specific perpetrators.

13 The Prosecution in its response further claims Mr Fofana
14 had de jure authority as supported by evidence that he was second
15:28:49 15 in command in the military chain with specific duties and
16 responsibility entrusted upon him. However, it appears that the
17 Prosecution misunderstand the concepts of de jure authority,
18 which is authority that is formally and legally established.
19 There is simply no evidence of any de jure responsibilities
15:29:13 20 assigned to him or anyone in the CDF for that matter. As noted
21 in our motion, the fact that Mr Fofana had an official title and
22 received a letter of appointment shows only that he had an
23 official title and received a letter of appointment. Nothing
24 more. The title of Director of War is, in our opinion,
15:29:38 25 objectively meaningless and the letter of appointment is devoid
26 of any specific de jure duties or responsibilities associated
27 with that specific title of Director of War. The law is, in our
28 opinion, clear that a formal title alone does not suffice to
29 reasonably establish de jure authority.

1 As to his de facto authority, it seems that the Prosecution
2 claims that the evidence indicates that he selected commanders to
3 go to battle, distributed arms and ammunition when directed so by
4 Mr Norman, that he was responsible for the deployment of fighting
15:30:14 5 forces on the ground, that he decided how many Kamajors should
6 take part in an attack, and had some measure of control along
7 with the first and third accused over the Death Squad. However,
8 in the context of the Article 6.3 analysis, these assertions in
9 our opinion are too vague to be meaningful and simply do not
15:30:36 10 amount to the kind of evidence that could support element one of
11 a command responsibility case beyond a reasonable doubt. Again
12 this particular batch of evidence fails to show that Fofana had
13 authority over any particular CDF members, let alone over those
14 unnamed Kamajors alleged to have perpetrated the acts at the
15:30:58 15 various crime bases.

16 As to the more specific points, namely that Mr Fofana
17 ordered a witness to deploy to Yele in January '97 to carry out
18 an operation there as a commander, along with Mr Kondewa, he
19 decided that Mustafa Ngobea should lead the attack on Bo, took
15:31:19 20 part in the decision to appoint Joseph Koroma national director
21 of operations and, along with Mr Kondewa, appointed George
22 Jambawai to take over the CDF office in Kenema, there is simply
23 no evidence that Mr Fofana had effective control over any of
24 these men in the sense of being able to prevent them from
15:31:39 25 committing crimes or punishing them after the fact. Indeed, none
26 of these individuals has been shown to be the perpetrator of any
27 of the underlying offences during the specific time frame that
28 Mr Fofana is alleged to have been their commander.

29 As with all of the Prosecution's punitive evidence against

1 Mr Fofana, this particular batch reveals the huge disconnect
2 between Mr Fofana himself and the events that allegedly took
3 place at the crime bases.

4 While it arguably suggests in some vague way that Mr Fofana
15:32:16 5 may have possessed a certain amount of authority among the
6 Kamajors at Base Zero, the legally significant question remains
7 unanswered: Authority to do what? Effective control is the key
8 to the command responsibility inquiry and the Prosecution's
9 evidence is patently lacking in this regard. A closer look
15:32:38 10 reveals that while he may have exercised some influence,
11 Mr Fofana did not possess effective control over any specified
12 subordinates, let alone those accused of committing the
13 underlying acts alleged in the indictment. To the extent that he
14 may have instructed certain men to deploy here or there, such
15:32:59 15 alleged instructions are legitimate military orders, not
16 directives to commit crimes.

17 Perhaps most importantly it has not been shown that
18 Mr Fofana possessed the ability to prevent or punish the
19 commissions of crime, the telltale sign of effective control. On
15:33:18 20 that score the evidence suggests that the only authorities with
21 this ability were Mr Norman and some individual ground
22 commanders.

23 Certain evidence highlighted by the Prosecution in this
24 regard has, in our view, been mischaracterised. For example,
15:33:41 25 where the Prosecution claims that the evidence suggested
26 Mr Fofana directly ordered the burning of civilians, a closer
27 look at the trial transcripts reveals that what the witness
28 actually said was that he ordered the burning of a single corpse;
29 an obvious and legally significant difference. It is

1 disingenuous for the Prosecution to assert that this isolated
2 piece of testimony indicates that Mr Fofana directly ordered the
3 burning of civilians. Indeed, it may be even improper to suggest
4 that.

