



Case No. SCSL-2004-15-T
THE PROSECUTOR OF
THE SPECIAL COURT
V.
ISSA SESAY
MORRIS KALLON
AUGUSTINE GBAO

MONDAY, 16 OCTOBER 2006
9.40 A.M
TRIAL

TRIAL CHAMBER I

Before the Judges:

Bankole Thompson, Presiding
Pierre Boutet
Benjamin Mutanga Itoe

For Chambers:

Ms Candice Welsh
Mr Matteo Crippa

For the Registry:

Mr Thomas George

For the Prosecution:

Mr Peter Harrison
Mr M Bangura
Ms Shyamala Alagendra
Ms Amira Hudroge

For the accused Issa Sesay:

Mr Wayne Jordash
Mr Jared Kneitel
Ms Stephanie Lefevre (legal assistant)

For the accused Morris Kallon:

Mr Melron Nicol-Wilson
Mr Charles Taku

For the accused Augustine Gbao:

Mr Andreas O'Shea
Mr John Cammegh

1 [RUF16OCT06A- CR]

2 Monday, 16 October 2006

3 [The accused present]

4 [Open session]

09:43:05 5 [Upon commencing at 9.40 a.m.]

6 PRESIDING JUDGE: Good morning, learned counsel. May I
7 have appearances, please. For the Prosecution?

8 MR HARRISON: My name is Harrison, initials PH. Also
9 present are Mr Bangura, initial M; Ms Alagenda, initial S; and
09:43:26 10 Ms Hudroge, initial A.

11 PRESIDING JUDGE: Thank you. For the first accused?

12 MR JORDASH: For the first accused, myself, Wayne Jordash;
13 Jared Kneitel; and may I announce our new legal assistant,
14 Stephanie Lefevre, who is seated to my left-hand side.

09:43:49 15 PRESIDING JUDGE: For the second accused?

16 MR TAKU: Charles Taku, for the second accused, with
17 Mr Melron Nicol-Wilson. Mr Shekou Touray will be here in a
18 little while.

19 PRESIDING JUDGE: And for the third accused?

09:44:00 20 MR O'SHEA: My name is Andreas O'Shea, and I appear for
21 Mr Gbao, with Mr John Cammegh.

22 PRESIDING JUDGE: Thank you. Counsel, this proceeding is
23 the Rule 98 proceeding, and the current applicable provisions of
24 Rule 98 of the Rules of Procedure and Evidence, as amended by the
09:44:32 25 plenary meeting of the judges of the Special Court on 13 May
26 2006, reads as follows:

27 "If, after the close of the case for the Prosecution, there
28 is no evidence capable of supporting a conviction on one or more
29 counts of the indictment, the Trial Chamber shall, by oral

1 decision, and after hearing the oral submissions of the parties,
2 enter a judgment of acquittal on those counts. "

3 This is what today's proceeding is all about. In the
4 conceded view of the Chamber, the amended Rule 98 merely
09:45:19 5 introduces an oral procedure for disposing of the motions for
6 judgment of acquittal, without modifying the legal standard
7 applicable to these motions, which, as laid down in our decision
8 on motions for judgment of acquittal, rendered in the CDF case,
9 is:

09:45:46 10 "One that limits and restricts the Tribunal, only to a
11 determination as to whether the evidence adduced by the
12 Prosecution at the close of its case is such as is legally
13 capable of supporting a conviction on one or more counts of the
14 indictment. "

09:46:11 15 According to the most recent jurisprudence of the ICTY on
16 the judgment of acquittal, the rationale behind the adoption of
17 an oral procedure is to expedite the process of disposing of
18 motions of this type. While, as stated in *Prosecutor v Oric*, not
19 in any way diminishing the Chamber's responsibility to make a
09:46:26 20 conceded decision.

21 In order to promote fairness and efficiency of the
22 proceedings under the amended Rule, both the Defence and the
23 Prosecution have filed advanced notices of the specific issues
24 relating to each count of the indictment, together with legal
09:47:00 25 arguments that they intend to address in their oral submissions
26 pursuant to Rule 98 today.

27 I must emphasise that, as to the applicable legal standard
28 prescribed by Rule 98, the Chamber reiterates its previous
29 exposition of the law on the subject, namely:

1 "Whether the evidence adduced is legally capable of
2 supporting a conviction."

3 Therefore, for reasons of judicial efficiency, the Chamber
4 does not deem it necessary to hear submissions on the applicable
09:47:48 5 legal standard governing Rule 98. In addition, the Chamber
6 wishes to point out that this standard is to be applied in
7 respect of each count, taken as a whole, contained in the
8 indictment against the accused persons, and irrespective of each
9 specific offence which might form part of that particular count.

09:48:16 10 However, mindful of the right of an accused person to be
11 informed of the case against him, where the Chamber is satisfied
12 that there is no evidence capable of sustaining a conviction in
13 respect of a particular offence or location in a count pleaded in
14 the indictment, it will accordingly make a finding to that effect
09:48:45 15 in its oral decision.

16 On the issue of modes of liability, particularly individual
17 criminal responsibility, we wish to state that with reference to
18 the various modes of liability charged in the indictment and with
19 particular reference to the individual criminal responsibility of
09:49:09 20 the accused persons under Article 6.1 and 6.3 of the Statute in
21 our decision on motions for judgment of acquittal in the CDF
22 case, we held as follows:

23 "The Chamber recognises, as a matter of law, generally,
24 that Article 6.1 of the Statute of the Special Court does not, in
09:49:44 25 its proscriptive reach, limit criminal liability to only those
26 persons who plan, instigate, order, physically commit a crime, or
27 otherwise aid and abet in its planning, preparation or execution.
28 It's proscriptive ambit extends beyond that to prohibit the
29 commission of offences through a joint criminal enterprise in

1 pursuit of the common plan to commit crimes punishable under the
2 Statute.

3 Furthermore, Article 6.3 of the Statute holds superiors
4 criminally responsible for the offences committed by their
09:50:32 5 subordinates, where a superior has knowledge or reason to know
6 that subordinates are about to or have committed an offence and
7 that superior fails to take the necessary and the reasonable
8 measures to prevent or punish the perpetrators thereof.

9 The Chamber is of the opinion that a determination of the
09:50:57 10 accuseds' liability depends, to a degree, on the issues of fact
11 and weight to be attached to the evidence, which require an
12 assessment of the credibility and reliability of that evidence.
13 These issues, however, do not arise for determination at this
14 stage. "

09:51:19 15 The Trial Chamber reaffirms and adheres to its previous
16 reasoning and interpretation on the issue of modes of liability
17 within the context of Rule 98. Therefore, again it is
18 emphasised, for reasons of judicial efficiency, we are not
19 inclined to hear submissions on the various modes of liability at
09:51:50 20 this stage.

21 In accordance with the schedule provided in the scheduling
22 order concerning oral motions for judgment of acquittal, pursuant
23 to Rule 98, each Defence team will have a maximum of two hours to
24 present its oral submissions, while the Prosecution will have a
09:52:15 25 maximum of three hours to present its oral submissions in
26 response.

27 The parties are now invited to present their oral
28 submissions as set out in their written notices and following the
29 order of the counts contained in the indictment. We must

1 emphasise that counsel on both sides are not obliged to exhaust
2 the maximum amount of time allotted. We have thoroughly read and
3 digested your submissions, and we're all designed to make this
4 proceeding as expeditious as possible, and so we invite your
09:53:01 5 co-operation in this regard. It is just because we need
6 tidiness, that's why we've set that maximum limit.

7 We'll start with learned counsel for the first accused.
8 Before we do that, let me urge the Prosecution and advise them
9 that they are at liberty to make reference in their response to
09:53:28 10 any evidence concerning any locations expressly specified in the
11 indictment in addition to concessions. Yes, Mr O'Shea.

12 MR O'SHEA: Your Honour, I just raise one preliminary
13 matter in relation to one comment that Your Honour made with
14 regard to the order of the counts in which our arguments are
09:54:02 15 placed. Of course, I fully understand the rationale behind that
16 statement, and I will attempt, in so far as possible, to comply
17 with that invitation. I would however like to note, so the
18 Chamber is aware, in terms of my planning, and that planning was
19 for the sake of judicial economy and for the sake of tidiness,
09:54:23 20 and having regard to the fact they are elements which are common
21 to different counts, I have changed the order slightly, for those
22 reasons and also reasons of strategy. So I will be asking
23 Your Honours' leave to deviate slightly, without affecting
24 tidiness or the economy of these proceedings.

09:54:43 25 PRESIDING JUDGE: That point is taken.

26 MR O'SHEA: Thank you, Your Honour.

27 PRESIDING JUDGE: In other words, some degree of
28 flexibility here, without, at the same time, sacrificing
29 expeditiousness.

1 MR O'SHEA: I'm grateful, Your Honour.

2 PRESIDING JUDGE: We'll now proceed to hear learned counsel
3 for the first accused.

4 MR JORDASH: Your Honours, happily, I can be fairly brief.

09:55:12 5 There has been a good deal of communication between ourselves and
6 the Prosecution, and much of what is contained in our skeleton --

7 PRESIDING JUDGE: Let me just interrupt you. Perhaps I
8 need to mention, too, there will be no interventions or
9 interjections from the Bench until after we've heard the parties.

09:55:30 10 We will do our best to keep that to a minimum, unless it becomes
11 absolutely necessary, as a general rule. So you have an
12 uninterrupted -- except it's absolutely necessary.

13 MR JORDASH: Much of what is contained in the skeleton for
14 the first accused has been the subject of communication and final
09:56:00 15 agreement. I think the only outstanding matter is the argument
16 relating to count 8, which is at paragraph 45 to 49 of the
17 skeleton.

18 If I can take Your Honours through the various arguments to
19 indicate where --

09:56:24 20 JUDGE ITOE: What paragraph of the indictment, Mr Jordash?

21 MR JORDASH: Count 8 is the outstanding argument which
22 relates to --

23 JUDGE BOUTET: When you say paragraph 45, you mean of your
24 skeleton argument?

09:56:43 25 MR JORDASH: Of the skeleton argument, yes.

26 JUDGE BOUTET: And your argument has to do with count 8 of
27 the indictment?

28 MR JORDASH: Yes, which Your Honours will find at paragraph
29 54 to 60 of the indictment. If I may deal with the aspects of

1 the argument which have been agreed.

2 Firstly, paragraph 7 of the skeleton, the Prosecution
3 concede that they have not adduced evidence of unlawful killings
4 in Telu and Mamboma.

09:58:48 5 In relation to paragraph 9 of the skeleton, the Prosecution
6 concede that there is no evidence of unlawful killings in
7 Willifeh and Biaya. The Defence concedes there is sufficient
8 evidence of unlawful killings in Foindu.

09:59:53 9 JUDGE BOUTET: You're now conceding this. In your skeleton
10 argument, you were taking issue with that, but now you are not
11 taking issue any more; it has to do, obviously, with the
12 spelling, or the description, or the time used?

13 MR JORDASH: There is evidence of unlawful killings in a
14 place called Foendor.

10:00:12 15 JUDGE BOUTET: That's the way the transcript has written
16 that location down.

17 MR JORDASH: Yes. We concede that.

18 JUDGE BOUTET: As Foindu?

10:01:10 19 MR JORDASH: The same as Foindu, yes. In relation to
20 paragraph 11, the Prosecution concede that submission in relation
21 to Heremakono, Komalu or Kamalu, Katombo and Kamadugu; no
22 evidence of unlawful killings in those locations.

23 In relation to paragraph 13, the defence concede there is
24 evidence sufficient in relation to Tendakom and unlawful
10:02:21 25 killings. Tendakom, we concede, is the same as Chendekom, and
26 the evidence which was given relating to Chendekom.

27 In relation to paragraph 6 to 9, beginning at paragraph 15
28 of the skeleton, the Prosecution agree they have failed to adduce
29 evidence of sexual violence in Fok Koya and Superman Camp.

1 In relation to Tomendeh, there is evidence relating to
2 Tomendeh, which has been given on the transcript as Tomandu, but
3 the Prosecution concede that the evidence given by TF1-016 is
4 insufficient to sustain a conviction.

10:04:20 5 JUDGE BOUTET: Run that again, please.

6 MR JORDASH: The only evidence of sexual violence in
7 Tomendeh is the evidence --

8 JUDGE BOUTET: Whether it is Tomendeh or Tomandu, for that
9 purpose of the argument, it's the same?

10:04:37 10 MR JORDASH: Yes, TF1-016.

11 JUDGE BOUTET: Is the only witness who spoke about that
12 particular location?

13 MR JORDASH: Indeed.

14 JUDGE BOUTET: And according to the Prosecution, this is
10:04:46 15 not sufficient. They concede whatever evidence this witness gave
16 would not be sufficient to meet the standard?

17 MR JORDASH: Yes. The evidence is that two females were
18 taken into a house, but the witness did not know what had
19 happened inside the house. The Prosecution concede that is
10:05:04 20 insufficient to sustain a conviction in relation to Tomendeh.

21 JUDGE BOUTET: And the counts relating to sexual violence?
22 In other words, there is no evidence of any to sexual violence?

23 MR JORDASH: In relation to this location, 6 to 9.

24 JUDGE BOUTET: Yes. Mr Jordash, just one question. I
10:05:26 25 apologise. We said we would not intervene. You mentioned
26 something about Superman Camp that the Prosecution conceded.

27 MR JORDASH: Yes.

28 JUDGE BOUTET: I didn't see that in their own pleadings, as
29 such, or skeleton arguments. Can you enlighten me on this, if at

1 all possible?

2 MR JORDASH: That has been agreed subsequently.

3 JUDGE BOUTET: Subsequently, that's okay. We'll question
4 the Prosecution when it's their turn.

10:05:54 5 MR JORDASH: Since we drafted the reply, which Your Honours
6 have seen in response to the Prosecution's submissions, but since
7 then we have been trying to narrow the issues down even further
8 to avoid having to take up any of the Chamber's time.

9 JUDGE BOUTET: So Superman Camp is an additional
10:06:14 10 concession, and so there is agreement. We'll take it from the
11 Prosecution when we get there. It is just for clarification at
12 this stage.

13 MR JORDASH: Certainly.

14 JUDGE BOUTET: Thank you.

10:06:24 15 MR JORDASH: In relation to paragraph 15, the defence
16 concede there is evidence of sexual violence at Kissi Town Camp.
17 Finally for counts 6 to 9, paragraph 17 of the skeleton,
18 Prosecution concede that they have failed to adduce evidence of
19 sexual violence in Heremakono and Fadugu.

10:07:28 20 JUDGE BOUTET: So in this instance, Fadugu being an
21 additional concession?

22 MR JORDASH: Indeed, yes. Counts 7 to 11, physical
23 violence, paragraph 19 of the skeleton, the Prosecution have
24 concede they have not adduced evidence of physical violence in
10:08:20 25 Konkoba or Kontoba.

26 PRESIDING JUDGE: Continue, counsel.

27 MR JORDASH: Paragraph 21, the Prosecution concede that
28 they have not adduced evidence of physical violence in Mahondeh,
29 Malama and Mamaka.

1 Paragraph 23, Freetown and the Western Area, we concede
2 that there is some evidence of physical violence in Wellington.

3 JUDGE BOUTET: You're not pursuing your argument there was
4 no evidence capable in Wellington?

10:10:21 5 MR JORDASH: No. The state of the evidence is that there
6 is reference to a place called Loko Town. We can't find Loko
7 Town on the map, but the evidence would suggest that Loko Town is
8 in Wellington. There is certainly an arguable point to be made
9 about that; not a very strong one, but we concede it for the
10:10:46 10 purpose of 98 submissions.

