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

TUESDAY, 28 NOVEMBER 2006
9.32 A.M.
TRIAL

TRIAL CHAMBER I

Before the Judges:	Bankole Thompson, Presiding Pierre Boutet Benjamin Mutanga Itoe
For Chambers:	Ms Roza Salibekova Ms Anna Matas
For the Registry:	Mr Thomas George
For the Prosecution:	Mr Christopher Staker Mr Kevin Tavener Mr Joseph Kamara Mr Mohamed Bangura Ms Nina Jorgensen 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 Powle
For the accused Allieu Kondewa:	Mr Yada Williams Mr Martin Michael (legal assistant)

1 [CDF28NOV06A - CR]
2 Tuesday, 28 November 2006
3 [Closing Statements]
4 [Open session]
5 [The accused Fofana and Kondewa present]
6 [The accused Norman not present]
7 [Upon commencing at 9.32 a.m.]
8 PRESIDING JUDGE: Good morning, learned counsel. This
9 Chamber is convened today for the purpose of hearing the closing
10 arguments for the Prosecution and each of the Defence teams in
11 the CDF trial. May I have representations, please; for the
12 Prosecution?
13 MR STAKER: May it please the Chamber, for the Prosecution,
14 Christopher Staker. With me today, Joseph Kamara, Kevin Tavener,
15 Mohamed Bangura, Nina Jorgensen, Lynn Hintz and Patricia
16 Corrigan.
17 PRESIDING JUDGE: Thank you. For the first accused?
18 MR JABBI: Good morning, Your Honours. For the first
19 accused, Dr Bu-Buakei Jabbi, Mr Alusine Sesay, and Mr Kingsley
20 Belle, legal assistant.
21 PRESIDING JUDGE: Thank you. For the second accused?
22 MR PESTMAN: Good morning, Your Honours. For Mr Fofana,
23 Arrow Bockarie, Stephen Powles and Andrew Ianuzzi and myself,
24 Michiel Pestman.
25 PRESIDING JUDGE: Thank you. For the third accused.
26 MR WILLIAMS: May it please Your Lordships, YH Williams and
27 Martin Michael for the third accused.
28 PRESIDING JUDGE: Thank you. This proceeding is being
29 conducted -- I have just been reminded that the first accused is

1 not in court; does Dr Jabbi have anything to say about that?
2 MR JABBI: My Lord, I was just informed whilst we were
3 already in court that he called for the chief of detention and
4 requested that the other co-accused might proceed to the Court
5 whilst they wait for the chief of detention. I have no idea why.
6 PRESIDING JUDGE: At this point in time, we'll expect -- I
7 think we'll proceed with the business of today and expect you to
8 give us some further information on that question.
9 MR JABBI: Later on.
10 PRESIDING JUDGE: Right. This proceeding is being
11 conducted pursuant to Rule 86 of the Court's Rules of Procedure
12 and Evidence and this Trial Chamber's scheduling order for filing
13 trial briefs and presenting closing arguments, dated the 18th day
14 of October 2006. Rule 86 provides as follows, and I quote:
15 "(A) After the presentation of all the evidence, the
16 Prosecutor shall and the Defence may present a closing
17 argument.
18 (B) A party shall file a final trial brief with the Trial
19 Chamber not later than five days prior to the day set for
20 the presentation of that party's closing argument.
21 (C) The parties shall inform the Trial Chamber of the
22 anticipated length of closing arguments; the Trial Chamber
23 may limit the length of those arguments in the interests of
24 justice."
25 The aforementioned scheduling order ordered as follows:
26 "1. The Prosecution and Court Appointed Counsel for each
27 accused shall file their respective final briefs
28 simultaneously on the 22nd of November 2006 by 4 p.m.
29 "2. The Prosecution shall and the Court Appointed Counsel

1 for each accused may present their respective closing
2 arguments commencing on the 28th November 2006 at 9.30 a.m.
3 and continuing, if necessary, on 29th November 2006 in
4 Courtroom 1.
5 "3. The Parties shall inform the Chamber of the
6 anticipated length of their closing arguments on
7 27th November 2006 by 1 p.m., which may thereafter be
8 limited by the Chamber in the interests of justice."
9 In compliance with the aforesaid orders, the Chamber notes
10 in respect of the anticipated lengths of the closing arguments as
11 follows:
12 1. That the Prosecution's estimate is two hours.
13 2. That the first accused estimate is two hours.
14 3. That the second accused estimate is between
15 two-and-a-half to three hours.
16 4. That the third accused estimate is three hours.
17 We also note that the Prosecution did indicate that should
18 the Defence seek a significantly disproportionate amount of time,
19 the Prosecution will seek leave for additional time. It is the
20 Chamber's disposition to be guided by these indicated maximum
21 time limits. It is the Chamber's further disposition to
22 encourage the parties to conserve as much valuable time as
23 possible and not seek to adhere strictly to those estimates
24 without good reason or to exceed them unreasonably.
25 Following inquiries as to what methodology or methodologies
26 the parties will be adopting in presenting their closing
27 arguments, the Chamber was advised as follows:
28 The Prosecution indicated that they will follow this
29 sequence:

1 1. Presentation of their legal analysis under three
2 themes; namely:
3 (a) Prosecution's theory.
4 (b) General overview of applicable law and.
5 (c) responses to Defence legal issues.
6 2. Evidentiary analysis under five rubrics:
7 (a) Overview of the evidence.
8 (b) The case against the first accused.
9 (c) The case against the second accused.
10 (d) The case against the third accused.
11 (e) Responses to Defence evidentiary challenges.
12 The Defence team for the first accused indicated that they
13 will adopt this approach, presenting their arguments under the
14 following themes:
15 1. Presentation of general comments.
16 2. Brief history.
17 3. Insider witnesses.
18 4. Crimes against humanity.
19 5. CDF strategic command.
20 6. Counts 1 and 2.
21 7. Counts 3 and 4.
22 8. Count 5.
23 9. Count 6.
24 10. Joint criminal enterprise.
25 The Defence team for the second accused advised that their
26 address will cover these things:
27 1. Introductory remarks.
28 2. Prosecution's introduction.
29 3. Prosecution's brief history.

1 4. Crimes against humanity.
2 5. Second accused's alleged responsibility under Article
3 6(1):
4 (a) Second accused's position of authority.
5 (b) Unlawful killings.
6 (i) Tongo.
7 (ii) Koribundu.
8 (iii) Kenema.
9 (iv) Nallo's assertions.
10 (c) Physical violence and mental suffering.
11 (d) Pillage.
12 (e) Terrorising the civilian population.
13 (f) Use of child soldiers.
14 6. Joint criminal enterprise.
15 (a) Plurality of persons.
16 (b) Common plan, design or purpose.
17 (c) Participation in the execution of common plan.
18 (d) Shared intention.
19 7. Command responsibility.
20 8. Comments on Defence case.
21 9. Closing remarks.
22 Up to the time of coming to court, this Chamber had not
23 been advised as to the methodology of the third accused. I
24 assume, therefore, that their methodology will follow the
25 sequence, thematic or otherwise, as indicated in their final
26 trial brief.
27 On the assumption that there are no last minute variations
28 in methodologies, we will now commence the proceeding. Let the
29 Prosecution begin.

1 MR JABBI: My Lord, with your leave, I just want to raise
2 an issue before we start. My Lord, yesterday, the Prosecution
3 was granted leave to file two annexures to the final trial brief.
4 Some of the implications for that for the Defence, and also the
5 implication of Rule 86(B) for that decision, I thought needed
6 some attention.
7 My Lord, Rule 86(B), which was amended in May last year,
8 has made certain aspects of that Rule mandatory. The Rule reads,
9 86(B):
10 "A party shall file a final trial brief with the Trial
11 Chamber not later than five days prior to the day set for the
12 presentation of that party's closing argument."
13 It is our understanding, My Lord, that the filing of the
14 annexures by the Prosecution yesterday effectively completes the
15 filing of the final trial brief by the Prosecution, and that that
16 was done only yesterday.
17 My Lord, we would like to be guided as to whether, by force
18 of Rule 86(B), the closing arguments are not thereby implicitly
19 deferred to five days later; at least five days later.
20 Furthermore, My Lords, the Prosecution has obviously filed
21 those annexures some six days after the filing of the final trial
22 briefs by the Defence teams and, quite understandably, must have
23 benefited from those processes.
24 The Defence are not thereby given an opportunity to
25 consider whether there is need to respond or, indeed, whether
26 they need as much time as the Rule seems to imply for considering
27 the annexures.
28 So, My Lord, as I say, obviously there are implications as
29 to whether the Defence may be entitled to consider whether to

1 apply to file any document as part of the trial brief or, indeed,
2 whether, as the result of the final trial brief for the
3 Prosecution having been completed only yesterday, the necessary
4 implication for the oral arguments are stipulated in Rule 86(B).
5 Thank you very much.
6 PRESIDING JUDGE: Before I ask the Prosecution to respond,
7 probably I need to, as I hear that observation and also the
8 reference to the Rule, I am reminded of a maxim in law which I
9 learned some several years ago at law school lex de minimis non
10 curat. But, having said that, let me ask the Prosecution to
11 respond.
12 JUDGE ITOE: But before that, Dr Jabbi, what are you really
13 seeking? Are you saying that because the Prosecution, as you
14 allege, filed lately, that you reserve the right to respond to
15 those late filings that have been annexed to the Prosecution's
16 final brief? Is that what I understood you to be saying at a
17 certain point in time when you were making your observations,
18 your submissions on this issue?
19 MR JABBI: My Lord, the first point I'm making is the
20 implication of Rule 86(B), for that, and also the entitlement to
21 seek the sort of clarification that I am seeking. Also, if I may
22 just say before the Prosecution speaks, I do not know whether
23 other Defence teams may have anything to say about this or not.
24 But I am seeking clarification on those issues.
25 PRESIDING JUDGE: But if counsel for the other accused
26 persons wanted to, as the Americans say, weigh in on this, they
27 probably would have indicated that and they would be given
28 audience, but I would pass on the baton to the Prosecution and
29 please ignore my own intervention with my Latin maxim and respond

1 to counsel's observation. Because it's not in the form of an
2 objection; it's an observation. But before you do that, Justice
3 Boutet would like to intervene on this.
4 JUDGE BOUTET: Dr Jabbi.
5 MR JABBI: Yes, My Lord.
6 JUDGE BOUTET: Why is it that you are raising this matter
7 this morning only when you knew of this yesterday and all of a
8 sudden you are springing this on the Court at the very last
9 moment, as such? I mean, this is not news to you; it happened
10 yesterday.
11 MR JABBI: My Lord, it happened -- it was filed yesterday
12 11 minutes after 3.00 p.m., and I personally got to know of it
13 some minutes to 6.00 p.m. I was not in a position to make this
14 sort of representation until this morning.
15 JUDGE BOUTET: Are you suggesting that this motion was
16 filed yesterday? Is anything new to you and so new to you that
17 you are taken by surprise and, therefore, cannot deal with these
18 matters today? Is that part of your suggestion? I mean, you are
19 saying you are asking for clarification. What is it you are
20 seeking exactly? Is it clarification as to the meaning of Rule
21 86(B).
22 MR JABBI: As to the effect of Rule 86(B) on the filing of
23 the annexures in question as a completion of the final trial
24 brief for the Prosecution.
25 JUDGE BOUTET: For what purpose are you seeking this, more
26 specifically? I mean, we don't give explanation and information
27 just for the purpose of giving information. What is it you are
28 seeking this morning, more precisely?
29 MR JABBI: Well, My Lord, there is, of course, the need for

1 constant complete compliance with the Rules, especially when
2 those Rules are framed in mandatory terms, and when events take
3 place which may appear to be slightly at variance with such
4 rules. It is necessary that the attention of the Chamber be
5 called to it with the relevant implications.
6 JUDGE BOUTET: I understand that and I appreciate that you
7 brought this to the attention of the Court. But my question to
8 you was: What is it you are seeking this morning, other than the
9 fact you are trying to bring this to the attention of the Court?
10 Are you seeking any particular remedy? I mean, what is it you're
11 asking?
12 MR JABBI: Well, My Lord, I believe that if, indeed, the
13 final trial brief of the Prosecution was completely filed only
14 yesterday then, in accordance with Rule 86(B), either it has been
15 filed contrary to the not later than five days before the order
16 argument, or that the five days may begin to be counted from the
17 filing of the final trial brief yesterday. Only Your Lordships
18 can clarify that issue, and I thought it was necessary to raise
19 that.
20 JUDGE BOUTET: Just the last comment, I am informed that
21 that document was filed with Court Management yesterday morning
22 at 9.05, and the public portion of it was filed in the afternoon
23 at 15:00. So this information was available to you as of 9:00
24 yesterday morning and not yesterday afternoon at 3.00. Thank
25 you.
26 MR JABBI: My Lords, with respect, My Lords, the document
27 that was filed at 9.05 yesterday was a request, a Prosecution
28 request. It was not --
29 JUDGE BOUTET: With the documents.

1 MR JABBI: Yes, indeed, My Lord, but at that stage,
2 obviously the Court had not ruled on it, and it was not a
3 substantive authentic filing of the documents in question.
4 PRESIDING JUDGE: Mr Prosecutor, please, respond.
5 MR STAKER: Well, Your Honour, we would submit that it's
6 self-evident that the five-day time limit in Rule 86(B) is what
7 might be called directory rather than mandatory. I think the
8 Trial Chamber always has the power to grant an extension of time
9 or, indeed, to curtail any time limit prescribed under the rules,
10 and, indeed, I think that's expressly provided for in Rule 7bis
11 which also states that a time limit can be extended without
12 hearing the other party if the Chamber thinks that that's not
13 necessary. So I think it always remains the case that the other
14 side, if they feel they have suffered some prejudice as a result
15 of this, can bring an appropriate motion. Perhaps what Defence
16 counsel is raising now could be construed as an oral motion, but
17 we would also submit that no specific prejudice has been shown
18 and no specific relief has been sought and that if a motion in
19 proper form is brought, of course, the Trial Chamber would
20 consider it. Thank you.
21 PRESIDING JUDGE: Learned counsel, what's your response --
22 reply to that?
23 MR JABBI: Your Honour, first of all, the rule in question
24 does not yield to a construction of being merely directory,
25 rather than mandatory. The language is very, very clear and, in
26 fact, when it is compared with its former version up to the
27 amendment, the former version of Rule 86(B) reads, "A party may
28 file a final trial submissions with a Trial Chamber before the
29 day set for the presentation of that party's closing argument."

1 That is obviously quite optional and directory but that is the
2 rule that was amended into the present form which reads, "A party
3 shall file a final trial brief -- shall file a final trial brief
4 with the Trial Chamber not later than five days prior to the day
5 set for the presentation of the party's closing argument."
6 PRESIDING JUDGE: But isn't it the case that, perhaps the
7 question of whether the rule is mandatory or directory and goes
8 to the issue of the option to file a final trial brief rather
9 than the question of the time within which the final brief should
10 be filed; isn't that the mischief, so to speak, that the plenary
11 was trying to cure? In other words, whereas before the rule was
12 amended, it was optional, legally, to the party to file a final
13 trial brief. But that, in fact, this was not considered to be a
14 satisfactory state of affairs, so the plenary, in its wisdom,
15 decided that it should be mandatory. How do you respond to that
16 random thinking, on my part?
17 MR JABBI: My Lord, that is very constructive thinking, in
18 fact, and I agree with it, but that is only one element of the
19 optionality that has been addressed in that explanation. The
20 other element is the timing as distinct from whether or not a
21 filing may be made.
22 PRESIDING JUDGE: Let me concede that ex arguendo and then
23 let me ask then, but then how do you construe that Rule 86(B)
24 with the rule that provides and vests the Trial Chamber with
25 authority to order filings to be made out of time?
26 MR JABBI: Well, My Lord, that, of course, is not implicit.
27 That is to say, it will not be assumed that the Chamber has
28 ordered the filing of trial briefs out of time.
29 PRESIDING JUDGE: No. I'm not assuming that, but I'm only

1 saying that doesn't that rule give the Trial Chamber statutory
2 authority to order that time limitations could be, in fact,
3 exceeded when the justice of the case so demands?
4 MR JABBI: Yes, indeed, My Lord. But before that --
5 PRESIDING JUDGE: Well, let me further complicate the issue
6 --
7 MR JABBI: -- by the necessary --
8 PRESIDING JUDGE: But Let me further complicate the issue
9 by saying that would you concede even if there was no such
10 statutory authority that, in fact, the Court will have, pursuant
11 to its inherent jurisdiction, such a power?
12 MR JABBI: My Lord, yes, indeed. But what I'm saying is
13 that if that were the case, that power would be expressly invoked
14 for a certain purpose, especially when it is against a rule that
15 is stated in such clearly mandatory terms.
16 I do not understand whether there has been any application
17 for the invocation of the inherent jurisdiction of the Court.
18 So, of course, if, in those circumstances, an event does take
19 place which seems not to be in complete accord with such a clear
20 cut mandatory rule, obviously the concern of any parties should
21 be raised and the relevant clarifications made and, if any,
22 indeed, prejudice is alleged then perhaps, that also will be
23 attended to.
24 PRESIDING JUDGE: But has a prejudice been alleged?
25 MR JABBI: So far, no.
26 PRESIDING JUDGE: Well, wouldn't that be the one --
27 wouldn't that be the overriding factor that could dispose of this
28 argument? Because, indeed, we don't come to court merely just to
29 raise hypothetical issues, and, of course, I'm not suggesting

1 that you're raising hypothetical issues. There can be
2 non-compliances with rules and the courts, in their wisdom, have
3 decided how to deal with that kind of situation. If it were in a
4 civil court, probably some compensation, in monetary terms, would
5 take care of this in terms of costs. But what's the prejudice to
6 your side that has now been alleged?
7 MR JABBI: My Lord, I do not wish to --
8 PRESIDING JUDGE: Remember, these are annexures to the
9 final brief. They are annexures that were filed late. In other
10 words, I'm assuming they were inadvertently left out. So what's
11 the prejudice from your perspective?
12 MR JABBI: The subject matter of the so-called annexures is
13 said that, in fact, they are of substantive nature. They are
14 inadvertently left out as part of the final trial brief, and it
15 is by virtue of their being requested to be filed late that they
16 are now being called annexures. That is very clear from the
17 subject matter. They are dealing with counts 7 and 8 of the
18 indictment, and it is not as if it is a mere attachment to the
19 final trial brief.
20 PRESIDING JUDGE: So what would be your --
21 MR JABBI: If all the circumstances --
22 PRESIDING JUDGE: But what would be the remedy? Assuming
23 that you've been prejudiced, what would be the remedy that you
24 are seeking from the Court at this point in time?
25 JUDGE ITOE: Because we have two documents. We have the
26 final trial brief, which was filed within time, and then the
27 annexures, which were inadvertently left out of what was filed
28 within time.
29 What would be your approach? I mean, what's the remedy you

1 are seeking in terms of these two documents which -- I mean, one
2 is part of the other, the other is in time, and the other one was
3 introduced after the time limits that are provided for, and given
4 the fact that the Court has, at least the powers, you know, to --
5 in circumstances like this, to grant an extension of time
6 implicitly like we did by granting the leave for these annexures
7 to be accepted as part of the Prosecution's final brief.
8 MR JABBI: My Lord, I would want the Court to grant the
9 Defence time, both to consider if there is a need to respond to
10 it and also to ensure that the five days following the filing of
11 the final trial brief is not tampered with.
12 JUDGE ITOE: A question was put to you by my colleague,
13 Honourable Justice Boutet. The question was: What is so new in
14 the annexures, which have been introduced by the Prosecution and
15 which may have taken you by surprise? What is so new in the
16 submissions that appear in those annexures that you're
17 complaining about? And if you're asking for time, what impacts,
18 you know, will that have on the expeditiousness of these
19 proceedings, because I think we are all committed and the Statute
20 commits us to proceed expeditiously. Giving you time, I mean,
21 would prejudice the rights of the accused; don't you think so?
22 MR JABBI: My Lord, certainly not the rights of the first
23 accused, because it is in view of the rights of the first accused
24 that this request is being made. The first accused would want to
25 --
26 JUDGE ITOE: And it is not for him alone to determine
27 whether his rights to expeditiousness have been violated or not.
28 It is not for him, you know, to determine. It is for the Court
29 as well to determine, maybe in his place, as to whether the

1 principle -- the statutory right to expeditious trials has been
2 violated.
3 MR JABBI: My Lords --
4 JUDGE ITOE: So it cannot be that it is not for him. It is
5 not for him to determine that alone.
6 MR JABBI: No. Not -- certainly not, My Lord. But, My
7 Lord, it is certainly for him to indicate whether a certain event
8 has tended to affect his rights, and expeditiousness, My Lord, is
9 not just a temporal phenomenon. It is certainly in respect of
10 the fair -- fairness of all processes to the accused, and one is
11 saying here that this filing, notwithstanding that
12 expeditiousness is a requirement of the proceedings, but this
13 filing has slightly affected the rights of the accused, the first
14 accused, and he would want to be sure that he responds
15 appropriately to it as soon as possible without any detriment to
16 the requirement for expeditiousness. My Lord, I think I have
17 said enough, and I will now stop and leave it to your Your
18 Lordships to decide.
19 PRESIDING JUDGE: Does the Prosecution intend to add
20 anything in response before I indicate what the disposition of
21 the Bench is?
22 MR STAKER: No, I think I've said all I can.
23 PRESIDING JUDGE: Very well.
24 MR STAKER: Other than to draw attention, again, that no
25 prejudice has been demonstrated.
26 PRESIDING JUDGE: Very well. I've not had any indications
27 from counsel for the other accused persons of their interest in
28 this matter, so we'll take a short break.
29 [Break taken at 10.08 a.m.]