15:34:15 5 The Prosecution also claims in its response that because
6 Mr Fofana allegedly addressed troops at public meetings where
7 Mr Norman allegedly gave unlawful orders, this somehow
8 demonstrates his effective control. While it may indicate that
9 Mr Fofana enjoyed some level of prestige at Base Zero, it is
15:34:39 10 surely not indicative in any way of his ability to control
11 subordinate Kamajors. Clearly, as the evidence indicates, the
12 Kamajors reacted to Mr Norman's orders and it must be
13 re-emphasised that attempting to fix criminal liability on
14 Mr Fofana for the actions of Mr Norman, which it seems is exactly
15:34:57 15 what the Prosecution is attempting to do, is directly counter to
16 the principle of individual criminal responsibility. An order
17 can only be given by an individual in a position of authority to
18 an individual subject to that authority, and there is simply no
19 evidence that Mr Fofana possessed the authority to issue binding
15:35:24 20 orders.

21 I think I may be running out of time.

22 PRESIDING JUDGE: Very close to it.

23 JUDGE ITOE: You are still within your time, if you are not
24 only reading the submissions which we have before us. You are
15:35:47 25 still within time because I took down when you started.

26 MR KOPPE: How much more do I have?

27 JUDGE ITOE: I don't know, but I know when to stop you.

28 PRESIDING JUDGE: You have five minutes.

29 MR KOPPE: I have five more minutes. Well, that clearly

1 doesn't do it for me. Let me see the points that I definitely
2 would like to raise.

3 PRESIDING JUDGE: Please, yes.

4 MR KOPPE: Actually I would like to raise everything, but
5 just a few more remarks about joint criminal enterprise if that's
6 okay with you, Your Honours.

7 PRESIDING JUDGE: Yes.

8 MR KOPPE: The Prosecution, as we understand it, claims
9 that Mr Fofana belonged to a plurality of persons engaged in a
15:37:13 10 joint criminal enterprise as evidenced by his attendance at
11 meetings where the implementation of a common plan was discussed.
12 It further claims that the evidence regarding his presence at
13 these meetings demonstrates a clear agreement between the three
14 accused and several subordinate members of the Kamajors to use
15:37:28 15 any means necessary - including a terrorisation of the civilian
16 population through killings, serious physical and mental injury,
17 collective punishment and pillage - to meet the objective of
18 eliminating the RUF/AFRC and its supporters and sympathisers.

19 No doubt Mr Fofana, as a Kamajor, was a member of the CDF,
15:37:49 20 but that group's only common purpose - and I cannot stress that
21 enough - was the defence of the country of Sierra Leone and the
22 restoration of the Kabbah government. There is simply nothing
23 criminal about either one of these aims. Not one of the
24 Prosecution's 75 witnesses nor one page of its documentary
15:38:12 25 evidence revealed the existence of a common purpose, plan or
26 design among members of the CDF that was criminal in nature. The
27 fact that allegedly unlawful orders may have been given at
28 certain meetings by Mr Norman does not somehow taint the
29 legitimacy of the large CDF effort and ensnare everyone present

1 into a criminal act. Despite the Prosecution's attempt to extend
2 the boundaries of an already overly broad theory of liability,
3 mere presence at meetings cannot amount to a clear agreement to
4 commit crimes no matter how many times the Prosecution restates
15:38:53 5 the vague and unsubstantiated concerns contained in its
6 indictment.

7 One last point, Your Honour, and that's the question about
8 the fact whether the count 6 and 7 issue -- the question of
9 terrorism and collective punishments. It is our view that these
15:39:27 10 issues can be raised at this stage of the trial. Obviously the
11 things that we are now looking at is the question of whether
12 there is enough evidence at this stage to support the counts.
13 When trying to go through the transcript and to see if there's
14 enough evidence, we came to the conclusion that at this stage it
15:39:55 15 is very indefinite what the elements of the alleged crimes are,
16 and simply saying that this is only something that can be raised
17 before the trial starts because it amounts to a defect of the
18 indictment is not our view. We should be able to raise, because
19 the evidence has now been presented, at this stage that the
15:40:20 20 elements of crime six and seven are unclear and we should not be
21 waiting until the closing arguments to come up with these
22 arguments.

23 So it is our opinion that problems with the indictment
24 should not only be raised at that stage and it doesn't exclude
15:40:46 25 the possibility that we can raise that issue right now, and I
26 think it is one of the points that your Court should be looking
27 at at this stage. So it is by finding or by trying to construe
28 the evidence that we encountered the problem with the elements of
29 this crime and at this stage of the Rule 98 hearing it is a point

1 that your Court should be looking at.

2 That's the last remark I would like to make.

3 PRESIDING JUDGE: Thank you, Mr Koppe.

4 JUDGE THOMPSON: Mr Koppe, may I ask you one short
15:41:21 5 question. As regards command responsibility you submitted that
6 your client had no de jure authority but considered, if I recall
7 correctly, some attribution of de facto authority to him. Do you
8 have, for the guidance of the Bench, any propositions of law
9 deducible from the jurisprudence of other tribunals as to when de
15:42:00 10 facto authority for the purposes of command responsibility may
11 exist?

