

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

WEDNESDAY, 29 NOVEMBER 2006  
9.35 A.M.  
TRIAL

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Ms Anna Matas Ms Roza Salibekova
For the Registry:	Mr Thomas George
For the Prosecution:	Mr Christopher Staker Mr Kevin Taverner Mr Joseph Kamara Mr Mohamed Bangura Ms Lynn Hintz (Case manager) Ms Patricia Corrigan (intern)
For the accused Sam Hinga Norman:	Dr Bu-Buakei Jabbi Mr Alusine Sesay Mr Kingsley Belle (legal assistant)
For the accused Moinina Fofana:	Mr Arrow Bockarie Mr Michiel Pestman Mr Andrew Ianuzzi Mr Steven Powles
For the accused Allieu Kondewa:	Mr Yada Williams

1 [CDF29NOV06A\_SM]  
2 Wednesday, 29 November 2006  
3 [The accused present]  
4 [Closing Statements]  
5 [Open session]  
6 [Upon commencing at 9.35 a.m.]

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

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

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

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

29 MR JABBI: Yes, My Lord.



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

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

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

10 MR JABBI: As Your Lordship pleases.

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

12 MR JABBI: Thank you very much.

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

17 MR JABBI: Thank you.

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

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

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

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



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

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

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

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

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



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

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

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

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

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

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





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

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

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

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



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

5           JUDGE ITOE: What paragraphs?

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

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

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

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



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

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

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

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

15           PRESIDING JUDGE: Yes. All right. Thanks. Yes.

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

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



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

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

7 JUDGE BOUTET: Fine. Thank you.

8 MR JABBI: Thank you, My Lord.

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

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

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

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





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

5 So, My Lord, that brings me to --

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

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

12 PRESIDING JUDGE: Merely to clarify --

13 MR JABBI: Just to -- yes.

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

16 MR JABBI: Yes, My Lord.

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

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

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

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

23 MR JABBI: More?

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

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



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

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

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

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

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



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

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

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

21 MR JABBI: Yes, My Lord.

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

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

28 PRESIDING JUDGE: Right, try and do that.

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



1 innocence.

2 PRESIDING JUDGE: Right. All right. Thanks.

3 MR JABBI: Thank you, My Lord.

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

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

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

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

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

15 PRESIDING JUDGE: Mr Thomas, please help.

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

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

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

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

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

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

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





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

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

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

6 JUDGE ITOE: I will stop there.

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

8 My Lord, my submission is that the agreement established in  
9 this Court did not enter into force either -- did not enter into  
10 force either lawfully or in accordance with Article 21 of the  
11 agreement itself and, to that extent, the agreement in question  
12 is at this present moment, and for all time it has been in  
13 operation, it is in unlawful operation and, by the same token,  
14 the operation of this Court has, accordingly, been equally  
15 unlawful. The main reason for saying this, My Lord, is that  
16 Article 21 of the agreement requires that it shall be  
17 incorporated into the laws of Sierra Leone as the basis for its  
18 entry into force. That is the prerequisite and it is sine qua  
19 non of the agreement coming into force. It has to be  
20 incorporated into the laws of Sierra Leone and indeed --

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

23 MR JABBI: Pardon, My Lord?

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

26 MR JABBI: Yes, My Lord.

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

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

29 PRESIDING JUDGE: Very well.



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

2 PRESIDING JUDGE: Yes. Right. Please.

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

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

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

17 PRESIDING JUDGE: Counsel?

18 MR JABBI: Yes, My Lord.

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

21 MR JABBI: Yes, My Lord.

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

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

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

27 PRESIDING JUDGE: Of this Court.

28 JUDGE ITOE: Of the Special Court.

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



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

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

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

13 MR JABBI: Yes, indeed, My Lord.

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

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

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

20 MR JABBI: Of this Court.

21 PRESIDING JUDGE: Yes. Right.

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

23 PRESIDING JUDGE: Yes.

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

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

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



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

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

5 MR JABBI: Yes. Straight to the Appeals Chamber.

6 PRESIDING JUDGE: Because it raises jurisdictional issues.

7 MR JABBI: Yes, indeed, My Lord.

8 PRESIDING JUDGE: Quite right.

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

11 PRESIDING JUDGE: Yes.

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

13 PRESIDING JUDGE: Yes.

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

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

17 MR JABBI: Yes.

18 PRESIDING JUDGE: -- by a Defence mechanism.

19 MR JABBI: Yes.

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

21 MR JABBI: Yes.

22 JUDGE ITOE: Are you then suggesting that because it went  
23 by reference mechanism and was decided upon by the Court of  
24 Appeal we can now relitigate the issues that were determined by  
25 the Court of Appeal in that decision?