1 [Upon resuming at 10.23 a.m.]
2 PRESIDING JUDGE: This is the ruling of the Chamber on
3 counsel's observation. No proper objection having been
4 formulated in respect of the observation of counsel for the first
5 accused as to the late filing of annexures to the Prosecution's
6 final trial brief, and no appropriate remedy having been sought,
7 and no prejudice demonstrated, the Chamber is unable to examine
8 the merits of the submissions at this stage. We will,
9 accordingly, proceed with the closing arguments.
10 The Prosecution will begin.
11 MR JABBI: Thank you, My Lord.
12 MR STAKER: Your Honour, I regrettably have to raise one
13 further preliminary issue before we begin, relating to the fact
14 that the first accused is not in court today. We don't know at
15 this stage the reason for his absence, and it may be material
16 whether he's not here because he doesn't wish to be here, or
17 whether he's not here because he is unable to be here. There
18 have been discussions of this issue in the past over the course
19 of the trial. We feel that for the avoidance of any difficulties
20 that might arise, perhaps we should, as an initial matter, at
21 least establish the reason why the first accused is not here
22 right now.
23 PRESIDING JUDGE: Right, thanks. Learned counsel for the
24 first accused, please provide us with some response to that.
25 MR JABBI: My Lord, unfortunately, I am not in a position
26 to explain why the first accused is not now in court. I was
27 myself informed of it only when we were already in court, and I
28 have sought to contact him in detention. Even the short break we
29 had just now, we tried to get in touch with them. We were first

1 told that he had left to come to court, but up to the time Your
2 Lordships were coming in, we have not seen him. We have no
3 explanation at all as to why he's not in court.
4 PRESIDING JUDGE: Counsel for both sides, I have in my
5 possession here a document coming from the detention facility,
6 and it's addressed, of course, to the Court. I read it:
7 "I, H Norman, will not attend court today, 28/11/06, for
8 the following reasons: I have been informed about my
9 rights under Article 17(4)(d) of the Statute for the
10 Special Court for Sierra Leone, in particular, my right to
11 be tried in my presence.
12 I have been informed that the proceedings may continue in
13 my absence pursuant to the Rules of Procedure and Evidence
14 of the Special Court for Sierra Leone. I do not waive my
15 right to be present."
16 Under the section signature there is the statement,
17 "Refuses to sign." And the date is 27/11/06. There is a
18 certificate at the bottom:
19 "I, Raymond Ewing, hereby certify that the above-mentioned
20 detainee has given the following reason for his absence:
21 Refuses to attend court as a protest for a reasons that I
22 will only reveal to the judges."
23 This certificate is signed by Raymond Ewing and also dated
24 today's date.
25 Mr Prosecutor, that's what we have by way of communication
26 to the Court.
27 MR STAKER: Your Honour, we'd submit on the basis of the
28 material that is now before the Court, that the Trial Chamber is
29 able to conclude that the accused has waived his right to be

1 present today.
2 PRESIDING JUDGE: Counsel for the first accused.
3 MR JABBI: My Lord, I believe it is very clear and it is,
4 in fact, expressly stated in what Your Lordship has just read,
5 that whilst there will be reasons why the first accused has not
6 come to court today, he, however, says that he is not waiving his
7 right to be present. My Lord, the message below the signature
8 where it is clearly said "refuses to sign," however says that the
9 reason is available, though it will be supplied only to the
10 Court.
11 JUDGE ITOE: To the judges.
12 MR JABBI: To the judges, sorry.
13 JUDGE ITOE: And where will he and when will he do this?
14 Is he going to meet the judges in Chambers, in their houses, or
15 in court?
16 MR JABBI: My Lord, that is written by Mr Ewing.
17 PRESIDING JUDGE: He is a supervisor for the detention
18 facility, Mr Ewing.
19 MR JABBI: Yes, he is the one who said he can supply the
20 reason, only to the judges. May be, My Lord, a way could be
21 found to ensure --
22 PRESIDING JUDGE: He certifies that.
23 MR JABBI: Pardon me, My Lord.
24 PRESIDING JUDGE: It's a certificate. It's a certificate
25 under the hand of the supervisor for the detention facility.
26 MR JABBI: Is that to say that he is not saying he has been
27 told the reasons, and he can supply the reasons only to the
28 judge?
29 PRESIDING JUDGE: Well, I don't know. All I'm saying this

1 is an official document. Mr Ewing is saying this in his official
2 capacity, certifying that the above-mentioned detainee gave him
3 the reason for his absence. That's all I'm trying to call your
4 attention to.
5 MR JABBI: My Lord, I believe my own understanding of that
6 certificate is that in fact the reason has been revealed to
7 Mr Ewing, but Mr Ewing himself is saying that he can only reveal
8 it directly to the judges.
9 PRESIDING JUDGE: I understand that the reason given to
10 Mr Ewing, as a result of a refusal, is that the first accused is
11 saying that he can only give the reasons to the judges. In other
12 words, he's refusing to attend court today as a protest for
13 reasons that he can only reveal to the judges.
14 MR JABBI: I see.
15 PRESIDING JUDGE: So, in other words, he's saying that he's
16 not come to court today as a protest.
17 MR JABBI: Yes.
18 PRESIDING JUDGE: And why he has protested, from what Ewing
19 has said, is something that he will only disclose to the judges.
20 Are we on the same radar screen?
21 MR JABBI: My understanding was slightly different.
22 PRESIDING JUDGE: Well, enlighten me.
23 MR JABBI: I thought that in the certificate, Mr Ewing was
24 saying that he was told the reason, only to be told --
25 PRESIDING JUDGE: That's not my understanding, but I stand
26 to be enlightened.
27 JUDGE BOUTET: It's not my understanding either. My
28 understanding is the same as Justice Thompson has said, the
29 Presiding Judge. Your client has decided not to come for reasons

1 that he, your client, will only tell the judges, to nobody else.
2 That's basically what he's saying. Whether he will speak to you
3 or not, I don't know, but certainly not to the detention people.
4 JUDGE ITOE: That is why I came in with a question, because
5 my understanding is that of my learned brothers and colleagues of
6 this Chamber. I asked: When, then, will he inform the judges?
7 Do we suspend the process and wait for him to inform the judges?
8 Where and when will he inform the judges?
9 MR JABBI: In the circumstances, My Lord --
10 PRESIDING JUDGE: What would you advise? How would you
11 guide the Bench? Help us out of the impasse.
12 MR JABBI: May we ask for a short break, during which we
13 can contact the accused so that we are able to better inform and
14 advise the Bench? Because we are equally in the dark. Even the
15 content of the certificate that has been read, this is the first
16 time we are hearing it, and, as I said earlier on, it was only
17 when we were in court and you were about to come in that we were
18 concerned that he had not come with the other accused persons.
19 So, My Lord --
20 PRESIDING JUDGE: The Prosecution is submitting, as a
21 matter of law, that he has impliedly waived his right to be
22 present.
23 MR JABBI: Well, My Lord, except that he has expressly said
24 in the communication that he has not waived his right. He has
25 expressly said that.
26 JUDGE BOUTET: He has also expressly stated that he is not
27 coming as a protest.
28 PRESIDING JUDGE: Isn't it is a matter for the Court to,
29 determine, as a matter of law, whether an accused person has

1 expressly or impliedly waived his right to be present? That is
2 not a unilateral issue for the accused.
3 MR JABBI: No, My Lord.
4 PRESIDING JUDGE: I would have thought it is a question of
5 law.
6 MR JABBI: Yes, indeed, My Lord. My Lord, it is really
7 unfortunate that the situation has arisen in that way. My Lord,
8 I would have thought that a request for a short time within which
9 the Defence team can meet the first accused would not unduly
10 prejudice the proceedings.
11 PRESIDING JUDGE: Let me hear the Prosecution on that.
12 MR STAKER: Your Honour, our submission was that the Trial
13 Chamber can conclude that there has been a waiver from the fact
14 that it is expressly stated that there is a protest. The reason
15 for the protest doesn't matter and absence due to protest is a
16 waiver. However, for the avoidance of any difficulty that might
17 arise in the future, we would not object to a short adjournment,
18 perhaps 15 minutes or so, or the accused to be informed that if
19 he has reasons, he needs to make them known now, otherwise the
20 proceedings will continue in his absence, and he will be deemed
21 to have waived his right to be here.
22 PRESIDING JUDGE: We've heard both sides. Did you want to
23 a make a submission, a short point?
24 MR JABBI: A very short point, only as to the length of the
25 break which may be granted. 15 minutes is far too short for us
26 to have to contact him. I will really suggest something like 30
27 minutes, My Lord.
28 PRESIDING JUDGE: Thanks. Well, we have heard both sides
29 on this issue. We appreciate the Prosecution's willingness and

1 readiness to accommodate the Defence in respect of their
2 application, but the Bench is disposed to decline the application
3 in the sense that at some point in time, the Court must act with
4 the degree of firmness and forthrightness that are the
5 quintessential elements of the judicial process. This Court,
6 undoubtedly, recognises that the rights of accused persons are
7 preeminent, but there are other considerations which compel us,
8 in the interests of justice, particularly also, the interest of
9 expediting the proceedings at this point in time when everything
10 has been prepared for closing arguments, everything painstakingly
11 done, we think it is eminently desirable that we proceed with
12 closing addresses. In fact, we deem that the accused person has
13 waived his right, the first accused, to be presently impliedly.
14 We'll hear the Prosecution.
15 MR STAKER: May it please Your Honours, our oral
16 submissions today will be presented by myself and Mr Tavener who
17 is one of our former staff who has returned to appear before you
18 today. I should point out that Mr Kamara, who is the senior
19 trial attorney for the Prosecution on this case, was conscious of
20 the need not to burden the Trial Chamber by being addressed by
21 too many counsel in closing arguments. In consequence he has
22 insisted on relinquishing the podium today. I trust the Trial
23 Chamber will be understanding of that graciousness.
24 Your Honours, the charges against the accused in this case
25 are set out in the indictment. In October last year, in the Rule
26 98 decision, the Trial Chamber rejected motions by all three
27 accused, seeking a judgment of acquittal at the end of the
28 Prosecution case, although it did find that there was
29 insufficient evidence in relation to certain geographic

1 locations. Any reference to the counts made in our closing
2 submissions are, of course, subject to the Rule 98 decision.
3 The question now before the Trial Chamber, having heard the
4 further evidence that was presented to it on behalf of all three
5 accused in the course of the Defence case, is whether it's been
6 proved beyond a reasonable doubt that the accused are guilty of
7 the crimes with which they have been charged.
8 The Prosecution's submission is that it has indeed been
9 proved beyond a reasonable doubt in relation to all three
10 accused. And the Prosecution case can be stated quite simply:
11 The case is that the three accused, Norman, Fofana and
12 Kondewa established unchallenged control and authority over the
13 CDF, and that they used their unrivalled positions to create an
14 ordered framework under which the CDF operated throughout the war
15 against the so-called rebels. The three accused had a number of
16 options as to how that war would be conducted and the option
17 chosen by the three accused was to implement a strategy of
18 winning the war at all costs. And, in order to do this, of
19 adopting a policy of attacking, neutralising and/or punishing
20 anyone they considered to be a rebel or a collaborator of the
21 rebels.
22 They defined a collaborator to include anyone who did not
23 actively oppose the rebels including, for instance, civilians who
24 stayed in their rebel-held towns. In other words, their policy
25 deliberately included attacks on civilians and captured enemy
26 combatants. These attacks involving unlawful killings, the
27 infliction of physical violence and mental suffering, looting and
28 burning of civilian property, terrorising the civilian population
29 and inflicting collective punishments and as part of this policy

1 of winning the war at all costs, they also used child soldiers.
2 Now, it is not alleged that the CDF in itself was an
3 illegal organisation. It's aim of restoring the democratically
4 elected government of Sierra Leone was not illegal. It's not
5 suggested that it was a crime under our Statute for CDF
6 combatants to engage in armed conflict with combatants of
7 opposing forces. It's not suggested that every member of the CDF
8 committed crimes within the Statute of the Special Court.
9 However, those who formulated and caused the implementation of a
10 policy that included attacks on civilians and captured
11 combatants, and the use of child soldiers, crossed the line into
12 the realm of criminality.
13 The Prosecution case is that the three accused, supported
14 by others, were acting in concert to carry out this common plan,
15 purpose or design for the CDF to win the war by any means
16 necessary, including by the commission of these crimes. In
17 causing the plan to be implemented they planned, instigated,
18 ordered, committed and aided and abetted these crimes and, at the
19 same time, they were responsible as superiors for failing to
20 prevent or punish the commission of these crimes by their
21 subordinates.
22 Now, the Prosecution's closing arguments are set out in
23 detail in the Prosecution's final trial brief. It is, of course,
24 unnecessary for me to repeat all of those arguments orally. Our
25 purpose today is to give an oral response to the arguments
26 contained in the Defence final trial briefs.
27 Mr Tavener will address the arguments in the Defence briefs
28 that are specific to factual issues but, before he does so, I
29 will address other Defence arguments of a more general legal

1 nature.
2 The first of the matters I address concerns the approach to
3 be taken by the Trial Chamber in the evaluation of the evidence
4 before it. This is a matter on which submissions are found in
5 the Prosecution brief at paragraphs 32 to 51, and are addressed
6 in the Norman brief at paragraphs 113 to 145; the Fofana brief at
7 paragraphs 4 to 22; and the Kondewa brief at pages 3 to 5.
8 The Prosecution's submission is that the starting point is
9 that a finder of fact must evaluate the evidence based on his or
10 her ordinary life experiences and on commonsense with a view to
11 establishing the truth.
12 It must be remembered that in many national systems the
13 ultimate findings of fact in a criminal trial are made by lay
14 members of a jury who are capable of doing this without
15 specialised legal knowledge. The question is simply whether,
16 based on all of the evidence, there can be any reasonable doubt
17 as to the guilt of the accused.
18 A reasonable doubt means that there can be no reasonable
19 doubt. The fact that they may be hypothetical, logically
20 possible, but nonetheless fanciful doubts, is not sufficient to
21 raise a reasonable doubt.
22 Perhaps to give a simple practical example, if the evidence
23 showed that an accused ordered subordinates to go and kill a
24 group of civilians, and if the evidence showed that those
25 subordinates then killed that group of civilians, in our
26 submission, without anything more, it could be established that
27 the killing was caused by the order given by the accused.
28 Now, as a matter of pure logic, it might be argued that it
29 had not been disproved that the physical perpetrators of the

1 crime bore a personal grudge against the victims, and that they
2 were going to kill them anyway, and that without such a personal
3 grudge they would have disobeyed the order and the order had
4 nothing to do with it. But absent any evidence that would tend
5 to raise that as a possibility, I would submit that it is pure
6 fanciful, technical logical thinking; we all know that is not the
7 way the real world works.
8 The Norman brief at paragraphs 121 and 122 appears to
9 suggest that, at this stage, the Trial Chamber can decide to
10 exclude certain evidence. Our submission is that decisions on
11 whether evidence will be admitted or excluded are made during the
12 course of the trial. At the end of the trial, the Trial Chamber
13 is called upon to weigh up all of the evidence before it. It
14 must, of course, decide what weight to give certain pieces of
15 evidence. Indeed, it might decide to give no weight at all to a
16 particular item of evidence. But, at this stage, it does not
17 exclude evidence; it looks at everything before it.
18 I would add that, in looking at the evidence, each item of
19 evidence needs to be looked at in light of all of the evidence as
20 a whole. The final briefs of the parties, of course, identify
21 the issues, and identify the evidence directly relevant to each
22 of those issues. But that's not to say that each individual
23 issue can be looked at in isolation and decisions made solely on
24 the basis of the evidence relevant to that issue. In relation to
25 all issues it's necessary to look at the evidence in light of the
26 evidence as a whole.
27 Again, to give a simple example: If the Trial Chamber is
28 looking at an attack on a particular village one doesn't look
29 just at the evidence relevant to that particular attack on that

1 particular village and ask the question: "Was that attack part
2 of a widespread or systematic attack against a civilian
3 population?" Of course, in deciding that question, it's
4 necessary to look at the evidence of other attacks on other
5 villages occurring according to a similar pattern, in similar
6 geographic areas, in a similar time frame.
7 When all of the evidence is looked at, it's submitted that
8 the Defence submissions on this issue of widespread or systematic
9 attack against a civilian population appear fanciful, along the
10 lines of the example I gave before. It's been suggested, for
11 instance, that attacks on civilians committed by the CDF were
12 only against individual collaborators of the RUF, or AFRC, or
13 that they were acts of individual Kamajors, not pursuant to
14 orders but individual initiatives of individual Kamajors, or that
15 the crimes occurred because the physical perpetrators bore
16 personal grudges or disputes against the victims. When all of
17 the evidence is looked at as a whole, it's our submission that
18 doubts of that kind are not reasonable. Rather, suggestions of
19 doubts of that kind are fanciful.
20 In paragraphs 124 to 127 of the Norman brief it's argued
21 that particular caution must be given to uncorroborated evidence.
22 It's true, of course, that if evidence is uncorroborated, that is
23 a matter that can go to weight.
24 JUDGE ITOE: What paragraph, Mr Staker? What paragraph are
25 you saying?
26 MR STAKER: 124 to 127.
27 JUDGE ITOE: Thank you.
28 MR STAKER: Of the Norman brief. It is, of course, the
29 case that if evidence is uncorroborated that goes to weight.

1 But, again, even uncorroborated evidence must be looked at in the
2 light of the evidence as a whole. If we have, for instance,
3 uncorroborated evidence of a single witness of a particular
4 attack on a particular village, if that evidence is consistent
5 with other evidence of similar attacks on other villages at the
6 same time that can be seen, when the evidence is viewed as a
7 whole, to have been part of a single campaign fanning out to
8 various villages in the region, the totality of the evidence, in
9 itself, can be corroborative of that evidence. Certainly, the
10 fact that uncorroborated evidence is consistent with a general
11 pattern of the evidence as a whole is a matter that must also go
12 to weight.
13 Paragraphs 127 to 131 of the Norman brief argue that
14 hearsay evidence cannot be relied upon to the prejudice of an
15 accused. The Prosecution's submission is that this argument is
16 contrary to the well-established case law of international
17 criminal tribunals. Again, the hearsay nature of evidence may
18 clearly go to weight but, again, it's necessary to examine
19 hearsay evidence in the light of the evidence as a whole.
20 A further point of some importance is that it's not
21 necessary, in order to establish guilt beyond a reasonable doubt,
22 to prove every single fact alleged by a witness beyond a
23 reasonable doubt. Again, to give a simple hypothetical example
24 from a national system, suppose that it is alleged that two
25 accused acted in concert to murder the victim, the case being
26 that one of the accused restrained the victim while the other
27 inflicted a mortal injury on the victim. But suppose the
28 witnesses give inconsistent accounts of which accused played
29 which role in the murder, we would submit that if the Trial

1 Chamber is satisfied, or if the Court, the tribunal of fact is
2 satisfied at the end of the day that it has been proved beyond a
3 reasonable doubt that the two did commit the murder acting in
4 concert, it can enter a finding of guilty for both, even if it
5 can never establish which of the two played which of the roles in
6 the murder.
7 This example can then be applied to the case of widespread
8 crimes against international law. If we take an example, for
9 instance, from the Second World War, the top leadership of Nazi
10 Germany carried out a concerted genocidal policy to kill the
11 Jewish people. Now, suppose the question is we have a particular
12 group of people in a particular concentration camp who were
13 killed on a particular day, were the top leadership of Nazi
14 Germany responsible for those killings of those persons on that
15 day? Now, it may be that we'll never know if the top leadership
16 of Germany knew that those people were being killed on that day,
17 whether they knew who the physical perpetrators were. It's
18 unlikely the top leadership of the country would know the names
19 of individual camp guards in a concentration camp. It's unlikely
20 they would have known that any particular killings occurred on
21 that day. They might not even know of the existence of that
22 camp. They might know there are many camps all over the conflict
23 area, but they might not know all of them. Yet, despite not
24 being able to establish any of these concrete facts, if the
25 evidence in the case is such, we submit it is possible, in an
26 example like that, to find that the top leaders were guilty
27 beyond a reasonable doubt of those murders that occurred on that
28 day.
29 A move, then, to a further argument in paragraphs 140 to

1 145 of the Norman brief. It's argued that responses given by
2 Prosecution witnesses to leading questions cannot be taken into
3 account against an accused. Now, the normal procedure, we
4 submit, is that if opposing counsel thinks that
5 examination-in-chief is impermissibly leading, the normal
6 practice is to take objection at the time, and, if it's
7 warranted, to move that the answer to the question be excluded
8 from evidence. We would submit, certainly if no objection taken
9 to a question is taken at the time, and even if objection is
10 taken and the line of questioning stops, but no motion is made to
11 exclude any answer that's been given, then the answer to those
12 questions is evidence in the case. This is an aspect of a
13 general rule that issues and objections have to be raised in a
14 timely manner. We submit that counsel cannot let questions like
15 that pass and then argue at the end of the day when the evidence
16 is unfavourable that it should be disregarded by the Trial
17 Chamber.
18 In pages 6 to 13 of the Kondewa brief, it's argued at some
19 length that some of the evidence is contradictory.
20 JUDGE BOUTET: Mr Prosecutor, are you moving to a second
21 accused or a third accused now? I'm just trying to follow your
22 approach in this respect. Have you completed your comments
23 vis-a-vis the Norman brief or what you're dealing with now is a
24 related matter to what has been raised in the Norman brief?
25 MR STAKER: Yes. Your Honour, we don't break down our
26 argument according to the three accused, because many of these
27 issues are raised by more than one accused. We have a number of
28 separate legal issues that we propose to address in turn in
29 response to points raised in the Defence briefs. The first topic

1 that I'm dealing with, the first general legal issue, is the
2 approach to be taken by the Trial Chamber in the assessment of
3 the evidence before it. Within this first topic, I'm dealing
4 with a number of separate points. I freely admit they're a
5 little bit separate. They're just separate points. We jump a
6 bit from one point to another, but these are just the matters
7 that arise out of the Defence brief.
8 [CDF_28NO06B_MC]
9 PRESIDING JUDGE: Is that the same rubric.
10 MR STAKER: This is all under the first rubric.
11 PRESIDING JUDGE: The same rubric, yes.
12 MR STAKER: Of the approach to be taken by the Trial
13 Chamber in the assessment of the evidence before it.
14 PRESIDING JUDGE: Thank you.
15 JUDGE BOUTET: And, presumably, what you are suggesting to
16 the Court is not only based on commonsense, as you have
17 indicated, but also based on some law? And I take it that at the
18 end of your submission you will be making reference to case law
19 to support all these propositions that you are putting forward.
20 I know some of them are already included in your brief, but I
21 think some of your suggestion in your approach, the one
22 suggested, is not all included in your briefs. My question to
23 you is: Will you be providing the Court with some legal
24 authorities?
25 MR STAKER: Yes, Your Honour. The authorities we rely on I
26 think are largely contained already in our final trial brief.
27 Some of the points I am making are really an oral expansion of
28 the arguments already supported by authorities in our brief. In
29 the course of my presentation I will, indeed, be referring to a

1 number of additional authorities and at the conclusion of our
2 argument, we can certainly provide a document setting out precise
3 references to all of those authorities.
4 JUDGE BOUTET: Thank you.
5 PRESIDING JUDGE: For the sake of further clarity, you are
6 still on the rubric of general arguments of a legal nature as to
7 how the Chamber should approach the question of evaluating
8 evidence?
9 MR STAKER: Yes, Your Honour.
10 PRESIDING JUDGE: Right, thanks.
11 JUDGE ITOE: But the transition from the brief of the first
12 accused to the third is what intrigues me a bit. I thought you
13 would visit the briefs, you know, sequentially, unless of course,
14 you know, it is not within your mandate depending on how you have
15 distributed your respective duties. You do not want, you know,
16 to address us on the same issues as far as the trial brief of the
17 second accused is concerned?
18 MR STAKER: Your Honour, the Prosecution has taken very
19 much to heart the call of the Trial Chamber, not to unduly use
20 Court time and to confine our arguments as much as possible.
21 JUDGE ITOE: Fair enough. My comment rests there; you may
22 proceed. Thank you very much.
23 MR STAKER: I should explain: We have looked at the
24 Defence briefs. In many cases the arguments raised in them are
25 already directly dealt with in the Prosecution brief. The two
26 sides have taken issue on those matters. We have simply looked
27 for points in the Defence briefs that may not have been addressed
28 in the Prosecution brief or may require something additional to
29 be said. So, as I say, these may come across as a few isolated

1 points but confining ourselves to those we make the most
2 effective and efficient use of Court time.
3 JUDGE ITOE: Thank you.
4 MR STAKER: The argument that I was referring to in pages 6
5 to 13 of the Kondewa brief, relate to the fact that some of the
6 evidence is contradictory. Of course we freely --
7 JUDGE ITOE: Pages what, again?
8 MR STAKER: Six to 13.
9 JUDGE ITOE: Six to 13, thank you.
10 MR STAKER: It is freely acknowledged that some of the
11 evidence is contradictory. In a case of this magnitude,
12 involving events of such turmoil that happened some time ago, one
13 would expect the evidence not to be entirely consistent. In
14 fact, it would look very unusual if it did.
15 Again, that is why these inconsistencies in evidence all
16 need to be looked at in the light of the evidence as a whole. It
17 is possible for the Trial Chamber to prefer some evidence over
18 another. It is not the case that the mere fact that there is a
19 contradiction means there must be a reasonable doubt. And it is
20 possible for the Trial Chamber to accept some parts of a
21 witness's testimony and not other parts of the witness's
22 testimony. That is also well established in the case law. It
23 doesn't mean if some parts of a witness's testimony are not
24 accepted that the witness must be considered untruthful or
25 unreliable as a whole.
26 There are two final matters that I want to mention under
27 this rubric of the approach to evaluation of evidence. The first
28 is the effect of the failure by the Defence to put its case to
29 Prosecution witnesses in cross-examination; I won't deal on this