12 MR KOPPE: Not at this stage, Your Honour. If I could come
13 back to answering that question.

14 JUDGE THOMPSON: Right. Thank you.

15:42:15 15 PRESIDING JUDGE: I do have one question for you. In your
16 oral arguments when talking about the individual criminal
17 responsibility you refer, if I'm not mistaken -- I have written
18 down participation must be physical to be a real participation,
19 in your own words. What do you mean by this, "physical"?

15:42:37 20 MR KOPPE: It must be an overt act or something to be
21 distinguished as opposed to simply having thoughts on certain
22 issues. So the giving of an order is something physical.

23 PRESIDING JUDGE: But acquiescing to an order would be
24 physical to you or this is too intellectual to be an active
15:43:01 25 participation?

26 MR KOPPE: No, there should be a certain outward act that
27 you're actually following that order.

28 PRESIDING JUDGE: That's what you meant by "physical"?

29 MR KOPPE: Yes, because otherwise we will step into the

1 area of simply having thoughts on certain issues.

2 JUDGE THOMPSON: So, in other words, an overt act for the
3 purpose of a joint criminal enterprise may not be other than
4 physical. Suppose you conceptualise the criminal common purpose,
15:43:49 5 you design it in your mind, would that suffice for physical?

6 MR KOPPE: No, it should leave your mind, otherwise we will
7 have what is in German called *gesinnungsstrafrecht*.

8 JUDGE THOMPSON: In other words, that is, as I recall
9 elementary law, the thoughts of a person are not triable.

10 MR KOPPE: No, it has to be shown by some overt act.

11 JUDGE THOMPSON: Overt act, so overt would be the word here
12 for physical.

13 MR KOPPE: Yes. Physical is maybe a more limited concept
14 but overt would be comprising everything.

15 JUDGE THOMPSON: So an agreement in a conspiracy would be
16 an overt act?

17 MR KOPPE: Yes, because a conspiracy would, for instance,
18 amount to having a certain agreement with somebody to do
19 something. That is an overt act per definition. The distinction
15:44:49 20 between just thoughts and just an agreement can be thin, but it
21 always has to be distinguishable for a third person that, for
22 instance, an agreement was made.

23 JUDGE THOMPSON: Quite. Thank you.

24 JUDGE ITOE: One question, Mr Koppe. Following you very
15:45:11 25 attentively, you appear to have considered at a certain point
26 that there was an allegation made about your client being
27 involved in distributing arms, and you qualified it by saying
28 that this was under instructions, when he received instructions,
29 and these arms were going to serve a purpose. The purpose of

1 course was combat. Where would you place his responsibility in
2 this particular context?

3 MR KOPPE: For me what is very relevant to understand, and
4 it is further to also a question of one of the learned judges, is
15:45:59 5 that the purpose of CDF in itself was legitimate. To wage a war
6 against RUF/AFRC was a legitimate thing to do. To plan military
7 attacks on RUF/AFRC was very legitimate. In that context, to
8 provide Kamajors with arms to execute those attacks, that was
9 also very legitimate. It had, obviously, the backing of even the
15:46:35 10 international community. So if Mr Fofana was a chain or an
11 element in that chain, that is obviously something he is not
12 denying. But the fact is whether he was instrumental to alleged
13 war crimes committed in the context of that legitimate purpose
14 and that he was not.

15:46:59 15 So you have heard that we are not denying that he held a
16 position within the CDF. Of course why would we, because the
17 goals and purpose of the CDF was to restore democracy and to put
18 back the legitimate government of President Kabbah. That
19 possibly war crimes have been committed in this in itself
15:47:30 20 legitimate context is something to regret, but that doesn't mean
21 that that incurs responsibility in a criminal sense for
22 Mr Fofana.

23 JUDGE ITOE: Thank you.

24 PRESIDING JUDGE: Mr Kamara, or somebody for the
15:47:49 25 Prosecution.

26 MR KAMARA: Thank you, Your Honours. I will start by
27 associating with the paragraphs 36 to 38 of the Defence motion
28 for the second accused.

29 PRESIDING JUDGE: 26?

1 MR KAMARA: 36 to 38. We agree and accept and I would like
2 the Court to take note of that, and it follows from the line of
3 questioning from the Bench, Your Honours, especially I think from
4 learned Justice Thompson. If I may proceed beyond that point,
15:49:09 5 the issue raised by my learned friend on Rule 98 as to the
6 standard of greatest responsibility, and it borders on the fact
7 also of personal jurisdiction of the second accused.

8 [CDF20SEP05 - CR]

9 Your Honours, we clearly stated it in the motion that this
15:48:59 10 issue has been raised and it has been determined and settled by
11 this Trial Chamber, but it seems like it will never die; the
12 second accused will raise it again and again.