26 MR JABBI: No, My Lord.

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

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





1           PRESIDING JUDGE: Yes.

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

4           PRESIDING JUDGE: Yes.

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

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

11          JUDGE ITOE: It's unlawful, yes.

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

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

18          JUDGE ITOE: Jurisdiction.

19          MR JABBI: Yes, indeed, My Lord.

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

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

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

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

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



1 the difference.

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

3 PRESIDING JUDGE: Yes. And counsel, perhaps, you see, you  
4 may take points, as I say, you must treat the Court with candour.  
5 You may take points that you likely feel will carry seasoned  
6 judicial minds and I'm not sure whether it's -- one needs to  
7 advise oneself as to whether some of the arguments that you are  
8 canvassing in the question of -- on the issue of  
9 constitutionality is something that you need to pursue too much  
10 knowing that this Court is bound by decisions of a higher  
11 tribunal, and I also think that this very issue that you are  
12 raising may well have arisen in the highest court in the national  
13 system where it was argued, forcefully, as to whether the  
14 ratification agreement was in accordance with constitutional  
15 provisions. And the Supreme Court did say that everything was  
16 regularly done.

17 MR JABBI: My Lord, I am aware of the Supreme Court  
18 decision that Your Lordship has referred to. Just as, indeed,  
19 I'm also aware of the Appeals Chamber decision that we've already  
20 mentioned, but what I am saying, My Lord, is that the basis for  
21 my making that general proposition of law is not the same as the  
22 basis on which that general proposition was argued in either our  
23 Supreme Court or the Appeals Chamber.

24 PRESIDING JUDGE: I think I read this -- I read the  
25 decision of the Supreme Court very carefully. The issue of  
26 noncompliance with constitutional provisions for ratification was  
27 very much an issue there. Very much an issue.

28 MR JABBI: My Lord, I have specific provisions of the  
29 constitution which I want to draw to Your Lordship's attention.



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

3           MR JABBI: Yes.

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

11          MR JABBI: So, My Lord --

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

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

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

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

21          PRESIDING JUDGE: Yes.

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

27          PRESIDING JUDGE: Yes.

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

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



1 sections.

2 MR JABBI: Inconsistent or incompatible with both ordinary  
3 and entrenched provisions of the Sierra Leone Constitution as  
4 follows -- those provisions, in respect of ordinary provisions of  
5 the Constitution and it is those that are inconsistent with  
6 ordinary provisions of the Constitution are as follows:  
7 Article 17(2)b of the agreement is inconsistent and incompatible  
8 with Section 144 (1) and (2). Article 17(2)a, c and d, Article  
9 17(2)a, c and d of the agreement is incompatible with Section 1  
10 and Section 5(2)a of the Constitution. Article 6(2) of the  
11 statute is inconsistent and incompatible with section 48(4),  
12 Section 98, Section 99(1) and Section 100 of the Constitution and  
13 Section 29 of --

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

15 MR JABBI: My Lord --

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

17 MR JABBI: [Overlapping speakers].

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

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

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

25 PRESIDING JUDGE: Yes. Go ahead.

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





1 There are two sets of them.

2 PRESIDING JUDGE: Yes.

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

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

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

11 PRESIDING JUDGE: No, there is no need.

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

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

14 MR JABBI: Subsection 15 of the Constitution.

15 PRESIDING JUDGE: Yes.

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

19 PRESIDING JUDGE: Yes. That's it.

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

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

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

28 [CDF29NOV06B - CR]

29 MR JABBI: Well, My Lord --



1           PRESIDING JUDGE: Thank you very much.

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

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

5           JUDGE ITOE: Maybe in academic circles.

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

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

11          PRESIDING JUDGE: Are you sure?

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

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

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

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

24          PRESIDING JUDGE: You want leave to do that?

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

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



1 MR STAKER: Certainly, Your Honour.

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

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

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

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



1           PRESIDING JUDGE: Right.

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

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

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

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

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





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

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

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

14 PRESIDING JUDGE: Yes.

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

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

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



1 great length.