1 at length. It was raised in the oral hearing on the 14th of
2 February this year. Then on the 16th of February the Prosecution
3 filed a document setting out authorities on the question. That
4 was document number 560 in this case. The Defence responded on
5 the 17th of February. That is document number 561.
6 It remains the Prosecution position that in the
7 cross-examination of a witness who was able to give evidence,
8 relevant to the case for a cross-examining party, counsel is
9 required to put to that witness the nature of the case for the
10 party for whom counsel appears, which is in contradiction to the
11 evidence given by that witness. This gives the witness a chance
12 to comment on, to explain or to clarify any possible
13 contradictions and it assists the Trial Chamber in the
14 determination of the truth.
15 And if, as in this case, Defence counsel fail to do this,
16 the Prosecution submission is that this is also something that
17 needs to be taken into account by the Trial Chamber in assessing
18 credibility and reliability of what any Defence witness said in
19 contradiction of what a Prosecution witness said.
20 The final matter on this question of approach to evaluation
21 of evidence is simply a -- an appeal, a respectful submission to
22 the Trial Chamber -- that in its judgment it addresses and makes
23 findings on all material issues. I say this because, well, again
24 to give a simple example: If the Trial Chamber found, for
25 instance, that it was proved beyond a reasonable doubt that the
26 accused instigated a certain crime, it might take the approach of
27 saying, having found that there is guilt by instigation, there is
28 no necessity to make any findings as to planning, ordering or
29 joint criminal enterprise. But if on appeal, for instance, it

1 were held that the wrong legal test of instigating had been
2 applied and the conviction for instigating were overturned, that
3 leaves the situation a little bit difficult if there are no
4 findings in the judgment as to other potential modes of
5 liability.
6 If findings are made on all material issues, it means that
7 whatever may occur in the Appeals Chamber above, the necessary
8 factual findings that may flow from that will have been made by
9 the Trial Chamber.
10 JUDGE BOUTET: So I want to be sure I understand what you
11 are reasoning at this particular moment because this is an issue
12 that I intended to raise with you, or some of your colleagues,
13 maybe later on, as to modes of liability especially. So, on your
14 comments, I take it that there is no position from the
15 Prosecution except to say, you pick it up as such, and whatever
16 you find you decide. In other words, you are not proposing any
17 specific theory based on the evidence that you have adduced, that
18 the accused A instigated rather than plan and so on. In other
19 words, you are leaving it to the Court to make that decision for
20 you as to which mode of liability you are claiming was applicable
21 to that part of your case or scenario. Am I understanding your
22 position right? Because the example you just gave, you said if
23 we conclude that there is instigating, for example, we should
24 also look at other modes of liability, in case. But what is your
25 -- I am at a loss to understand what it is you are expecting the
26 Court to do in those kind of circumstances. I would like to
27 hear, be enlightened in this respect.
28 MR STAKER: With respect, Your Honour, that is not, that is
29 not the Prosecution position. The Prosecution position is that

1 the evidence establishes all modes of liability and that it is
2 essentially the same evidence that establishes all modes of
3 liability. It is not the case that there is one set of evidence
4 that relates to planning and a different set of evidence that
5 relates to instigating and a different set of evidence that
6 points to a joint criminal enterprise.
7 It is essentially the same body of evidence as a whole
8 which, in our submission, satisfies the elements of all of those
9 modes of liability. It is also our submission that a mode of
10 liability, each mode of liability, is not a separate crime. It
11 may be, for instance, that murder is a war crime and murder is a
12 crime against humanity, are two separate crimes. And if the
13 evidence established that all elements of both had been proven
14 beyond a reasonable doubt, if the accused were convicted of both,
15 it would be the case that the accused had been convicted of two
16 separate crimes in relation to the same conduct in respect of one
17 single killing.
18 Modes of liability is something different. If an accused
19 is convicted, both of ordering and of instigating, for instance,
20 that doesn't mean that an accused has been convicted of two
21 separate crimes in respect of the same act. There is only one
22 crime that the accused is convicted of, but what the Trial
23 Chamber will have established is that on the evidence more than
24 one mode of liability -- there was sufficient evidence to
25 establish more than one mode of liability.
26 Our submission is the evidence is sufficient to establish
27 all of those modes of liability but we would request the Trial
28 Chamber rather than refraining from deciding all of them, once it
29 has decided there is sufficient evidence of one, should consider

1 each of the separate issues. I give this by way of an example.
2 To give another, I will call this a hypothetical example,
3 if -- this is none an example from this case -- but suppose that
4 there is an Article 6(iii) case and the Trial Chamber were to
5 determine that the accused did not have superior authority over
6 the alleged physical perpetrator, it might then say, "We
7 therefore don't need to proceed to decide whether the crime even
8 ever happened because we have decided there was no superior
9 responsibility".
10 Our submission would be in this situation, findings should
11 be made on the other issue as well. So that if, on appeal, it
12 was determined that superior authority did exist, we wouldn't be
13 left in the situation that now we have established superior
14 authority but the Trial Chamber has made no findings with respect
15 to the crime base.
16 In our submission a finding of the Trial Chamber level on
17 all material issues, even if they're not strictly necessary, will
18 expedite the proceedings and enhance the efficiency of the case
19 as a whole, bearing in mind what may happen on appeal and what
20 may need to be done as a result.
21 That then concludes my arguments.
22 PRESIDING JUDGE: Just a minute, counsel. In fact, before
23 you leave that area and following what my learned brother,
24 Justice Boutet was raising, I need to, again for my own judicial
25 enlightenment, have you articulate the difference between, when I
26 mean difference here, I mean the juridical or conceptual
27 difference between a crime and the mode of liability for the
28 purpose of this indictment. Perhaps I may be wrong here. The
29 jurisprudence itself may not be that clear as to the conceptual

1 or juridical difference between a crime and a mode of liability.
2 MR STAKER: Well, it is our submission, Your Honour, that a
3 mode of liability, each mode of liability, is not a separate
4 crime.
5 PRESIDING JUDGE: Just a minute, slowly. Yes.
6 MR STAKER: To give an example: Again, suppose a group of
7 two or three people decide to rob a bank together and they each
8 play their different part in this plan. One drives the get-away
9 car; two go into the bank together, one holds the gun and says,
10 "Take all the money and put it in a bag." Now, on the evidence
11 it may be possible to convict all three of armed bank robbery,
12 even though, for instance, the one who drove the get-away car
13 never went into the bank and never demanded any money or never
14 furnished any weapon. The one who held the gun and said, "Put
15 all the money in the bag," on the evidence that person may be
16 liable in the same way as the driver of the get-away car of being
17 guilty of armed bank robbery as part of a joint criminal
18 enterprise. But on the evidence, even without looking at joint
19 criminal enterprise, the fact that he held the gun and demanded
20 money to be put in a bag, would be sufficient, in itself, to find
21 that he had committed armed bank robbery simply by virtue of his
22 own acts.
23 Now, if that person is found guilty of robbery, he is not
24 convicted of two separate crimes. Armed bank robbery as a
25 participant in a joint criminal enterprise and armed bank robbery
26 as a direct perpetrator, while the person who drove the get-away
27 car, would only be convicted of armed bank robbery as a
28 participant in a joint criminal enterprise.
29 I would submit both of them are convicted in exactly the

1 same way of armed bank robbery. The fact that in the case of one
2 the evidence may have been sufficient to establish his liability
3 on the basis of more than one mode of liability doesn't alter
4 that fact.
5 Now, we say in this case the evidence is sufficient to
6 establish the criminal responsibility of the three accused. We
7 have one single corpus of evidence that we say is the relevant
8 evidence to establish that criminal responsibility and when you
9 look at that single body of evidence, in our submission it
10 establishes -- it is sufficient to establish beyond a reasonable
11 doubt each of the modes of liability under the Statute.
12 So we are not asking the Chamber to pick and choose. We
13 say all are established and we submit that should be the finding.
14 I merely submit that if the Trial Chamber were not
15 satisfied in relation to one or more modes, it should still
16 consider the others.
17 JUDGE BOUTET: In the example you just gave why is it that
18 the, the view of the Court we need to know, and I am using your
19 armed robbery scenario, and the evidence supports that this
20 accused was the one holding the gun and so on. So if these are
21 the facts, why would the Court then embark to try to determine if
22 he, over and above all of this, he may have been part of the
23 joint criminal enterprise, which is what you are suggesting that
24 this Court should do over and above; why?
25 MR STAKER: Well, I think in reality, in a national system,
26 the Court would simply make findings of all the facts and
27 probably would find that they're all part of the joint criminal
28 enterprise and were all liable.
29 The reason we are asking for separate findings here is

1 simply this case is so large and so complex that, unlike in a
2 national system, finders of fact may sometimes be tempted to find
3 an easy route to decide that if certain issues are established,
4 that is sufficient to reach a verdict, and it is not necessary to
5 go beyond that and consider other issues that have now become
6 moot in light of the points that have been be found. Of course
7 in the national system cases are much smaller. If on appeal it
8 is determined that the basis of the verdict was wrong and it is
9 overturned, it is a relatively routine matter for the case to be
10 referred back for retrial.
11 In our submission the size and complexity of cases before
12 the Special Court are such that this eventuality should be
13 avoided wherever necessary, and that the making of findings of
14 fact by the Trial Chamber on all material issues, will reduce the
15 possible need for any remittal back to a Trial Chamber following
16 any possible appeal.
17 JUDGE BOUTET: So to complete, from my perspective on this
18 mode of liability, I have read, not very carefully in detail, the
19 submission in your final brief as such and certainly what you are
20 proposing today is not necessarily consistent, I would say, with
21 what you have pleaded. Reading through your briefs, your final
22 brief, it would appear to me that in some instances you are
23 alleging some modes of liability for certain crimes and different
24 modes of liability for other crimes and you, maybe it's my
25 reading of it and maybe I should reassess all of my understanding
26 of that, based on your comments today, but your position, and the
27 position of the Prosecution that you putting forward today, is,
28 essentially, that modes of liability applies to the three accused
29 for all the crimes that they are alleged to have committed. Am I

1 quoting you correctly in this respect?
2 MR STAKER: Yes, certainly. And that is put on the basis
3 of the existence of a joint criminal enterprise. If a
4 participant in a joint criminal enterprise is one of the planners
5 of that joint criminal enterprise, they are a planner of all the
6 crimes committed within that joint criminal enterprise.
7 Similarly, if the joint enterprise involves instigating the
8 commission of crimes then an instigator of that criminal
9 enterprise an is an instigator in relation to all. If the
10 existence of a joint criminal enterprise were not established, it
11 may then be necessary to go into further details about individual
12 crimes, the position might look a bit different. But the
13 Prosecution's primary submission is that a joint criminal
14 enterprise has been established beyond a reasonable doubt and in
15 that context there is sufficient evidence of all modes of
16 liability.
17 JUDGE BOUTET: For all counts for all three accused.
18 MR STAKER: For all counts.
19 JUDGE BOUTET: Because there is some suggestion in your
20 pleadings as well that some cases you rely on, 6(iii) ordering,
21 rather than a joint criminal enterprise; so what we to do about
22 this?
23 MR STAKER: Your Honour, if I can take that question on
24 notice and revert in due course.
25 JUDGE BOUTET: Right, thank you.
26 MR STAKER: The next main topic.
27 JUDGE ITOE: Mr Staker, would the degree of participation
28 or ordering, you know, in the joint criminal enterprise matter,
29 within the context of this case, a degree of participation of

1 each accused person, would it to your mind matter in determining
2 his guilt in terms of the crimes that have been charged?
3 MR STAKER: Our submission is no; it might, potentially, go
4 to sentencing.
5 JUDGE ITOE: You are suggesting that even if he did not
6 actively take part in the planning and ordering, if he were shown
7 to be part of that group, he would be liable on the basis of the
8 joint criminal enterprise, for the crimes for which he may not
9 have actively participated in terms of planning and ordering; is
10 that what you're saying?
11 MR STAKER: The elements of joint criminal enterprise are
12 set out in our brief. It is necessary --
13 JUDGE ITOE: I know that. I just want clarification of the
14 question.
15 MR STAKER: It is necessary that an accused acted in
16 furtherance of the joint criminal enterprise. There is a mens
17 rea requirement, there is an actus reas requirement of acting in
18 furtherance. If an accused has acted in furtherance there are no
19 precise limits on the way in which an accused may act in
20 furtherance. Acting in furtherance is not specifically limited
21 to planning, ordering, instigating or so forth, but we submit
22 that it can also take that particular form.
23 If a contribution made by an accused were so remote that it
24 did not satisfy the elements of furthering the joint criminal
25 enterprise, it may be the actus reas is not satisfied. In our
26 submission, though, that is certainly not a situation here. We
27 would really be talking about such a remoteness of causation,
28 again I am trying to think of hypothetical examples, but if an
29 accused knew that another person was on their way to murder

1 somebody and they're standing at the door of a building and they
2 open the door for them to pass through, assuming the door wasn't
3 locked and the person could have easily past through anyway, it
4 might be said the contribution by opening a door for somebody is
5 just so remote that it can't be said that it contributed to the
6 commission of the crime.
7 JUDGE ITOE: Thank you.
8 MR STAKER: I turn then to the next main issue that we
9 intend to address which are arguments found in all three Defence
10 briefs on defects in the form of the indictment.
11 JUDGE ITOE: But before you do that, I wanted to take you
12 back to your submissions on, which were referred to in the Norman
13 brief which are referred to in paragraphs 124 to 127 of Norman's
14 brief in relation to the corroboration. What would the
15 Prosecution's position, in the light of the practice in
16 international criminal tribunals be, so far as corroborative or
17 corroboration is concerned? The principle of corroboration; what
18 would your stand be on this issue?
19 MR STAKER: The stand is that corroboration is not required
20 and that a person can even be convicted on the evidence of a
21 single, uncorroborated witness; there is case law to that effect.
22 That is not to say that a single uncorroborated witness will
23 always be sufficient to prove guilt beyond a reasonable doubt but
24 it is possible.
25 JUDGE ITOE: So what you're saying is that corroboration in
26 international criminal justice is not necessary as such; is that
27 what I understand you to be saying?
28 MR STAKER: There is clear and consistent case law to that
29 effect.

1 JUDGE ITOE: I know there is but what impact, you know, do
2 you think -- don't you think that corroborative evidence would at
3 least make a difference to a particular situation, if it were
4 there?
5 MR STAKER: Of course the fact that evidence is not
6 corroborated goes to weight. If evidence is corroborated of
7 course that goes to weight. If it is uncorroborated that also
8 goes to weight. And my basic submission is that it is necessary
9 to look at all of the evidence, the entirety of the evidence in
10 the whole case in relation to every single isolated issue.
11 JUDGE ITOE: Thank you.
12 MR STAKER: The arguments on defects in the form of the
13 indictment are found in the Norman brief at paragraphs 53 to 112;
14 the Fofana brief at paragraphs 23 to 48 and 212 to 225 and the
15 Kondewa brief at pages 13 to 16.
16 It is not entirely clear to the Prosecution what relief is
17 being sought by the Defence in these paragraphs. We think in the
18 Norman brief, at paragraph 54, for instance, it said "The Trial
19 Chamber should take full consideration of the concerns raised by
20 the Defence." We are not sure what relief is being sought. Our
21 basic submission is that it should not be possible for the
22 Defence to raise defects in the form of the indictment at the end
23 of the trial.
24 Rule 72, paragraph D, contains an express provision for
25 alleged defects in the form of the indictment to be raised at the
26 pre-trial stage, and it is obvious what the purpose of Rule 72D
27 is; is that if the Defence believe they have insufficient notice
28 of the charges against them, this can be dealt with before the
29 trial begins. And we submit that it should not be countenanced

1 that an accused, the Defence for an accused failed to raise such
2 an object objection, allow the trial to proceed and respond to
3 all the allegations made against an accused and then say at the
4 end of the trial: "Oh by the way, whatever the relief being
5 sought is, disregard all the evidence because we had insufficient
6 notice."
7 Again, this is part of the more general principle of
8 criminal proceedings, that issues must be raised by parties in a
9 timely manner. And if they're not, that the right to do so may
10 be waived.
11 In this particular case, only one of the three accused
12 brought a motion alleging defects in the form of the indictment.
13 It was dealt with by the Trial Chamber. The Trial Chamber
14 dismissed the motion, subject to one aspect which related to
15 words such as "but not limited to." That defect was cured by the
16 filing of a bill of particulars. The wording of the bill of
17 particulars was subsequently reflected in the consolidated
18 indictment and we submit that that issue has now been settled and
19 the time for raising it has passed.
20 One authority I would refer to from the ICTY is the
21 Brdjanin trial judgment of 1 September 2004 where it was said in
22 paragraph 48 that "the Defence has failed to put forward any
23 convincing reason why the Trial Chamber should exceptionally deal
24 with alleged defects in the form of the indictment at this late
25 stage. On the contrary the Defence was given ample opportunity
26 to raise these issue during the pre-trial phase which lasted well
27 over two years."
28 Our submission would be that even if it were possible to
29 raise defects in the indictment once the trial has commenced it

1 would be a wholly exceptional situation; nothing exceptional has
2 been shown here.
3 We would add that the authorities referred to in the
4 Defence briefs on this issue, in our submission are not
5 pertinent. For instance in the Kondewa brief, on page 9 at
6 footnote 43, there is a reference to a passage in the RUF oral
7 Rule 98 decision, supposedly in support of the argument that
8 defects in the form of the indictment can be raised at the end of
9 trial. That is not our reading of that decision. The passage
10 cited dealt with the question of whether count eight of the
11 indictment was duplicitous of other counts. That is certainly a
12 matter that can await for the -- can await the end of trial, if
13 it appears the elements of count eight and other counts are
14 satisfied, it can then be determined whether convictions can be
15 entered on both.
16 In any event it is our submission that even if the Trial
17 Chamber were --
18 PRESIDING JUDGE: In other words are you now saying that,
19 as a matter of law, that certain defects in an indictment,
20 certain types of defect in an indictment, notwithstanding that
21 they may not have been raised at the pre-trial stage, can be
22 raised at a later stage if there was such a nature as the law
23 allows to be raised? In other words, are there certain types of
24 defect in law, based on the jurisprudence, which in fact can be
25 raised at any time, even on appeal? Defects in the form of the
26 indictment and is duplicity one of them?
27 MR STAKER: Well, I haven't made the submission that
28 defects in the form of the indictment can't be raised on appeal.
29 What I am submitting --

1 PRESIDING JUDGE: I mean the general purport of your
2 statement about defects in the form of the indictment did not
3 particularise or articulate whether there are certain types of
4 defects that are not permissible after pre-trial stage, as
5 against certain defects that can be taken at any point in a
6 proceeding, even on appeal. And when you mention duplicity, I am
7 reminded, particularly in the national system, there is settled
8 case law authorities to say that a defect alleging duplicity in
9 an indictment can be brought, even on appeal.
10 MR STAKER: Yes, Your Honour. Without wanting to go into
11 detail, too much detail on an issue that doesn't arise here, I
12 think in international criminal proceedings the basic approach is
13 always one of basic commonsense. The Rules say that defects in
14 the form of the indictment are raised at the pre-trial stage, and
15 if the issue is raised at a later point in time, the first
16 question would be why wasn't this raised earlier? Could counsel
17 have reasonably be expected to raise it earlier? You know, why?
18 And the second question would be: What prejudice would be caused
19 to the other side if this issue were dealt with now? And as that
20 passage I cited indicated, there may be very exceptional
21 circumstances where that can occur.
22 PRESIDING JUDGE: I didn't really want to engage you in any
23 debate on this. It's just that when you used, when you made
24 reference to duplicity that triggered off my line of thinking but
25 I will rest my position on that.
26 JUDGE BOUTET: I would like to add my voice to some of
27 these concerns. I would like to hear from you on the notion of
28 vagueness of allegations when allegations are of such a nature
29 that an accused may not be able at the outset of the pre-trial

1 brief to know exactly what the charges are against him in the
2 same way as we move along the trial and also then discover that
3 the -- what is alleged there, leads to at least some ambiguity
4 and, hence, may put the accused in the very difficult position of
5 not knowing the case against him with enough provision as such.
6 Are you saying that even at this stage of the trial that matter
7 cannot be raised?
8 MR STAKER: We come back to the same basic rule of
9 commonsense that I referred to: If the Defence raised an issue
10 such as that and said we couldn't have raised it earlier because
11 it has only now become apparent, and it is raised at the earliest
12 opportunity, it has only just now become apparent, we are
13 promptly raising it. Then at that time consideration could be
14 given to how the situation might be remedied and how possible
15 remedies might prejudice the other party. It may be that at that
16 stage an adjournment, or the giving of further particulars by the
17 Prosecution, might cause a short delay in the proceedings and
18 allow them to move on.
19 But to say nothing at the time and to allow the end of
20 trial to be reached and then to say, when it is all too late to
21 remedy the situation, that they're entitled to some remedy
22 because the indictment is too vague, we submit is inconsistent
23 with ordinary principles of procedure. And I come back to the
24 basic point: That there has been no showing of exceptional
25 circumstances in our submission as to why this couldn't have been
26 raised at the pre-trial stage, if that is what the Defence
27 wanted, and two of the three accused simply didn't do that. The
28 third accused did and the Trial Chamber ruled on it and the one
29 defect that was found was remedied.