11 Count 12, paragraph 25 of the skeleton, the Prosecution
12 concede that they have not adduced evidence of the acts which
13 underlie this count in Bonthe, Moyamba, Pujehun, and Tonkolili,
14 and Bo.

10:12:08 15 JUDGE BOUTET: Can you repeat that enumeration: Bonthe,
16 Moyamba.

17 MR JORDASH: It's Bonthe, Moyamba, Pujehun, Bo and
18 Tonkolili.

19 JUDGE BOUTET: So Kambia is not there any more, or Port
10:12:27 20 Loko?

21 MR JORDASH: Exactly, Your Honour. We concede there is
22 evidence in those two locations.

23 JUDGE BOUTET: So you are considering now there is some
24 evidence in Kambia and Port Loko?

10:12:40 25 MR JORDASH: Indeed, yes. Well, I won't go into the
26 arguments. It's probably not significant.

27 JUDGE BOUTET: I'm just reading from your paragraph 25.
28 Those were listed there at the time but, since then, you have to
29 come to some agreement.

1 MR JORDASH: Yes. The discussions have revolved around
2 where certain places are, whether they fall within a district or
3 not. We've conceded after some discussion with the Prosecution
4 that there is evidence in those two places.

10:13:28 5 JUDGE BOUTET: Thank you.

6 MR JORDASH: If it assists, I can certainly refer to the
7 evidence of the witnesses.

8 JUDGE BOUTET: Well, that would facilitate our homework on
9 this. You can make our life easier, certainly. Presumably, in
10:13:41 10 your discussion, you have pinpointed the evidence that would
11 relate directly to these two locations, Kambia and Port Loko?

12 MR JORDASH: Certainly, TF1-167 referred to Major Eddie
13 Town being in the Kambia District, and I think the substance of
14 the evidence is that there were child soldiers with the SLAs at
10:14:07 15 Major Eddie Town.

16 In relation to Port Loko, there evidence relates to
17 TF1-255.

18 JUDGE ITOE: Mr Jordash, I think this is an admonishment to
19 all the parties. It would help us if you give us not just a
10:15:12 20 pseudonym but also the order in which the witness testified. Is
21 he the 25th, 26th, or the first or third witness, you know? It
22 would help us to locate ourselves very easily on our personal
23 records, if you could. That would be very helpful as well.

24 MR JORDASH: What we could do in relation to TF1-255 is
10:15:35 25 give you the date, which 18 July 2006. In relation to TF1-167,
26 he gave evidence about Major Eddie Town on 14 October 2004. I'm
27 sorry, we don't have the place where they appeared in the list.

28 JUDGE ITOE: That's okay, just to say the first Prosecution
29 witness, or the 20th or 31st.

1 MR JORDASH: Certainly.

2 JUDGE ITOE: That's okay. The dates are all right. But
3 where you can, please.

4 MR JORDASH: I'm afraid I'm going to disappoint
10:16:26 5 Your Honour, because I don't have reference to that here.

6 Count 13, abductions and forced labour, the defence concede
7 there is evidence of abductions and forced labour in Tomendeh.

8 Paragraph 29 of the skeleton, the Prosecution concede they
9 have failed to adduce evidence to support this count in relation
10:17:39 10 to Heremakono, Komalu or Kamalu and Kamendugu.

11 In relation to paragraph 31 of the skeleton, the
12 Prosecution made the same concession in relation to Peacock Farm.

13 In relation to paragraph 33, a similar point as earlier:
14 We accept that Tendakom is the same and Chendekom, and we concede
10:19:12 15 there is evidence of abductions and forced labour at Tendakom.
16 The Prosecution concede there is no evidence relating to Masiaka.

17 JUDGE BOUTET: So this paragraph 33 which relates to Port
18 Loko District, there is agreement, from your part, conceding now
19 there is evidence about Tendakom.

10:19:47 20 MR JORDASH: Yes.

21 JUDGE BOUTET: And you were also saying there was none
22 about Masiaka, but now you agree there is some evidence about
23 Masiaka.

24 MR JORDASH: No, we win that one. We win the Masiaka one;
10:20:06 25 the Prosecution concede there is no evidence.

26 JUDGE BOUTET: It was the other way around. That's okay.

27 MR JORDASH: Count 14, looting and burning, paragraph 35 of
28 the skeleton, the Prosecution concede they have not adduced
29 evidence of looting and burning in Telu and Mamboma.

1 Paragraph 37, Koinadugu District, the Prosecution concede
2 they have not adduced evidence in Heremakono and Kamendugu.

3 Paragraph 39, the Prosecution concede they have not adduced
4 evidence at all in Foindu and Yardu Sandor.

10:21:49 5 Paragraph 41, dealing with counts 15 to 18, attacks on
6 UNAMSIL personnel and humanitarian assistance workers. Paragraph
7 41, the Prosecution concede they have not adduced evidence within
8 the relevant time frame of attacks on humanitarian assistance
9 workers.

10:22:47 10 Now, it gets a bit more complicated in relation to
11 paragraphs 43 and 44. Can I just have a moment, please. The
12 Prosecution concede that there is no evidence that the AFRC/RUF
13 engaged in attacks against UNAMSIL peacekeepers, except in
14 Bombali, Kailahun, Kono and Tonkolili. Tonkolili's additional to
10:23:50 15 what's on the skeleton, and Kambia has been missed out -- no,
16 sorry, it hasn't.

17 PRESIDING JUDGE: No, it's part of it. It's Bombali and
18 the three Ks.

19 MR JORDASH: Of course. Could I add to that list
10:24:38 20 Port Loko. There is evidence of --

21 PRESIDING JUDGE: In other words, to the exception? Are
22 you adding to the exception?

23 MR JORDASH: Yes. The Prosecution have adduced evidence --

24 PRESIDING JUDGE: They've adduced evidence in Port Loko?

10:24:52 25 MR JORDASH: Yes.

26 PRESIDING JUDGE: All right.

27 MR JORDASH: Which is TF1-288, relating to Port Loko.

28 PRESIDING JUDGE: That's a Defence concession?

29 MR JORDASH: Yes. I'm trying to find the number of that

1 witness from the witness list. It is number 67 on the witness
2 list.

3 Going back to the list I've just given Your Honours,
4 dealing with Kailahun, the Prosecution agree that the evidence
10:26:10 5 which has been adduced in relation to Kailahun supports only
6 count 18. In relation to Kono, the evidence adduced supports
7 only counts 17 and 18.

8 The remaining evidence relating to the remaining locations
9 mentioned, we concede that the evidence relates to 15 to 18. I
10:27:12 10 hope that makes sense. The remaining locations where the
11 Prosecution have adduced evidence, the evidence support counts 15
12 to 18. It's only --

13 JUDGE BOUTET: The locations you are talking about are the
14 locations of Bombali, Tonkolili?

10:27:33 15 MR JORDASH: And Port Loko.

16 JUDGE BOUTET: And Port Loko.

17 MR JORDASH: Yes. Fifteen to 18 are supported by the
18 evidence. Just to clarify, the Prosecution agree there is no
19 evidence in relation to Kambia.

10:28:18 20 JUDGE BOUTET: Fifteen to 18?

21 MR JORDASH: Fifteen to 18. I would like to just deal very
22 briefly with count 8. I know this is out of turn, but it makes
23 sense to deal with those preliminary -- well, the points which
24 were all relating to just sufficiency of evidence all in one
10:28:53 25 section of my submissions.

26 PRESIDING JUDGE: Leave granted.

27 MR JORDASH: Thank you. I can be very brief with count 8,
28 and those submissions which Your Honours will find at paragraphs
29 45 to 49. Your Honours will see from these submissions that they

1 are essentially based on a ruling from this Chamber, to the
2 effect that only acts of a non-sexual nature fall within
3 Article 2(i) of the Statute. I won't simply reiterate what the
4 skeleton says. I hope it's clear and I hope the arguments are
10:29:51 5 set out fully.

6 Paragraph 47. Perhaps I put my submissions too high when I
7 said that there could be no doubt that the Prosecution intended
8 that the factual basis of count 8 contained acts of a sexual
9 nature. Your Honours will see from the Prosecution's skeleton
10:30:15 10 that, suddenly, there is a doubt. Whereas, once the Prosecution
11 were apparently saying that count 8 included acts of a sexual
12 nature, that was before they, obviously, were cognisant of this
13 Trial Chamber's ruling that count 8 couldn't, or I should say
14 Article 2(i) couldn't include acts of a sexual nature. It would
10:30:48 15 appear the Prosecution have now shifted their position.

16 If I can refer Your Honours to paragraph 16 of the
17 Prosecution's skeleton, where the Prosecution, in the last three
18 lines of the paragraph say, or attempt to rely upon a ruling in
19 the Brima trial, to the effect that Trial Chamber II said, "We
10:31:28 20 consider that there is evidence which falls within that category
21 relating to the abductions of women and girls, and forcing them
22 to submit to marital relationships and to perform various
23 conjugal duties."

24 The majority in Trial Chamber II appear to suggest that
10:31:54 25 count 8, relating to the forced marriage allegations was a count
26 which consisted of non-sexual acts, hence that count could
27 remain, notwithstanding this Chamber's ruling that count 8 could
28 not, or Article 2(i) could not include acts of a sexual nature.
29 The Prosecution, I interpret from this paragraph, appear to be

1 trying to rely upon that and saying, "Well, once upon a time, we
2 wanted count 8 to include acts of a sexual nature." Trial
3 Chamber I said it couldn't, so we'll shift our position and rely
4 upon the Brima ruling, which says count 8 can stand because it
10:32:49 5 can simply and exclusively include acts of a non-sexual nature.

6 In my submission, in relation to the Prosecution's
7 expedient shift in their case, it is two-fold. Firstly, that
8 they should not be allowed to shift their position, if they said,
9 as they did, and it's clear from their reliance upon -- well, let
10:33:20 10 me simplify: Your Honours can see from the skeleton the way in
11 which the Prosecution sought to put their case on count 8, when
12 applying to amend the indictment. Your Honours can see from
13 their skeleton, paragraph 16, the way in which they now seek to
14 put their case. In my submission, this is effectively trial by
10:33:41 15 ambush. They've simply shifted their position because it suits
16 and because they are concerned that count 8 is now legally
17 impermissible.

18 PRESIDING JUDGE: It could also be a preference for the
19 majority ruling in Trial Chamber II.

10:34:02 20 MR JORDASH: Well, it is a preference for them, because it
21 suits them

22 PRESIDING JUDGE: And there is no appellate ruling on this
23 issue.

24 MR JORDASH: But it is a preference which contradicts
10:34:12 25 completely the bona fide submissions they made when trying to
26 amend the indictment and add count 8 to it.

27 PRESIDING JUDGE: Very well.

28 MR JORDASH: That was their position then. They ought not
29 be allowed to --

1 PRESIDING JUDGE: Approbate and reprobate.

2 MR JORDASH: Yes. They gave notice to the defence that
3 count 8 included acts of a sexual nature. Now they say, at the
4 end of the Prosecution case, no, it doesn't, it only include acts
10:34:35 5 of a non-sexual nature. That cannot be, in my respectful
6 submission, fair to the accused. It cannot be proper notice in
7 relation to that count, and it cannot be fair for the Prosecution
8 to make one allegation, when it suits, to amend the indictment,
9 and then make one submission in contradistinction to that earlier
10:34:56 10 submission, simply because it suits them later on in the day.

11 PRESIDING JUDGE: I merely sought clarification, that's
12 all. Thanks.

13 MR JORDASH: Those are my submissions, unless I can assist
14 Your Honours further. Before I do, Your Honour, if I have
10:35:45 15 misinterpreted the Prosecution's intent in relation to count 8, I
16 would seek to reserve a right to reply, because it's not
17 altogether clear what the prosecution are saying in relation to
18 count 8. Their submissions in paragraph 16 are rather skeletal,
19 as they're intended to be.

10:36:05 20 PRESIDING JUDGE: Well, if it becomes necessary, leave can
21 be sought.

22 MR JORDASH: Thank you.

23 PRESIDING JUDGE: Learned counsel for the -- have you got
24 some more further --

10:36:16 25 MR JORDASH: Only one thing. Your Honours have seen the
26 reply, which we filed on the 12th of October 2006, dealing with
27 our forthright position on arguments concerning various aspects
28 of the joint criminal enterprise.

29 PRESIDING JUDGE: What was the date again?

1 MR JORDASH: It was the 12th of October 2006. With
2 Your Honours' leave, I would seek to revisit this reply, if
3 necessary, in light of any of my co-accused's submissions. We
4 feel very strongly about the contents of our reply and would like
10:37:08 5 to hear our learned friends' submissions before elaborating on
6 them. We hope we don't have to elaborate on them.

7 PRESIDING JUDGE: You will make a case of the point at that
8 juncture, if it's necessary.

9 JUDGE BOUTET: If I may, Mr Presiding Judge. Mr Jordash,
10:37:28 10 this last comment relates to the joint criminal enterprise issue,
11 so that's the one where you say, depending as to what is being
12 addressed, you would like to be able to readdress the issue,
13 should it be necessary, depending how it is dealt with?

14 MR JORDASH: Yes.

10:37:46 15 JUDGE BOUTET: Your position, to my understanding, is quite
16 clear; it is not to be disposed of at this particular juncture.
17 In a nutshell, that's the way I heard it to be, or read it to be.

18 MR JORDASH: If I can put it this way: If the submissions
19 of my learned friends relate to sufficiency of evidence in
10:38:05 20 relation to joint criminal enterprise, I don't have a problem
21 with those submissions. If they're submissions which relate to
22 the issues of notice, issues of common purpose, and so on, as I
23 outlined in the reply, then I do object to that being decided at
24 this stage.

10:38:31 25 PRESIDING JUDGE: Yes. Of course, we have an injunction.
26 The question really is how we navigate that. When we do come to
27 that, because we do really -- we don't want to hear legal
28 arguments on the various modes of liability at this point in
29 time. But, of course, we are very sensitive to the fact that the

1 question of sufficiency or insufficiency of evidence may well be
2 a kind of grey area, but we'll hear counsel. And when, if it
3 becomes necessary to apply the injunction, we may do that very
4 mildly. If it doesn't become necessary, we'll hear the
10:39:15 5 arguments.

6 MR JORDASH: Thank you.

7 PRESIDING JUDGE: Yes. We'll hear the submissions on
8 behalf of the second accused. Again, counsel is reminded that we
9 have thoroughly digested the material submitted and you don't
10:40:00 10 really need to exhaust the allotted time.

11 MR TAKU: May it please Your Honours, I propose to deal
12 with the counts of the indictment with regard, specifically, to
13 the charges against Mr Kallon.

14 Your Honours, the defence of Morris Kallon submits,
10:40:48 15 respectfully, that the time frames pleaded in the indictment form
16 the very basis on which the temporary jurisdiction of the Court
17 and well as jurisdiction of other accused Morris Kallon is
18 founded, and the evidence led out of these time frames go to no
19 issue, we submit.

10:41:29 20 JUDGE BOUTET: And evidence?

21 MR TAKU: Led out of the specific time frames pleaded in
22 the indictment go to no issue.

23 JUDGE BOUTET: No issue?

24 MR TAKU: Yes, Your Honour, we would respectfully submit.

10:42:01 25 As we shall prove very soon, when we get the specific counts of
26 the indictment, the Prosecutor, in some counts, a crime basis,
27 has led evidence out of the time frames pleaded in the
28 indictment; in others, he has led insufficient evidence in regard
29 to the time frames.

1 An example, Your Honours, witness TF1-371, in the
2 transcript of 24th July 2006, page 5, line 16 to 23, was unable
3 to establish the exact time frame within which the alleged crimes
4 in Tombodu, Kono District, took place, stating only that it took
10:43:39 5 place in the rainy season.