13 This Court has found that it has jurisdiction over the
14 person of the second accused. The Trial Chamber also stated in
15:49:47 15 its decision on the personal jurisdiction that that question,
16 whether or not in actuality the accused is one of the persons who
17 bears the greatest responsibility for the alleged violations of
18 international humanitarian law, is an evidentiary matter to be
19 determined at this trial's stage.

15:50:19 20 At this Rule 98 stage, we are barely halfway in the
21 proceedings. It is unfair to call upon Your Lordships to make a
22 determination at this point. A clear objective and thorough
23 analysis of this issue can only be arrived at the end of the
24 trial. A conclusive position at this moment would suggest the
15:51:03 25 absence of factors that might have played a role in the decision.
26 Also, my learned friends seem to try to move away, cleverly, tu
27 quo que defence which they have raised in their motion. But if
28 they are conceding that they are not relying on that at the
29 moment, I wouldn't bother. But, Your Lordships, it is well to

1 note that there is clear jurisprudence in international law that
2 does not constitute a defence. It has been rejected as a flawed
3 principle. You cannot rely on the quality of your act by
4 depending on the wrongness of another person's act. That is a
15:52:18 5 flawed principle in law. Further, if the Defence anticipate by
6 any way a defence of necessity - I think they did that in
7 paragraph 32 of the motion - again, that is not an issue for the
8 Rule 98 process.

9 Your Honours, if I may go into the individual criminal
15:52:55 10 responsibility of the second accused, as my learned friend
11 raised. The Prosecution maintains that we leave all the modes of
12 liability open with regards to each and every charge in the
13 indictment, and that sufficient evidence has been adduced before
14 this Tribunal for it to arrive at a decision that there has been
15:53:40 15 proof beyond a reasonable doubt for the purposes of the Rule 98
16 standard.

17 It is interesting to note that the Defence suggested that
18 the second accused is no one but a glorified storekeeper, to
19 quote them. Evidence was adduced before this Court that the
15:54:00 20 second accused was appointed as national director of war, he was
21 responsible for the delicate planning of the war and the
22 execution of the war machinery of the CDF, and it is him who
23 authorises the supply of war materials and ammunition to each and
24 every commander before they go to war. Over and above that, when
15:54:49 25 we look at the issue of command responsibility, while at Base
26 Zero in the absence of Hinga Norman, the evidence has been
27 adduced before this Court that the second accused is the man in
28 charge of operations. We have the evidence of TF2-005 who
29 testified that when he went to Base Zero he came with citation

1 reports from the Tongo front lines, but the first accused was not
2 there and they were directed to the second accused, to whom they
3 presented a citation report.

4 JUDGE ITOE: That witness again?

15:55:52 5 MR KAMARA: TF2-005 and TF2-079. We also have evidence
6 before this Court that the second accused at all material times
7 of planning was instrumental and physically present. As my
8 learned friend was trying to suggest about notional acts on the
9 part of the accused, here is a physical act that at all material
15:56:22 10 points in time of planning for the Tongo attack, the Bo attack,
11 the Kenema attack, the second accused was present and he
12 participated.

13 My learned friends seem to waive a very critical issue to
14 this case for the Prosecution in terms of the mode of liability
15:56:44 15 for ordering. We have clear evidence in this Court wherein the
16 second accused gave specific command for the attack on Bo, and
17 even suggested who that leader should be, the commander who
18 should lead the Bo attack, typical of a director of war. We have
19 evidence before this Court atrocities that were committed in Bo
15:57:32 20 pursuant to that attack for which the second accused had made the
21 order. We also have evidence that after the attack on Bo the
22 second accused physically went to Bo and whilst he was at the
23 headquarters of the Kamajors, in his presence there were
24 executions, to which the second accused was indifferent.

15:58:30 25 Your Honours, we also have evidence of TF2-014, when we
26 examine the mode of liability of commission, that on two
27 occasions the second accused himself participated in the killing
28 of someone; participated in the killing of Mustapha Fallon,
29 together with the first and third accused; participated in the

1 killing of Amadou Kanu, a Kapra that was brought to Base Zero by
2 TF2-017. Your Honours, what else can we lead to show
3 sufficiently an act of commission? Your Honours, it is important
4 to note at this point that during the course of
15:59:37 5 cross-examination, the vital issue of the commission or
6 participation of the accused was not brought to the focus during
7 cross-examination. It was not challenged.

8 As to the aiding and abetting aspect as a mode of liability
9 on the ICR, we have time again wherein we have evidence that the
16:00:16 10 second accused admitted after the first accused has given his
11 instructions he will come in his capacity as director of war --
12 in one particular incident when said, "You have heard what the Pa
13 said. If you go, you do not conquer, don't bother to come back."
14 Your Honours, to my simple mind that is encouraging, giving tacit
16:00:39 15 and moral support, to the fighters. An expression like that will
16 definitely constitute and form part of the ingredients for the
17 offence.