1 My final submission on that point, as I say, is that even
2 if the Trial Chamber were to look at this issue, at this stage,
3 we submit that the decision that it gave at the pre-trial stage
4 on the Kondewa motion on defects in the form of the indictment,
5 and the other case law of the Special Court on defects of the --
6 in the form of the indictment in other cases should be followed,
7 and that in accordance with the case law we have of the Special
8 Court there was nothing defective in that respect in this
9 indictment.
10 I propose, then, to move on to the next main issue which
11 concerns the effect of the words "those bearing the greatest
12 responsibility in the Statute of the Court". This is dealt with
13 in the Kondewa brief at pages 16 and 17; the suggestion appearing
14 to be that if it is not proved beyond a reasonable doubt that the
15 accused was one of those bearing the greatest responsibility, no
16 conviction can be entered. The way it has been put by the
17 Defence, I understand, is that it is a material element of the
18 crime, of all crimes within our jurisdiction, that an accused
19 must be one of those bearing the greatest responsibility.
20 In our submission that is not the effect of those words and
21 I think that is plain, if one looks at the reason why those words
22 were inserted into our Statute.
23 At the ICTY and the ICTR those words do not appear in the
24 relevant Statutes. As a result, the persons indicted by those
25 tribunals have included persons ranging from Heads of State, like
26 Slobodan Milosevic, down to ordinary foot soldiers or guards in
27 detention camps, and those who were responsible for the creation
28 of the Special Court clearly intended that the Special Court's
29 mission would be much more focused and it was, therefore, decided

1 to adopt a provision which directed the Court to concentrate on
2 those bearing the greatest responsibility.
3 But it is clear that the decision as to who falls within
4 that category is one that necessarily falls to be made at the
5 time that an indictment is issued. The way the procedures of the
6 Court work is that the Prosecutor goes and investigates and is
7 then required to make a decision based on all of the evidence
8 that the Prosecution has collected in the course of its
9 investigations up to that point in time, who in the Prosecutor's
10 reasoned, professional judgment does the evidence point to as
11 being those bearing the greatest responsibility?
12 We submit that it is obvious that that is a question that
13 necessarily requires a degree of judgment and it is not to say
14 that every professional, reasonable mind would necessarily come
15 to the same conclusion. But we submit that it would be an absurd
16 result if the Prosecutor, having exercised that discretion in a
17 professional and possible manner, brought an indictment if a
18 trial was conducted and if, at the end of the trial, the Trial
19 Chamber was satisfied that it had been proven beyond a reasonable
20 doubt that the accused had committed very serious violations of
21 international humanitarian law, falling within our Statute, but
22 nonetheless after the lengthy trial the person had to be
23 acquitted on the grounds that he was not one of those bearing the
24 greatest responsibility.
25 We submit this provision clearly is one that confers a
26 discretion on the Prosecutor. It may be that it is reviewable on
27 grounds of abuse of discretion. For instance, if an indictment
28 were brought against an extremely low level perpetrator who had
29 clearly committed, perhaps a crime within our jurisdiction, but

1 one that just pales into insignificance compared to what is known
2 about the scale of events, that person might plead, perhaps
3 ideally in a preliminary motion by way of raising issues at the
4 earliest possible opportunity, and say: "No reasonable
5 Prosecutor could consider me one of those bearing the greatest
6 responsibility, this is an unreasonable exercise of discretion,
7 it is an abuse of discretion and proceedings against me should be
8 stopped." But it is my submission that the question of those
9 bearing greatest responsibilities is not a material element that
10 needs to be established at the end of trial and certainly not one
11 that needs to be proved beyond a reasonable doubt.
12 In any event, I would add that it is difficult to see how
13 the Trial Chamber could ever determine whether or not an accused
14 was one of those bearing the greatest responsibility, if that
15 kind of proof beyond a reasonable were required, since it
16 necessarily involves comparison with other persons, and unless
17 all other potential persons falling within that category were
18 tried by this Court, and all of the evidence against all of them
19 were heard and considered in the same judicial way as in this
20 case, it would be impossible to draw that kind of meaningful
21 comparison. And the suggestion that this is a matter to be
22 determined at the end of trial, in our submission, is one that
23 would simply be unworkable.
24 The next main heading that I propose to address concerns
25 the relevance of evidence of acts occurring outside the temporal
26 or geographic scope of the indictment. That is dealt with by the
27 Norman brief at paragraphs 140 to 141, and the Kondewa brief at
28 pages 13 to 15.
29 It is said in the Norman brief, for instance: "The Trial

1 Chamber can only review evidence that falls within the relevant
2 time frame of the indictment." Now, if this is intended to
3 suggest that the Trial Chamber can't look at any evidence
4 relating to acts or conduct outside the time frame of the
5 indictment, for any purpose, then in our submission that is
6 wrong. Again, if I give a simple analogy from a national legal
7 system: Suppose that it is alleged that the accused murdered the
8 victim on a specified day. Now, clearly, it is possible to look
9 at evidence of acts or conduct occurring before or after that
10 day. We could hear evidence that three weeks beforehand the
11 victim cheated the accused out of a large amount of money. It
12 may be that two weeks before we have evidence that he purchased a
13 gun. It may be that two weeks afterwards we have evidence that
14 the body of the victim was found buried in his backyard.
15 Now, this is all evidence relating to matters occurring
16 before or after the date specified for the crime in the
17 indictment, but it is clearly relevant and probative of issues in
18 the case and these events occurring before or after, typically,
19 would not be pleaded in the indictment. They would be disclosed
20 to the Defence as part of disclosure but would not be necessary
21 to plead them in the indictment.
22 So we clearly accept that the Trial Chamber is only called
23 upon to consider the crimes that are charged in the indictment.
24 But evidence of matters occurring before the relevant time
25 frames, or after the relevant time frames, or outside the
26 specified geographic area, may be relevant and probative of
27 issues that are contained in the indictment. If there is
28 evidence that very shortly before the time period specified in
29 the indictment the accused exercised superior authority, and

1 there is evidence that very shortly after the specified time
2 frame he exercised superior authority. Clearly, that evidence is
3 probative of the question whether he exercised, whether he
4 exercised superior authority during the time material to the
5 indictment.
6 Similarly, evidence of things occurring before or after the
7 specified time frames may go to issues such as the existence of
8 an armed conflict, the existence of a widespread or systematic
9 attack against a civilian population and so forth. And so I come
10 back again to our basic point: The Trial Chamber is only called
11 upon to decide what is charged in the indictment but, in so
12 doing, it looks at all of the evidence in the case considered as
13 a whole.
14 Our second argument that arises in this context would
15 appear to be, if I understand the Defence arrangements correctly,
16 that an accused cannot be convicted of a crime unless it is
17 proved beyond a reasonable doubt that the crime did, in fact,
18 occur within the time frame specified in the indictment. In
19 other words, the suggestion is that the time frame mentioned in
20 the indictment becomes a material element of the crime which must
21 be proved beyond a reasonable doubt. Again, we submit that that
22 is incorrect.
23 If an accused is responsible for murders committed in an
24 attack on a village, then the accused is criminally responsible
25 for that act, regardless of when it occurred. The reason for
26 specifying dates in an indictment is not because they're material
27 to criminal liability but is to give notice to the Defence, so
28 that it is able to prepare its case.
29 And, of course, it's not always possible to specify exactly

1 what the relevant dates were, especially when dealing with events
2 on the scale of the ones we are dealing with and given the
3 turmoil and upheaval in which they happened. And precisely
4 because of that, we do find language in the indictment that
5 speaks about on or about a certain date, or in or about a certain
6 month, and gives time frames.
7 We submit that the approach to be followed in this is one
8 that has been set out in Archbold. I refer to the 2002 edition
9 and as I say I will provide the reference. It refers to the so-
10 called Dossi principle, D-O-S-S-I, coming from the case Queen v.
11 Dossi, 13 Criminal Appeal Reports, page 158. Dossi said that
12 this was a rule that has existed since time in memorial, and the
13 rule, as stated by Archbold, is that a date specified in an
14 indictment is not a material matter unless it is an essential
15 part of the alleged offence. The defendant may be convicted,
16 although the jury finds that the offence was committed on a date
17 other than that specified in the indictment. However, the
18 Prosecution should not be allowed to depart from an allegation
19 that an offence was committed on a particular day in reliance on
20 in the principle in Dossi, if there is a risk that the defendant
21 has been misled as to the allegation he has to answer, or that he
22 would be prejudiced in having to answer a less specific
23 allegation.
24 So, in our submission, this reaffirms that the reason for
25 specifying dates in an indictment is to give notice to the
26 accused, and if the evidence shows that the dates may be other
27 than those specified, the question is whether this would cause
28 prejudice to the accused, whether the accused was misled as to
29 the nature of the case which the accused was called upon to

1 answer.
2 Our submission is that if the indictment says the accused
3 is guilty of an attack on this village that occurred at a certain
4 time, and it turns out the attack was a slightly different date,
5 it might be the accused is not prejudiced by that in any way. It
6 may be the accused, when preparing the defence, interviews
7 witnesses in that village, asks about an attack occurring in that
8 village, witnesses say, "Yes, we remember that. It was on a
9 different date but yes, we remember that." Prejudice would need
10 to be shown. And it would have to be shown that it would be
11 unfair to take into account evidence of matters occurring so far
12 outside that time frame because the accused has been misled. And
13 whether it is unfair or not, whether it has caused prejudice or
14 not, would include considerations of such matters as how far
15 outside that time frame the evidence put matters. And, again,
16 because this is not a material element of the crime, it means it
17 does not matter that different witnesses don't agree on the time
18 frame. If there are several witnesses who put the crime inside
19 the time frame alleged in the indictment, and other witnesses
20 say, "well, we don't remember exactly," or, "we're not sure," or,
21 "we think it was some time in the rainy season," because it is a
22 not a material element, it is not possible to argue that the
23 accused must be acquitted on this crime because there is a
24 reasonable doubt as to whether it occurred inside the specified
25 time period. It is not a material element. It doesn't have to
26 be proved beyond a reasonable doubt.
27 The date is specified to give notice. If witnesses, some
28 witnesses come and put it in that time frame that indicates why
29 that time period was given in the indictment. If some other

1 witnesses are unsure, or put it at a slightly different time, we
2 submit that is immaterial, unless it shows that the Defence was
3 so prejudiced, so misled that it was not effectively on notice as
4 to the case it had to answer.
5 Now, the Dossi principle has been recognised in the case
6 law of International Criminal Tribunals. I can provide those
7 references in the list of the authorities that I indicated I
8 would provide after this hearing.
9 PRESIDING JUDGE: I hate to intervene but I just think it
10 would be fair to you to remind you that you have about 50 more
11 minutes left out of the allotted time.
12 MR STAKER: Yes, Your Honour. We have had some
13 questioning. It may be that we will be exceeding our estimate
14 slightly, which of course is an estimate. The remaining issues
15 can be dealt with fairly briefly. One is an argument that the
16 indictment was not properly served; that is found in paragraph 7
17 of the Norman brief, paragraph 16 of the Kondewa brief. Again,
18 our submission is that has now been settled by a decision of this
19 Trial Chamber and the Appeals Chamber. There is no occasion for
20 reopening it.
21 There is some suggestion in the Norman brief that because
22 of a delay in the giving of the Appeals Chamber decision on this,
23 he declined to attend proceedings here for some months. There
24 seems to be some suggestion that may have prejudiced him in some
25 way. In our submission decisions of the Trial Chamber must be
26 respected, unless and until they're overturned on appeal, and
27 that by boycotting proceedings one cannot claim prejudice
28 afterwards.
29 Another argument found in the Kondewa brief at pages 15,

1 72, 77, 78 and 80, is an argument that there are no agreed
2 elements of certain crimes; that there is no established case law
3 on what the elements of those crimes are; and that it would,
4 therefore, violate the principle of, if I am permitted to use
5 Latin in this Courtroom, Your Honour, it would violate the
6 principle of nullum crimen sine lege to convict a person of those
7 crimes given the absence of established legal authority on their
8 content.
9 This is an argument that has been rejected, again in the
10 case law of international criminal tribunals, again, I will
11 provide references in the notice that we hand up. I think for
12 present purposes it is sufficient, though, to refer to a
13 judgment, a decision of our own Appeals Chamber that was given in
14 this very case, was the decision on the preliminary motion
15 relating to the child soldiers issue. And at paragraph 25 of
16 that decision this issue was mentioned, other case laws referred
17 to, and it was said that in interpreting the principle of nullum
18 crimen sine lege it is critical to determine whether the
19 underlying conduct at the time of its commission was punishable.
20 The emphasis on conduct rather than the specific description of
21 the offence, in substantive criminal law, is of primary
22 relevance. In other words, it must be foreseeable and accessible
23 to a possible perpetrator that his concrete conduct was
24 punishable. So the issue is not whether precise legal elements
25 are foreseeable but whether an accused, in that position at that
26 time, could say, well, I should realise that if I do this I will
27 be violating the law. And if we are talking about, or the trial,
28 the Appeals Chamber already found that that was satisfied in the
29 case of recruitment of child soldiers, in the case of other

1 crimes such as burnings, lootings and so forth, we submit that it
2 is incontestable.
3 A further issue we wish to address which was raised in the
4 Norman brief, at paragraphs 94 to 97, relates to a complaint that
5 paragraph 27 of the indictment charges certain instances of the
6 destruction and burning of civilian property as pillage and it is
7 argued that destruction and burning doesn't fall within the crime
8 of pillage. This is dealt with in paragraphs 137 to 140 of the
9 Prosecution brief, so I needn't repeat those arguments at length.
10 But all I would add is that, in my submission, the answer to this
11 question is quite obvious if one again adopts the commonsense
12 approach of looking at the value that the law against pillage is
13 intended to protect.
14 International humanitarian law exists for the protection of
15 victims such as civilians, persons taking no part in the conduct
16 of hostilities. The law exists to protect their person, their
17 human rights, their property. The law against pillage exists to
18 protect their property from losses caused by the ravages of war.
19 From the point of view of the victim, it makes no
20 difference whether they lose their property, because a combatant
21 has taken them away for the combatant's own profit and use, or
22 whether the victim has lost the property because the combatant
23 has simply destroyed them. We would submit it's an absurd
24 submission to say that it's okay to say soldiers can go around
25 destroying civilian property, it only becomes pillage once they
26 actually take it away for their own benefit and use. That's
27 looking at the issue from the point of view of the perpetrator
28 and not from the point of view of the victim.
29 The final issue which I propose to address is an argument

1 found in the Fofana brief at paragraphs 225 to 234. In
2 particular, paragraph 227 of the Fofana brief makes the statement
3 that the joint criminal enterprise liability, in all cases, it
4 must be shown that the accused, as well as the physical
5 perpetrator of the crime, were both parties of the agreement to
6 commit criminal activity. Again, we submit that that is
7 incorrect. We think it's obvious, if one thinks about cases
8 involving very high level leadership -- I referred earlier to the
9 case of Nazi Germany, we can think of a case even from the
10 Yugoslavia Tribunal involving President Milosevic, although, of
11 course, no verdict was ever reached in that case, but to take the
12 Nazi German example, was it necessary to establish joint criminal
13 enterprise liability on the part of the top-level German
14 leadership to show that they were parties to an agreement with
15 the individual soldiers in all of the different concentration
16 camps spread across the continent? We submit the answer is
17 clearly no. If the answer were yes, what would the result be?
18 It would mean that a guard in one prison camp would be part of
19 the joint criminal enterprise and therefore would be guilty of
20 every crime under international law committed anywhere on the
21 continent during the entire war. Of course the guard might be
22 guilty of crimes under international law for what the guard does
23 inside that camp, but it would be artificial to say that each of
24 those individual guards is a member of the same joint criminal
25 enterprise, in agreement together with the top leadership of the
26 country, and to say that you could never convict anyone on joint
27 criminal enterprise liability unless you could show an express
28 agreement between the top-level leadership and every one of the
29 thousands or tens of thousands of individual physical

1 perpetrators.
2 To give another example along those lines: Suppose the
3 joint criminal enterprise consisted merely of inciting others to
4 commit crimes. Suppose the top-level leadership got together and
5 said, "We are going to incite one ethnic group in this country to
6 commit genocide against another group in this country." That's
7 not a fantastic scenario. I think it will sound quite familiar.
8 Is it to be said there can be no joint criminal enterprise
9 amongst those who instigated this genocide unless you can show
10 they were party to an agreement individually with each one of the
11 individual physical perpetrators. We submit that cannot be the
12 case, and we submit that that position is supported by case law
13 of the international criminal tribunals. Again, I won't use more
14 time by reading out the references. We will include those in our
15 lists subsequently.
16 So at this stage, unless I can assist the Bench further --
17 sorry, before I conclude, I simply would like to answer a
18 question that was posed earlier by Your Honour Justice Boutet.
19 I'm reminded that in the indictment, at times, the Prosecution
20 has elected to nominate some but not all of the modes of
21 liability cited within Article 6, paragraph 1. For instance, we
22 have not always alleged planning against all accused. So, of
23 course, the Prosecution is bound by what is specifically pleaded
24 in the indictment. So, of course, it would be the case that even
25 if the evidence did satisfy other modes that weren't pleaded that
26 the Trial Chamber would not be called upon, of course, to decide
27 those.
28 So, at that point, unless I can assist the Chamber further,
29 I would invite the Chamber to call upon my colleague, Mr Tavener,

1 to address the factual aspects of the Defence brief.
2 PRESIDING JUDGE: We will do that after a short break.
3 [Break taken at 12.05 p.m.]
4 [Upon resuming at 12.25 p.m.]
5 PRESIDING JUDGE: The Prosecution will continue.
6 MR TAVENER: Thank you, Your Honour. Before I commence I
7 will mention I will be approximately an hour, maybe a bit more.
8 I am in Your Honours' hands whether you wish me to go --
9 PRESIDING JUDGE: We will certainly take the lunch break at
10 1.00.
11 MR TAVENER: Thank you, Your Honour. In terms of the
12 submission, Your Honour, I take note of the fact that Your
13 Honours have had the opportunity to read the written submissions,
14 in particular the written submissions of the Prosecution which
15 address in some detail the matters that have arisen out of the
16 evidence. In particular, it summarises with footnotes and the
17 like the evidence of individual witnesses. So in making my
18 presentation now, I'm seeking to assist the Court in arriving at
19 a proper verdict. The Prosecution, therefore, in this submission
20 relies upon what has already been put before you in writing and
21 we adopt those written submissions.
22 What I seek to do is cover the evidentiary basis upon which
23 the charges have been established and also to address issues
24 raised by the Defence counsel, in their written submissions.
25 In saying that there is some degree of commonality in the
26 submissions of Defence counsel, so I won't necessarily initially
27 breakdown the responses between counsel. I will stick to general
28 submissions.
29 As a starting point, and as has already been said, it's

1 admitted that upon a review of the evidence, the trial counsel
2 can be satisfied the individual offences have occurred. That is,
3 there is evidence against on each of the counts and there is
4 evidence against even of the accused men. As I am addressing
5 Your Honour, I may only speak about unlawful killings, but I am
6 doing that as a form of brevity rather than repeating all the
7 offences on the indictment. We say that the evidence that
8 relates to killings often, in particular when looking at the
9 modes of liability, applies across all the counts. So the main
10 issue I wish to speak about is how the accused men acquired
11 criminal responsibility for those offences.
12 One of the ways in which this was queried by the Defence
13 submissions was whether or not a nexus has been established
14 between the offences and the accused men. We say the nexus, the
15 criminal responsibility comes from the words and the acts of the
16 accused. As has already been addressed, it may well be the case,
17 and it certainly may be in some instances, the Prosecution cannot
18 identify the individual combatant, the individual Kamajor, the
19 individual member of the CDF who killed a civilian -- perhaps who
20 killed a civilian while standing in a field at Tongo. The
21 Prosecution is not in a position to identify that individual
22 Kamajor.
23 At the same time, the Prosecution cannot -- because we
24 cannot identify that individual Kamajor, we were never in a
25 position to say that Kamajor received a direct order from someone
26 to do that killing, and that has been addressed and the analogy
27 of the concentration camp guard has already been used this
28 morning.
29 What we do say, however, is that Kamajor who killed a

1 civilian on a field in Tongo, near the national diamond mining
2 company headquarters, for instance, just to use an example, the
3 Kamajor who did that, did that because of the framework
4 established by the three accused men in which that particular
5 Kamajor could kill in that manner, in the open, without any
6 concern about retribution or punishment. He was simply following
7 the framework that had been established by the three accused men.
8 In our submission, we say that the Kamajors under the
9 general orders of the three accused men. Those orders having
10 been given and then passed down by various means to those
11 Kamajors, those combatants at the front line. In this case at
12 Tongo.
13 In establishing that issue beyond a reasonable doubt, the
14 Prosecution relies upon a combination of direct evidence: It
15 relies upon the pattern of the events and that has been spoken
16 about, and it relies upon the drawing of inferences upon proven
17 facts.
18 At the same time, and I will go into this in more detail,
19 the three men -- that is, the three accused were clearly in a
20 superior position. They were in control of the CDF. There was
21 no one else at that level. There was no other candidates for the
22 position of control of the CDF.
23 The Kamajor who killed civilians at Tongo was not alone.
24 He was part of an organised military group. Prior to the
25 conflict occurring, he may well have been a farmer. He may well
26 have been a diamond miner. He may well have been a hunter, a
27 traditional Kamajor.
28 The question for Your Honours, and we say the Prosecution
29 case has answered this, the question for the Court is: How did

1 that farmer become a killer? How could he kill someone while
2 standing on a field watched by people, a large crowd of people at
3 Tongo.
4 He did so, we would say, when one looks at the evidence, by
5 following the orders and instructions of his leaders, and they
6 are the three accused men. Now certainly, as has been
7 acknowledged, it's accepted in war that killings occur. There
8 may well be, to use the euphemistic phrase, some collateral
9 damage. In this conflict, however, under the control of the
10 three accused men, the Kamajors committed the offences on the
11 indictment because Norman and his two deputies, that is Kondewa
12 and Fofana, conducted a total war, a war which was to be won at
13 all costs.
14 That, as it has been mentioned, was the option chosen by
15 the three accused men and that is what was instigated -- sorry,
16 that is what was executed by members of the CDF.
17 I appreciate that Mr Fofanah formally held the title of
18 deputy, or certainly acted in the position of deputy.
19 Mr Kondewa, not so. He was the High Priest, but for the purposes
20 of the submission, we would say they were, in effect, deputies,
21 whatever their individual titles were.
22 There were members of the CDF who did not follow the orders
23 that inevitably led to these war crimes, but sufficient numbers
24 of the CDF did, in fact, follow those orders, and that is
25 demonstrated by the evidence Your Honours have heard over several
26 years.
27 There was no one within the CDF movement who could stop
28 those acts, could stop the Kamajors from committing the acts we
29 say amount to the crimes listed on the indictment. As I've said,

1 perhaps the only group or body of people who could have prevented
2 these acts from occurring were the paramount chiefs - I will go
3 into that in further detail - but they were marginalised and were
4 ineffective, and we've heard evidence about that. It was not the
5 situation, as is raised in a number of the Defence submissions,
6 that rogue Kamajors committed these acts. One only has to look
7 at the breadth of the crime bases to see that it was not rogue
8 Kamajors all over the eastern part -- sorry, the western --
9 eastern part of Sierra Leone and the south-eastern part of Sierra
10 Leone. In particular, was not full of rogue Kamajors
11 committing --
12 THE INTERPRETER: Your Honours, could counsel reduce his
13 speed for the purposes of interpretation, please.
14 PRESIDING JUDGE: Counsel take that advice.
15 MR TAVENER: Thank you. I was waiting for that familiar
16 advice. Thank you.
17 We say that when you look at the breadth of the offences
18 being occurred, when you look at the manner in which they
19 occurred, and I refer back to the example of Tongo Fields, people
20 being killed in public, no attempt to disguise what was going on,
21 no attempt to camouflage their face. People being killed by
22 Kamajors in that way. The only inference one can draw is that
23 the Kamajors were committing acts which were within the framework
24 created by the three accused men. And one can see that picture
25 replicated both on the local level and when one pulls back, one
26 can see it across Sierra Leone. That is, and as I will discuss,
27 individual witnesses saw particular offences. That's all they
28 knew about. They had very little connection with anyone else.
29 They saw and spoke about what happened to them, and we saw those

1 witnesses in Court. However, we can also look -- draw back and
2 look down from above and see those type of offences occurring
3 across Sierra Leone, and it cannot be said as a matter of logic
4 and as a matter of evidence that they were committed by rogue
5 Kamajors.
6 The Prosecution maintains that at all times the CDF or the
7 Kamajors, and I won't discuss the difference because I am sure we
8 are all aware of the Kamajors being a substantial part of the CDF
9 and the nature of the Civilian Defence Force, but at all times
10 the CDF or the Kamajors were under the control of the three
11 accused persons; Norman, Fofana and Kondewa were at the very
12 heart of the organisation. As a witness said, TF2-008, Norman,
13 Fofana and Kondewa had the executive power of the Kamajor
14 society. These people, nobody can take a decision in the absence
15 of this group. Whatever happened, they came together because
16 they are the leaders, and the Kamajors look up to them.
17 As I've mentioned the CDF, and the major component being
18 the Kamajors, was an organised fighting body, and I will come to
19 why that is so. They were fighting, and this mantra was often
20 cited in court and repeated quite often, they were fighting for
21 the return of the Kabbah government, the return of the
22 constitutional government, but that doesn't justify the manner in
23 which they conducted the war. It appeared to be put forward as a
24 form of justification; clearly it is not.
25 There were options available as to how a war is conducted
26 and, indeed, how this war could have been conducted. The three
27 men at the top of the CDF chain, of the organisation, chose to
28 create an ordered framework, a system of instructions and rules,
29 such that the competence, for example, as I've said, kill