6 TF1-360 testified, Your Honours, to the events in Bumpe,
7 Kono District, transcript of 20th July 2005, page 58, lines 12 to
8 14, stating that the said events took place in the rainy season.

9 And TF1-263, testifying to the events in Kono, stated that,
10:44:59 10 only that, these events took place during the mango season.

11 Your Honours, the defence of Morris Kallon submits, also
12 that, as we will show shortly in the different counts pleaded in
13 the indictment, that the Prosecutor has impermissibly departed
14 from the indictment and adduced evidence that falls out of the
10:45:45 15 indictment.

16 PRESIDING JUDGE: Can you repeat that submission?

17 MR TAKU: We submit, Your Honours, that the Prosecutor, in
18 many of the accounts, which we shall show shortly, departed
19 impermissibly from the indictment.

10:46:08 20 PRESIDING JUDGE: From the indictment?

21 MR TAKU: From the indictment.

22 JUDGE BOUTET: What is this Court to do about this on a
23 judgment of acquittal?

24 MR TAKU: A judgment of acquittal, apart from showing the
10:46:25 25 insufficiency or non-existence of the evidence, include evidence
26 out of the jurisdiction of the Court, or does not fall within the
27 indictment, we submit it goes to no issue. It cannot be
28 considered, even at this point in time, Your Honours, because
29 that specific averment in support of each count, and if the

1 Prosecutor comes here and adduces evidence that falls out of the
2 time frame, or falls out of the indictment totally, we think it's
3 appropriate to draw your attention to that in respect of this
4 motion.

10:46:58

5 JUDGE BOUTET: What are we to do with that, assuming we
6 agree with you? What are we supposed to do to say this evidence
7 is of absolutely no value or something like that? I'm just
8 trying to understand what you're trying to suggest to the Court,
9 bearing in mind what this Court has to deal with. It is a
10 judgment of acquittal that is insufficiency of evidence in
11 relation to one or more counts. That's what we're dealing with.

10:47:16

12 MR TAKU: At that point, Your Honours, the evidence goes to
13 no issue. The evidence is not probative of the count and should
14 not be considered. At the end of the day, we'll make the
15 argument that there is no evidence and that the Prosecutor, as a
16 result, has adduced no evidence in support of the count.

10:47:36

17 PRESIDING JUDGE: Is it that you are saying that this is a
18 submission of law? In other words, it goes to what, the
19 jurisdiction of the Court?

10:47:47

20 MR TAKU: Yes, Your Honours.

21 PRESIDING JUDGE: So it's not just a question on an
22 evidential issue, but it is also a jurisdictional one?

23 MR TAKU: Exactly, Your Honours. I think it can be raised
24 at this point in time.

10:48:03

25 PRESIDING JUDGE: That's why you say impermissibly departs
26 from

27 MR TAKU: Yes, Your Honours.

28 PRESIDING JUDGE: Because I'm trying to understand, really,
29 in the line of the interjection of my learned brother, whether

1 this is just a submission as to the sufficiency of evidence, or
2 lack thereof, or whether it's a submission of law --

3 MR TAKU: It's a submission of the law.

4 PRESIDING JUDGE: -- as to the jurisdictional issue here.

10:48:25 5 MR TAKU: Yes, Your Honours. As we shall show very soon,
6 one we get to cases of abductions and rape, that some of the
7 witnesses stated that they were abducted in 1994, far out of your
8 temporary jurisdiction.

9 PRESIDING JUDGE: All right. I just wanted to seek
10:48:43 10 clarification.

11 JUDGE BOUTET: With your last explanation, I understand it.
12 In other words, obviously if it is rape allegedly taking place in
13 1994, it would not go to support a charge of rape within the time
14 frame of the indictment. If that's what you're saying, there is
10:48:59 15 no dispute on this matter.

16 MR TAKU: Thank you, Your Honour.

17 PRESIDING JUDGE: I must not be understood to agree or
18 disagree. I just wanted to characterise the issue for my own
19 understanding, whether it is a submission that can go to
10:49:16 20 jurisdiction.

21 MR TAKU: Yes, Your Honour. Also, because it is our
22 submission that the evidence adduced so confirms, proves the
23 different counts of the indictment. If they adduce evidence that
24 does not, we would not have intended to prove any other counts on
10:49:35 25 the indictment, then that issue cannot be considered,
26 Your Honours.

27 Your Honours will see in paragraph 18 of the Prosecutor's
28 skeleton response, Your Honour, the Prosecutor makes categorical
29 statements about Morris Kallon in that paragraph, and we would

1 submit, Your Honour --

2 PRESIDING JUDGE: Why not be specific? Is that paragraph
3 18 at page 6, you're talking about?

4 MR TAKU: Paragraph 18, Your Honour.

10:50:56 5 PRESIDING JUDGE: At page 6?

6 MR TAKU: Yes, Your Honour.

7 PRESIDING JUDGE: Why not be a bit specific?

8 MR TAKU: Yes, Your Honour. By reason of the accused's
9 senior positions in the RUF, they have command responsibility and

10:51:09 10 effective control. It goes further to say Sesay and Kallon were
11 participants. Now, we'll make this -- we'll make submissions on

12 this issue, Your Honours, to the elements of mens rea, knowledge
13 and even the actus reus of the crimes, as specified in the

14 indictment generally, with regard to Morris Kallon. We submit,

10:51:53 15 Your Honours, that that assertion does not fall in context with
16 the indictment, particularly paragraphs 24 to 28 of the
17 indictment.

18 JUDGE ITOE: Are we addressing issues of mens rea and actus
19 reus; is that our primary occupation at this point in time?

10:52:21 20 MR TAKU: These will be elements of the offence, to state,
21 purely, that certain murders or massacres took place without
22 addressing the mens rea and actus reus, Your Honours, because
23 without these elements the count would not be proved.

24 JUDGE ITOE: Yes, at this stage, at this stage, are we
10:52:47 25 addressing issues relating to actus reus, mens rea, or just
26 limiting ourselves to the fundamental issues of whether the
27 evidence, so far available, is capable of sustaining a
28 conviction. The evidence.

29 MR TAKU: Yes, evidence.

1 JUDGE ITOE: Counsel, I wonder if you want us to go -- to
2 delve into legal analysis, you know, of the elements of the
3 crime, which, of course, would take us to an analysis of the
4 evidence, and so on and so forth.

10:53:24 5 MR TAKU: Well, Your Honours, to ascertain whether the
6 evidence is sufficient to sustain the conviction, Your Honours
7 will be required to look into whether that evidence was of such a
8 nature from which mens rea could be inferred, because it is an
9 element of the crimes in the indictment. Actus reus, per se, it
10:53:57 10 not enough. It cannot be the basis on which Your Honours could
11 convict, if you believe the evidence. It can't be the basis.
12 So, at this view, also be looking at if that evidence were
13 enough, was sufficient, from which you could infer actus reus and
14 knowledge, that's the position I take, Your Honours.

10:54:21 15 PRESIDING JUDGE: Following that, perhaps -- let's see if
16 we can have some common ground here. At the beginning of this
17 proceeding, I read out an extract from one of our previous
18 decisions in the CDF trial where we said that, amongst other
19 things, the Chamber is of the opinion that a determination of the
10:54:45 20 accused liability depends, to a degree, on the issues of fact and
21 weight to be attached to the evidence, which require an
22 assessment of the credibility and reliability of that evidence.
23 Then we, quite emphatically, stated that these issues did not
24 arise for determination at this stage.

10:55:10 25 So the question really is: How do we navigate this kind of
26 situation where you now are saying that a consideration of the
27 actus reus and the mens rea would have to be factored into this
28 exercise that we're engaged in. To what extent would that also
29 require looking at the evidence so far, and determining weight

1 and credibility, if at all? You can guide us on that. How does
2 a Court resolve that kind of problem if you're saying that we
3 need to look at -- I don't know whether in detail or merely
4 preliminarily, where there's some elements of the offences, as
10:56:15 5 alleged, have been proved or not.

6 MR TAKU: Yes, Your Honour, because if we look at the
7 constituting elements of all the counts, apart from the actus
8 reus, you will also find that the mental element is there, the
9 knowledge or the mental --

10:56:33 10 JUDGE ITOE: But we're not denying that.

11 PRESIDING JUDGE: Each specific offence has to have what
12 you call a [indiscernible] requirement which are the general,
13 then the specific. What we're saying is that, at this point in
14 time, to be able to relate the evidence in terms of whether the
10:56:49 15 evidence satisfies some of those specific ingredients, would also
16 require some kind of assessment of the weight and the credibility
17 of the evidence.

18 MR TAKU: Yes, Your Honour.

19 PRESIDING JUDGE: Are we obliged to do that? Are we
10:57:12 20 permitted to do that in a Rule 98 situation?

21 MR TAKU: Well, Your Honours have to look for a way to
22 navigate around this. It may not be in detail. I made these
23 submissions; let me say why, Your Honours. Primarily because the
24 position of the Prosecutor, in that paragraph, is out of context
10:57:40 25 with paragraphs 25 to 28 of the indictment. It doesn't take into
26 consideration these particular paragraphs, and these paragraphs
27 are material, Your Honours, in assessing whether the elements of
28 the crime have been committed or not. Let me just say that, or
29 he committed crimes because of that. I'm replying to that

1 specific pleading --

2 PRESIDING JUDGE: Yes. In other words, you're saying
3 you're taking your cue from paragraph 18, where the Prosecution
4 replies and makes reference to actus reus and mens rea, you're
10:58:23 5 entitled to respond in the same context.

6 MR TAKU: Yes, Your Honours, if they're dealing with the
7 assertion --

8 PRESIDING JUDGE: Then you would not have raised the issue.
9 All right.

10:58:29 10 MR TAKU: Your Honours, we'll move quickly to the different
11 counts of the indictment. Your Honours, in the skeleton motion,
12 we did address the question of crimes against humanity and war
13 crimes to Article 3 common to the Geneva Conventions on
14 Additional Protocols II. Your Honours --

10:59:07 15 PRESIDING JUDGE: Which document are you referring to?

16 MR TAKU: The Kallon skeleton --

17 PRESIDING JUDGE: Filed on what day? Do you have the date
18 reference there?

19 MR TAKU: The revised skeleton motion was filed --

10:59:37 20 JUDGE ITOE: Was this the one filed on 27th September?

21 MR TAKU: Yes, Your Honour.

22 JUDGE BOUTET: I have that. And you're saying, in that
23 particular skeleton --

24 MR TAKU: I'm saying, Your Honours, that we did indicate
10:59:51 25 that we were going to address this issue of crimes against
26 humanity and war crimes, specifically with regard to counts 3, 5.

27 JUDGE BOUTET: I have it -- I see. "During the time frame
28 the Prosecution has failed to produce any evidence that Kallon
29 planned, instigated, ordered or committed the crime of murder as

1 a crime against humanity or war crime." That's the allegation in
2 the count, yes.

3 MR TAKU: That allegation, Your Honours, that allegation in
4 the --

11:00:38 5 JUDGE BOUTET: This is the statement of counts 3 to 5.

6 MR TAKU: Yes, Your Honour.

7 JUDGE BOUTET: Are you saying that you want to go beyond
8 that?

9 MR TAKU: Yes, Your Honour.

11:00:52 10 JUDGE BOUTET: I thought what you had indicated in your
11 skeleton argument, it would be to argue that, in the Kenema
12 District, Kailahun District, all of these districts, there is no
13 evidence to support --

14 MR TAKU: In fact that, considering the response by the
11:01:06 15 Prosecutor and the --

16 PRESIDING JUDGE: Continue,

17 MR TAKU: Yes, Your Honours, the Prosecutor did indicate
18 that area, the motions would be struck out, because we didn't
19 give particulars with regard to our submissions on that area.

11:01:44 20 Our reply is that we take the position that no evidence was
21 adduced, but, also, there's a matter for the mental fairness.
22 The Prosecutor, in his consolidated skeleton response, did
23 address the issue in respect of these counts, and the other
24 accused did address them. As a matter for mental fairness, we're
11:02:13 25 entitled to address them now, now that the issues have been
26 brought to your attention. So, on that premise, Your Honour, I
27 would think we are entitled to address the issues extensively.

28 JUDGE BOUTET: I don't understand what you mean by this.
29 Anyhow, we'll see what you have to say on this.

1 MR TAKU: Yes, Your Honour.

2 JUDGE BOUTET: Your pleadings, essentially, my
3 understanding of it, is you are taking the position that the
4 accused you are representing -- you're suggesting that the
11:02:51 5 Prosecution has not produced any evidence that Kallon had
6 instigated, ordered or committed, according to paragraph 38 of
7 the indictment, murders or crimes against humanity, or a crime in
8 the following locations, locations being all the districts. In
9 other words, nowhere, you're saying, was there any evidence, that
11:03:06 10 the accused committed murder as a crime against humanity or a war
11 crime. That's specifically what your pleadings seem to be
12 suggesting.

13 MR TAKU: Exactly, Your Honour. But, also, if Your Honour
14 looks at counts 15 to 18, we did make very extensive legal
11:03:24 15 arguments that crimes against humanity and war crimes, as such,
16 cited along jurisprudence. Also, we take the position that since
17 the Prosecutor has addressed that issue and the other accused
18 have addressed the issues, as a matter of fundamental fairness in
19 this oral presentation, we are bound to respond.

11:03:49 20 JUDGE BOUTET: What I was raising with you, because you
21 indicated to the Court that you were about to address counts 3 to
22 5, now you're talking of count 18. I'm just trying to follow the
23 sequence of your argument. I thought we were about to hear your
24 arguments about count 3 to 5.

11:04:09 25 MR TAKU: Yes, Your Honours. That's what we want to say,
26 but we say that the legislation -- I mean, the jurisprudence in
27 respect to all the counts of where Kallon is charged with war
28 crimes, or crimes against humanity was developed in this count
29 and we're going to rely on that jurisprudence in respect of all

1 the counts in which he was charged, either for Article 3 common
2 to the Geneva Conventions or to crimes against humanity. First,
3 we'll start at counts 3 to 5, Your Honour, if I'm given the
4 opportunity.

11:04:47 5 JUDGE BOUTET: Yes, I thought that's where you were, but,
6 okay.

7 PRESIDING JUDGE: As long as you remain faithful to your
8 revised skeletal submissions and make sure that you keep within
9 the confines of those submissions.

11:05:04 10 MR TAKU: Your Honours, as a matter of law, Your Honours,
11 the elements of crimes against humanity --

12 PRESIDING JUDGE: Sorry, counsel. As you take us through
13 your arguments, please, wherever possible, you can refer
14 specifically to the paragraphs in your revised skeletal arguments
15 so that we can keep track of your submissions in our records.

11:07:24 16 MR TAKU: Yes, Your Honours. Your Honours, it is our
17 submission, that --

18 JUDGE ITOE: Are you on page 9 of your revised skeletal
19 submissions? You're talking of addressing counts 3 to 5, or so.

11:08:02 20 MR TAKU: Yes, Your Honours. Very briefly, we take the
21 position that, with regard to the events, the murders, that took
22 place in Bo, we note, Your Honours, that the Prosecutor has
23 conceded to two locations. Your Honours, we also submit that
24 insufficient evidence has been adduced to support that particular
25 count in respect of the alleged widespread nature of the attacks.

11:09:15 26 Your Honours, we would refer to the testimonies of witness
27 TF1-004, the transcript of 7th and 8th December 2005; TF1-008,
28 the transcript of 30th November, 1st and 2nd December 2004, in
29 particular, at page 31, line 17.

1 With regard to Kenema, Your Honours, the Prosecutor relies,
2 in his consolidated skeleton response, on the testimony of
3 TF1-141.