2 PRESIDING JUDGE: Thanks very much.

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

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

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

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

12 MR POWLES: Thank you very much.

13 PRESIDING JUDGE: It is your turn now.

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

17 PRESIDING JUDGE: Very well.

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

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

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



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

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

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

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

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



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

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

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

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





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

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

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

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



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

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

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

15 It should be noted, and we would submit this is important,  
16 that at paragraph 14 of their final brief, the Prosecution state  
17 that they do not dispute that the CDF was fighting for the return  
18 of the constitutionally elected Government of Sierra Leone. They  
19 do not suggest that the CDF was a joint criminal enterprise, nor  
20 was every member a participant in a joint criminal enterprise.  
21 They further acknowledge that not every member of the CDF  
22 committed crimes. Those are, of course, crucial concessions  
23 because it recognises that there were some in the CDF who were  
24 part of the force for good, who had nothing less than the most  
25 noble aims in fighting with the CDF. There were some, and a good  
26 majority, we would submit, that were not involved in the matters  
27 that you, Your Honours, have been hearing about over the last  
28 150-odd days of evidence.

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



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

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

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

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



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

4 PRESIDING JUDGE: Specifically which paragraphs are those?

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

7 PRESIDING JUDGE: Very well. All right.

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

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





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

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

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

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



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

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

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

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



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

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

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

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



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

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

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

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

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





1 did not appeal that finding of the Trial Chamber.

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

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

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

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



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

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

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



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

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

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

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



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

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

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

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





1 the democratically elected government of this country.

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

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

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

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

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



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

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

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

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

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



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

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

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

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

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

18 [Break taken at 11.25 a.m.]

19 [Upon resuming at 11.50 a.m.]

20 PRESIDING JUDGE: Mr Powles, please continue.

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

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



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

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

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

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

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

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

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





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

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

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

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

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



1 a true expert witness.

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

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

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

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



1 would submit, is nil.

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

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

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

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

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



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

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

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

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

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





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

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

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



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

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

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

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



1 food to come and destroy Sierra Leone."

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

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

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

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



1 other potential leaders of them.

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

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

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

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

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





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

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

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

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



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

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

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

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



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

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

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

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



1 casualties or any crimes being committed.

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

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

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





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

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

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



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

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

14 The first point to make, of course, is that those  
15 allegations were not properly pleaded. Nor were the allegations  
16 of ritual killings in relation to Fallon and Kanu. And the  
17 Prosecution yesterday said that no prejudice arises from their  
18 failure to properly plead those issues because, of course, the  
19 Defence could deal with them during the course of the trial.  
20 Well, I can tell Your Honours some great prejudice was caused,  
21 certainly to Mr Ianuzzi and Mr Bockarie who sit either side of me  
22 in relation to the allegation in relation to the killing of  
23 Mr Fallon, because they trekked some six hours to go and try and  
24 find his brother. They had to walk through swamp waters with  
25 computers on head to go and track down that witness, had to strip  
26 down to their underpants. I don't invite you to envisage it, and  
27 go and interview this witness, the witness who ultimately came  
28 and testified before you.

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



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

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

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



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

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

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

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





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

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

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

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

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

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



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

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

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

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

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

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

29 His greatest responsibility for willful killing? No. We



1 say no responsibility for willful killing.

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

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

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

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



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

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

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

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

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





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

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

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

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

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

29 The Prosecution contend that there is strong evidence of



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

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

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

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



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

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

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

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

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



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

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

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

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

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

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





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

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

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

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



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

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

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

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

29 "From academic literature that has emerged on this question



1           there is fairly substantive literature on child soldiers in  
2           this region. One of the distinctions that comes out is  
3           this idea -- is this idea that the RUF seems to have fairly  
4           systematically used abduction as a method of bringing  
5           children in and, in fact, were sort of deliberately  
6           targeting children for membership in the organisation".

7           And I -- he said this: "You just do not see that with the  
8           CDF".

9           There is a clear and marked distinction.

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

14          At paragraph 452 of the Prosecution --

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

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

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

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

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

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



1           PRESIDING JUDGE: Right, okay.

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

8           PRESIDING JUDGE: No. Continue with your submissions.

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

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

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

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





1 to be getting up now and interrupt.

2 PRESIDING JUDGE: And these factual --

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

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

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

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

21 PRESIDING JUDGE: Right.

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

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



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

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

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

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

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



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

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

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

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

23 Your Honours, I see the time.

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

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

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



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

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

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

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

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