1 civilians, burn houses, loot, and they could use child soldiers,
2 and they could do that openly, they could do it across Sierra
3 Leone.
4 The war could have been fought in such a way by the CDF
5 that criminal offences would not have been committed. There was
6 no need, I suggest, to adopt the policy of total war; win at all
7 costs. But that is what the three accused men did, they
8 implemented that policy, it was carried out by the Kamajors.
9 I think it was Mr Penfold who said that they were fighting
10 fire with fire. Again, that's not a justification. They
11 certainly achieved that result, however. They certainly did
12 fight fire with fire. To the villager facing someone with a
13 machete, and we heard from the witness who stood in a queue
14 whilst waiting for his neck to be chopped, and we saw that
15 witness with the scar on the back of his neck. To that
16 particular witness, for instance, it did not matter whether the
17 person wielding the machete was a rebel or someone fighting for
18 the return of the constitutional government, and that is the
19 position. It is accepted the rebels used and committed many
20 offences. However, that does not justify, and particularly from
21 the villager's point of view, it doesn't matter whether it was a
22 rebel or a person fighting for the return of the constitutional
23 government. To return to that issue, the nexus between each of
24 the accused men and the crimes committed is established by their
25 acts and their words, which I will come onto.
26 In arriving at actual verdicts, the trial Court, I submit,
27 will apply your combined knowledge and experience. The Court has
28 heard from many witnesses, and also a large number of documents.
29 I suggest the witnesses who testified about crimes, they did so

1 without guile, they did so without vindictiveness. To an
2 objective observer, I may not be the one, but to an objective
3 observer I would suggest that these people, the witnesses simply
4 related the story about how particular events impacted upon their
5 life. Quite often, and perhaps in national jurisdictions,
6 witnesses testify and they bring along with them a baggage of
7 bias, a baggage of -- they may misstate what they said, they may
8 exaggerate, they may guild in some way.
9 The Prosecution's submission is when one looks at the
10 witnesses who testified about the crimes inflicted upon them,
11 they did so in a way that gave them great credibility, I submit.
12 They appeared not to be motivated, I suggest, by revenge or a
13 need to somehow get even with anyone, and that's why the
14 Prosecution places, and suggests this Court can as well, places a
15 great deal of weight on what those witnesses told the Court.
16 It's not an easy matter to testify about such events, but they
17 did so, I would suggest, with dignity.
18 However, the Court has an advantage over the witnesses
19 you've heard, and that is you've seen and heard stories from
20 across the range of events that occurred in Sierra Leone. As
21 I've mentioned, you've heard witnesses speak about individual
22 events which occurred to them at the village level. You've also
23 heard experts talk about the global view, whether or not the
24 Kamajors was an organised fighting force. So Your Honours are in
25 a far better position than most witnesses were, because you will
26 have had the opportunity of seeing this story from a variety of
27 angles.
28 You also heard from a number of Defence witnesses who came
29 along and said, "I know nothing," or "I saw nothing." It's a

1 false logic, I would suggest, to say because a witness came along
2 and said this didn't happen or I didn't know about it, does not
3 mean it did not happen. I think all you can say about such a
4 witness is they didn't know anything about that particular
5 matter.
6 As I've mentioned, the witnesses who spoke about the crimes
7 did so with dignity and I suggest also they were, in some ways,
8 because of their lack of bias, their lack of guile, they acted
9 like cameras; they simply repeated or told you what had happened
10 to them. I contrast that with Defence witnesses who were more
11 often than not concerned Kamajors who came along to testify for
12 their former comrades. Again, that is simply an issue to take
13 into account when assessing weight placed on individual
14 testimony. It's not my intention to go through and argue about
15 whether one should believe this witness or another witness, but I
16 suggest to you, the witnesses who came along on behalf of the
17 Prosecution and spoke did so with a great deal of credibility and
18 reliability. They were not, as I mentioned, concerned Kamajors;
19 they did not take sides. They were not rebels, they were not
20 Kamajors. They were just, in many ways, unfortunate to be in a
21 particular place at a particular time.
22 As I've mentioned, we heard from people who were at Base
23 Zero, we heard from insiders. We heard from witnesses who had no
24 connection with anyone else, but they repeated and the pattern
25 became quite obvious after a while. These offences occurred over
26 Sierra Leone, in particular, the eastern and south-eastern areas.
27 So that pattern then becomes very important, I'd suggest or
28 submit, when considering what weight to place on individual
29 witness's testimony. And when one does that, there is a

1 consistency throughout. There is a consistency of reporting to
2 the Court as to what happened.
3 As I mentioned, the Prosecution submits that all the
4 offences on the indictment have been made out. They have been
5 put threw, as has already been mentioned, a filter of the Rule 98
6 process, and I'd submit that the evidence produced by the Defence
7 counsel in their portion of the trial did not have a significant
8 impact on the considerations of whether or not those offences
9 took place.
10 Now, obviously the Court has not yet considered the weight
11 and reliability to be attached to the evidence, but in the
12 Prosecution's submission, when that exercise is completed, you
13 will be satisfied that each of those events took place. When one
14 looks at, as I've said, what was raised by Defence, to a large
15 extent, I would submit, the crime bases were not weakened in
16 anyway. Nothing significant has changed in those terms since the
17 Rule 98 exercise.
18 An issue raised by Defence counsel, and certainly one for
19 consideration by the Court, is how to determine which witness to
20 accept or believe. One must not simply look at that witness, as
21 has already been mentioned this morning, in a vacuum. The
22 evidence can be tested about what other witnesses said and also
23 by Your Honours' application of your combined knowledge and
24 experience.
25 For example, MT Collier testified for some extensive period
26 of time about the nature of Kamajors and, in particular, their
27 behaviour at Base Zero, and what he knew about it. But,
28 ultimately, from memory, his last words about what he knew about
29 Kamajors was that they ate rice and went away. You then look at

1 his evidence in terms of his final comment. I'd suggest a person
2 such as MT Collier is indeed raised by Defence counsel as someone
3 upon whom you can place some weight. His final words, departing
4 words to the Court are such that you would not place any weight
5 on his evidence.
6 So those are the types of issues you look at, whether or
7 not, one --
8 JUDGE ITOE: What are these his parting words? Can you
9 rephrase?
10 MR TAVENER: His parting words, from memory, Your Honour,
11 were the Kamajors -- "they came, they ate rice, and they left."
12 I may be paraphrasing. I'm sure my friends will pick me up if I
13 am. It was they came, they ate rice, they left.
14 JUDGE ITOE: Thank you.
15 MR TAVENER: It's not only what the witness said, how he
16 says it, but also in a trial such as this where there has been
17 such a voluminous amount of evidence, you look at whether or not
18 it's consistent with other witnesses. One should be satisfied as
19 to their credibility and reliability, and that's the process, I
20 suggest, the Court is obliged to do.
21 There is an annexure provided which indicates which
22 witnesses deal with various crime bases. There are a number of
23 crimes bases, as are indicated on the document, that were not
24 challenged. So, in our submission, having put forward the
25 evidence to the level of the Rule 98, having observed and taken
26 note of the Defence witnesses called during their part of the
27 trial, we would say the crime bases have been established.
28 Having said that, the next issue is the offences occurred.
29 Without -- as I say, I'm not going to refer to all the detail

1 that has been compiled and submitted. Having established, we
2 would say, the offences have been committed, the question is:
3 Why did they occur and, later on, how did they occur.
4 Going briefly over the background of the Kamajors, they
5 were originally hunters and, it's accepted, at one time they
6 assisted the Sierra Leone Army as scouts. They had a history,
7 they had rules, they had traditions, they were controlled by
8 their chiefs. The war changed that position as, indeed, the war
9 changed many matters. It had a significant impact on prevailing
10 social structures and people committed offences they otherwise
11 would not have committed; that is, matters were changed so much
12 that the person who was a farmer, a few months later, is killing
13 someone in Tongo. Again, it is accepted that the Kamajors who
14 fought within the CDF contained some of the original elements,
15 some of the people who were once hunters prior to the war. By a
16 process established by the three accused men, the Kamajors
17 changed into a military organisation, capable of conducting
18 offensive operations against an equally organised rebel force
19 and, indeed, ultimately overcoming that force.
20 There was no offence on the indictment committed by way of
21 that process. What was done, and this is a matter of evidence,
22 was the introduction of new secret societies by the High Priest.
23 Certain rituals, which included giving a person a belief in being
24 bulletproof, indeed, as we heard, many witnesses still held that
25 belief. Those factors shifted the social structure; it shifted
26 the loyalty and competence away from their chiefs to Mr Norman,
27 Fofana and Kondewa.
28 So the Kamajors, and this is a matter quite often raised by
29 Defence and relied upon, the Kamajors were not the Kamajors who

1 were hunters, were not the Kamajors who may well have been
2 scouts. They were included in the final or in the final group
3 that was involved in overcoming the rebels, but these were no
4 longer persons screened by their chiefs. They were no longer
5 people whose first loyalty was to their chiefs, it was to the
6 three accused men, and all that changed due to the exigencies of
7 the war.
8 Now, in order for the Kamajors to become a successful
9 fighting force, there had to be such changes. The Kamajors of
10 old, the hunters, the scouts, were not in a position to take on
11 an organised fighting force such as the rebels. Again, no
12 offence has been committed at that stage. There is a need to
13 change the nature of the competence or the fighting people you
14 have under your control, and that's what the three men went about
15 doing. Norman applied his military training and experiences; he
16 used the resources available to him. Ultimately, the three men
17 were in absolute control. No one did or could challenge their
18 leadership. Again, up until that stage, there is no offence
19 being committed.
20 If indeed the Kamajors were still operating under the old
21 regime, then the War Council would have had more impact. The War
22 Council, the collection of chief and others, would have had a
23 greater degree of control over what was happening in the war. As
24 it turned out, we've heard from witnesses who spoke about the War
25 Council, it did not have any control over the war. It lasted for
26 a relatively short period of time. It wasn't consisting of
27 military men. It met once in Kenema after the Kamajors came out
28 of the bush. That was it. It was a very ineffectual body at the
29 most. At its highest, it simply provided some advice to Chief

1 Norman. So that in itself indicates the changing of the
2 structure.
3 The fact that the War Council did not and could not run the
4 war is yet another demonstration of how the Kamajors involved in
5 the fighting against the rebels, particularly in late 1997/1998,
6 had changed. Some issue was raised, at times, people were
7 initiated without being required to fight, particularly older
8 people. That is of no great significance. In order to fight,
9 however, one was made bulletproof. The metamorphosis of the
10 Kamajors, indeed the CDF, was achieved in a fairly short time by
11 the force of Norman's personality and his status as deputy
12 defence minister and national coordinator. It was also achieved
13 through the arcane and sometimes violent practices of Kondewa,
14 and is achieved through the unquestioned support and loyalty of
15 Fofana. The model of the village of Talia is behind us. I don't
16 wish to refer to it in any great extent but these men, those
17 three men, the three accused lived and worked and directed the
18 activities of the CDF in a very small area. The village is quite
19 small in Talia. One can see on the model the barri, a number of
20 houses around the barri, that is where the three men lived. It
21 was a very small collection. Three men ran the CDF. There were
22 other people I will speak about, who assisted them, given various
23 titles, but those three men were the core of the CDF. They gave
24 the orders. They set the framework under which the combatants
25 operated. They set the standard. Win at all costs.
26 Certainly the CDF, as an offensive organisation, was not
27 flawless but one can see from all the evidence it was directed
28 from Base Zero. That was the centre point of the CDF. That is
29 where the combatants went out from to attack other villages.

1 That is where training occurred. That's where various guns and
2 ammunition came in. Supplies by helicopter and the like.
3 Norman promulgated the orders which was supported by Fofana
4 and had the essential, and it is essential, the essential
5 imprimatur of the high priest. The orders were then disseminated
6 throughout the area in which operations were being conducted.
7 That communication was by a number of means including runners,
8 men on motor bikes and the like. The odd radio.
9 So if we stop there, the accused men, the three accused men
10 have achieved an impressive outcome. They have moulded a
11 fighting force from a disparate group of people who, because of
12 their belief in being bulletproof in the early stages in
13 particular, were willing to attack armed men with guns when they
14 themselves were only armed with machetes and sticks and the like.
15 So at that stage that is what the three accused men have managed
16 to achieve. And, again, I say though it's hard to distinguish
17 when that achievement was finally finished.
18 However, even at that time, they were included in the ranks
19 of the Kamajors' children under the age of 15 but that's where
20 they could have -- they had the option to conduct a normal war
21 without committing the offences now on the indictment.
22 But the three men chose then to set up a framework, a
23 framework, as I say, of orders to kill anyone who was against
24 them. To kill people who remained in towns held by the rebels.
25 To kill police. To kill police because they continued to
26 function regardless of who was in control of a town, and that is
27 how these offences came into being.
28 The Kamajors, or the combatants, the members of the CDF who
29 were given such orders followed those orders literally. The

1 people to whom the three men gave their orders were very well
2 known to the accused men. They came from the same area. They
3 would be fully aware of the nature of their audience. They gave
4 clear commands: Kill these people. Kill the police. Kill those
5 who have in any way assisted or collaborated with the rebels and,
6 because of the nature of their audience, because of the nature of
7 the organisation they have formed, the loyalty that was owed to
8 them, the respect in which the three men were held, the offences
9 were then committed because the Kamajors executed those orders
10 literally.
11 One only has to look at the consistency of behaviour by the
12 Kamajors in different areas at different times to be satisfied
13 there was a pattern of conduct. And again, and I do repeat this
14 a number of times, the pattern can only be explained by the words
15 "win at all costs." I don't know whether that is a suitable
16 time, Your Honour?
17 PRESIDING JUDGE: We will now recess for lunch and resume
18 at 2.30 p.m.
19 [Luncheon recess taken at 1.00 p.m.]
20 [CDF28NOV06D - SM]
21 [The accused Norman present]
22 [Upon resuming at 2.40 p.m.]
23 PRESIDING JUDGE: Mr Tavener, please continue.
24 MR TAVENER: Thank you, Your Honour. My Lord --
25 PRESIDING JUDGE: Yes.
26 MR JABBI: Just to inform the Court that, indeed, the first
27 accused is now with us in court which was not the situation
28 earlier. And he tells me that he has an explanation to make to
29 the Court.

1 PRESIDING JUDGE: Well, we can dispense with that in
2 case -- I would just, my preference would be, and I am pretty
3 sure that would be the preference of my colleagues, that we let
4 the records reflect that he's here now, and proceed with the
5 closing argument. Is this explanation of very great importance
6 that the Court must hear it?
7 MR JABBI: I believe so, My Lord.
8 PRESIDING JUDGE: And you guarantee that it's going to be
9 extremely brief so that the rhythm of the process is not
10 disturbed?
11 MR JABBI: I have already indicated that to him, My Lord.
12 PRESIDING JUDGE: Very well. On your assurance then --
13 MR JABBI: Thank you very much.
14 PRESIDING JUDGE: -- we will let the first accused give his
15 explanation. Mr Norman?
16 THE ACCUSED NORMAN: Yes, My Lord. My Lords, in the first
17 place I will have to apologise for not being here this morning.
18 It was not my intention nor my wish. The documents presented to
19 you was not written by me. However, I protested to the
20 representative of the chief of detention that from the time the
21 Court went into recess, right up to this date, I had not seen him
22 to express to him my concern over my health which was a concern
23 that was expressed to this Court, and the condition is
24 deteriorating every day right up to today. And it is my fear
25 that after the Court retires to consider its decision, my
26 condition will be neglected even further and worse. That is my
27 reason, My Lords.
28 PRESIDING JUDGE: Thank you, Mr Norman. Counsel? The
29 records will reflect that explanation.

1 MR JABBI: Thank you very much.
2 PRESIDING JUDGE: And I reckon that you will advise your
3 client as to what other remedies are open to him in case he has
4 the serious concern about his health condition. Thank you.
5 Mr Tavener, please continue.
6 MR TAVENER: Thank you, Your Honour.
7 Turning now to the chronology of events and what can be
8 drawn from the evidence about the chronology, that is, the taking
9 of the towns and the manner in which the Kamajors reclaimed
10 sections of Sierra Leone, the Prosecution would say, as a matter
11 of inference and as a matter of direct evidence, that there was
12 clearly a central command unit, however constituted, overseeing
13 the activities of the Kamajors.
14 To put it another way, if there was an objective observer
15 watching over Sierra Leone, that person would see the CDF
16 arriving at the same place, at the same time, in large numbers
17 and attacking and often defeating an armed enemy and we would say
18 then that the only reasonable inference that can be drawn was
19 that there was a central command unit. Combatants did not turn
20 up randomly hoping that other combatants would be there and there
21 with the same goal in mind.
22 Now, that may appear to be stating the obvious, but it's
23 part of addressing the Defence submission that there were rogue
24 elements and that there were no central control simply by looking
25 at the pattern of the attacks, the number of Kamajors involved,
26 the timing and how they came together, that's clearly not the
27 position. You may well, as we did have a witness, a Defence
28 witness for instance, BJ Sei who testified that, according to
29 him, he was significant in the attack on Tongo.

1 However, from Mr Sei's point of view, and this is the
2 danger of listening to one witness without looking at the full
3 perspective, from Mr Sei's point of view, he was the Kamajor in
4 charge. However, we heard from witnesses such as TF2-201 that
5 there were many other commanders involved in the attack on Tongo.
6 It was a co-ordinated attack, and TF2-201, for instance, and this
7 is important, was at Base Zero when the attack on Tongo was
8 planned.
9 So Mr Sei, due to his limited knowledge, his limited
10 understanding, his low, relatively low rank, could well come
11 along to the Court as he did and say: "Well, no, I just planned
12 attacking Tongo by myself." And that is not the case. The case
13 was it was planned at Base Zero; people went out from there;
14 Mr Sei joined in. So that's a relatively important matter, I'd
15 submit, Your Honour, that one has to look carefully at the
16 knowledge of the witnesses, their ability to understand the
17 broader picture and their access to information. And, indeed, we
18 also have Colonel Iron, who was in a position, being a military
19 expert, to look over the evidence, speak to people and give an
20 assessment for the benefit of the Court.
21 As he said, the CDF was sound though they had some tactical
22 difficulties. That's not to say they were unorganised, but they
23 experienced some practical challenges at the war front.
24 Strategically, they were competent, but as one would except with
25 combatants who are not highly trained they had some tactical
26 issues. They may not have been at the standard of a conventional
27 army but they were effective in the circumstances they faced.
28 So, I would say again, logically, and by evidence, that was
29 a central command unit, an organising committee that directed the

1 war and provided the orders by which the CDF carried out their
2 tasks. And again, as to be expected, and as the Defence
3 witnesses demonstrated, not everyone was aware of the source of
4 the particular orders, and that's obviously the same in any
5 organisation. And, as I have mentioned, I will say this very
6 briefly, orders were conveyed from Base Zero by way of radios,
7 runners, motorcycles, nothing unusual in the circumstances, and
8 effective in the circumstances.
9 To call a witness as Defence did, to say a particular
10 accused, say Fofana, did not give me orders does not assist the
11 case. One needs to look at the structure of the organisation.
12 It may well be that Fofana never gave people on the front line
13 orders, but orders were transmitted, and that's simply a matter
14 of logic, a matter of evidence. And we also know that often
15 before Kamajors went to the front, they were addressed in large
16 public meetings on the playing field near Talia.
17 So we are at the stage, I would submit, that there was a
18 central command unit of some sort. It was located at Base Zero.
19 There could be no doubt that it was located at Base Zero because
20 that is where training occurred; that is where people gathered;
21 that is where displaced chiefs went to in order to seek refuge.
22 It was the base. It was a nominated place from which offensive
23 action was to occur. It was where helicopters came bringing guns
24 and ammunition.
25 So the next logical step, I'd suggest, is to look at who
26 formed the central command unit; who was in charge, and then what
27 did they do.
28 There are only two contenders, as I've mentioned, two
29 groups who could have been in charge of the CDF; the War Council

1 or the three accused men. And as I have discussed, it wasn't the
2 War Council. We've heard evidence about that, extensive evidence
3 about that. The War Council did not exist for any great length
4 of time, did not keep extensive records, and they were not
5 military men. So the only other contenders are the three accused
6 men.
7 To this stage I have not spoken directly about the offences
8 but I can, in summary I can say, by a matter of logic and
9 evidence, we can see that Norman, Fofana and Kondewa were the
10 central command unit based at Base Zero organising the CDF which
11 was a military organisation.
12 Another way, as one of the witnesses described this central
13 command unit, is that of the Father, Son, and Holy Ghost. It's
14 simply another way of expressing the closeness by which these
15 three men worked together.
16 The three accused men by, and this is in the respective
17 Defence submissions, would have the Court accept they had no
18 active role. Mr Norman in his evidence would have the Court
19 accept he co-ordinated but did very little else. By co-ordinate,
20 it was certainly unclear as to what he meant by coordinate.
21 Mr Fofana would suggest that he was some form of
22 shopkeeper, and Mr Kondewa would submit to the Court that in
23 effect he merely blessed the combatants, made them bulletproof,
24 and then waved them goodbye as they went to the battle front.
25 It is the Prosecution's submission that they are far too
26 modest. Each of them had a very significant role in the CDF.
27 There was no one else, when one looks at the evidence, no one
28 else who was in control of the CDF.
29 The Kamajors, the CDF indeed, but certainly the Kamajors

1 were comprised of ordinary country people; as I mentioned,
2 farmers and the like. They would not have committed these
3 offences unless the accused men had implemented a policy of win
4 at all costs, had allowed them, had given them the imprimatur to
5 commit offences that are now before you on the indictment.
6 That is not to say the Kamajors who committed these
7 offences are without blame; they are individually responsible for
8 their actions. However, without going over the submissions of
9 this morning, those Kamajors, those individual Kamajors, do not
10 bear the greatest responsibility. That lies with the accused who
11 created and maintained the framework by which such ordinary
12 people could commit such acts and commit such acts at the time
13 with impunity.
14 As I have mentioned, the important part of the
15 Prosecution's submission and, indeed, in our written submission,
16 he is asking the Court to look at the patterns of behaviour to
17 assist the Court assessing witnesses, but also identifying the
18 criminal liability of the accused.
19 We have witnesses describing, or one witness as I
20 mentioned, who stood in the line of civilians waiting to have his
21 head removed by a machete. As I mentioned, he survived. Another
22 person spoke about seeing people killed at a roadblock. There is
23 the example of people being killed at a field at Tongo.
24 Now, the witnesses when they testified were not aware of
25 that pattern, they merely spoke of their own experiences. But I
26 would submit the Court can see that pattern of violence, can see
27 the manner in which it was done, can see that there was no
28 attempt to conceal. It was clearly part of the framework by
29 which the CDF operated, and that framework, those orders came