11:10:53

4 PRESIDING JUDGE: Which part is that in the consolidated
5 response?

6 MR JORDASH: Can Mr Sesay use the bathroom, please?

7 PRESIDING JUDGE: Leave granted.

11:11:31

8 MR TAKU: Paragraph 34. Your Honours, we submit that the
9 evidence of that witness on which the Prosecutor relies does not
10 fall within the time frame pleaded in the indictment, because,
11 Your Honours, that witness alleged that he was abducted
12 in February 1998, in Kono, and taken to a location called Nyama
13 Ju, whereas, Your Honours will see the alleged crimes in Kenema
14 took place between 25th May 1997 to 19th February 1998.

11:12:16

15 PRESIDING JUDGE: State that again. The witness said what?

16 MR TAKU: The Prosecutor, at that paragraph 34, states that
17 Morris Kallon led a mission to Kenema, and many civilians were
18 killed and houses burnt.

11:12:37

19 PRESIDING JUDGE: Which date? You're talking of the date.
20 Which date was that, according to the evidence?

21 MR TAKU: Well, the evidence shows that this happened --

22 PRESIDING JUDGE: Allegedly happened, yes.

23 MR TAKU: That the witness was abducted.

24 PRESIDING JUDGE: On what date?

11:12:52

25 MR TAKU: In February 1998.

26 PRESIDING JUDGE: Allegedly. All right. You say the
27 indictment says what?

28 MR TAKU: The indictment says that the alleged crimes in
29 Kenema were committed between 25th May 1997 and 19th February

1 1998.

2 PRESIDING JUDGE: Because your allegation is that there is
3 a discrepancy here between the indictment and the evidence?

4 MR TAKU: Yes.

11:13:24 5 PRESIDING JUDGE: So take your time and let us know exactly
6 what you are saying. 25th May to 19th February 1998. Move on,
7 counsel.

8 MR TAKU: The massacre, or the killing of BS Massaquoi in
9 that location, as the following witnesses testified, took place
11:13:54 10 within this time frame. TF1-129 --

11 PRESIDING JUDGE: Said?

12 MR TAKU: In the transcripts of 10th, 11th and 12th May
13 2005, stated that BS Massaquoi was killed in February.

14 PRESIDING JUDGE: February when?

11:14:18 15 MR TAKU: 1998.

16 PRESIDING JUDGE: What is your complaint?

17 MR TAKU: The complaint, Your Honour, is that at the time
18 that this massacre, this killing took place in Kenema, this
19 witness had not yet been allegedly abducted. He was abducted
11:14:42 20 in February.

21 PRESIDING JUDGE: If I follow the thrust of your
22 submissions now, you are pointing out discrepancies between
23 indictment -- I don't know if you've left that. You're talking
24 about evidence being outside?

11:14:54 25 MR TAKU: Yes.

26 PRESIDING JUDGE: Emphasis: Outside the dates given in the
27 indictment.

28 MR TAKU: Exactly, Your Honour.

29 PRESIDING JUDGE: Have you finished with that?

1 MR TAKU: That's what I'm saying.

2 PRESIDING JUDGE: So when in the indictment do we have?
3 What date is in the indictment, in respect of this?

4 MR TAKU: The indictment, this particular witness --

11:15:10 5 PRESIDING JUDGE: About the alleged killing of
6 BS Massaquoi.

7 MR TAKU: Yes, Your Honours, they only say that
8 in February.

9 PRESIDING JUDGE: February of what year?

11:15:19 10 MR TAKU: 1998.

11 PRESIDING JUDGE: That's what the indictment said?

12 MR TAKU: Yes, Your Honour.

13 PRESIDING JUDGE: And the witness said in February --

14 MR TAKU: I think it was 21st February 1998.

11:15:28 15 JUDGE BOUTET: I'm trying to follow you as well. You're
16 saying it's outside. Now you're saying the indictment
17 says February 1998, and you said this witness says --

18 MR TAKU: This is a different witness I'm citing. That
19 other witnesses have situated the crimes in Kenema. The
11:15:44 20 Prosecution is relying on this particular witness to say that
21 Morris Kallon led the attack in Kenema. Indeed, this particular
22 witness -- the evidence of this particular witness that the
23 Prosecution is relying on is outside the time frame.

24 PRESIDING JUDGE: That's what we're trying -- I'm trying to
11:16:09 25 follow you.

26 MR TAKU: Outside the time frame in the indictment.

27 PRESIDING JUDGE: The main thrust of your submissions so
28 far, and you're saying quite, I mean, strongly, that, indeed,
29 witnesses have come to this Court, they've testified to

1 particular time frames of alleged crimes.

2 MR TAKU: Yes, Your Honour.

3 PRESIDING JUDGE: And you're saying those time frames are,
4 in fact, outside the pleaded time frames in the indictment.

11:16:35 5 MR TAKU: Exactly, Your Honour.

6 PRESIDING JUDGE: That's a very serious allegation to make.
7 You're virtually saying that we have here evidence relating to
8 one particular time frame, and then, in the indictment, another
9 set of time frames. All we're trying to do is get you to give us
10 particulars in support of that, your general submission. Because
11:16:57 10 particulars in support of that, your general submission. Because
11 how do we evaluate the merit of that submission if we don't have
12 the particulars. Just to make the submission, learned counsel,
13 is not enough. Take us through the samples.

14 MR TAKU: Okay, Your Honours.

11:17:16 15 PRESIDING JUDGE: Unless you find you have another
16 methodology, but I think the methodology you're adopting now is a
17 little confusing, because it's your submission, except if we have
18 misstated your submission.

19 MR TAKU: Your Honours, the Prosecutor submits in his
11:17:38 20 skeleton response that Morris Kallon led a mission to Kenema and
21 many civilians were killed and houses burnt, according to
22 TF1-141.

23 PRESIDING JUDGE: Yes.

24 MR TAKU: Now, TF1-141 alleges that he was abducted in Kono
11:18:24 25 in February 1998. The time frame to the indictment is that the
26 crimes in Kenema were committed between 25th May 1997 to 19th
27 February 1998. So, clearly, Your Honours, the evidence of this
28 witness falls out of this time frame, the alleged murders to
29 which it is referred out of this time frame.

1 JUDGE BOUTET: You're saying we should not believe that
2 evidence?

3 MR TAKU: Not necessarily. But that evidence, Your Honour,
4 does not go to support the indictment. It doesn't support the
11:19:06 5 indictment, so it should not be considered.

6 JUDGE BOUTET: Yes, but I just want to make sure I
7 understand your position. It is true, from what I read in the
8 skeleton arguments filed by the Prosecution, that they say, and,
9 as you have quoted in paragraph 34, headed Kenema District.

11:19:06 10 Obviously this is, in their skeleton argument, in response to
11 your argument on behalf of Kallon, that there is no evidence
12 about Kenema District. So they're responding in giving some
13 information. Am I understanding your position to be, with
14 reference to Kallon, you are taking the position that there is no
11:19:21 15 evidence that you are focusing on one mode of liability? You are
16 excluding the other mode of liability in your position. You're
17 saying Kallon himself didn't do this, or Kallon himself wasn't
18 there. So when you say this, you're asking this Tribunal, at
19 this stage, to make a pronouncement on one of the modes of
11:19:39 20 liability that may involve your client. Is it what you are
21 trying to achieve?

22 Just like the Presiding Judge is saying, we're trying to
23 follow your argument to make sure that we properly understand
24 what you're presenting to this Court. I'm not trying to argue
11:19:53 25 with you, I'm just trying to understand what you're trying to
26 convey to the Tribunal.

27 MR TAKU: Your Honours, I will say this: In respect of
28 crimes against humanity, the murder of BS Massaquoi will be a
29 specific murder because it talks about the individuals, the

1 identifiable individuals. In respect of crimes against humanity,
2 massacres that took place in Kenema. The Prosecutor makes this
3 allegation, cites this witness in support of crimes against
4 humanity. That's a massive killing of these individuals, or the
11:20:30 5 killing of individuals on a massive scale.

6 PRESIDING JUDGE: With respect, we have not come to that
7 dimension yet. What we're trying to do is to have your
8 submissions focused. If you are attacking time frames, let's
9 concentrate on time frames. If you're attacking the question of
11:20:48 10 whether alleged killings were systematic or widespread, that's
11 another dimension, you see. You can't have it lumped altogether,
12 otherwise we're not able to comprehend the thrust of your
13 submission. You remember when you began your position, I asked
14 you: Are you making a submission of law, when you said that the
11:21:15 15 Prosecution have charged the particular time frame within their
16 indictment, but then witnesses have come and given evidence
17 outside the time frame. It would seem as if you're still on that
18 radar screen, and that's the argument you are still trying to
19 persuade this Chamber of. But now, to move away from that focus,
11:21:48 20 which is a narrow focus, and talk about things in a broader
21 universal discourse confuses me. I don't know whether my learned
22 brothers are confused. Yes.

23 MR O'SHEA: I do apologise, Your Honour. May Mr Gbao use
24 the restroom, please.

11:22:14 25 PRESIDING JUDGE: Leave is granted. Do you follow me?

26 MR TAKU: Yes, Your Honour.

27 PRESIDING JUDGE: I know that you have a series of
28 arguments. Perhaps the best way to do is to present them
29 *seriatum*. Take one limb first; argue that limb. The time frame,

1 I'm not sure whether you are finished, but if that's what you're
2 focusing on, let us remain focused on that until you go to other
3 aspects. Am I clear, or am I confusing you?

11:22:42 4 MR TAKU: Thank you, Your Honours. If I departed, it was
5 because I was trying to reply to --

6 PRESIDING JUDGE: Well, I do apologise. I promise that
7 we'll interject minimally. But it seems as if the argumentative
8 streak in all of us as lawyers tends not to restrain us in that
9 regard. Just help us a bit more.

11:23:10 10 MR TAKU: In respect of Kenema, let me just repeat that.
11 We'll make two arguments.

12 PRESIDING JUDGE: Good, fine. One.

13 MR TAKU: The first argument is that the evidence relied on
14 by the Prosecution at paragraph 34 is out of the time frame
11:23:23 15 stated in the indictment; 2. That the Prosecutor has not led any
16 evidence to show that the alleged killings in Kenema were
17 widespread or systematic. It is not very clear from the
18 indictment, as pleaded, whether the Prosecutor was pleading
19 widespread -- was relying on the widespread nature of that task
11:24:10 20 or systematic --

21 PRESIDING JUDGE: In other words, the indictment is vague
22 in that regard, and then the evidence is not sufficient.

23 MR TAKU: Yes, Your Honours.

24 PRESIDING JUDGE: So it's a two-pronged attack on that?

11:24:22 25 MR TAKU: Yes, Your Honours.

26 PRESIDING JUDGE: All right. So that's your second
27 argument?

28 MR TAKU: Yes, Your Honours. If we look at the indictment,
29 Your Honours --

1 PRESIDING JUDGE: And you refer to what paragraph, or
2 counts?

3 MR TAKU: That's counts 3 to 4. Your Honours will look at
4 paragraph 45. The Prosecutor only pleads that victims were
11:25:04 5 routinely shot, hacked to death and burnt to death. He says
6 unlawful killings include the following: Bo, Kenema. It is only
7 in paragraph 52 that he indicates that the attacks were on a
8 large scale. From paragraph 45 to 51, he doesn't indicate the
9 nature of the attacks, whether the attacks were widespread or
11:25:54 10 systematic. The evidence is insufficient.

11 PRESIDING JUDGE: Right. We are in agreeance to that.

12 MR TAKU: Yes, Your Honours.

13 PRESIDING JUDGE: Let's move on.

14 MR TAKU: Your Honours, in respect of Kono, our earlier
11:26:16 15 agreements, Your Honours, with regard to time frames, we adopt
16 them. We don't want to --

17 PRESIDING JUDGE: Only argument as to time frame.

18 MR TAKU: That they refer only to rainy season when the
19 mangoes arrived. So There is insufficient evidence to fit the
11:26:34 20 alleged crimes within the time frames to that in the indictment.

21 Apart from Tombodu, with regard to the actions of Savage,
22 no evidence is led, as were in Kenema, as to the nature of the
23 attacks. In this case, we also submit that the nature of the
24 attack is not pleaded in that regard.

11:27:32 25 With regard to Bombali, Koinadugu, we reiterate our
26 arguments on the time frames, and also that the nature of the
27 attack is not specified clearly in the indictment to give
28 reasonable notice to the accused. We do not know whether it was
29 systematic or widespread. It's not stated clearly in the

1 indictment. That is the case in paragraph 52. Indeed, other
2 paragraphs of the indictment where the nature of the attack
3 specified most specifically and clearly. With regard to --

11:28:32 4 JUDGE BOUTET: Mr Defence Counsel, are you saying that in
5 the previous paragraphs, that is 48, 49, 50, 51, there is not
6 enough specificity about the widespread or systematic --

7 MR TAKU: Yes, Your Honour.

8 JUDGE BOUTET: You are suggesting that it should be like it
9 is in 52, where they say, at least, these attacks included
11:28:51 10 large-scale killings and so on?

11 MR TAKU: Yes, indeed. In all of the paragraphs --

12 JUDGE BOUTET: Allegations of that nature should have been
13 included in the other districts?

14 MR TAKU: Yes, Your Honours. Indeed, the Prosecutor
11:29:03 15 specifies in each of the other paragraphs thereafter whether they
16 were on a large scale, widespread or systematic.

17 JUDGE BOUTET: Thank you.

18 MR TAKU: Also, we submit, Your Honours, that in the
19 locations pleaded therein, insufficient evidence or no evidence
11:29:23 20 at all had been led to show that attacks were either widespread
21 or systematic.

22 With regard to Freetown and Western Area, Your Honours, we
23 submit, Your Honour, that the nature of the attack is pleaded as
24 a large scale, clearly. The evidence clearly --

11:30:02 25 PRESIDING JUDGE: So what is your complaint there?

26 MR TAKU: Your Honours, we're saying that it is clearly
27 stated --

28 JUDGE ITOE: Are you saying it was clearly stated that
29 evidence was not led?

1 MR TAKU: No, Your Honour, we're saying in respect of
2 Freetown and Western Area, it's clearly stated -- we submit, at
3 least that --

4 PRESIDING JUDGE: There's greater specificity?

11:30:26 5 MR TAKU: Yes, Your Honour, there is greater specificity,
6 that there's notice in that regard.

7 PRESIDING JUDGE: So we ask, then, what is your complaint
8 about that?

9 MR TAKU: We're only submitting that, at least with
11:30:37 10 that particular [overlapping speakers] --

11 PRESIDING JUDGE: Okay.

12 MR TAKU: -- evidence had been led to establish the
13 widespread attacks.

14 PRESIDING JUDGE: You concede that; it's a concession?

11:30:45 15 MR TAKU: Yes, Your Honour.

16 PRESIDING JUDGE: When you're making a concession, say you
17 concede.

18 JUDGE ITOE: You should make it clear to us.

19 MR TAKU: We concede, Your Honours, that Gullit and others
11:30:56 20 committed crimes.

21 PRESIDING JUDGE: We're you're attacking, you submit, and
22 when you concede, concede. Use the word "concede," it helps us.

23 MR TAKU: That individual specified they committed this
24 crime.

11:31:24 25 PRESIDING JUDGE: Yes, counsel.

26 MR TAKU: Your Honours, in Port Loko, we submit the nature
27 of that attack is not clearly specified. Insufficient evidence
28 has been led, Your Honours.

29 PRESIDING JUDGE: So lack of specificity there, in terms of

1 laying the charge, or the allegation.

2 MR TAKU: Yes, Your Honour.

3 PRESIDING JUDGE: And also lack of sufficient evidence?

4 MR TAKU: Yes, Your Honour.

11:32:05 5 PRESIDING JUDGE: A two-pronged attack.