18 Your Honours, we have led evidence before this Court that
19 the second accused was in a position to receive citation reports
16:01:02 20 from the front line and he will pass them on to the first
21 accused. So he knew and he was in a position to know the
22 atrocities that were being committed. Notwithstanding that, he
23 will still continue to provide the logistics, the arms and
24 ammunitions to the very Kamajors in furtherance of the common
16:01:33 25 purpose as we have alleged in the JCE.

26 So, Your Honours, there is no misconstruction of the actus
27 reus here, neither the Prosecution is creating any new mode of
28 liability. It is as clear as it can be of the physical
29 participation of the accused, not only in the planning or in the

1 execution of the plan.

2 My learned friend is talking about no link between the acts
3 of the accused and the crimes that were committed. We have
4 evidence that was led before this Court, the evidence of TF2-222,
16:02:11 5 that even after the Kenema attack the second accused was there.
6 He paid regular visits to the SS camp, wherein evidence was
7 alleged was a place of executions. Evidence was adduced in this
8 Court, again through the testimony of TF2-222, that there was an
9 occurrence book at SS camp. The visits of the second accused to
16:03:00 10 SS camp will investigate and inquire as to what happened and gave
11 instructions. Even my learned friend conceded at a point that he
12 gave instruction to the burning of a single corpse; the fact that
13 he was placed in a position of authority to order the Kamajors to
14 do something, to do an act, which they did.

16:03:36 15 It is quite right to imagine that once a person has been
16 labelled as a director of war, with the constituting powers that
17 he had in the sense of the timing of the attack, in the sense of
18 the timing who leads an attack, in the sense of providing the
19 logistics for the attack, that person can be described as a
16:04:02 20 glorified storekeeper. If there was a glorified storekeeper, it
21 was witness TF2-201. He was a deputy director of war. He was a
22 glorified storekeeper. He had the key, he kept it. But the
23 second accused is an active participant in the planning,
24 execution and implementation of the war machinery of the CDF.

16:04:29 25 As the Prosecution indicated in its motion, that an army
26 marches on its stomach, more or less, then without the food there
27 is no army. Without arms, no one would fight. The second
28 accused was so strategic and functionally equivalent to this
29 role, that the first accused thought it fit and proper to

1 nominate him in that role. And, as such, to say that war
2 director was a mere form of title is a mischaracterisation of the
3 evidence.

4 Also, to suggest that there is a huge disconnection between
16:05:21 5 the second accused himself and the incidents at the crime bases
6 is not tenable when the evidence has been taken as a whole. We
7 have evidence before this Court from TF2-190 after the Gbongeh
8 attack the second accused went to [indiscernible] court barri.
9 He was there. He addressed the Kamajors there. And supportively
16:05:49 10 after the Bo attack, the second accused was going to assess the
11 effect of the attack, and after the Kenema attack, he was there
12 as well. So, at each material point of time in the indictment,
13 we have the physical presence of the second accused in his
14 capacity as the director of war. As we have enumerated in the
16:06:16 15 motion, the instances, so many, wherein the second accused had
16 the position and capacity of a superior over the subordinate
17 Kamajors.

18 My learned friend also suggested that the position on the
19 fact of command responsibility was nothing more than a level of
16:06:38 20 prestige. He ventured even to suggest disingenuity. I hope it
21 was not contributed to us or else I will refer it back to him at
22 this point.

23 To suggest, also, that a fixed liability on the second
24 accused for actions of the first accused, it is the position of
16:07:00 25 the Prosecution that where the act of one accused contributes to
26 the purpose of the other and both acted simultaneously in the
27 same place and within full view of each other over a prolonged
28 period of time, the argument there was no common purpose is
29 plainly unsustainable. And that is a quotation that I got from

1 the Prosecutor v Furundzija. We see the argument of the second
2 defendant here saying that the first accused did this, he did
3 that. Following the question which is quoted from learned
4 Justice Itoe, "Where would you place the mode of liability of the
16:07:52 5 second accused", the evidence is not suggesting that he was
6 merely standing there following the first accused wherever he
7 goes; he was actively participating. He will address the
8 Kamajors at every point in time at the passing-out parade at Base
9 Zero. After Norman had spoken, he addressed the crowd of new
16:08:15 10 recruits.

11 We also have evidence of him accepting looting property,
12 property that was looted, coffee, that was brought back to Base
13 Zero. We have evidence of that. Would all this suggest he is a
14 mere glorified storekeeper? No. We, the Prosecution, says he is
16:08:36 15 an active participant and you cannot even rely on the fact that
16 Norman gave immediate instructions. He himself gave
17 instructions, supported Norman, that he could stand on his own.

18 Your Honours, if I will proceed continue on to the issue of
19 collective punishment.

16:09:02 20 PRESIDING JUDGE: I remind you you are close to your half
21 hour. I ask you to wrap up and come to some conclusion.