1 from that central command unit consisting of the three accused
2 men.
3 When the witnesses testified about the crimes committed
4 upon themselves or others, they told, in effect, the same story.
5 They may have forgotten some details, or they may have remembered
6 further details. And those particular examples, they didn't talk
7 about rebels dressing up as Kamajors. They saw Kamajors come in,
8 they saw Kamajors commit offences in the open. That could not
9 have happened, except the Kamajors had the support of their
10 superiors and that went all the way to the top of the chain, to
11 the top of the organisation. It's not the case that rogue
12 Kamajors, in all these crime bases, in the open felt confident
13 enough to commit offences like this. That's simply an affront to
14 common sense.
15 Now, the answer as to why these Kamajors killed and
16 committed offences, the other offences, is to be found in the
17 orders given to them by Norman and his deputies. That is the
18 only reasonable explanation, the only reasonable inference that
19 can be drawn from the evidence, and that is -- that explains why
20 the conduct was so widespread. I will go shortly to the orders
21 that were given, and as been mentioned this morning, and in that
22 way the three accused men attract the three modes of criminal
23 liability.
24 The Court can certainly draw inferences once facts are
25 established to its satisfaction. There might not be evidence of
26 Norman ordering that certain offences occurred or the other
27 accused doing the same; that is, on not every occasion is there
28 evidence of Norman ordering that certain offences occur - I
29 should start that way - and then publically acknowledging these

1 orders as he did in respect of Koribundu, and to a lesser extent
2 in Bo. But when one looks at Norman's behaviour in respect of
3 Koribundu, it does not only apply to Koribundu, in our
4 submission. You have there an example of Norman giving certain
5 orders, then later going to Koribundu, speaking about what his
6 orders were, his disappointment they weren't followed out to the
7 fullest. That is relevant to Koribundu. It is also relevant to
8 the general structure of the CDF and the Kamajors, that Norman
9 was in that position to give such orders to criticise people for
10 not carrying out those orders.
11 In respect of Koribundu, and we say generally, because it's
12 an example of the behaviour, the framework established by the
13 three accused men, Norman wanted civilians killed and houses
14 burned as part of the war, winning at all costs.
15 Now, in this particular trial, the trial we have been
16 involved in for some time, there is a considerable body of
17 evidence about Norman. Norman was clearly the most important
18 person in the CDF, and he tended to dominate those persons around
19 him. At the same time, Fofana and Kondewa did not have the
20 profile of Mr Norman; however, he could not have functioned,
21 could not have achieved what he did without the assistance of the
22 other accused.
23 As noted in the Prosecution's submission, there is a strong
24 commonality of evidence between the accused and the offences. So
25 it's an artificial exercise in seeking to allocate the evidence
26 in a manner that does not recognise intrinsic closeness of the
27 accused, one with the other, and their direction connection to
28 the offences.
29 I merely mention that because Mr Norman was of such a

1 charismatic nature, that most people remembered him, and it may
2 be easy at times to allow the other two to fall off the radar, so
3 to speak, but without their assistance, these events could not
4 have occurred.
5 Mr Norman did not operate the organisation by himself, and
6 that is described by such people as xx xxx and other
7 insiders who described to the Court, reflected in our
8 submissions, the manner by which Base Zero operated.
9 Before I go onto the individuals, I will speak very briefly
10 about a few other matters that were raised by the Defence.
11 Dr Hoffman is relied upon, to some extent, in the Defence
12 submissions, and Your Honours heard Dr Hoffman and formed a view
13 of him and obviously place whatever weight is appropriate to be
14 given to him. I would submit that with your -- with the Court's
15 combined knowledge and experience, you are, in fact, in a better
16 position than Dr Hoffman to assess what had happened in Sierra
17 Leone over that period of time.
18 Your Honours have heard extensive experience -- sorry,
19 extensive evidence about the development of the Kamajors, the
20 social structures changing. Certainly, you have spent more time
21 listening to witnesses describe social structures, power and
22 authority in Sierra Leone. Your Honours have heard more about
23 that, I would submit, than the young Dr Hoffman has spent in this
24 country. I am sure he means well. No doubt he's an experienced
25 photographer, but until 1998 he had not commenced graduate work
26 in cultural anthropology. He had no military experience. He had
27 some articles published in 2004, and he had never been accepted
28 as an expert anywhere else. This may not have been the place to
29 start.

1 But, Your Honours do have far more, I would submit,
2 knowledge and experience in the way in which matters operate now
3 in Sierra Leone, and the cultural aspects. I would suggest that
4 whatever weight you place on Dr Hoffman, is not to such an extent
5 as to overcome your own experience and your own knowledge, having
6 the seen the witnesses appear before you. At the same time,
7 Dr Hoffman should not, I would submit, is not the person to look
8 for to comment on military matters.
9 Another issue I shall address is that of timing. Timing is
10 a very significant issue in this trial. The indictment is spread
11 over a period of time, and there has been some mention of that.
12 However, as we know now from the evidence, the majority of the
13 offences occurred in a relatively compressed period of time. And
14 that is, from late 1997, approximately through to March/April
15 1998. And I accept that the indictment covers a wider period,
16 but that is when most of the offences took place.
17 It can be said that upon the return of the government, and
18 with the increasing capacity of ECOMOG to exercise control over
19 the Kamajors, the number of offences reduced. And again, that's
20 a matter of both logic and evidence. When the government was
21 away, it was certainly not in a position to control what was
22 in -- what was happening in Sierra Leone. The government in
23 exile was, in effect, unable to direct military operations, nor
24 did it attempt to. Chief Norman was sent here to do that.
25 ECOMOG came in later and it took some time to exercise control
26 over the country.
27 So by looking at the evidence, one would form the view that
28 ECOMOG took some time to exercise control over the CDF, but their
29 influence was neither immediate nor absolute. It wasn't the

1 government in exile that was in control, then ECOMOG. There was
2 a gap. And in that gap, the majority of the offences were
3 committed by the Kamajors.
4 Quite often in Defence evidence and, indeed, in their
5 submissions, issues such as the National Co-ordination Committee,
6 the NCC, is mentioned. Care must be taken there. The NCC was
7 started relatively late, well after these offences had occurred.
8 It was, in effect, an administrative body.
9 The Prosecution would submit, by looking at the timing, it
10 does not really matter how matters resolved in late 1998, 1999,
11 they really had no impact. The focus is on when the offences
12 actually occurred.
13 The Court can reject the proposition the government went
14 into exile. It was in control, then ECOMOG was in control.
15 That's simply not available on the evidence.
16 Another issue that arises under the heading of timing, and
17 there is some confusion at times when witnesses testify, and that
18 is the role, for instance, of the Nigerian forces at Lungi.
19 Colonel Khobe, when he was at Lungi, was in charge of a Nigerian
20 contingent. He later changed and became a general and took over
21 different roles. It is very important not to say, because of the
22 position he ended up holding in 1998 and later, because he held
23 that position, you then go backwards to find out -- go backwards
24 in time and say, well, General Khobe was in charge of ECOMOG when
25 these offences took place. One has to look very carefully at
26 that evidence.
27 The Prosecution would say that, having established the CDF
28 was a military organisation - I won't go into all the details
29 there - but certainly Colonel Iron brings together the evidence

1 about that, as does Mr Nallo and others. We can look at how
2 those individual accused persons acquired criminal
3 responsibility. What did they actually do?
4 In respect of that, Chief Norman, as I said, there was
5 extensive evidence about Chief Norman. He was clearly the one in
6 control. He gave evidence to that effect. There was no one
7 above him in the CDF. He was in charge but at the same time all
8 he did was co-ordinate. The Prosecution would submit, in
9 relation to Chief Norman, there is no other conclusion but that
10 he was in charge, he was the one directing the CDF, he was the
11 one who created the framework by which they then we went out and
12 committed the offences that are now on the indictment. He
13 acquired that position due to being the deputy defence minister
14 and being the national co-ordinator and subsequently by force of
15 personality within Talia and elsewhere.
16 According to the Norman submission, from May 1997 to
17 February 1998, command and control of the Kamajors was with the
18 chieftain commanders and ECOMOG. As has already been submitted,
19 the War Council was ineffectual. There may have been chieftain
20 commanders, but they came under the umbrella of the CDF, and
21 ECOMOG was not in the country at those times and certainly was
22 not in a position to influence the CDF and their behaviour.
23 As to examples of orders given, and they are certainly
24 outlined by Norman. They are certainly outlined in the written
25 submissions. The Prosecution has led evidence of military
26 planning for an all-out offensive done at Base Zero at a meeting
27 in which all three accused were present, together with field
28 commanders. I simply note in the significant meetings, the three
29 accused are normally present, they normally spoke. That was part

1 of their role and part of their support for one another in
2 issuing these orders.
3 TF2-005 gave evidence when he was at passing out parade in
4 Base Zero, when Norman addressed the trainees that the attack on
5 Tongo would determine who was the winner or loser of the war --
6 sorry, whoever won Tongo, in effect, would win the war. He said,
7 "When I go to Tongo, let them bear in mind that there is no place
8 to keep captured or war prisoners like the junta, let alone their
9 collaborators."
10 Now, that's a clear statement that falls under the heading
11 "win at all costs." So contrary to BJ Sei, the Defence witness
12 saying he was the one alone -- he was the one who organised the
13 attack on Tongo. With orders such as that, bearing in mind the
14 nature of the people listening to the orders, bearing in mind the
15 loyalty and commitment they had, particularly in response to
16 the -- to the gift of bulletproofness that is provided to them by
17 the third accused, it is no surprise that when they went to
18 Tongo, there was mass unlawful killing of civilians. There was
19 no place to keep captured or war prisoners like the junta, let
20 alone their collaborators.
21 TF2-027 describe how civilians were seized, rounded up and
22 killed and how some civilians were ordered to dig mass graves.
23 And we certainly heard from witnesses, or a witness who was the
24 chief grave digger in Tongo.
25 TF2-014 gave evidence that Norman labelled residents of
26 Koribundu - another example - as spies and collaborators, and
27 said that the witness should ensure that no one should be left
28 alive, and homes should be burned.
29 TF2-008 testified that at a meeting at Base Zero, Norman

1 instructed the commanders present that when they proceeded to
2 attack Koribundu, they should not leave alive any living thing
3 and that they should burn down houses if there was resistance.
4 Commanders should only spare the mosque, the school and the
5 barri. Later, as we've heard, civilians heard Norman repeating
6 that order but in reverse saying that he was disappointed that it
7 was not carried out. There is significant evidence about
8 meetings which all three accused plus other commanders discussed
9 military issues.
10 TF2-005 and 201 were both at a meeting where all three
11 accused made plans for the Tongo attack. TF2-079 testified about
12 a meeting at Base Zero where Norman did most of the talking but
13 was later on supported by the director of war and the high priest
14 also followed suit. At that meeting, Norman said that in Tongo
15 civilian collaborators should forfeit all their property and be
16 killed. So again, the three men worked together. They each had
17 a separate role but they all worked together.
18 TF2-014 testified at another meeting where Fofana and
19 Kondewa were also present, Norman said the enemies included
20 sympathizers, collaborators and those who refused deliberately to
21 leave the AFRC and RUF zones. Those were our enemies and that we
22 should kill them.
23 Again, in Bo, similar orders were issued in respect of the
24 attack on Bo. Kamajors would attack and kill anyone who had a
25 connection with or accommodated the rebels or AFRC. So the
26 Kamajors were given a very broad mandate as to who they could
27 kill and, as we have seen from the other side, from the victims'
28 side, they killed anyone who they believed fell under that very
29 broad mandate provided by the three accused persons.

1 As I mentioned in Koribundu, after it was taken, the
2 witness specifically recalled Norman's speech: "I said that
3 nothing should be spared because when the soldiers were here you
4 were here together and you hosted them and you supported them and
5 you have brought a lot of wicked things." A justification for
6 attacking civilians who simply were living in their own homes and
7 chose not to leave.
8 As another example, Norman gave instructions for the attack
9 on Tongo, which included killing, burning and looting. After he
10 spoke, Fofana spoke next, and this comes from TF2-222. Fofana
11 spoke next and warned that any commander who did not perform
12 accordingly, or who had lost ground, should decide to kill
13 yourself there.
14 Now that's not the instructions of someone who was simply a
15 shopkeeper. That is someone who was supporting his leader,
16 someone who was an intrinsic part of the central command unit.
17 Kondewa was the last to speak, and he said: "I give you my
18 blessings, so, my boys, go." Again, it's complete. That is, you
19 have the instructions from Norman, they are supported by Fofana.
20 And Kondewa, who was obviously held in very high regard by the
21 Kamajors because of the powers they believed he gives them, says:
22 "I give you my blessings." That's all part of sending off
23 Kamajors with a clear guideline to kill those persons who are
24 deemed to be collaborators or rebels, to loot, to kill, and at
25 the same time as they are going they are taking with them child
26 soldiers.
27 I won't spend much time on child soldiers. The evidence, I
28 would suggest there, is very clear. We have evidence of
29 approximately five per cent of the Kamajors were looking at

1 demobilisation figures for child soldiers, but I won't go into
2 that evidence. I'd suggest that's virtually uncontested. It's
3 quite clear that the Kamajors used children under the age of 15.
4 By looking at that particular meeting in which the three
5 accused spoke it's clear that they were the core of the CDF; they
6 gave orders; they were in support of one another. There was no
7 criticism of what was being told to the Kamajors. The Kamajors
8 went to Tongo and they did as they were told. Not rogue units,
9 not soldiers dressed in ronko, but Kamajors told to go and kill
10 civilians, and that's what they did.
11 So, as I have said, and I've said a number of times, the
12 crimes were never committed in secret. They took place in public
13 and, on occasions, people in the crowd were asked to point out
14 rebels or suspected collaborators who were then killed. The only
15 people who could have opposed Norman at this time in regards to
16 those orders were the two accused, Fofana and Kondewa. They did
17 not. They supported him.
18 As I've mentioned, Fofana says he's just a shopkeeper, but
19 we have, as I've mentioned the evidence in relation to Tongo
20 which gives the Court an indication as to where Mr Fofana stood
21 in the scheme of the CDF. He was not someone who simply opened
22 the door to allow people to take out some rice. He was someone
23 who spoke at meetings. He was someone who supported Norman. And
24 that evidence, we would submit, in relation to Tongo, is equally
25 applicable generally when reviewing his position in the CDF.
26 It's mentioned that he was the director of war, and somehow that
27 was meant as a joke. When you look at his role, he was far more
28 than a shopkeeper or a storekeeper.
29 The Defence case suggests that all he was doing when

1 speaking at the Tongo meeting, for instance, was providing strong
2 words of encouragement to those in attendance at the meeting. He
3 was saying that the civilians found in Tongo at the time of the
4 battle were to be regarded as enemy and should be treated as
5 such. I think he was supporting orders to kill. He was the
6 second person to speak after Norman, indicating his position in
7 the command structure, and also indicating the view that other
8 Kamajors had of him.
9 There was a person, a witness testified that he knew Fofana
10 before the war but didn't approach him at Base Zero because he
11 was too important. And, as I have said, he told people, he told
12 commanders: "Anyone failing their mission should kill himself."
13 So that would assist the Court, I would suggest, not only
14 in assessing Fofana's role in that particular matter but his role
15 generally.
16 Kondewa also said at the time the surrender had passed he
17 gave a blessing and because of the importance of becoming
18 bulletproof, and the other benefits Kondewa's services provided
19 to the Kamajors, clearly that was a strong motivating factor in
20 the Kamajors following orders.
21 The circle is almost -- is complete. We have the orders
22 given. We have the civilians suffering as a consequence of the
23 orders. We have in Koribundu Norman accepting, I acknowledge,
24 and in Bo, acknowledging that he gave such orders. It cannot be
25 suggested that just because you told people to leave over the BBC
26 or some other way that you can then issue orders to kill anyone
27 who stays in their town.
28 Coming back to Mr Fofana, he distributed ammunition and, in
29 the light of this war, and the shortage of resources in this

1 country, that was a very important exercise of control and
2 authority. Other people may have had keys as well, but he was
3 the one who delegated to control the distribution of ammunition.
4 Fofana didn't simply provide a mere presence. He has an
5 important part of the command structure. He was a deputy when
6 Mr Norman was away from Base Zero. He was someone who provided
7 support. Alternatively, he was someone who could have stopped
8 the orders or disagreed with the orders. He didn't. He was part
9 of the unit that created the framework by which these offences
10 occurred.
11 So, in terms of approaching, speaking about each of these
12 accused men, the Prosecution, in its written submission, has
13 spent some time identifying their respective responsibilities and
14 the evidence supports that, so I won't go into that in too much
15 further detail.
16 I should note that some dispute arises over the
17 killings of Mustapha Fallon and Alpha Kanu. The Prosecution
18 says, amongst other things, that evidence is led to prove that
19 the three accused were in such positions of power, such
20 unrivalled positions of power as on some occasions to be able to
21 kill one of their own.
22 Coming on to Mr Kondewa, he was capable of exerting
23 effective control over Kamajors. He was held in high regard. He
24 had something that all Kamajors wanted; that is, the ability that
25 they believed to make them bulletproof. And as I have mentioned,
26 witnesses even today, or even when they gave evidence before the
27 Court, still valued that power very highly. It was something
28 that helped bind the Kamajors and it was an essential part of
29 ensuring they followed the orders given to them.

1 Chief Norman could not operate the entire organisation by
2 himself. As it is, when we look at Base Zero, it was a very
3 small central organizing unit. There were the three accused, and
4 we have heard about other persons who held positions of various
5 responsibility, but the people who made the decisions were
6 Norman, Fofana and Kondewa. And they gave the orders that I have
7 repeated, and they are outlined in more detail in the written
8 submissions.
9 Just to finish with the High Priest Kondewa, he joined in
10 with orders promulgated by Norman. He was in a powerful
11 position. He has an integral part of a command unit. He was
12 and, as we have heard repeatedly, there were rules relating to
13 Kamajors as to what they could and couldn't do. Ultimately, the
14 high priest was the arbiter of those rules and he joined in when
15 Norman gave orders to kill civilians; to kill collaborators. The
16 joining in of the high priest, the arbiter of the rules of the
17 Kamajors, at that time was a very significant event and part of
18 the process by which the Kamajors felt emboldened to go to towns
19 to kill civilians without any attempt to disguise what they were
20 doing.
21 Now, Talia, as I have mentioned, is a small place. These
22 men worked together; they lived together; they decided how the
23 CDF would conduct the war. We saw, we have heard about the
24 orders they have given. We have heard about how the Kamajors
25 behaved when they attacked towns and when they took towns.
26 Coming on to the final submissions, Your Honour. TF2-015
27 stated that at Kamboma they were taken to a house by Kamajors.
28 He said they said: "Anybody that passed by Kamboma should be
29 killed. We pleaded to them. We told them we are civilians.

1 They said no. They said the Kamajors had ordered them to kill
2 anybody that passed through Kamboma, so they put us in two lines.
3 They began by killing us behind that house. Anybody that is
4 fired, he rolled and goes to the swamp. He was the person I have
5 mentioned a number of times. He was struck on the back of the
6 neck and the Court saw that scar." Again, no attempt at
7 concealment. The Kamajors quite openly killed people who
8 declared themselves to be citizens and there was no suggestion
9 they were otherwise. We have another example, and this will be
10 the last example, Your Honours, we have a policewoman, TF2-042.
11 She describes how the AFRC -- she describes how the AFRC left
12 Kenema on 15th of February 1998. Everyone was happy as the
13 Kamajors entered town. She was happy. There were thousands of
14 Kamajors. From that, there is no doubt they were Kamajors. From
15 that, there is no doubt it was a co-ordinated act to get
16 thousands of Kamajors to come into the town at the one time.
17 Her children went outside and they told her they had shot
18 Sergeant Mason. Later they found -- shot two other police
19 officers. Then we heard the graphic description of police
20 officers walking across a football field, near the barracks, and
21 they were shot. They were identified -- they identified
22 themselves as police, they were shot by Kamajors. TF20 -- and
23 those police were unarmed. TF2-042 said she later saw the bodies
24 of those police she saw shot, and those her children told her had
25 been shot by Kamajors. Initially, the Kamajors refused
26 permission to bury those bodies, but later she buried six police
27 officers and a soldier in the one pit.
28 Later, police reported to ECOMOG that 36 police officers
29 had been killed in Kenema. They were killed because the Kamajors

1 said they were junta. "We work with the junta, so that we were
2 all junta." Again, we have the orders being given. We have
3 independent witnesses, witnesses simply watching the killing of
4 people in the open; no attempt to disguise. This is clearly a
5 concerted act and it is controlled by a central body consisting
6 of the three accused men. How can it be that Kamajors, without
7 any pretense and attempted concealment kill an unarmed policeman?
8 The only conclusion that can be drawn is they were acting under
9 orders and those orders, as we have heard, we have heard examples
10 of those orders, came from the three accused men.
11 I have not spoken to any great extent about section 6(3) of
12 the JCE. The reason being, as has already been mentioned this
13 morning, the commonality of evidence relates to all three modes
14 of liability, applies equally. In this particular case, the
15 three men were in charge, they were aware of what was going on,
16 situation reports were coming back to Base Zero, at all times
17 they were informed. If anyone was informed within the CDF
18 Kamajor movement, it was the people at Base Zero. That's where
19 the information was coming to and that's where the runners were
20 going to. That's where men, such as Mr Nallo, were going out
21 from on their motorbikes, telling people what to do.
22 So it's suggested at times that because of the Kamajor
23 rules, that they wouldn't kill civilians. We have the clear
24 evidence of the killing of police. It is contrary to what may
25 have once been the Kamajor philosophy; however, clearly, in this
26 time of war when the Kamajors are under the control of the three
27 accused men, their philosophy was warped. It was warped to the
28 extent that police officers could be killed in the manner
29 described by TF2-042. It wasn't random, it wasn't a mistake, it

1 wasn't by rogue Kamajors. It was Kamajors following the orders,
2 examples of which we have heard throughout the trial. Police
3 were targeted because they were seen to be - and they were just
4 one group - seen to be someone who assisted the junta. They fell
5 under the broad definition of collaborators.
6 To finish, Your Honours, there are differences between the
7 accused men as to what they did, but those differences are not
8 such as to excuse any of them in respect of their criminal
9 liability. The differences, that is the contributions each of
10 them made, the most prominent one being Mr Norman, Chief Norman,
11 may result in different penalties, but that's another issue and I
12 won't take that any further. It is the only way they can be
13 differentiated. But in terms of evidence being presented that
14 should satisfy the Court beyond a reasonable doubt on each
15 charge, that is present. The Kamajors were under the control of
16 these three men. They had options as to how they went about
17 directing their subordinates to conduct themselves. They gave
18 orders that clearly allowed their subordinates to kill people,
19 such as civilians standing in lines, police officers walking
20 across football fields.
21 So in summary, the Prosecution submits all the evidence
22 points to one inescapable conclusion. The three accused
23 exercised absolute control over the CDF, and the CDF
24 concomitantly followed the orders of the three accused. Embedded
25 in those orders was fundamental command expressed in a number of
26 ways by combatants to win the war at all costs. Consequently,
27 the CDF personnel, including many child soldiers, as we have
28 heard, and as is demonstrated in the written submissions,
29 implemented those orders across the field of war against anyone

1 who fell under that broad definition of rebel, collaborator or
2 sympathiser. Any failure to follow those orders was due to
3 tactical considerations. It was not due to the intervention of
4 the accused men. They knew what was happening. They condoned
5 it.
6 Each of the three men, finally, the Prosecution submits,
7 are criminally responsibile for the offences now before you on
8 the indictment.
9 Thank you.
10 PRESIDING JUDGE: Just a minute, Honourable Justice Boutet
11 has a couple of questions for you.
12 JUDGE BOUTET: Mr Tavener, I just want to have a few
13 clarifications, if I may. I heard you in your submission to talk
14 about the murder of one Fallon and Kanu, to be -- I'm not sure if
15 I understood your position clearly on this. Are you saying that
16 these are not murders as war crimes or crimes against humanity
17 because these were the killing of their own Kamajors and these
18 killings or murders were there to show how much power they
19 exercised? Am I misquoting you? It seems to be the message I
20 got from you. In other words, the Prosecution is not relying on
21 these murders, if they are murders, as evidence of crimes against
22 humanity or war crimes but more for other purposes.
23 MR TAVENER: In brief, Your Honour, that's what I'm
24 submitting. The reason I say that is those two persons were
25 both -- one was Kapra, one was a Kamajor. They were both persons
26 who were combatants on the side of the Kamajors. So although
27 they were killed within -- and can only be killed, I would
28 submit, within the terms of a war -- a war taking place, that is
29 the main thrust we say as to the effect of them being killed.