6 MR TAKU: Yes, Your Honour.

7 PRESIDING JUDGE: What else?

8 MR TAKU: Your Honour, with regard to count 6 to 9, we
9 would submit that the Prosecutor correctly stated the elements of

11:32:40 10 the crimes --

11 PRESIDING JUDGE: You concede that?

12 MR TAKU: Yes, Your Honours, we submit that the Prosecutor
13 has rightly --

14 JUDGE ITOE: First of all, are you conceding anything --

11:32:48 15 MR TAKU: No, Your Honours.

16 JUDGE ITOE: -- on those counts?

17 MR TAKU: No, Your Honour. We're submitting on the legal
18 elements, the law, as laid down by the Prosecutor.

19 PRESIDING JUDGE: They correctly stated the law.

11:33:02 20 MR TAKU: Yes.

21 PRESIDING JUDGE: In terms of the constitutive elements?

22 MR TAKU: Yes, Your Honours, referring to the jurisprudence
23 established by Your Honours in Norman. We submit, Your Honours,
24 that insufficient evidence has been led in support of the counts
11:33:28 25 in this regard.

26 JUDGE ITOE: In support of all the counts; counts 6 to 9?

27 MR TAKU: Counts 6 to 9, Your Honours. First,
28 Your Honours, as a war crime and as a crime against humanity.

29 PRESIDING JUDGE: Both?

1 MR TAKU: Both, Your Honours. I would submit,
2 Your Honours, as a crime against humanity, the Prosecutor has not
3 led sufficient evidence to support, or to prove that, or show
4 that -- to establish that it was widespread or systematic.

11:34:15 5 PRESIDING JUDGE: No evidence to support that.

6 MR TAKU: We would refer, Your Honours, to witness TF1-078,
7 the transcript of 25th October 2004, page 44, line 28 to 29; and
8 page 45, line 1 to 2. It's clearly stated, Your Honours, that
9 the witness says, "The first incident I saw a witness was the
10 execution of a soldier, AFRC/RUF soldier, for committing rape
11 against a woman."

12 Also, Your Honours, witness TF-041, in the transcripts of
13 11th July 2006, pages 11, 19, 26, 27, 28 and 29. That witness
14 was talking about the three points of attention and the ideology
15 formulated about RUF in respect of these crimes. That evidence
16 adduced by the Prosecution goes to show that this alleged offence
17 has not been able to establish that it was widespread or
18 systematic, to rely on that evidence.

19 PRESIDING JUDGE: Okay. Next?

11:36:18 20 MR TAKU: Your Honours, we move to Koinadugu. We have to
21 establish here, Your Honours, that none of the victims --

22 JUDGE ITOE: Learned counsel, how much more time do you
23 need?

24 MR TAKU: I'm moving very fast, Your Honour.

11:36:32 25 JUDGE ITOE: No, no, how much more time? You don't need to
26 move very fast. Take your time. You have all the time. So how
27 much more time do you think you need to conclude, because it's
28 11.30. That's why I'm putting the question to you.

29 MR TAKU: How much more time do I have, Your Honour?

1 PRESIDING JUDGE: Well, probably you're still about half an
2 hour.

3 MR TAKU: Okay, Your Honour.

4 PRESIDING JUDGE: In any event, perhaps it's an appropriate
11:37:04 5 time we should take the usual tea break for 30 minutes and come
6 back. Hopefully you'll wind-up.

7 JUDGE ITOE: I was thinking he was winding-up already.

8 PRESIDING JUDGE: I'm sure he's winding-up. We don't want
9 to put you under pressure. When we come back, you can just take
11:37:20 10 us through the -- the way you have been proceeding is very
11 helpful. We have been moving from submission to submission. If
12 you can just give that methodology and refer us to the relevant
13 passages, I think we should be done with you before, about half
14 an hour after we resume.

11:37:39 15 MR TAKU: Thank you, Your Honour.

16 PRESIDING JUDGE: We'll take the usual tea break at this
17 point and come back in 30 minutes' time.

18 [Break taken at 11.35 a.m.]

19 [Upon resuming at 12.07 p.m.]

12:10:24 20 PRESIDING JUDGE: Mr Taku, please proceed.

21 MR TAKU: Thank you, Your Honours. Your Honours, we're on
22 sexual violence. We'll move very quickly through other counts.
23 I will get to counts 15 to 18. Your Honours, in most of the
24 crime bases in this count --

12:10:51 25 JUDGE ITOE: Did you say we're moving to which counts now?

26 MR TAKU: The sexual violence. I want to complete that
27 quickly. We'll submit, Your Honours, that it has not been
28 established that these crimes were committed in a widespread
29 manner. So the evidence is clearly insufficient, especially as,

1 in most of the crime bases, they did not have direct evidence of
2 rape. For example, there were no victims of sex crimes to
3 testify -- some other persons. So it may be what happened had
4 been outrageous on the bodies of these individuals, but not
12:11:39 5 really rape, as such.

6 PRESIDING JUDGE: So there was not sufficient evidence
7 of --

8 MR TAKU: Rape.

9 PRESIDING JUDGE: -- of these alleged sexual offences.

12:11:48 10 MR TAKU: Yes, Your Honour.

11 PRESIDING JUDGE: In other words, you concede there may
12 have been some random acts, but not widespread and systematic?

13 MR TAKU: Not widespread and systematic, Your Honours.
14 Even the evidence of some random cases here, it's clearly
12:12:07 15 insufficient to the extent that most of the allegations, the
16 evidence was not direct, it was indirect evidence by third
17 parties, not by the victims themselves.

18 That said, Your Honours, we'll move quickly to physical
19 violence, counts 10 to 11. Your Honours, insufficient evidence
12:12:43 20 has been led to establish a widespread nature on this count,
21 especially in the light, Your Honours, of the testimony of
22 TF1-366, dated July 7th, 2006 at pages 71 to 75.

23 JUDGE ITOE: TF1?

24 MR TAKU: 366. July 7th, 2006, pages 71 to 75.

12:13:28 25 Your Honours, we will move quickly to count 12.

26 JUDGE ITOE: What do you say here? In this particular one,
27 what do you say? There's no evidence --

28 MR TAKU: Widespread nature, yes, Your Honour.

29 JUDGE ITOE: That's all?

1 PRESIDING JUDGE: You did say it's insufficient.

2 MR TAKU: It's insufficient, Your Honour. Yes,
3 insufficient.

4 PRESIDING JUDGE: All right.

12:13:55 5 MR TAKU: Thank you, Your Honour.

6 PRESIDING JUDGE: Count 12 now, you say.

7 MR TAKU: Yes. Your Honours, we submit here that there was
8 insufficient evidence to establish the ages of these alleged
9 child soldiers. We rely, Your Honours, on the evidence of
10 TF1-362, in the transcript of 20th April 2005, at pages 25, 26
11 and 27. Also, the same witness, the testimony of TF1-362, on
12 21st April 2005, at page 79.

13 PRESIDING JUDGE: Your alleged point here is as to age?

14 MR TAKU: As to age.

12:15:05 15 PRESIDING JUDGE: That's all.

16 MR TAKU: Also, Your Honours, TF1-177. We would testify,
17 Your Honours, the period of abduction and conscription of these
18 individuals are out of the jurisdiction -- out of the time frame
19 pleaded and out of the jurisdiction. Then TF1-314 --

12:15:38 20 JUDGE ITOE: Let me get you what said about TF1-177. In
21 what context are you placing his evidence, as far as count 12 is
22 concerned?

23 MR TAKU: I'm sorry, Your Honours, let me get one
24 correction. This witness could not establish a time frame.

12:16:02 25 JUDGE ITOE: You mean TF1-177?

26 MR TAKU: Yes, Your Honours, could not establish a time
27 frame. It is TF1-314, who testified on the following, in May
28 2005. At page 40, she said she was abducted in 1994; she was
29 abducted, raped and conscripted in 1994. That is out of the

1 temporary jurisdiction of the Court.

2 PRESIDING JUDGE: Count 12, how many complaints do you have
3 about that?

4 MR TAKU: The time frame and the age.

12:16:52 5 PRESIDING JUDGE: Time frame.

6 MR TAKU: And the age.

7 PRESIDING JUDGE: As to the time frame, your reference is
8 the evidence of TF1-314?

9 MR TAKU: Yes, Your Honour.

12:17:08 10 PRESIDING JUDGE: On the question of age, insufficiency of
11 evidence as to age, which particular witnesses do you rely upon?
12 TF1-177, 362?

13 MR TAKU: 362.

14 PRESIDING JUDGE: Yes.

12:17:33 15 MR TAKU: Dated 20th April 2005.

16 PRESIDING JUDGE: 362, that is to age. And then 177 is as
17 to what? Discrepancy between the indictment and the --

18 MR TAKU: No. That one, as you put it, the time frame --
19 couldn't establish the time frame. TF1-296, the experts, Your
12:18:00 20 Honour, the entire testimony of that witness.

21 JUDGE ITOE: TF1?

22 MR TAKU: 296.

23 PRESIDING JUDGE: You say that was an expert witness?

24 MR TAKU: Yes, Your Honour.

12:18:14 25 PRESIDING JUDGE: What is your complaint about that?

26 MR TAKU: This is the expert witness who was called upon to
27 establish the age. She was not only giving her opinion about the
28 evidence that had been adduced, but she was physically in the
29 field with this alleged young soldiers in order to establish

1 their ages, as she testified that the basis of her assessment of
2 age was based on 18 and not on 15, as pleaded in the statute.

3 PRESIDING JUDGE: So what's your submission?

4 MR TAKU: Our submission, Your Honours, that there has not
12:18:53 5 been established -- sufficient evidence was not adduced --
6 established of the conscription and the use of child soldiers
7 below the age of 15.

8 PRESIDING JUDGE: You mean to sustain the count?

9 MR TAKU: To sustain the counts. Thank you, Your Honour.

12:19:22 10 Now, Your Honours, on the abductions, on a forced level, at count
11 13, we submit, Your Honours, that enough evidence was not also
12 adduced of the widespread nature of the alleged abduction in
13 order to sustain the count, in particular, Your Honours --

14 JUDGE BOUTET: Here, you're not talking of the fact that --
12:20:16 15 it is alleged, but you're saying there is insufficient evidence?

16 MR TAKU: Yes, Your Honours, insufficient evidence.

17 PRESIDING JUDGE: And do you have specific witnesses'
18 evidence that you want us to focus on?

19 MR TAKU: Yes, TF1-078.

12:20:31 20 JUDGE ITOE: I would like to be clarified on that. Are you
21 saying that the evidence is insufficient, or there was no
22 evidence at all?

23 MR TAKU: Your Honour, the evidence is insufficient.

24 JUDGE ITOE: The evidence is insufficient?

12:20:44 25 MR TAKU: Yes, Your Honour.

26 JUDGE ITOE: It is not that there is no evidence at all?

27 MR TAKU: No, Your Honour. It is insufficient,
28 Your Honour.

29 JUDGE ITOE: Thank you.

1 MR TAKU: Just one minute, Your Honour.

2 JUDGE BOUTET: Mr Taku, when you say insufficient in
3 relation to count 13, you say this with reference to each and
4 every district, regardless?

12:21:24 5 MR TAKU: Your Honours, we have -- just one minute,
6 Your Honours. We would like to address what the Prosecutor says
7 about this, in response with regard to this count. With your
8 permission, Your Honours, I'm trying to look for the page.
9 Your Honours, paragraph 17 of the Prosecutor's skeleton brief.

12:22:19 10 The Prosecutor relies on TF1-371. Let me read out what it says:
11 "TF1-371 said that Sesay and Kallon were part of the Supreme
12 Council and that, during the AFRC, junta decisions were made to
13 force civilians to mine for diamonds so that logistics could be
14 obtained, including weapons." We will address that,
12:22:44 15 Your Honours.

16 We submitted about this witness earlier, you will remember,
17 that this witness was unable to establish a time frame for which
18 he testified, stating only that it was in the rainy season. So
19 the time frame has not been established through this witness, as
12:23:05 20 such. That's our first argument. The second argument, Your
21 Honour, is that witness TF1-078 testified on 24th October 2004,
22 pages 76, line 1, then 27, line 29. Also the transcript of 26th
23 October 2004, page 18 to 19, where he stated, from February 1998
24 to June 1998, there were no abductions in Kono. Civilians were
12:23:47 25 only kept there for safety. We submit, Your Honours, that that
26 is clearly an indication that the Prosecutor has not provided
27 sufficient evidence to show that these abductions were taking
28 place in Kono, in particular, within the time frame of the
29 indictment.

1 As well, in other locations, Kenema, and others, that
2 insufficient evidence had been adduced. We also refer
3 Your Honours to TF-367, the transcript of 26th June 2006; witness
4 041, transcript of 17 June 2006, pages 16, 17 to 21; witness
12:25:14 5 TF1-078. They state here, Your Honours, that most of the
6 civilians willfully came to the zones controlled by the RUF to
7 seek security from the brutality of the CDF and, also, some of
8 them, it was a policy for food-finding for the survivors of
9 combatants and civilians.

12:25:41 10 PRESIDING JUDGE: What's your submission on that?

11 MR TAKU: The submission is that that evidence is clearly
12 insufficient, Your Honours, to establish that these abductions,
13 as alleged, on a forced level, took place. [Indiscernible] there
14 is insufficient evidence. And also, Your Honours, it has not
12:26:02 15 been established that it was widespread.

16 In respect of Kailahun, Your Honours, we will refer to
17 TF1-168, the transcript of 3rd April 2006; and witness TF1-144,
18 20th April 2005. They establish, Your Honours, that there was a
19 system of passes. These civilians, they sought security; they
12:26:52 20 were given passes to move freely and also to distinguish them
21 from enemy combatants. So this cannot be said to be forced level
22 abductions. Clearly, the Prosecutor has not led evidence to show
23 that these people were abducted, because of testimony here.

24 Your Honours, I will move to count 14 quickly.

12:27:22 25 Your Honours, what I will say very quickly to this, is that with
26 regard to the alleged burning of Koidu, that was never pleaded in
27 the indictment.

28 PRESIDING JUDGE: Say that again.

29 MR TAKU: The alleged burning of Koidu Town, it's not

1 pleaded in the indictment. No evidence had been led to show that
2 the alleged houses were civilian houses. Indeed, TF1-361
3 testified from 11th to 19th July 2005, and said that --

4 JUDGE ITOE: TF1?

12:28:25

5 MR TAKU: 361, said the houses in concern were houses
6 occupied by the combatants, so the evidence was not clear that
7 they were houses occupied or the property of civilians --
8 civilian property. So that would not fall under the statute as
9 long as it is not civilian property. He says that, as the
10 combatants fled, the attack from ECOMOG, when the bombs were
11 dropping, so Superman gave instructions that the houses occupied
12 by the combatants should be burned down. So, Your Honours, that
13 has not been proved to be the civilian houses or civilian
14 targets, as the case may be.

12:29:25

15 In the other locations, Your Honours, we'll submit that
16 evidence has not been led to -- sufficient evidence has not been
17 led to show that it was widespread.

18 PRESIDING JUDGE: And systematic, is it?

19 MR TAKU: Or systematic, Your Honour.

12:29:51

20 PRESIDING JUDGE: Or systematic.

21 MR TAKU: Yes, Your Honour.

22 PRESIDING JUDGE: Nature of what?

23 MR TAKU: The nature of the alleged attacks, Your Honour.

12:30:09

24 Now, we come to our core argument submissions, count 15 to 18,
25 the alleged abduction and other crimes committed against UNAMSIL
26 peacekeepers.