22 MR KAMARA: Yes. Let me round up then, Your Honours.

23 We will finally submit that against the background of
24 issues that I have raised, that the second accused was in a
16:09:20 25 responsible command position over and above the Kamajors, and was
26 aware and had reason to know of the atrocities that were
27 committed by the Kamajors, and that he, himself, over and above
28 knowledge, participated in the killings of at least two persons.
29 Sufficient evidence has been led with regards to the joint

1 criminal enterprise to show his support to the criminal plan; his
2 logistic supply; and the implementation of that plan.

3 I thank Your Honours.

4 PRESIDING JUDGE: Thank you.

16:10:21 5 JUDGE THOMPSON: Learned counsel for the Prosecution, let
6 me ask you two short questions, to which I invite two short
7 responses. The first is: Are you suggesting or submitting that
8 the raising of the issue of personal jurisdiction of the Court
9 over the second accused and making it a part of the instant
16:10:46 10 motion may well amount to an attempt to relitigate an issue

11 contrary to the doctrine of estoppel or res judicata? In other
12 words, you cited a decision of this Chamber where the matter was
13 adequately and comprehensively dealt with. That's the first part
14 of that short question. The second part is: Would different
16:11:19 15 considerations apply if this issue had never arisen before this
16 Chamber?

17 MR KAMARA: Thank you, Your Honour. With regards to the
18 first question about the fact of relitigating the issue, yes,
19 Your Honour, that is our position, that the Defence is merely
16:11:40 20 relitigating issues that have been determined by this Court.

21 JUDGE THOMPSON: In other words, inviting us to revise our
22 position?

23 MR KAMARA: Revise the position and revisit an issue which
24 has been settled.

16:11:54 25 JUDGE THOMPSON: Thank you. The second part is: Would it
26 have been proper for the motion or the issue to have been
27 determined within the context of this motion for acquittal if it
28 had never been raised at all before?

29 MR KAMARA: Your Honour, I will venture, with a slight

1 hesitation here because I have not delved into the jurisprudence
2 of that, but from my previous argument, as long as it borders on
3 the jurisdictional issue of the Court - that is, as to the form
4 of the indictment or the jurisdiction of the Court, whether the
16:12:33 5 Court has power to try him as a person - Rule 98 does not allow
6 that process. It is not a proper vehicle.

7 JUDGE THOMPSON: I will be satisfied tentatively with that
8 answer.

9 MR KAMARA: Thank you.

16:12:44 10 JUDGE THOMPSON: My next question is: You gave what
11 appeared to me to be an almost exhaustive category of instances,
12 of manifestations, of command responsibility on the part of the
13 second accused. Your learned colleague submitted, rather
14 forcefully, that he had no de jure authority, that he may well,
16:13:09 15 and he conceded, some measure of attribution of de facto
16 authority. Shortly, how do you respond to that?

17 MR KAMARA: Yes, Your Honour. My learned friend conceded
18 to the fact of de facto authority and I think I gave several
19 examples.

16:13:35 20 JUDGE THOMPSON: Yes, you gave examples of command
21 authority. But you probably did not articulate a distinction
22 between de jure and de facto. He makes a point. He is prepared
23 to say, quite candidly, that there may be some measure or there
24 can be some attribution of de facto authority, but not de jure at
16:13:59 25 all.

26 MR KAMARA: Yes, Your Honour. I believe we did address
27 that issue in our motion.

28 JUDGE THOMPSON: Could you refer me to the paragraph? I
29 will be satisfied with your response.

1 MR KAMARA: Yes, Your Honour. While they're looking into
2 the motion of that, I can go on to the de jure jurisdiction. We
3 did refer to it.

4 JUDGE THOMPSON: Thank you very much.

16:14:30 5 PRESIDING JUDGE: Mr Margai, or someone on behalf of the
6 third accused.

7 MR MARGAI: Thank you, My Lord. I am going to be very,
8 very brief and we will attempt to save Your Lordships the burden
9 of hearing a detailed recap of written responses. I am adopting
16:14:51 10 in its entirety my written submission, which I believe is
11 comprehensive enough and needs no further amplification.

12 I would attempt to address what appears to be a
13 misrepresentation of a standard of proof under a Rule 98
14 application as addressed in this Court by my three previous
16:15:41 15 colleagues. All three referred to sufficiency of evidence, and
16 the Prosecution, to compound the misrepresentation, referred to
17 sufficiency of evidence beyond reasonable doubt. Twice he said
18 that.