1 JUDGE BOUTET: My other question has to do with police
2 officers. I don't think I have read in your written brief, nor
3 in your presentation as to what -- how you qualify these police
4 officers other than I just heard you to say that they have been
5 described by the leaders, as such, the Kamajors, as you submit,
6 as being collaborators of the AFRC or junta. I would like to
7 hear your views or comments as to what was the police role or
8 function at that time? Were they part of -- were they
9 combatants? Were they members of the civilian community? Were
10 they civilians? I mean, we are dealing here with war crimes and
11 crimes against humanity, as such. The qualification of
12 individuals, as you will agree, is quite important. So that's
13 the purpose of my question, to see where do those police
14 officers, wherever they may be - I am not necessarily saying in
15 Bo or Kenema and, so on - I mean, in the context of these
16 activities that were taking place, how would you describe and
17 qualify them to assist the Court in trying to understand your
18 position in this respect.
19 MR TAVENER: There are a number of issues, Your Honours.
20 There is the suggestion that the police were involved in
21 resisting, using -- attacking Kamajors. That is some suggestion.
22 The evidence was, as I understand it, the only part of the police
23 force that was armed was the SSD. That was the one part of the
24 police force.
25 The evidence that comes from TF2-042 was, one of the police
26 officers who was shot was an SSD officer. He identified himself
27 as such. Kanu, I think Kanu, OIC, officer in charge. But he was
28 one, not engaged in any activity against the Kamajors. We would
29 say that police are civilians, to discuss that particular issue.

1 One, they are civilians. Two, the one police officer, as I
2 understand, was the SSD. However at the time he was killed, he
3 was a civilian, he was unarmed, and he was not, in any way,
4 engaged in any combat. He was walking across a football field or
5 an open space. I believe it was a field. He was approached. He
6 identified himself. He was shot. The police officers -- the
7 evidence that we have of police officers being shot relates to
8 Kamajors going into the barracks and simply shooting. At that
9 stage there was no -- that they weren't resisting, they weren't
10 armed, these police officers that I spoke about as described by
11 TF2-042 were not armed police. The SSD potentially could have
12 been armed, but this particular person who was shot was not --
13 there is no evidence he was armed. There is no evidence he was
14 doing anything except walking across a field.
15 Now, there is some suggestion, I understand, that, as I
16 mentioned earlier, that at some stage -- there was some vague
17 suggestion that police may have been involved in shooting. But
18 when the Kamajors came in to Kenema, for instance, on that
19 15 February, there was no shooting taking place. They were
20 simply targeting police officers because they were considered to
21 be collaborators, according to the evidence, because they had
22 continued to work in a junta controlled town.
23 JUDGE ITOE: That is the thesis of the Prosecution, that
24 there was no fighting. That's your thesis, I mean.
25 MR TAVENER: Yes. We say one, police officers were
26 civilians; two, in general, they weren't armed; three, these
27 police officers who were killed were doing -- were not involved
28 in combat in any way. They were simply shot.
29 PRESIDING JUDGE: Then, of course, that particular case --

1 is there any support from the jurisprudence for your
2 characterisation for the purposes of crimes against humanity of
3 police officers as civilians? I mean, in other words, I am
4 virtually asking you to bring together the two view points,
5 having submitted that on the evidence that you have led, there
6 were not -- that's okay. Having submitted that on the basis of
7 the evidence that you have led, they can properly be
8 characterised as civilians. My question now is: Is there any
9 support from the jurisprudence in support of this position for
10 the purpose of crimes against humanity that police officers,
11 indeed, can be properly legally characterised as civilians.
12 MR TAVENER: Okay. And I will return to the initial point
13 that these police officers were not part of any armed body, and I
14 understand - which I can provide to Your Honours - under section
15 175 of the Constitution -- 165 of the Constitution of Sierra
16 Leone, police are not part of the armed forces. They, in fact,
17 are fulfilling a civilian function. So as a matter of law in
18 Sierra Leone, they are civilians, and may be categorised as
19 civilians.
20 PRESIDING JUDGE: And there is no exception made in respect
21 of the SSD, or formerly the ISU.
22 MR TAVENER: The only evidence is that on occasions they
23 were the only police force that did carry arms. And the example
24 I used, that was the person who was shot at that time. The
25 police officer was not carrying arms and he, too, as the other
26 police officers that were killed, fall under the 165 of the
27 Constitution.
28 PRESIDING JUDGE: Is there anything in the jurisprudence of
29 ICTY or ICTR that can be of assistance to this Court on that? If

1 not, don't worry. We will cause the necessary research to be
2 done. You don't need to pursue that. Thank you.
3 MR TAVENER: I will reply very briefly, but perhaps not
4 directly to you question, in that, it depends on the nature of
5 the police force. Some police forces are paramilitary, some are
6 less so. We would say, when you look at the evidence as provided
7 by the range of police officers who testified before us, bearing
8 in mind Section 165 of the Constitution, they were, in fact, not
9 a paramilitary organisation.
10 Witnesses TF2-04, the policewoman, she described her
11 functions. By no stretch of the imagination could she be
12 considered a paramilitary -- a member of a paramilitary
13 organisation. She carried no gun, she investigated normal
14 domestic crimes, and she simply conducted police functions. So
15 we would say, in terms of Sierra Leone at that time, the police
16 were civilians.
17 PRESIDING JUDGE: Thank you. I think it was just a legal
18 brainteaser anyway from my perspective. Are you through?
19 MR TAVENER: Yes. Thank you.
20 JUDGE ITOE: Not quite. Not quite, Mr Tavener. The
21 Prosecution in the conduct of its case placed a lot of emphasis
22 on, and I think spent quite some time, in adducing evidence of
23 the killings, the alleged killings of Mustapha Fallon and Alpha
24 Kanu. Where -- why was this evidence adduced and where do you
25 place these killings within the context of the charges that you
26 are alleging against the accused persons?
27 MR TAVENER: Thank you, Your Honour. If you give me the
28 opportunity, I may have had an error in respect to Mr Fallon.
29 JUDGE ITOE: Because there were two murders and then the

1 killings. Mustapha Fallon and Alpha Kanu.
2 MR TAVENER: Mr -- Mustapha Fallon was a noncombatant. He
3 was simply someone picked to provide certain material for the
4 secret -- the secret activities of Fofana and the -- sorry, High
5 Priest Kondewa and the others. So Mustapha Fallon falls under --
6 and that's where I'm mistaken.
7 JUDGE ITOE: You say Mustapha Fallon was a noncombatant?
8 MR TAVENER: Yes.
9 JUDGE ITOE: I suppose we have evidence of that on the
10 record?
11 MR TAVENER: Excuse me, I just --
12 JUDGE ITOE: I suppose we have evidence of that in the
13 record?
14 MR TAVENER: The evidence is that he was a Kamajor, but at
15 the time of the killing, he was not a combatant. He was simply
16 someone who was identified as being available to be used as a
17 sacrifice, and he was.
18 The evidence in that area is contested, and we would say
19 that at the least, as I've mentioned, at the least the position
20 was that it indicates a position of power and authority by the
21 three accused men; that they were capable of committing such a
22 murder, both of Kanu and Fallon.
23 JUDGE ITOE: The what? Let me get this very, very clearly.
24 Let's find a -- a clear statement on these, because I want to --
25 I think we want to get it clearly as to where you situate these
26 two alleged killings in the context of the indictment.
27 MR TAVENER: The strongest position, the position that best
28 represents what the Prosecution is saying in regards to Alpha
29 Kanu and Mustapha Fallon is that they were both chosen to be

1 sacrifices, or sacrificial. Their bodies were used for certain
2 purposes, and they, obviously, were killed as a part of that
3 process. We would say in respect of Fallon, but not Kanu, he
4 could fall under the heading of a noncombatant, because was he
5 was a noncombatant at the time. The difficulty of categorising
6 Mr Fallon is that he was a Kamajor. So we --
7 JUDGE BOUTET: I mean, you are losing me now, because are
8 you saying you have Kamajors and Kamajors?
9 MR TAVENER: No, Your Honour.
10 JUDGE BOUTET: So you have Kamajors who are combatants and
11 Kamajors that are noncombatants. So how are we to deal with
12 this, and how are we to differentiate? And furthermore, I would
13 really like to hear you to say, even to take your actual position
14 that he may not have been at the time a combatant, I would
15 imagine Kamajors who are at Base Zero sleeping during the night,
16 and you may say they are noncombatants.
17 I mean, whatever it is, but if he is a noncombatant, we
18 assume that for the purpose of this discussion under which item,
19 count, is this appeal? Because I look at the indictment, I
20 cannot see this particular crime, as such, under any of the
21 heading of the alleged killings or murders as such. I'm just
22 seeking your guidance and assistance in this respect.
23 [CDF28NOV06E - CR]
24 MR TAVENER: I appreciate that, Your Honour, and we can say
25 that the best way for the Court to deal with the evidence in
26 respect of the killings of these two men, is it demonstrates the
27 power and authority of the three accused men in that they could
28 kill people belonging to them. That is clearly a case of Alpha
29 Kanu, and we would say it is also the case in respect of Fallon;

1 that is probably the easiest way. In terms of arguing about
2 status, I agree with Your Honour, this is not the time to do it,
3 the best approach is simply to see these two men's deaths as
4 examples of where the three accused stood in the hierarchy, their
5 ability to do acts without sanction from anyone else. In fact,
6 it demonstrates that they were in absolute control of the CDF.
7 That is, we would say, how the deaths of those two men fit into
8 the Prosecution case.
9 JUDGE BOUTET: Thank you.
10 JUDGE ITOE: I won't go any further with Mr Fallon.
11 MR TAVENER: I appreciate that, Your Honour.
12 JUDGE BOUTET: Mr Tavener --
13 JUDGE ITOE: Mr Tavener, I'm sorry.
14 PRESIDING JUDGE: Dr Jabbi, it's your turn.
15 MR JABBI: Thank you, My Lord. My Lords --
16 JUDGE ITOE: Dr Jabbi, I suppose you have your eyes on your
17 watch to know when you're starting?
18 PRESIDING JUDGE: Yes, Mr Jabbi.
19 MR JABBI: My Lords --
20 PRESIDING JUDGE: You'll confirm that your estimate is two
21 hours.
22 MR JABBI: Yes, My Lord.
23 PRESIDING JUDGE: Very well. Let's proceed.
24 MR JABBI: I'm very likely to go under two hours.
25 PRESIDING JUDGE: That sounds very refreshing.
26 MR JABBI: My Lords, we have, of course, filed our final
27 trial brief, and responded to various aspects of the Prosecution
28 case. I wish to begin by giving some of the main highlights of
29 that trial brief and begin by tackling some of the issues raised

1 both in the Prosecution trial brief and also in the submissions
2 that have been made by the Prosecution today.
3 My Lords, I want to go straightaway to the question of the
4 defects in the indictment, and to note that this is covered in
5 our brief, generally in paragraphs 53 to 112. My Lords, the
6 general point we make about the indictment is that it is vague in
7 several parts, and that the Prosecution pre-trial brief did not
8 have to remove that vagueness as much as would have been
9 necessary. We do not have a sufficient amount of material facts
10 set down in the indictment to substantiate the counts. We
11 accordingly submit that this has substantially prejudiced the
12 ability of the first accused to organise his defence, as best as
13 possible, and that that has also affected his right to a fair
14 trial.
15 It is generally accepted that the indictment is the very
16 foundation on which the Prosecution proceeds, and the whole
17 trial, of course. Accordingly, they should contain a statement
18 of facts which detail the various crimes, and it is those
19 allegations of fact that the Prosecution is required to prove in
20 making the case against the accused persons. What, in fact, we
21 do have in the indictment is a series of repeated general facts,
22 alleged facts, which, on no particular occasion, particularise
23 the elements of the various offences in question.
24 Since, My Lords, the evidence is also limited to what is
25 specifically pleaded, if there is vagueness and lack of
26 particularity, it becomes extremely difficult to determine what
27 is to be responded to. Indeed, even what is being pleaded. My
28 Lords, if I may just briefly refer to an opinion expressed by
29 this Chamber with respect to the relevance of having

1 particularised pleadings in the indictment.
2 My Lords, in a decision of 24th May 2005, a separate
3 [indiscernible] opinion of Honourable Justice Itoe, at paragraph
4 27, this opinion is expressed: "One of the fundamental
5 principles on which international criminal justice is based is
6 that an accused person should never be tried nor convicted on the
7 strength of evidence related to an offence for which he has not
8 been indicted, nor should such evidence be adduced or admitted if
9 this would not only be contrary to the provisions of Article
10 17(4)(A) of the Statute, but would also amount to a flagrant
11 violation of the principle of fundamental fairness."
12 My Lord, having expressed the relevance of particularity in
13 the indictment and the effect of vagueness in that regard, I
14 would just want to draw Your Lordships' attention to a selection
15 of some of those defects as addressed in the Norman final trial
16 brief. These examples, My Lords, are extensively recited in
17 paragraphs 71 to 100, that is page 28, paragraphs 71 to 100 of
18 the Norman final trial brief. I do not, My Lords, wish to go
19 into too much detail there because, in fact, they are well set
20 out in those paragraphs, but I would just want to list some of
21 those defects. One, My Lords, is the failure to plead the mode
22 and extent of an accused's participation under the relevant
23 article of the Statute. And this is covered in the next six
24 paragraphs from paragraph 71.
25 My Lords, paragraph 20 of the indictment speaks to the
26 Prosecution's view of the acts alleged -- alleged acts or
27 omissions of the first accused and others which, according to the
28 Prosecution, makes them individually criminally responsible under
29 Article 1 for the various offences cited. And all that is

1 provided there is the allegation that the first accused, together
2 with others, was criminally responsible for the crimes referred
3 to in Articles 2, 3 and 4 of the Statute, as alleged in this
4 indictment, which crimes each of them planned, instigated,
5 ordered, committed or in whose planning, preparation or
6 execution, each accused otherwise aided and abetted, for which
7 crimes were with a common purpose, plan or design, in which each
8 accused participated or where a reasonably foreseeable
9 consequence of the common purpose, plan or design in which each
10 accused participated. My Lords, our submission is that this does
11 not sufficiently particularise the modes of liability by the
12 first accused.
13 Indeed, that mode and extent of participation are material
14 facts which the indictment should clearly set out for the purpose
15 of proof by evidence. In fact, however, we have no indication,
16 as demonstrated in that paragraph, of the specific acts by which
17 the accused allegedly planned, instigated, ordered or aided and
18 abetted any of the crimes in question. So we submit that the
19 Prosecution has failed to provide that required specificity.
20 My Lord, the same thing goes for the second defect we want
21 to identify, and this is stated in paragraph 76 and 77, to the
22 extent that the alleged committing of offences under Article 6(1)
23 is also not specific enough. No specific crimes are indicated
24 there which the first accused is alleged to have committed. So
25 also, My Lords, with the next defect, the defects in pleading
26 joint criminal enterprise. These are paragraphs 78 to 80. Here
27 again, My Lords, one of the paragraphs in the indictment,
28 paragraph 19, is the area where the Prosecution proposes their
29 theory of joint criminal enterprise. That paragraph reads as

1 follows:
2 "The plan, purpose or design of Samuel Hinga Norman,
3 Moinina Fofana, Allieu Kondewa and subordinate members of
4 the CDF was to use any means necessary to defeat the
5 RUF/AFRC forces and to gain and exercise control over the
6 territory of Sierra Leone. This included gaining complete
7 control over the population of Sierra Leone and the
8 complete elimination of the RUF/AFRC, its supporters,
9 sympathisers and anyone who did not actively resist the
10 RUF/AFRC occupation of Sierra Leone. Each accused acted
11 individually and in concert with subordinates to carry out
12 the said plan."
13 My Lord, the Norman Defence submits that this paragraph
14 does not necessarily reveal any criminal activity or purpose and,
15 to that extent, it does not specify the, either for example, the
16 very nature of the joint criminal enterprise being alleged, or
17 the mode of it or, indeed, what form it is alleged to take. The
18 effect of this, of course, is to make it difficult to see clearly
19 what specific allegations of criminal conduct in fact are being
20 alleged. That is as far as Article 6(1) goes.
21 When we go to Article 6(3) as well, one of the defects in
22 respect of the pleading there is as to the alleged superior
23 responsibility of the accused.
24 PRESIDING JUDGE: This is the alleged fourth defect, is it?
25 MR JABBI: Yes, My Lord. This is in paragraphs 81 to 84.
26 PRESIDING JUDGE: I'm just saying it's the alleged fourth
27 defect. You have given us three.
28 MR JABBI: Yes, indeed. This is the fourth, My Lord.
29 PRESIDING JUDGE: Fine. 81 to?

1 MR JABBI: Eighty-one to 84.
2 PRESIDING JUDGE: Thank you.
3 MR JABBI: My Lord, we find here that there is no
4 specificity as to the subordinates in question to whom the
5 accused is supposed to have a superior responsibility, and the
6 allegation merely is as to CDF subordinates. The specific
7 paragraph of the indictment to which we would like to draw Your
8 Lordships' attention is paragraph 21. If I may briefly read
9 that, as well: "In addition, or alternatively, pursuant to
10 Article 6(3) of the Statute, Samuel Hinga Norman, Moinina Fofana
11 and Allieu Kondewa, while holding positions of superior
12 responsibility and exercising command and control over their
13 subordinates, are individually criminally responsible for the
14 crimes referred to in Article 2, 3 and 4 of the Statute. Each
15 accused is responsible for the criminal acts of his subordinates
16 in that he knew or had reason to know that the subordinate was
17 about to commit such acts or had done so and each accused failed
18 to take the necessary and reasonable measures to prevent such
19 acts or to punish the perpetrators thereof."
20 My Lord, it will be seen that in that allegation, no
21 subordinates are named, no commanders identified, nor certainly
22 is there an identification of the relationship between the
23 accused and his alleged subordinates, apart from the very general
24 statement that the accused had subordinates. Furthermore, no
25 material facts have been advanced in that process alleging the
26 conduct of the accused that would indicate the requirement of
27 knowledge, or having reason to know about the acts of the
28 subordinates which alleged to be his individual criminal
29 responsibility, as well. We submit that this is one of the modes

1 of indefiniteness, vagueness, or imprecision in the allegation of
2 the criminal responsibility of the accused.
3 My Lord, in the interests of brevity, so far as that may be
4 necessary here, I just want to mention the next defect and the
5 relevant paragraphs setting it out; that is the lack of
6 specificity with respect to the particular counts.
7 JUDGE ITOE: To follow up on the basis of specificity
8 raised by the Presiding Judge, I suppose you are now on the fifth
9 defect?
10 MR JABBI: Yes, My Lord.
11 JUDGE ITOE: On the fifth defect?
12 MR JABBI: Yes, My Lord. I believe so.
13 PRESIDING JUDGE: Which counts, do you say? Relating to
14 which counts?
15 MR JABBI: It's general there, My Lord, and the specifics
16 are provided in paragraphs 85 to 93.
17 PRESIDING JUDGE: Of the Norman brief?
18 MR JABBI: Yes, indeed, My Lord.
19 PRESIDING JUDGE: Thanks.
20 MR JABBI: I propose that those submissions are sufficient,
21 specific and clear, and I would want to go --
22 PRESIDING JUDGE: Without requiring further specificity
23 from you?
24 MR JABBI: Yes, indeed, My Lord.
25 PRESIDING JUDGE: All right.
26 MR JABBI: I would just want to go to the sixth --
27 JUDGE ITOE: I would only have loved, Dr Jabbi, that you
28 refer us to the corresponding paragraph of the indictment where
29 there is a lack of specificity in relation to what you've

1 referred to in paragraphs 85 to 93 of the Norman brief.
2 MR JABBI: Yes, My Lord. For example, My Lord, with
3 respect to count 3, inhumane acts punishable under Article 2(1)
4 of the Statute, when we refer to paragraphs 26(a) and (b) of the
5 indictment --
6 PRESIDING JUDGE: Yes.
7 MR JABBI: -- it reads, "Acts of physical violence and
8 infliction of mental harm or suffering included the following:
9 (a) between about 1 November 1997 and 30 April 1998, at various
10 locations, including Tongo Field, Kenema Town, Blama, Kamboma and
11 the surrounding areas, the CDF, largely Kamajors, intentionally
12 inflicted seriously bodily harm and serious physical suffering on
13 an unknown number of civilians; (b) between November 1997
14 and December 1999, in the towns of Tongo Field, Kenema, Bo,
15 Koribondo and surrounding areas, and the districts of Moyamba and
16 Bonthe, the intentional infliction of serious mental harm and
17 serious mental suffering on an unknown number of civilians by the
18 actions of the CDF, largely Kamajors, including screening for
19 'Collaborators,' unlawfully killing of suspected 'Collaborators,'
20 often in plain view of friends and relatives, illegal arrest and
21 unlawful imprisonment of 'Collaborators,' the destruction of
22 homes and other buildings, looting and threats to unlawfully
23 kill, destroy or loot."
24 My Lord, in paragraph 89, our criticisms of these
25 subparagraphs are indicated. There is, for instance, the charge
26 of physical violence and mental harm falling under Article 3(a)
27 of the Statute as distinct from material facts relevant to
28 count 4. It is not clear which of those activities are being
29 alleged as which form of criminal conduct. The inhumane acts are

1 not specified or clarified. The so-called illegal arrest and
2 unlawful imprisonment of collaborators, for example, cannot
3 easily qualify as a crime against humanity.
4 My Lord, to proceed to the next defect, this is one on
5 which the Prosecution has already had to make certain submissions
6 this morning. The count on pillage, under count 5, wherein
7 burning is alleged as an element of pillage. My Lord, count 5 in
8 the indictment reads as follows -- I will skip the area or the
9 geographical location which has been adjudged as having no place
10 in this indictment, just one location there.
11 Count 5, under paragraph 27, reads as follows: "Looting
12 and burning included, between about 1 November 1997 and about 1
13 April 1998, at various locations, including in Kenema District,
14 the towns of Ndanema, Tongo Field and surrounding areas, in Bo
15 District, the towns of Bo, Koribondo, and the surrounding areas,
16 in Moyamba District, the towns of Sembehun, Gbangbatoke and
17 surrounding areas, and in Bonthe District, the towns of Talia
18 (Base Zero), Bonthe Town, and surrounding areas, the unlawful
19 taking and destruction by burning of civilian owned property."
20 By their acts or omissions in relation to these events, Sam
21 Hinga Norman, Moinina Fofana and Allieu Kondewa, pursuant to
22 Article 6(1) and, or alternatively, Article 6(3) of the Statute,
23 are individually and criminally responsible for the crime alleged
24 below.
25 Then the crime reads, "Count 5: Pillage, a violation of
26 Article 3 common to the Geneva Conventions and of Additional
27 Protocol II, punishable Article 3(f) of the Statute."
28 My Lord, the essential point we're making here is that, by
29 including burning in count 5, the offence of pillage is not

1 thereby borne out, because there is authority that, in fact,
2 burning is not an essential element of pillage.
3 My Lords, I would like to refer to a decision of this
4 Chamber on the Rule 98 motions, decision on motions for judgment
5 of acquittal pursuant to Rule 98, dated 21st October 2005,
6 registry document number 473, paragraph 102. My Lord, this
7 Chamber clearly set out the following elements of pillage in that
8 paragraph: "(1) The perpetrator appropriated private or public
9 property." The operative word there, My Lords, the operative
10 word is "appropriated." The second element, "The perpetrator
11 intended to deprive the owner of the property and to appropriate
12 it for private or personal use." Again, the mental element there
13 relates, in part, at least, to appropriation. Of course, the
14 first aspect there is only an implicit aspect of appropriation
15 itself. "(3) The ppropriation was without the consent of the
16 owner."
17 My Lord, there is no sense in which burning of property can
18 be characterised as an appropriation. To the extent that that is
19 the case, making burning such a major feature of the count on
20 pillage in count 5 clearly means that that count is not borne
21 out, the offence in that count is not borne out.
22 PRESIDING JUDGE: Counsel, at this stage we'll take a short
23 break, and we'll reserve your 45 minutes out of the allotted
24 time.
25 MR JABBI: 45 minutes already, My Lord?
26 JUDGE ITOE: [Microphone not activated].
27 PRESIDING JUDGE: Well, you have done 45 minutes. We'll
28 reserve the balance of your time when we come back.
29 MR JABBI: That will be more than 45, My Lord.