27 PRESIDING JUDGE: Yes, what are your specific submissions
28 on that one?

29 MR TAKU: First, Your Honours, it has not been established

1 that these alleged attacks were widespread, because no evidence
2 has been led, Your Honours, to indicate that the abductions took
3 place in Kailahun, Kono, Magburaka. With regard to Freetown,
4 Western Area --

12:31:10 5 PRESIDING JUDGE: In other words, no evidence to support
6 the specific allegations of abductions in those locations?

7 MR TAKU: No, widespread.

8 PRESIDING JUDGE: Widespread?

9 MR TAKU: Yes.

12:31:19 10 PRESIDING JUDGE: You made that the first limb of your
11 submission.

12 MR TAKU: Yes, Your Honour. Because the evidence, which I
13 will recite very soon, goes to show that the disarmament took
14 place peacefully in most of the locations stated in the
15 indictment that abductions took place. The evidence points only
16 to Lunsar and Makeni, but it was submitted that these were not
17 widespread or systematic.

18 PRESIDING JUDGE: I see. In other words, there was
19 evidence of abductions, but not --

12:31:51 20 MR TAKU: Established.

21 PRESIDING JUDGE: Systematic or widespread.

22 MR TAKU: Yes, Your Honours. Furthermore, it is our
23 submission that the targeted group, alleged abducted UNAMSIL,
24 were not civilians in the sense of -- in the sense envisaged by
12:32:38 25 the Statute, because they were not civilians, as such.

26 PRESIDING JUDGE: No, the targeted group you say were not
27 civilians.

28 MR TAKU: The targeted group were not civilians.

29 PRESIDING JUDGE: As required by the Statute?

1 MR TAKU: Yes, Your Honours.

2 JUDGE BOUTET: Can you explain what you mean by this?

3 MR TAKU: Yes, Your Honours. Firstly, they have Chapter 7
4 authority of the UN Charter to use arms and did use arms in that
12:33:09 5 particular context, as specific witnesses will say.

6 JUDGE ITOE: As fighters?

7 MR TAKU: As fighters.

8 JUDGE ITOE: As fighters or as peacekeepers?

9 MR TAKU: Your Honours --

12:33:24 10 JUDGE ITOE: Are you saying they used or they carried arms?

11 MR TAKU: Your Honours, we will cite a specific
12 jurisprudence in this regard, Your Honours. Our authorities,
13 Your Honours, for this is the ICTR, in the case of Prosecutor vs
14 Kayishema and Ruzindana ICTR 95(1)T, trial judgment 21 May 1999
12:33:57 15 at paragraph 1 to 27. Let me read out exactly what your learned
16 colleagues said in that regard, Your Honours:

17 "The term 'civilian' must be understood within the context
18 of war as well as relative peace."

19 THE INTERPRETER: Your Honours, may counsel slow down his
12:34:17 20 pace.

21 PRESIDING JUDGE: Counsel, you are asked to slow down.

22 MR TAKU: Thank you, Your Honours.

23 JUDGE BOUTET: Counsel, are you still talking about 15,
24 because 15 deals with attacks on UNAMSIL personnel. I'm really
12:34:24 25 at a loss to understand what civilians have to do with this. Are
26 you still talking about that or a different count?

27 MR TAKU: One of the elements of the offence is that they
28 must possess civilian status. There is a difference --

29 JUDGE BOUTET: Who must possess civilian status?

1 MR TAKU: The targeted group, for them to be protected. To
2 fall within the ambit of the law, persons protected under the
3 Statute, they must either be civilians or people who have
4 civilian status. If, for example, there were other combat, or
12:35:06 5 they were wounded or surrendered, and thereafter they were
6 mistreated, is something else. But with regard to the alleged
7 abduction as it is here, Your Honours, we will cite specific
8 witnesses to show that because of the Chapter 7 authority they
9 had to use arms, not only to carry arms but to use arms in
10 specific circumstances, they didn't have the status of civilians.

11 JUDGE BOUTET: I don't think it is in dispute. I don't
12 think it is an issue. I will concede that to you, too. UNAMSIL
13 personnel, at the time, they were UN peacekeepers. The charge
14 has to do with the fact that they had -- the accused are alleged
12:35:50 15 to have "unlawfully killed UNAMSIL peacekeepers," and so they're
16 not saying peacekeepers or civilians. It's peacekeepers, and
17 abducting hundreds of peacekeepers and humanitarian assistance
18 workers, but let's focus on peacekeepers.

19 PRESIDING JUDGE: And you say that --

12:36:11 20 MR TAKU: I understand, Your Honours, you're worried,
21 because, in this particular count, they also allege crimes that
22 had been committed by the West Side Boys. The composition of the
23 group abducted by the West Side Boys was substantially different
24 from that that they were referring to in this particular count.
12:36:34 25 Yes, Your Honours.

26 PRESIDING JUDGE: What does the count say? Why not read it
27 to us. The count that you are attacking now, what does it say?

28 JUDGE ITOE: Count 21 of the indictment.

29 PRESIDING JUDGE: Read it, the count.

1 JUDGE ITOE: Counts 15 to 18. That's where you are?

2 MR TAKU: Yes, Your Honours.

3 PRESIDING JUDGE: What particular feature of that count are
4 you complaining about, and what's your submission?

12:37:03 5 MR TAKU: Between about 15 April 2000, about 15 September
6 2000, AFRC/RUF engaged in widespread attacks against UNAMSIL
7 peacekeepers and humanitarian assistance workers within the
8 Republic of Sierra Leone.

9 JUDGE ITOE: The Prosecution has conceded that
12:37:24 10 [indiscernible]. They said they have not adduced evidence on
11 that, as far as humanitarian assistance workers are concerned.

12 PRESIDING JUDGE: So what's your complaint now about that
13 one?

14 MR TAKU: My next complaint here, Your Honour, is that the
12:37:42 15 UNAMSIL personnel in this particular case, because they possess
16 Chapter 7 authority to use arms and did use arms from Lunsar --
17 you have one of the witnesses saying that even before there was
18 an engagement between him and the alleged abductor, he has put
19 his troops in a combat-ready position.

12:38:11 20 PRESIDING JUDGE: Yes.

21 MR TAKU: He mobilised -- he invoked Chapter 7 authority
22 and, indeed, you also have evidence showing that, rather than
23 proving that UNAMSIL personnel were killed, the evidence shows
24 that, indeed, it was the RUF, two combatants were killed. That's
12:38:32 25 the evidence adduced through them. So my submission here first
26 is that --

27 PRESIDING JUDGE: Yes, let's have it. One.

28 MR TAKU: First, this alleged attack was neither systematic
29 nor widespread.

1 PRESIDING JUDGE: Yes.

2 MR TAKU: Secondly, because of the fact the targeted group
3 had indeed invoked Chapter 7 authority --

4 PRESIDING JUDGE: Because what? Let's have it again.

12:39:09 5 MR TAKU: Because the targeted group --

6 PRESIDING JUDGE: Because the targeted group invoked --

7 MR TAKU: Chapter 7 authority.

8 PRESIDING JUDGE: When you say Chapter 7, you are thinking
9 of the United Nations --

10 MR TAKU: Charter.

11 PRESIDING JUDGE: Charter.

12 MR TAKU: Yes, Your Honours. Also, Resolution 1313 of the
13 Security Council, Resolution 1313.

14 PRESIDING JUDGE: Yes. Let's stick to Chapter 7. Because
12:39:38 15 they did that. As you say, they invoked that chapter.

16 MR TAKU: Yes. So it cannot be stated that they were
17 civilians or they had acquired civilian status.

18 JUDGE ITOE: [Indiscernible] Civilians. Are they not a
19 different category of people, peacekeepers? The attacks were
12:40:03 20 alleged to be either widespread or systematic against civilians,
21 or there were specific attacks on the UNAMSIL peacekeeping
22 personnel. Don't you find a distinction between civilians and
23 the UN peacekeeping personnel, learned counsel?

24 MR TAKU: Your Honours, let me provide a jurisprudence
12:40:29 25 which is that the police, gendarmes and others offered
26 peacekeeping, cannot be said to qualify for civilian status.
27 That jurisprudence, Your Honours, falls in line with this. It
28 cannot be presumed that because they were UNAMSIL personnel, per
29 se, and often had been committed, but you look at the elements of

1 the offence. The element of the offence says that -- talks about
2 they have acquired civilian status.

3 JUDGE BOUTET: The offence, Mr Taku, is under 4(B) of the
4 Statute. It says, "intention, redirecting attacks against
12:41:16 5 personnel," and so on and so on, of peacekeeping missions. And
6 according with the Charter of the [indiscernible] and so on.

7 JUDGE ITOE: It has nothing to do with civilians. Having,
8 you know, civilian status.

9 PRESIDING JUDGE: It is a special category of persons who
12:41:32 10 are here being protected by law, unless -- and that's the kind
11 of -- I find the lacunae in your thinking. Unless you telling us
12 there is settled jurisprudence that says that the targeted group,
13 to benefit from that protection must be civilians, unless you're
14 saying that there is jurisprudence, settled jurisprudence.

12:42:04 15 MR TAKU: [Indiscernible] civilians have all acquired
16 civilian status.

17 PRESIDING JUDGE: Right.

18 MR TAKU: Yes.

19 PRESIDING JUDGE: Well, that's what you're trying to do.

12:42:19 20 MR TAKU: Exactly, Your Honour.

21 PRESIDING JUDGE: You must persuade us that there is
22 settled jurisprudence on that subject. That's what I've been
23 waiting to hear. I think you were trying to cite Kayishema.
24 What does it say --

12:42:26 25 MR TAKU: With your permission, let me read.

26 PRESIDING JUDGE: -- on that subject, if it's relevant to
27 that.

28 MR TAKU: Yes, Your Honour. "The term 'civilian' must be
29 understood within the context of war as well as relative peace.

1 The Trial Chamber considers that a wide definition of civilian is
2 applicable and, in the context of the situation of Kibuye
3 *Prefecture* where there was no armed conflict, includes all
4 persons except those who have the duty to maintain public order
12:42:58 5 and have the legitimate means to exercise force. Non-civilians
6 would include, for example, members of the FAR, the RPF, the
7 police and the Gendarmerie Nationale. "

8 PRESIDING JUDGE: How do you apply it to this instant
9 situation?

12:43:22 10 MR TAKU: Applied to this situation, Your Honour, we have,
11 as evidence shows, different categories of UN personnel in the
12 field. But it is to this category that Chapter 7 authority was
13 given. Now, that, on and off of itself, does not change the
14 status, but the moment that they invoke that status, before,
12:43:50 15 even, the alleged abduction takes place, indeed, they use it and
16 confront the abductors, I think they cannot be said to have
17 applied civilian status.

18 PRESIDING JUDGE: That's the difficulty. There is a hiatus
19 in your thinking. I won't be satisfied that the jurisprudence
12:44:09 20 that you've cited is, in fact, saying that only civilians in that
21 context are protected in terms of a target group.

22 MR TAKU: That's my submission, Your Honour.

23 PRESIDING JUDGE: That's what I'm saying. I'm not sure
24 whether that particular authority that you've cited actually
12:44:31 25 supports that proposition, what Kayishema seems to be saying,
26 defining who civilians are. There is a big hiatus in your
27 thinking here.

28 MR TAKU: I sincerely submit that Your Honours look over
29 this area --

1 PRESIDING JUDGE: In other words, you're virtually saying
2 that the charges laid is bad. You virtually are attacking, not
3 the just the evidence, but the charge itself is misconceived.
4 That's what you're saying? Are you putting it as high as that?

12:45:17 5 MR TAKU: Not necessarily.

6 PRESIDING JUDGE: But it's misconceived.

7 MR TAKU: Not necessarily, Your Honour, because the other
8 categories of crime that could have been committed if, after they
9 surrendered, [indiscernible] and other crimes are committed

12:45:31 10 against them

11 PRESIDING JUDGE: In other words, you're saying if only
12 they were civilians, would they benefit from the protection of
13 the law --

14 MR TAKU: Or had acquired civilian status.

12:45:45 15 PRESIDING JUDGE: Or had acquired civilian status.

16 MR TAKU: Yes, Your Honour.

17 PRESIDING JUDGE: [Overlapping speakers] from the
18 protection of the law. But in this context they do not, by
19 reason of the fact they were acting in pursuance of Chapter 7.

12:46:00 20 MR TAKU: Yes, Your Honours, and did invoke Chapter 7.

21 PRESIDING JUDGE: That deprived them of protection of the
22 law.

23 MR TAKU: Yes, Your Honours.

12:46:09 24 JUDGE ITOE: That proposition is very novel to me. As you
25 say, we'll examine it with a fine-tooth comb and we'll arrive at
26 our conclusions on it. Because I don't see how the civilian
27 nature or the civilian composition or nature of UNAMSIL personnel
28 are alleged to have been taken hostage, you know, has to do with
29 Kayishema or their being civilians. Anyway, we'll look at that.

1 PRESIDING JUDGE: We'll look at the authority, anyway.

2 MR TAKU: Also, Your Honour, it has not been established
3 that the alleged attacks were systematic or widespread.

4 JUDGE ITOE: You said so already, that the attacks were
12:47:01 5 neither systematic, nor were they widespread.

6 MR TAKU: Yes, Your Honour. Also, Your Honour, there is
7 clearly no evidence on record about the murder of UNAMSIL
8 personnel. The evidence, on the contrary, shows that the RUF --
9 two of the combatants were killed. There is absolutely no
12:47:19 10 evidence, at least, to my knowledge, my reading.

11 JUDGE BOUTET: No evidence of what?

12 MR TAKU: Of the killing, the murder of UNAMSIL personnel.
13 I haven't seen that, from my reading, Your Honour.

14 JUDGE ITOE: The only evidence you have is the killing of
12:47:43 15 two RUF soldiers, according to your records.

16 MR TAKU: Yes, Your Honours. I would refer to
17 Lieutenant-Colonel [redacted], TF1-288 in the transcript of
18 23/3/2006, testified at page 35. He had one combatant complain,
19 "Your men have killed our people. They took pictures of their
12:48:13 20 comrades who were killed. Some said they wanted evidence that
21 the UN should observe that, their men were killed." This is what
22 I found. I was reading from the records. I'm not saying that --
23 I'm sorry, Your Honours, my colleague says this was a protected
24 witness. I'm very sorry. That can be struck out of the records.

12:48:40 25 PRESIDING JUDGE: Quite.

26 MR TAKU: TF1-288. I'm sorry, Your Honours.

27 PRESIDING JUDGE: Are you giving us your final submissions
28 now?

29 MR TAKU: Yes, Your Honours.

1 PRESIDING JUDGE: Because we've never had occasion to use
2 the gavel in these proceedings, and we certainly intend not to do
3 that.

4 MR TAKU: Yes, Your Honours. It is our submission,
12:49:05 5 Your Honours, that it has not been proved that, outside Bombali,
6 that's Lunsar and Makeni, that any alleged abductions took place
7 and he has also not established that they were widespread or
8 systematic.

9 On the basis of foregoing with us, Your Honours, to grant
12:49:47 10 our application -- our motion, Your Honours. Thank you.

11 PRESIDING JUDGE: Thank you, learned counsel. Mr Jordash,
12 you're intervening?

13 MR JORDASH: May I just intervene very briefly, in the
14 spirit of assisting Your Honours. In relation to Mr Taku's
12:50:03 15 submission about the peacekeepers and having to have acquired the
16 status of civilian status, could I just refer your Honours to
17 Article 4(B) of the Statute, which perhaps summarises what was
18 being said. It's not an argument that I --

19 PRESIDING JUDGE: But that's very -- we appreciate it.

12:50:29 20 JUDGE BOUTET: I gathered that's what he intended to do.