19 My Lords, with your leave, what Rule 98 states motion for
16:16:31 20 judgment of acquittal is, "After the close of the case for the
21 Prosecution, the evidence is such that no reasonable tribunal of
22 fact could be satisfied beyond reasonable doubt of the accused's
23 guilt on one or more counts of the indictment, the Trial Chamber
24 shall enter of a judgment of acquittal on those counts." The
16:16:59 25 standard of proof, I submit, is proof beyond reasonable doubt.

26 Sufficiency of evidence is confined to Rule 98(B), which is
27 the standard in ICTY and ICTR, which used to be the standard
28 before 1998. So, for the purposes of our trial here the standard
29 of proof at this stage under Rule 98 is proof beyond reasonable

1 doubt, and I dare say that the burden rests on the Prosecution.
2 No evidential burden rests on the accused at this stage. If that
3 body, as stated under Rule 98, is not satisfied as required,
4 then, of course, your Lordships will act accordingly by entering
16:18:25 5 a judgment of acquittal on the counts affected.

6 Secondly, the question of when a jurisdictional issue could
7 be raised, when Honourable Justice Thompson was highlighting the
8 issues that could be considered jurisdictional issues - in other
9 words, not every issue goes to jurisdiction - he specifically
16:19:11 10 referred to duplicity, multiplicity of counts and uncertainty. I
11 have no doubt in my mind, My Lords, that at the time he was
12 addressing those issues, he had, at the back of his mind, the
13 case of Lansana and Others, which states that a jurisdictional
14 point could be raised at any time of the proceedings, and by
16:19:41 15 virtue of that it is my respectful submission that counts 6 and 7
16 could properly be raised at this stage.

17 Except if Your Lordships want me to dilate on any specific
18 issue, that will be my contribution in so far as the oral
19 submissions are concerned.

16:20:15 20 PRESIDING JUDGE: Not from my part. Justice Thompson? No.
21 We thank you, Mr Margai.

22 MR MARGAI: Thank you, My Lords.

23 PRESIDING JUDGE: Mr Prosecutor, do you wish to respond?

24 MR KAMARA: Yes, Your Honour. The first issue my friend
16:20:35 25 raises is the one on misrepresentation of proof. I disagree in
26 its entirety. Your Honours, you will recall when I was
27 addressing the issues as relating to the first accused, my
28 opening was the position of the Prosecution on Rule 98 standard,
29 and I read it clearly: "Where there is evidence, if accepted,

1 upon which a tribunal of fact could be satisfied beyond
2 reasonable doubt of the guilt of the accused on a particular
3 charge". I am a bit confused here what my learned friend is
4 implying.

16:21:19 5 JUDGE ITOE: You based your submission on this, on the
6 sufficiency of evidence?

7 MR KAMARA: Yes, sufficiency of evidence.

8 JUDGE ITOE: You didn't couple it with the requirement of
9 proof beyond reasonable doubt?

16:21:24 10 MR KAMARA: I may not in certain instances --

11 JUDGE ITOE: What is the distinction?

12 MR KAMARA: -- but I do recall that it was coupled on a
13 couple of those occasions. That proof beyond reasonable doubt, I
14 usually added that.

16:21:37 15 JUDGE THOMPSON: Could it have been an omission from the
16 Jelisic case, the ICTY Appeals Chamber case, where that whole
17 thing was articulated?

18 MR KAMARA: Yes. But we rely entirely on our motion. The
19 motion is quite clear on the Rule 98 standard. I agree it is
16:21:57 20 very complementary with what my learned friend is saying. There
21 is no issue or doubt about the fact of proof beyond reasonable
22 doubt. We rely on the statement on our motion and we are clear
23 on that.

24 I went on further to discuss what the Prosecution believes
16:22:13 25 are the principles involved in the Rule 98 standard and it also
26 involved proof beyond reasonable doubt.

27 Further, my learned friend was referring to the burden on
28 the Prosecution. We do know we have the burden and it rests with
29 us and we are duly executing that.

1 The case of Lansana and Others that my learned friend has
2 referred to in the international jurisdiction, we say here that
3 in the case of the international tribunal the rules are slightly
4 different from national applications. Even if my learned friend
16:22:47 5 is insisting that when it comes to an issue as to the form of the
6 indictment --

7 JUDGE ITOE: Are you suggesting that if the law, as stated,
8 in a case by a national jurisdiction is good law, an
9 international tribunal would not go by it, particularly having
16:23:11 10 regard to the provisions of Rule 98(B) of the Rules?

11 MR KAMARA: No, Your Honour, I'm not saying that. Where it
12 is a good law and is still supported by other jurisprudence, the
13 Court will necessarily follow or adopt it. But then my point
14 here is that this Court conveys a decision. It is not bound by
16:23:29 15 local jurisdictions. That is the point I am making here.