1 PRESIDING JUDGE: Yes, certainly.
2 MR JABBI: I will make an application when we come back.
3 [Break taken at 4.30 p.m.]
4 [Upon resuming at 4.50 p.m.]
5 PRESIDING JUDGE: Dr Jabbi, let us continue.
6 MR JABBI: Yes, My Lord.
7 PRESIDING JUDGE: May I reassure you, you have only used up
8 45 minutes of your allotted time.
9 MR JABBI: My Lords, just to round off on count 5, the
10 defects in count 5, may I just make some general reference to
11 certain other paragraphs in our brief that deal with issues in
12 count 5. My Lord, in paragraphs 101 to 112, which I do not
13 intend to go deeply into, we identify the failure of the
14 pre-trial brief and the opening statement to cure the defects in
15 the indictment, the indictment defects. Paragraphs 101 to 112
16 where those references to the pre-trial brief, as set out in
17 extensive and may I also refer Your Lordships to paragraphs 413
18 to 431 where, again, the same count is dealt with. In paragraphs
19 401 to -- 413, rather, and 431, we however now include analysis
20 of the evidence, not only in relation to burning but also in
21 looting which is the other aspect of the offence charged in count
22 5. And in relation to all the geographic locations that are
23 referred to in count 5, again watching the clock, I would just
24 want to refer to the evidence of, in paragraph 420 of the trial
25 brief, paragraph 420, I just want to refer briefly to the
26 evidence of three Defence witnesses.
27 In paragraph 420 Ishmael Senesie Koroma gave testimony, in
28 transcript of his evidence on February 23, 2006, at pages 12 to
29 13 where he testified that while the juntas were leaving fully

1 out of Kenema, led by Mosquito, they caused a lot of destruction
2 and looted shops completely and took all the vehicles to
3 Kailahun.
4 And they of course also denied, under cross-examination at
5 page 63 of the transcript, the witness denied under
6 cross-examination, of being aware of Kamajors committing acts of
7 looting and stated that it was a rule for them not to loot. And
8 the testimony of Arthur Koroma, who gave evidence on 3 May,
9 transcript pages 34 to 35, corroborating the evidence of Koroma,
10 Senesie Koroma, Ishmael Senesie Koroma, to the effect that in
11 fact as the AFRC forces were pulling out of Kenema in February
12 1998, they launched what they called Operation Pay Yourself,
13 where they broke into all the major shops along the main street
14 and looted vehicles and items in the shops.
15 Then at paragraph 421 in respect of Tongo Field and
16 surrounding areas we just want to refer briefly to the testimony
17 of Prosecution witness TF2-144, TF2-144. He testified that when
18 they left Tongo and were escorted by the Kamajors to Kenema, he
19 was later escorted by one commander to Tongo, and upon arrival in
20 his compound he discovered that all his things had been removed
21 and his three houses destroyed. And that is given in the context
22 of looting and pillage.
23 We note that, and submit that this piece of evidence is
24 obviously unreliable since the witness was not there when the
25 alleged looting took place.
26 Now those three pieces of evidence should suggest the
27 limitations of much of the evidence given in respect of count 5
28 by the Prosecution and that it should not be relied on. Even in
29 those areas outside the reference to burning, and burning of

1 course, the evidence on burning in respect of count 5 qualifies
2 to be entirely discarded in view of the fact that burning is not
3 an element of the pillage charged in the count.
4 My Lord, the last defect I do not want again to go into and
5 that is on paragraphs 98 to 100; the failure to specify dates,
6 precise dates, of criminal acts. The relevant references are all
7 there.
8 I would now, My Lords, want to move on to another aspect of
9 our submissions in the final trial brief.
10 PRESIDING JUDGE: You are finishing with defects now?
11 MR JABBI: I believe I have indicated enough, My Lord.
12 PRESIDING JUDGE: On defects? You have covered that rubric
13 exhaustively?
14 MR JABBI: Yes, My Lord.
15 PRESIDING JUDGE: Yes. And then, would you then, for my
16 benefit and guide the Court as to what would be your submission
17 on the question of the defects, the alleged defects? In other
18 words, as to the legal effect. Because if you have asked us to
19 look at seven alleged or perceived defects in the form of the
20 indictment, what should the Court do in case, at some point, we
21 agree with you in respect of one or the other or all of them?
22 What is the law? A short submission, that's all. But if you are
23 not prepared to come to that, we'll leave that.
24 MR JABBI: I will say that briefly, My Lord -- My Lord,
25 there is obvious evidence of prejudice to the accused person and
26 the need for the weight to be given to that evidence to be
27 considerably reduced and much of it to be ignored.
28 PRESIDING JUDGE: Thank you, counsel. Proceed with your
29 further, your second rubric.

1 MR JABBI: Well, the next thing I would want to deal with
2 briefly is the elements for crimes against humanity, and to say
3 that the trial brief deals with this, principally at paragraphs
4 150 to 184, paragraphs 150 to 184. My Lord, our submission here
5 is a very wide ranging area. Our submission is that the
6 Prosecution has generally failed to show the -- the crimes
7 against humanity, both in the charges laid and of course in the
8 evidence. And I would like to refer to paragraphs 150 and 162 in
9 particular, 150 and 162 in particular, for the general elements
10 that must be pleaded and also proved for crimes against humanity.
11 If I may specify paragraph 162 which is more or less on all
12 fours with 150. The elements are as follows, My Lords: There
13 must be an attack. Two: The acts, alleged acts of the accused
14 must be part of the attack. Three: The attack must be directed
15 against a civilian population. Four: The attack must be
16 widespread or systematic. Five: The accused must know that his
17 acts constitute part of a pattern of widespread or systematic
18 crimes directed against a civilian population. And these
19 elements are espoused by this Chamber in paragraphs 54 to 59 of
20 the Rule 98 decision referred to earlier.
21 My Lord, the requirement for pleading and proving these
22 elements, one requirement is that it is not any attack that
23 qualifies as an element of this particular mode of offence. It
24 has to be an attack on a civilian population and directed to that
25 civilian population itself, as distinct from certain specified
26 persons who may well have suffered some violence, but not as part
27 of an attack on a civilian population. This is the basic
28 requirement of these elements. And the alleged acts of the
29 accused must be demonstrated to be part of that attack on the

1 civilian population.
2 My Lords, I just wish to state here, generally, but the
3 specifics are provided in the paragraphs I have already referred
4 to, that there is no evidence of Kamajor, the exercise of Kamajor
5 fighting efforts having been directed to a civilian population as
6 such. Notwithstanding that in the process of fighting exercises,
7 it is not impossible that some civilian may have encountered
8 discomfort.
9 My Lords, in paragraph -- paragraphs 178 to 180 of the
10 Norman final trial brief, some of the evidence of the Prosecution
11 is recited in order to demonstrate that the encounters in
12 question, in each case, did not rise to the level of what the law
13 characterises as an attack against a civilian population.
14 As I said, My Lord, paragraph 179, in particular, recites
15 some eight pieces of testimony by various Prosecution witnesses.
16 JUDGE ITOE: Paragraph what?
17 MR JABBI: Paragraph 179, My Lord. And in paragraph 180 we
18 make the following assessment: The evidence of alleged killings
19 continues in this same way where the alleged killings
20 specifically targeted an individual or is a random act of
21 violence; in some instances as acts of retaliation from past
22 vendettas, therefore, the Defence submits that there is no
23 evidence of an attack, let alone an attack against a civilian
24 population.
25 My Lord, in paragraphs 181 to 184 we deal with the other
26 element of a crime against humanity: That of the attack being
27 widespread or systematic. And we submit that in fact the
28 incidents in question are not attacks of that character. Now,
29 invariably more isolated instances of discomfort being met by

1 this or that person.
2 My Lords, although I intend to continue, I begin to sense
3 that my requested two hours may need to be slightly augmented.
4 PRESIDING JUDGE: Our disposition is to continue until 6.00.
5 MR JABBI: Yes, I'm continuing.
6 PRESIDING JUDGE: Our position is to continue until 6.00
7 and then --
8 JUDGE ITOE: Hoping that you'll round.
9 PRESIDING JUDGE: Hoping that you'll round up your -- but
10 if the law of diminishing returns begins to set in, then we might
11 consider the advisability of adjourning for you to finish up
12 during the first 30 minutes of tomorrow morning's session, but
13 we, we intend to go until 6.00.
14 MR JABBI: My intention, My Lord, was next to take quite a
15 major area but --
16 PRESIDING JUDGE: I think we have the judicial muscle to
17 withstand that until 6.00.
18 MR JABBI: With my own forensic muscle.
19 PRESIDING JUDGE: You're a much younger person.
20 MR JABBI: My Lord, if I may, instead of going into that
21 bigger chunk for now, if I may, therefore, refer Your Lordships
22 to certain areas of the variation of evidence and to refer Your
23 Honours to paragraphs 34 to 144, paragraphs 34 -- sorry -- sorry
24 My Lord, not paragraph 34. Paragraphs 119 on page 34, paragraphs
25 119 where, as a matter of fact it begins on paragraph 113,
26 general introductory. Paragraphs 113 to 144; paragraphs 113 to
27 144. Sorry, My Lords.
28 My Lords, here are certain aspects of the evaluation of
29 evidence are highlighted and analysed so as to assess their

1 effect in coming to a conclusion on various pieces of evidence.
2 The introductory basic principles that are in paragraphs 113 to
3 116, 118, the one referring to the need for the evidence to be
4 assessed in accordance with the tribunal Statute and the Rules
5 and the principle of fair determination of the case against the
6 accused, and also in the spirit of the Statute and the general
7 principles, then in joint trials the basic principles, when
8 conducting such trials, that is in paragraphs 114 to 115, where
9 the point is made that, notwithstanding the joint trial, each
10 accused person shall be accorded the same rights as if he or she
11 were being tried separately. And, secondly, that all the
12 evidence, whether or not by the particular accused, or on behalf
13 of the particular accused, ought to be taken into account in the
14 evaluation of guilt or otherwise, they will refer to the Simic
15 case, the Trial Chamber's decision in paragraph 18 thereof which
16 says that it is not just the evidence of the Prosecution and the
17 defendant under consideration, and must be taken into account
18 when [indiscernible] the evidence.
19 There is also the question of the right of the accused and
20 the standard of the burden of proof and that is raised in
21 paragraph 116, Article 17(3) of the Statute and Rule 87(A) of our
22 Rules of Evidence and Procedure state the main concepts here, to
23 the effect that the accused person is entitled to a presumption
24 of innocence which places the burden of proof of guilt on the
25 Prosecution, without any corresponding burden or responsibility
26 on the accused person, even to vouch for -- to seek to prove his
27 own innocence. And here again, My Lord, a pertinent statement of
28 the broad principle there from the Appeals Chamber decision in
29 this Celibici case at paragraph 458 which is partly cited in our

1 paragraph 116 to the following effect:
2 "At the conclusion that is sought to be reached it is not
3 sufficient that it is a reasonable conclusion available
4 from that evidence. It must be the only reasonable
5 conclusion available. If there is another conclusion which
6 is also reasonably opened from that evidence, and which is
7 consistent with the innocence of the accused, he must be
8 acquitted."
9 My Lords, in connection with this I would also want to cite
10 from a decision of this Chamber dated 27th of November 2006
11 entitled "Written reasoned decision on Prosecution motion for
12 leave to call evidence in rebuttal and for immediate protective
13 measures for proposed rebuttal witness," which is Registry
14 document number 750 at paragraph 54, wherein Your Honours
15 unanimously assert as follows:
16 "In order to arrive at a fair determination of the issue
17 and arguments raised in this motion, we would like to state
18 for the record that it is our view that the statutory
19 burden of proof that lies on the Prosecution obligates it,
20 not only to establish the guilt of the accused beyond all
21 reasonable doubt, but also equally imposes on it, on the
22 other hand, a corresponding obligation and duty of ensuring
23 that all the relevant evidence on which the proof of guilt
24 is, or will be based, is presented before the Chamber with
25 due diligence, preferably before the closure of its case
26 and before the opening of the case for the Defence."
27 My Lord, there has been some attempt on the part of the
28 Prosecution to slightly remove or displace the emphasis in that
29 stipulation of the burden of guilt, burden of proof of guilt, in

1 some of the submissions that have been made. But the statement
2 of that principle that I've just cited from Your Lordships is, of
3 course, the prevailing one, and it is what guides the assessment
4 of evidence adduced in criminal prosecution.
5 My Lords, we would want now just to name some of these
6 aspects of that evaluation of evidence to identify them and try
7 to state their effect, and, first, is the issue of corroboration.
8 This issue is treated in paragraphs 124 to 127 of the Norman
9 final trial brief. If I may just set them down, first of all.
10 The next issue, My Lords, is hearsay evidence and this also
11 is treated in paragraphs 128 to 131, followed by the next, which
12 is witness credibility, paragraphs 132 to 138, and certain
13 incidental issues related to those three I have named. Next,
14 inability to recall dates. Inability to recall dates. In
15 paragraphs 139 to 141. And the last of this set, the question of
16 leading questions at paragraphs 142 to 144.
17 My Lord, with respect to corroborative evidence, that
18 phenomenon is not presented as a requirement that evidence must
19 be corroborated, at least there are certain types of evidence
20 that must be corroborated, but not generally that evidence in
21 criminal Prosecution must be corroborated. That is not a
22 requirement.
23 PRESIDING JUDGE: Are you saying there is no general rule
24 of law that evidence --
25 MR JABBI: That all evidence must be corroborated.
26 PRESIDING JUDGE: Yes.
27 MR JABBI: There is no progressive rule of law.
28 PRESIDING JUDGE: No general rule, but exceptionally there
29 may be --

1 MR JABBI: There certainly are, My Lord.
2 PRESIDING JUDGE: -- statutory and requirements.
3 MR JABBI: Yes, indeed, My Lord.
4 PRESIDING JUDGE: All right. Let's go on.
5 JUDGE ITOE: And where there is corroboration, it makes
6 some difference, I suppose, to the situation, doesn't it?
7 MR JABBI: Yes, certainly, My Lord. In fact, this Chamber
8 has also said transcript of September 27, 2006, at page 59, lines
9 5 to 16, that it is not prepared to go as far as accepting that
10 it is a general principle of international law that corroboration
11 is not a requirement and it called the law -- that statement of
12 the law on corroboration, they called it a contentious
13 proposition. If I may just read the portion of the transcript.
14 JUDGE ITOE: May we have the name of that -- the reference
15 of that decision, please?
16 MR JABBI: Yes, My Lord.
17 JUDGE ITOE: Of this Chamber? You are saying yes.
18 MR JABBI: Yes, My Lord.
19 JUDGE ITOE: I remember, yes.
20 MR JABBI: It's from the transcript of 27 September 2006,
21 page 59, lines 5 to 16. The prosecuting counsel said, "-- but
22 the principles of international law, that there is no need for
23 collaboration," as he was about to proceed, then one of your
24 Lordships interposed, "Oh, well, I'm not saying -- I don't
25 accept -- I don't think I'm prepared to go that far, that there
26 is no need for corroboration, no." And then the prosecuting
27 counsel weighed in again, "Yes, My Lord." And then His Lordship
28 continued, "I contest that." Prosecuting counsel weighed in
29 again, "My Lord," and then the Presiding Judge, no less, said, "I

1 think it is a very, very," then the prosecuting counsel sought
2 attention, "My Lord," and the Presiding Judge continued. "I
3 think it is a very, very contentious proposition." And then
4 another of Your Lordships said, "It is a very contentious legal
5 proposal."
6 So, My Lord, the point one is making is that corroboration
7 is a phenomenon of criminal evidence, and whilst there is no
8 general proposition elevating it into a universal requirement,
9 however, there are various rules and stipulations prescribing it
10 as a requirement in certain context and circumstances and even
11 when it is not a requirement, it certainly has some force and
12 effect when it does obtain and even when it doesn't obtain. So,
13 my Lords, we identify a few pieces of evidence by the Prosecution
14 witnesses, which are so crucial that the failure to have it
15 corroborated in any respect by other evidence tends to gravely
16 undermine its force and persuasion. And in paragraph 126 of our
17 final trial brief we identify pieces of evidence by one --
18 TF2-165, then TF2-035, then TF2-022 and TF2-071 on very grave
19 allegations.
20 With TF2-165, in transcript of 7 March 2005, at page 9,
21 lines 13 to 25, page 10, lines 22 to 12 and 17, page 12, line 25
22 to page 13, line 22.
23 That related to a testimony to the effect that sometime in
24 1997, or later, a group of unidentified --
25 PRESIDING JUDGE: We may want to caution you that if those
26 extracts relate to evidence given in closed session, you may be
27 careful to do some kind of instantaneous redaction. I'm only
28 saying if. I'm not sure at all. Because there are names
29 mentioned there.

1 MR JABBI: Yes, indeed, My Lord.
2 PRESIDING JUDGE: And just to be on the safe side.
3 MR JABBI: Yes, safe side.
4 PRESIDING JUDGE: And an abundance of caution.
5 THE INTERPRETER: Your Honours, could counsel switch on his
6 microphone?
7 PRESIDING JUDGE: Counsel, you might. I am just wondering
8 whether since you are addressing us and this is all documented in
9 your brief whether the mere references just to the --
10 MR JABBI: To the paragraph.
11 PRESIDING JUDGE: -- and the paragraph would not suffice
12 for our purposes --
13 MR JABBI: The general character of the evidence.
14 PRESIDING JUDGE: Yes, to avoid you embarking upon this
15 exercise of instantaneous redaction.
16 MR JABBI: Yes, My Lord. I will proceed that way, My Lord.
17 Thank you very much.
18 PRESIDING JUDGE: Right.
19 MR JABBI: That evidence is in respect of a certain alleged
20 killing. And, in paragraph 126, sub (1), the details are stated.
21 Our point is that this is such a crucial piece of evidence of an
22 incident allegedly taking place in very open public, but for
23 which there is no corroboration whatsoever. And in this
24 particular case, as we note in the footnote, the need for
25 corroboration is heightened here by the fact that the date of the
26 alleged incident is not made clear in the testimony.
27 PRESIDING JUDGE: When you say "heightened," you mean
28 desirable?
29 MR JABBI: Made more desirable.

1 PRESIDING JUDGE: Because, clearly, as we have already
2 argued --
3 MR JABBI: Yes.
4 PRESIDING JUDGE: -- as a general principle, there is no
5 rule of law --
6 MR JABBI: No, My Lord.
7 PRESIDING JUDGE: -- requiring corroboration.
8 MR JABBI: No, My Lord.
9 PRESIDING JUDGE: Unless there are specific statutory
10 requirements to that effect.
11 MR JABBI: Yes, My Lord.
12 PRESIDING JUDGE: But, of course, the [indiscernible] that
13 corroboration may be desirable in certain circumstances, and, in
14 certain areas, as a matter of practice, corroboration may be
15 desirable. So, if you can put it at that, rather than
16 heightened, because I don't understand whether we understand the
17 language of heightened in that context.
18 MR JABBI: As Your Lordship pleases. What I'm saying here
19 My Lord is that because of the very seriousness of the
20 allegation, and the imprecise timing that is involved --
21 PRESIDING JUDGE: It's your submission that
22 corroboration --
23 MR JABBI: -- it is our submission that corroboration --
24 PRESIDING JUDGE: -- is desirable.
25 MR JABBI: By that -- and so corroboration is desirable.
26 PRESIDING JUDGE: Right.
27 MR JABBI: My Lord, then the evidence of TF2-035. This is
28 another alleged public incident where a large number of people
29 are alleged to have been isolated and systematically hacked to

1 death at a public checkpoint, if one may also say that.
2 Again, the seriousness of it suggests that it would be
3 desirable for it to have been corroborated. The same goes for
4 TF2-022 and TF2-071 and those are also set out in some detail in
5 the same paragraph 126.
6 We would want to put a rider to the points made so far on
7 corroboration by submitting that even where evidence is
8 corroborated it does not however necessarily follow that it is
9 credible or reliable, and we consider that there is need for a
10 lot of caution to be exercised by the Trial Chamber when looking
11 at the phenomenon of corroboration or the absence of it with
12 respect to certain pieces of evidence.
13 My Lord, I do not know whether it will be premature to seek
14 to end there for today with a plea. I still have a few minutes
15 on my original requested two hours but at this stage --
16 PRESIDING JUDGE: Yes.
17 JUDGE ITOE: No, no, I am sorry, you are out of time. You
18 are out of your two hours.
19 MR JABBI: Yes.
20 PRESIDING JUDGE: Yes. What is your promise for tomorrow
21 because you indicated that you definitely were going to stay
22 within the limits of two hours.
23 MR JABBI: Yes, My Lord.
24 PRESIDING JUDGE: And the way -- your methodology has been
25 generally speaking effective, virtually making your general
26 submissions and specific submissions, but referring us to the
27 paragraphs and it would seem to be a very helpful and workable
28 methodology. It would be the disposition of the Bench to advise
29 you to continue with that and hopefully, if we can reserve for

1 you 30 minutes during the first session, during the session -- we
2 only have one session tomorrow in fact, reserve 30 minutes for
3 you when we resume, or say, on the liberal side, 40 minutes for
4 you to wind up.
5 MR JABBI: My Lord, that is quite gracious of you. I think
6 I will contain myself during that time.
7 PRESIDING JUDGE: Yes. You don't have to use up to that
8 but I think it's fair to do that so that we can get on with the
9 other two accused persons.
10 MR JABBI: Yes, My Lord. Thank you very much, My Lord.
11 PRESIDING JUDGE: Right. So we will adjourn to 9.30 a.m.
12 tomorrow morning.
13 [Whereupon the hearing adjourned at 5.55 p.m.,
14 to be reconvened on Wednesday, the 29th day of
15 November 2006, at 9.30 a.m.]
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