21 MR JORDASH: I will leave it at that.

22 PRESIDING JUDGE: That's very helpful. Thank you. Learned
23 counsel for the third accused, your turn.

24 MR O'SHEA: If I could just have one moment to get my
12:50:48 25 papers in order.

26 PRESIDING JUDGE: Leave granted. The procedure will be
27 this: We'll let you to submit for ten minutes and reserve the
28 balance of your time when we come back.

29 MR O'SHEA: Yes. That would be useful. That will enable

1 me to outline where I'm going.

2 Your Honour, I have passed up some authorities to
3 Your Honours, or I believe they're about to be passed up to you,
4 perhaps. There are two additional authorities which I have also
12:52:25 5 given to the Prosecution, which I would wish to be passed up to
6 Your Honours. I have three copies and one for the legal
7 officers.

8 PRESIDING JUDGE: Thank you.

9 MR O'SHEA: Your Honours, the way I intend to proceed is to
12:53:04 10 begin, not by making comment upon the test. I agree with what
11 Your Honours say about the test on Rule 98. I will not pursue
12 that, as Your Honours have invited us not to. But I will make a
13 few general comments about approach, in terms of understanding my
14 submissions. I then intend to begin with count 10, mutilations.
12:53:50 15 I will go into that count in a little more detail than the other
16 counts, almost by way of illustration. So much of what I say in
17 relation to that count can be applied to other counts, once I've
18 said it.

19 In accordance with Your Honours' indication, I will then
12:54:12 20 try to take order of the counts, but I will begin with those
21 counts where I say there is not sufficient evidence for the count
22 to stand as opposed to any specific aspect of the count. So I
23 will begin with mutilations, count 10; I will move on to
24 extermination, count 3; I will then proceed with pillage, count
12:54:53 25 14. I say, for the purposes of Rule 98, that those three counts
26 should not stand against Mr Gbao.

27 JUDGE ITOE: That is 10, 3 and 13.

28 MR O'SHEA: Fourteen. Count 10 is dealt with, starting at
29 page 30 of our skeleton argument, and starting at -- sorry, not

1 page, paragraph 30, and starting at paragraph 48 of the
2 Prosecution skeleton argument.

3 PRESIDING JUDGE: Where does it end in your skeleton
4 argument? Just paragraph 30, that's all?

12:55:46 5 MR O'SHEA: Well, the reason I haven't put --

6 PRESIDING JUDGE: That's all right. I don't intend to --

7 MR O'SHEA: Yes, because it's a bit blurred in both
8 skeleton arguments and it's easier to deal with in that way.

9 PRESIDING JUDGE: In other words, the cross-reference in
10 the Prosecutions response will be paragraph 48?

11 MR O'SHEA: Paragraph 48, yes.

12 PRESIDING JUDGE: That's count 10.

13 MR O'SHEA: Yes, because in both of our skeleton arguments,
14 we deal with certain counts jointly and certain aspects jointly.
15 That's why I start with the first paragraph.

16 Extermination count 3 begins, in our skeleton argument, at
17 paragraph 12, and, in the Prosecution skeletal argument, at
18 paragraph 32. Pillage begins, in our skeleton argument, at
19 paragraph 31 and, in the Prosecution skeleton argument, at
12:56:45 20 paragraph 65.

21 Having dealt with those three counts, I will then proceed
22 to deal with counts where we do not suggest that there is no
23 evidence for the purpose of these proceedings against Mr Gbao,
24 but where we suggest that there is no evidence for the purpose of
12:57:14 25 these proceedings against Mr Gbao in specific locations
26 identified in the indictment. My submission there is that, while
27 I cannot ask Your Honours to acquit the accused on any specific
28 count, I can invite Your Honours to make a ruling that there is
29 no evidence in relation to those matters, which will facilitate

1 us, the Defence, in terms of confining our defence case.

2 PRESIDING JUDGE: This would be in line with our stated
3 methodology.

4 MR O' SHEA: Absolutely, Your Honour, and in line with that
12:58:04 5 of other tribunals, as set out in Kordic, for instance.

6 PRESIDING JUDGE: Thank you.

7 MR O' SHEA: Now, the two matters which are obvious, in a
8 sense, and certainly obviously to Your Honours, but I believe
9 need to be stated and kept in the forefront of our minds, even

12:58:30 10 when dealing with Rule 98 proceedings, are these two matters.

11 First of all, there may be a temptation in any lawyer's mind,
12 whether they be judge or advocate, to consolidate their thoughts
13 in relation to any particular count across the three accused. I
14 say that that, in a sense, is illustrated by the approach of the

12:59:07 15 Prosecution in their response.

16 Of course, these three accused, while they are in a joint
17 trial, they are entitled to be treated separately for the purpose
18 of the examination of the evidence against them. That, in my
19 submission, is an important principle to keep in the forefront of
12:59:33 20 one's mind, and I will make the assertion which will apply to
21 some of the things I'm going to say. The mere fact that there
22 may be some evidence against one accused does not mean that there
23 is sufficient evidence against another accused for the purposes
24 of a prima facie case.

13:00:02 25 The second principle that I would invite Your Honours to
26 keep firmly in mind is that of individual criminal
27 responsibility, that we are here, or Your Honours are here, to
28 determine the individual criminal responsibility of Mr Gbao, and
29 not the collective criminal responsibility of the RUF.

1 Your Honour, that concludes my introductory remarks. My
2 next step would be to move on to count 10. If Your Honours feel
3 it appropriate, that might be a convenient moment to take a
4 break.

13:01:02 5 PRESIDING JUDGE: Yes, I think it's appropriate to recess
6 for lunch at this time and come back at 2.30 p.m., prompt.

7 [Luncheon recess taken at 12.58 p.m.]

8 [Upon resuming at 2.41 p.m.]

9 PRESIDING JUDGE: Professor O'Shea, for the sake of
14:44:22 10 accurate computation of our time the balance of your reserved
11 time is 107 minutes.

12 JUDGE ITOE: I can assure you Professor O'Shea will not get
13 to that point.

14 PRESIDING JUDGE: I wanted to remind you the Prosecution
14:44:46 15 has three hours. We want to make sure we're on target to
16 complete our assignment today. Right, you can proceed.

17 MR O'SHEA: I'm aiming for between 7 and 77.

18 PRESIDING JUDGE: I'm giving you the balance of your
19 reserved time, 103 minutes.

14:45:04 20 MR O'SHEA: Thank you.

21 PRESIDING JUDGE: Go ahead.

22 MR O'SHEA: Beginning with the crime of mutilation, count
23 10 of the indictment, the Prosecution has helpfully set out the
24 evidence in relation to amputation, as I indicated from paragraph
14:45:36 25 48 onwards, when dealing with counts 10 and 11 cumulatively. I
26 think it would be helpful, without going, hopefully, into too
27 much detail, if I just try to pinpoint or highlight the character
28 or features of the evidence which the Prosecution have drawn to
29 the attention of Your Honours. The Prosecution helpfully

1 summarised in sentences, that information. Your Honours can, in
2 large part, rely upon those. Not completely but, in large part,
3 rely upon those sentences as being accurate. It would be
4 helpful, in the context of what I'm saying, to try to highlight
14:46:42 5 the features.

6 What one notices, when one has regard to the various
7 witnesses which give evidence of mutilation, is that, first and
8 foremost, the two principle places where the Prosecution place
9 Mr Gbao, the town of Makeni and the province of Kailahun, are two
14:47:17 10 areas where evidence in relation to mutilation and, in
11 particular, in the common form in this conflict, amputation, that
12 kind of evidence has not been presented in relation to those two
13 locations, Makeni Town and Kailahun District, which, it is our
14 case, and is reflected in the Prosecution evidence, is the
14:47:49 15 physical location of Mr Gbao.

16 That's quite a significant point and feature when dealing
17 with a Rule 98 application, in my submission, because the
18 Prosecution will tell Your Honours that the elements of crimes
19 can be inferred through evidence, a matter which I don't contest.
14:48:23 20 One can look at the direct evidence and one can look at the
21 circumstances, and certain aspects of elements of crimes or forms
22 of liability can, indeed, be inferred. Although, I emphasise,
23 not presumed. It is important to bear in mind, or keep firmly in
24 mind, Mr Gbao's location in that particular respect.

14:48:55 25 Now, in Bombali District, we have witness 196, which is
26 dated 13th July 2004, at pages 23 to 25, and that relates to
27 evidence of mutilation taking place prior to 6 January 1999.
28 Again, the defence case, and the Prosecution evidence, reflect
29 that Mr Gbao was present in Makeni Town, mainly in 1999. That,

1 having been said, this particular evidence does not relate to
2 Makeni Town, but [indiscernible] Village, and involves the
3 amputation of one woman. Witness 028 of 20 March 2006, to be
4 found at pages 21 to 23 of those transcripts, provides no time
14:50:29 5 frame at all and relates to the amputation of two men in a place
6 called Kortu.

7 In both of these cases, there is no clear evidence that the
8 perpetrators had a link with the RUF. There is certainly no
9 evidence of a direct link to Mr Gbao, but there is also no
14:51:04 10 clarity as to who, in fact, the perpetrators are, save the
11 reference to rebels. In the case of the first witness I
12 mentioned, it's largely reflected in the evidence that it is, in
13 my submission, probably the AFRC.

14 The town of Freetown and the Western Area, the Prosecution
14:51:38 15 have referred to 093 of 29 November 2005, pages 103 to 111 in a
16 place called Kanikay on 6 January 1999. Again, the evidence in
17 relation to that witness does not identify RUF perpetrators, and
18 does not directly identify Mr Gbao, because that witness, while
19 being linked to an RUF group, speaks of observing other groups
14:52:21 20 committing mutilation, without specifying the exact character of
21 those other groups.

22 331, in Wellington, transcripts 22 July 2004, pages 46 to
23 48, is the evidence of one child's hands being cut, and that of
24 the witness themselves. Again, no clear evidence that we are, in
14:52:56 25 fact, dealing with RUF combatants in that case. The significance
26 of this emphasis of mine will become clear in a moment.

27 If we come to Kono District, we have a witness 360, of 17
28 July 2005. That makes reference to mutilation on the orders of
29 one of the accused - not this accused - but one the Prosecution

1 claims to be superior to the accused I represent.

2 272, of 5 July 2005, to be found at pages 55 to 58, again
3 this is evidence in relation to Kono. This is a witness who,
4 essentially, comes forward as some kind of, I say, "expert
14:54:08 5 witness," a nurse from Holland, and she provides evidence in
6 relation to mutilations in respect to her work at a hospital
7 called Connaught Hospital.

8 The Prosecution, in relation to that witness, states that,
9 there is evidence of 58 patients, mutilated, from the Kono area,
14:54:37 10 giving specific place names. But that is, in fact, not accurate.
11 Your Honours will be able to see that from the transcripts. The
12 reference to 58 patients was a reference to an intake of patients
13 on a particular day. It is not, by any means, clear that all of
14 those 58 patients came from Kono. In fact, there is an

14:55:07 15 indication in the transcripts that 13 of them came from the
16 province of Kono. There is an indication that a large number of
17 patients were, in fact, interviewed, but it is not clear from the
18 evidence of that witness where these various patients who were
19 interviewed necessarily came from, in terms of proportions. Most
14:55:33 20 importantly about the evidence of this witness, the evidence of
21 this witness says nothing at all about who the perpetrators were,
22 other than the fact that they were armed people. In so far as
23 that evidence is there designed to establish some kind of
24 numerical vastness, it does not achieve that purpose, in my
14:56:03 25 submission.

26 No evidence of amputations in relation to Kenema. Sorry,
27 in relation to Kono, for the sake of completeness, 195 is a Kono
28 witness. Again, rebels are the perpetrators: Not clear that we
29 are dealing with RUF, certainly no direct reference to Gbao.

1 212, a specific reference to Staff Alhaji, in that specific
2 respect. Koinadugu, 215, a man who has his hands chopped off in
3 Yifin, and this is explained to us through a witness in the form
4 of hearsay evidence.

14:57:05 5 Again, that same witness refers to another man's hands who
6 were cut off in a place called Bodala. Here, there is a link
7 made to the RUF group in the evidence of this witness. Likewise,
8 with another witness, also in Koinadugu, 172, again, there is a
9 link to the RUF, where the perpetrators were described as
14:57:37 10 Sankoh's rebels. And Port Loko, 253, again, there is a link made
11 to the RUF in the evidence of that particular witness.

12 In most of these cases, in fact, the vast majority of these
13 instances where you have heard evidence in relation to
14 amputations, we have dealt with situations involving one, two,
14:58:15 15 three or four people and, occasionally, references to a greater
16 number. That is the context in which we place Mr Gbao.

17 If we just step back for one moment from the technicalities
18 of the law and just look at the matter from the point of view of
19 commonsense, and how the intelligent public would view this
14:58:48 20 situation, and also look at it from the point of view of Mr Gbao
21 as a person involved in the conflict during the relevant years,
22 would these people envisage that, in these kinds of
23 circumstances, Mr Gbao could be said to be criminally liable for
24 what has happened, according to these witnesses dealing with
14:59:16 25 amputations. I say, or I submit, that all commonsense dictates
26 that the ordinary intelligent man in the street would say that is
27 complete madness.

28 That's the context in which I approach Rule 98. Because I
29 say that, for Mr Gbao's responsibility for the amputations in

1 Sierra Leone, there is insufficient evidence to be legally
2 capable of sustaining a conviction. I make that assertion that,
3 effectively, there is no evidence. One can always find a way of
4 arguing that, somehow, some piece of evidence could arguably,
15:00:12 5 somehow, tenuously be linked to Mr Gbao. But, in my respectful
6 submission, when dealing with Rule 98 proceedings, Your Honours
7 are entitled to exercise a degree of commonsense, and where a
8 piece of evidence is pointed to is so tenuous and remote that no
9 reasonable tribunal could ever convict upon that, then the
15:00:43 10 tribunal is entitled to say that that is not evidence which is
11 legally capable of sustaining a conviction. If the same question
12 were put before an Appeals Chamber, that's how the Appeals
13 Chamber would approach it.

14 Now, the Prosecution will tell you that Mr Gbao is
15:01:05 15 responsible for these things because of forms of liability. I
16 entirely accept Your Honours' proposition that, generally
17 speaking, when one is dealing with questions of issues relating
18 to the doctrine of command responsibility, or the doctrine of
19 joint criminal enterprise, generally speaking, it often comes to
15:01:31 20 this: That it is a matter of appreciation of the evidence and,
21 therefore, is better left for the end of the case.

22 Let me make it plain that I do not contest the statement
23 which Your Honours made in the CDF trial. However, the statement
24 that Your Honours made in the CDF trial was made in specific
15:01:56 25 context; it was made in the context of the CDF trial. I am sure
26 that Your Honours were not making a blanket statement - that's
27 not how I read it - a blanket statement that issues of joint
28 criminal enterprise and command responsibility are never relevant
29 to Rule 98 proceedings. Of course, that would be a ludicrous

1 interpretation of what Your Honours have said.

2 A form of liability, as with a basic element of a crime,
3 requires some element to support it. If I can point to an
4 essential ingredient of a form of liability, just as if I can
15:02:41 5 point to an essential ingredient of a crime and say there is no
6 evidence or clearly insufficient evidence to support that
7 element, or that essential ingredient, in my respectful
8 submission, Your Honours would have a duty to acquit Mr Gbao on
9 that basis.

15:03:07 10 I accept all the Prosecution has to do to get past the
11 Rule 98 hurdle is to show that one of the forms of liability
12 might apply, not all of them must apply; I entirely accept that.
13 But with in respect to mutilations, in my respectful submission,
14 there are essential ingredients of each and every form of
15:03:29 15 liability which, in the case of Mr Gbao, in the case of
16 mutilation, is missing in this evidence.