16 JUDGE ITOE: That we know. It is clearly stated in
17 Rule 89.

18 MR KAMARA: Yes.

19 JUDGE ITOE: We are not bound by municipal law, that we
16:23:42 20 know.

21 MR KAMARA: Yes.

22 JUDGE THOMPSON: Consistent with what my learned brother
23 said, that there is also the requirement that where the Court may
24 not have exact guidance on some issue in its own Rules, it may
16:23:56 25 have recourse to the jurisprudence of the Sierra Leone Courts.

26 MR KAMARA: Yes.

27 JUDGE THOMPSON: We often forget that. Not must, may. In
28 other words, they say the ease of first claim on that
29 jurisprudential resource in case there is some lack of clarity as

1 to how we should proceed. So if our Rules did not provide for
2 the question of whether a Court is deprived of jurisdiction, if
3 the indictment is found to be defective by reason of duplicity,
4 multiplicity, vagueness, uncertainty, I don't think there will be
16:24:39 5 any prohibitory provision in our Rules having recourse to the
6 Sierra Leone case. For mere guidance; that's all. We may
7 overrule it.

8 MR KAMARA: Yes, very well. I agree with you entirely,
9 Your Honour. The Prosecution is saying here that we have
16:24:57 10 provisions in our Rules and Rule 72 clearly spells it out when
11 these are matters that are raised, how to conduct these matters.
12 If at all it is still in sync with local jurisdiction, it's still
13 fine. As my learned Justice had said, we are prepared where
14 there is no guidance for guidance to be provided.

16:25:16 15 JUDGE ITOE: Or where the guidance is insufficient. Are
16 you prepared to accept that?

17 MR KAMARA: I will, Your Honour.

18 PRESIDING JUDGE: But you have also admitted - not now, but
19 previously in your arguments - that 72 does not foreclose an
16:25:32 20 accused person from raising matters of jurisdiction at some
21 stages. You are saying this is not the time, but you're not
22 saying that no possibility exists to raise that outside of the 72
23 provisions. At least that has been my understanding. You are
24 not prepared to say when exactly, but you sort of admitted that
16:25:56 25 it was possible.

26 MR KAMARA: When I made that statement about a possibility
27 of that, it is in a legal context that, at the end of the trial,
28 there is no prohibition that it can be raised again.

29 PRESIDING JUDGE: Okay.

1 MR KAMARA: It could also be an appealable issue.

2 PRESIDING JUDGE: That's fine.

3 MR KAMARA: That was in the context of what I was thinking.

4 PRESIDING JUDGE: You agree at the end of the trial, when
16:26:20 5 we get there, the matter of jurisdiction is always alive and
6 could be raised?

7 MR KAMARA: Yes.

8 PRESIDING JUDGE: But you're saying, however, at the end it
9 may, but not at this stage?

16:26:30 10 MR KAMARA: Yes.

11 PRESIDING JUDGE: I just want to make sure I clearly
12 understand your position in this respect.

13 MR KAMARA: Yes [Overlapping speakers].

14 PRESIDING JUDGE: [Overlapping speakers] question unless
16:26:46 15 you are finished with your --

16 MR KAMARA: My learned friend was very brief and I intend
17 to support him in that.

18 PRESIDING JUDGE: That is very kind of you.

19 JUDGE ITOE: As brief as your learned friends were.

16:26:55 20 MR KAMARA: Yes. Thank you, Your Honours.

21 PRESIDING JUDGE: Thank you. Just for the information of
22 all concerned, obviously we are not prepared to give a decision
23 today, nor tomorrow. We have sent some time aside to look at
24 these matters very carefully. We hope to be able to do that in a
16:27:52 25 short while, but we will not, unfortunately, provide you with a
26 specific date as to when. However, we should inform you that we
27 will come shortly to all of you to indicate what it is likely to
28 be. Don't read this to conclude we have already made up our mind
29 on this judgment of acquittal, but we still have to prepare, in

1 case we are likely -- if it is denied in total or in part --
2 obviously if it is granted totally, my comments will have no
3 obligation. If it is denied in part, then we need to get ready
4 to carry on, and the carry on will be sometime early in the new
16:28:34 5 year. It is just a warning to all of you to get ready, but we
6 shall provide some guidance shortly as well. We thank you very
7 much.

8 MR NMEHIELLE: Before Your Honour rises, I wanted to use
9 this opportunity, even though we seem to be so much getting into
16:28:57 10 the motion before now, to welcome you back from your various
11 vacations and to also tell you that I am quite happy to see that
12 the process of the motion has taken the turn it has in terms of
13 being done in a very quick fashion to enable the various teams to
14 get ready as to the preparation of their case should this not be
16:29:28 15 granted. And we are very much in a position as a Defence office
16 to support them in their regard and to thank you for this entire
17 process.

18 PRESIDING JUDGE: Thank you, Mr Principal Defender. The
19 case is adjourned.

16:30:01 20 [Whereupon the hearing adjourned at 4.25 p.m. sine die]

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