17 First of all, with respect to this mysterious beast, joint
18 criminal enterprise, it's not my intention to go into any
19 detailed analysis of the law on joint criminal enterprise.

15:04:02 20 However, the notion has been sufficiently discussed in the
21 jurisprudence that there are certain clear parameters and clear
22 essential ingredients to that notion.

23 First and foremost, it is a common misconception which the
24 Appeals Chamber of the ICTY and ICTR has corrected. It is a
15:04:36 25 joint misconception that joint criminal enterprise is a form of
26 vicarious liability or accomplice liability. That, Your Honours,
27 is not the case. It has clearly been stated by the Appeals
28 Chamber that joint criminal enterprise is a form of commission,
29 not a form of accomplice liability.

1 Your Honours may find a reference to that in the Appeals
2 Chamber decision of 31 May 2003, decision on *Dragoljub Ojdanic*,
3 challenging jurisdiction, joint criminal enterprise, where the
4 Appeals Chamber states --

15:05:29 5 JUDGE ITOE: Is it one of the decisions you offered to us
6 here?

7 MR O'SHEA: One of the decisions that I passed up to
8 Your Honours. It is one of the decisions which is in loose leaf,
9 as opposed to in the binder. It's dated 31 May 2003. The
10 relevant paragraph is paragraph 31. At the bottom of that
11 paragraph, bottom of that page, page 13, the Appeals Chamber
12 states:

13 "The Appeals Chamber has already pointed out that the joint
14 criminal enterprise is to be regarded, not as a form of
15 accomplice liability, but as a form of commission."

16 And it goes on to say:

17 "And that liability stems not" --

18 JUDGE BOUTET: Mr O'Shea, you say you have given us a copy
19 of that this morning?

15:06:39 20 MR O'SHEA: If it's not there, it's a mistake.

21 JUDGE BOUTET: I don't see any case in my file of 2003.

22 PRESIDING JUDGE: [Microphone not activated].

23 MR O'SHEA: Sorry, Your Honour doesn't seem to have your
24 microphone on.

15:06:57 25 PRESIDING JUDGE: Is that the decision on *Ojdanic's* motion?

26 MR O'SHEA: Exactly, Your Honour.

27 PRESIDING JUDGE: Dated 31 May 2003.

28 MR O'SHEA: Your Honour, exactly.

29 JUDGE BOUTET: I have just been given a copy. That's fine.

1 MR O' SHEA: I'm afraid these decisions have come to you in
2 a fairly disorganised manner.

3 PRESIDING JUDGE: Can you just refer us to the paragraph
4 and espouse the detailed analysis, otherwise we might in fact be
15:07:36 5 finding ourselves virtually undermining the injunction that we
6 gave.

7 MR O' SHEA: Yes, quite right, Your Honour.

8 PRESIDING JUDGE: The literature on the subject is quite
9 extensive.

15:07:47 10 MR O' SHEA: Yes. I do intend to, unless Your Honours stop
11 me, refer to the paragraph, with a view to Your Honours perhaps
12 later having a look at it.

13 PRESIDING JUDGE: Paragraph?

14 MR O' SHEA: Thirty-one, Your Honours. The nub of joint
15:08:08 15 criminal enterprise, what makes joint criminal enterprise the
16 sort of distinguishing beast that everyone looks upon it as, that
17 feature is -- the feature that does not require the physical
18 presence of the accused. That has often been misinterpreted to
19 mean that we are here dealing with some kind of secondary

15:08:35 20 liability, which is not the case. We are here dealing with,
21 essentially, a form of direct liability. If Your Honours have
22 had the opportunity to look through some of the World War II
23 cases dealing with the joint criminal enterprise concept, they
24 are, in the main, fairly direct and concrete cases where, for
15:08:56 25 example, you have the *Lynchon* case being one example, and you
26 have those in the crowd who cheer; those who grab hold of a
27 person; and those who shout, grab hold of that person. That's a
28 classic example of a joint criminal enterprise where various
29 people come together with a joint intention to kill, but play

1 various parts in that process.

2 Now, it follows from the fact that we are dealing with a
3 form of commission here, and, again, this, you will find, at
4 least to some extent in the same paragraph, paragraph 31, that we
15:09:51 5 are not here dealing with the mere fact that a man belongs to an
6 organisation. For instance, in *Ojdanic* case, Your Honour will
7 find that concept discussed quite extensively, because it is one
8 of the grounds upon which Defence counsel pursued his argument.
9 He said this joint criminal enterprise was a form of
15:10:15 10 organisational liability and that this was not permitted. The
11 Appeals Chamber said, well, it's not a form of organisational
12 criminal liability. He said, well, it is, you've misunderstood
13 it.

14 THE INTERPRETER: Your Honours, can learned counsel please
15:10:25 15 speak through the mic.

16 PRESIDING JUDGE: The microphone appears to be off.

17 JUDGE ITOE: Something is wrong there.

18 MR O'SHEA: Possibly because of the rain, but I'm also
19 speaking in this direction and my microphone is in that
15:10:42 20 direction.

21 JUDGE ITOE: You can keep the two lit.

22 MR O'SHEA: I'm told by those who know better than I, when
23 one tries to mix technology, it can sometimes cause confusion.
24 Is that better, Your Honour?

15:11:03 25 PRESIDING JUDGE: That's okay. Let's proceed here.
26 Without meaning to cut you short, if you can make those
27 submissions very short, because the fact on the principle that
28 you're propounding from this Appeals Chamber, we're not talking
29 about membership of an unlawful organisation, when we talk about

1 JCE.

2 The Bench is aware, that is why we gave this caution. This
3 is an extremely controversial area. The literature itself is
4 extensive. The jurisprudence appears to be settled, but it may
15:11:58 5 be that it is not as settled as you may be making it. But,
6 indeed, we're very sensitive that this is extremely
7 controversial, and the jurisprudence is replete with different
8 kinds of interpretation, different ideas as to what JCE is,
9 different forms. Don't assume that we're not au fait with this.

15:12:26 10 We know we're treading on an extremely slippery area of the law,
11 and try not to put the propositions with such definitiveness. I
12 mean, all you need to do is make your submissions, that's all.

13 MR O'SHEA: I'm trying, Your Honour, to avoid the subtle
14 areas of the law and focus on those which are settled.

15:12:55 15 PRESIDING JUDGE: Yes. Well, just give us a summary of
16 those areas you think are settled, you want the Chamber to apply
17 its mind to.

18 MR O'SHEA: Yes, indeed.

19 PRESIDING JUDGE: That's what I'm waiting for. I've been
15:13:08 20 putting one, two, three, so I can fit them into my category.
21 Submission one, submission two. That would help us.

22 MR O'SHEA: Let me do it like this: 1. Membership of an
23 organisation is not what we're dealing with; 2. A person's
24 position in an organisation is not in itself and by itself enough
15:13:47 25 to establish its involvement in a joint criminal enterprise; 3.
26 In relation to category one and category two, joint criminal
27 enterprise, which, of course, we're not dealing with any way,
28 because --

29 JUDGE ITOE: You see, this is a problem, because it would

1 be difficult in your arguments to distinguish between these
2 various forms of JCE, which have given rise to proliferation, you
3 know, of thoughts and diverse academic and even judicial
4 pronouncements. I don't see how, if we went into details of
15:15:10 5 making the JCE the topic of our submissions, I don't see how you
6 can really compartmentalise yourself, you know, one, and abandon
7 the other, without necessarily drawing some analogies, you know,
8 here and there, and the differences between the various forms.

9 MR O'SHEA: Your Honour, may I invite the Chamber to take
15:15:36 10 this approach: To look at the essential ingredients of these
11 various forms of liability, not to make any definitive ruling on
12 what they mean or whether they are established or not established
13 in this case, but to say: We are satisfied that, in the case of
14 the charge of mutilation against Mr Gbao, there is insufficient
15:16:11 15 evidence to support that count, either as a direct perpetrator or
16 under some form of liability.

17 PRESIDING JUDGE: Make that a submission.

18 MR O'SHEA: Yes, Your Honour, I believe that would be a
19 permissible approach for this Chamber, without going into
15:16:36 20 detailed discussion of the law. Your Honours are sufficiently
21 acquainted with the jurisprudence to know where the clear settled
22 issues are. Your Honours have a sufficient degree of commonsense
23 and knowledge of the evidence in this case to be able to say that
24 we find that, in relation to mutilations, there is insufficient
15:17:06 25 evidence against Gbao. It is not necessary to go into detail --

26 PRESIDING JUDGE: I think that's a very, very creative
27 approach. In short, making the assumption, quite rightly, that
28 the judges know the law. In other words, the law resides in our
29 bosoms, if you like, and then tell us, on the basis of those

1 assumption, as my brother has suggested, give us the specific
2 submissions, just as you've done it. Your last point seems to be
3 the right kind of submission that I am looking for, rather than
4 elaborate discourse on JCE. I will tell you that we have --
15:17:50 5 we're fully apprised of this beast, as you call it, and its
6 various dimensions and complexities.

7 MR O'SHEA: I merely want to point, for Your Honours'
8 assistance, to those essential ingredients I say are missing,
9 without going into any detailed discussion.

15:18:14 10 PRESIDING JUDGE: I would like to hear the submission again
11 on behalf of your client that there is no direct --

12 MR O'SHEA: The general submission, and this is the
13 approach I'm inviting Your Honours to take, as a means of not
14 entering into a legal analysis of Your Honours' ruling, which is
15:18:32 15 to say that, having reviewed the evidence in relation to
16 mutilations, as set out from X witnesses from A to Z, this
17 Chamber is satisfied that, in the case of Mr Gbao, there is
18 insufficient evidence legally capable of supporting a conviction,
19 whatever form of liability one applies.

15:19:55 20 Is there evidence, and here I'm talking about joint
21 criminal enterprise, and I won't say any more than that, is there
22 evidence that Mr Gbao had a shared, or shared an intention to
23 commit the crime of mutilation? I say the answer is no. I say
24 there is no evidence of that whatsoever.

15:20:46 25 Is there any evidence that Mr Gbao had an intent to further
26 a system of mutilation? I say there is no evidence of that. Can
27 mutilation be considered as a natural and foreseeable consequence
28 or, as a likely result of an intention to commit any other crime
29 to which Mr Gbao can be linked? I say there is no evidence of

1 that.

2 Is there any evidence that Mr Gbao joined the RUF with the
3 intention of taking over this country by any means, by the
4 commission of any crime? I say there is no evidence of that. In
15:22:31 5 fact, quite to the contrary. Two Prosecution witnesses have
6 claimed that Gbao was locked in a cupboard, made to dig his own
7 grave, and essentially brought into the RUF like most people are,
8 and then embraced into the RUF ideologies, which did not involve
9 the commission of crimes. So there is no evidence coming from
15:22:59 10 Prosecution witnesses that Mr Gbao formed any such general
11 intention in relation to the entirety of Sierra Leone when he
12 became a member of the RUF.

13 Command responsibility. Is there any evidence that Mr Gbao
14 received any specific information -- and this is what the
15:23:30 15 jurisprudence says, *Celibici*, *Blaskic* and so forth -- is there
16 any evidence that Mr Gbao received any specific information which
17 would have enabled him to conclude -- the words of Protocol One
18 to the Geneva Conventions, Article 86 -- which would have enabled
19 him to conclude that there was a need to investigate the crime of
15:24:08 20 mutilation in any of the areas that I've indicated in relation to
21 any of the evidence that I've outlined? And I say there is no
22 such evidence. Absolutely clear fundamental principle and well
23 settled in the jurisprudence on command responsibility.
24 Knowledge is not presumed. It's not necessary that Mr Gbao has
15:24:42 25 information in his possession, showing that someone is committing
26 a crime, but it is necessary that he is in possession of specific
27 information, which would somehow lead him to these crimes
28 committed, these crimes of mutilation, as they were committed.

29 Did Mr Gbao have the material ability -- and here I come to

1 the issue of effective control -- did Mr Gbao have the material
2 ability to investigate or punish these specific crimes? We are
3 talking here, as the jurisprudence says, of actual control. I
4 say, in relation to most of these witnesses, that cannot be shown
15:26:00 5 at all, and a mere link to the RUF is not enough. It is,
6 however, the lack of specific knowledge which is the real
7 achilles heel to the Prosecution problem in relation to Mr Gbao
8 and mutilations.

9 Finally, and this will be sufficient, with regard to aiding
15:26:38 10 and abetting, has the Prosecution produced evidence that Mr Gbao
11 committed acts which were specifically directed to assisting
12 these mutilations? We say that there is no such evidence.

13 So, Your Honours, it is the absence of evidence in relation
14 to those essential ingredients, which I say a commonsense
15:27:42 15 analysis of this evidence on mutilations, brings to light. I
16 invite Your Honours to conduct the same analysis with regard to
17 forms of liability to the other counts in the indictment, in the
18 manner which I have described in our skeleton argument.

19 When we are dealing with locations in the skeleton
15:28:31 20 argument, as opposed to the count itself, what we have done is we
21 have deliberately stayed clear of those locations where Mr Gbao
22 was physically present. Accepting that, for the purposes of
23 Rule 98 proceedings, there is, perhaps, the possibility of
24 inference in relation to crimes committed in Gbao's physical
15:29:00 25 presence or near physical presence, if I can put it that way. So
26 we've deliberately steered away from those areas in relation to
27 most of the counts on the indictment, but we say if you conduct
28 the analysis that I've invited Your Honours to conduct in
29 relation to mutilations, with regard to the other provinces where

1 Mr Gbao was not present, with regard to, for instance, killing,
2 Your Honours will be led to the same conclusion.

3 That just leaves me with two other areas to deal with, the
4 first being the crime of extermination, and the second being the
15:29:57 5 crime of pillage.

6 PRESIDING JUDGE: Again, if you can have your submissions
7 as succinct as you did just now, again, we'd appreciate that.

8 MR O'SHEA: I'm trying my best, Your Honour. In the bundle
9 of authorities that have been placed to Your Honour, at D, in the
15:30:41 10 main bundle of authorities we have handed up to Your Honours,
11 Your Honours will find the case of *Prosecutor v Krstic* which is a
12 Trial Chamber decision. I invite Your Honours to understand what
13 has been said at page 178 of that decision as being a correct
14 statement of law.

15 PRESIDING JUDGE: Paragraphs 501?

16 MR O'SHEA: Paragraphs 501 and 503. Whilst succinctness is
17 the objective, I have to, for the purposes of this submission,
18 give Your Honours some historical context.

19 The crime of extermination was encapsulated in the Charter
15:31:56 20 establishing the International Military Tribunal at Nuremburg.
21 Crimes under international law are premised upon customary
22 international law, which means state practice, together with
23 opinio juris from states. The state practice and opinio juris
24 which gave rise to the case of extermination is the Nuremburg
15:32:31 25 Charter, the circumstances surrounding the Nuremburg Charter, its
26 formulation, the trial, the judgment and the adoption by the
27 general assembly of the United Nations of that judgment in
28 Nuremburg.

29 At the time that that judgment was delivered and at the

1 time that the Nuremburg Charter was created, the crime of
2 genocide did not exist as a concept. The term was coined by a
3 man called Raphael Lemkin after Nuremburg, or at least after the
4 formulation of the Charter at Nuremburg. So, the Chamber, in
15:33:20 5 Nuremburg, did not have the benefit of the crime of genocide.
6 Extermination was designed to deal with the extermination of the
7 Jews during the World War II. That is what it was designed to
8 deal with. It has, as Your Honours will know from the
9 jurisprudence, exactly the same elements as murder and unlawful
15:33:49 10 killing as forms of crime against humanity; exactly the same
11 elements, with the one difference, in the case of extermination,
12 we are dealing with murder on a massive scale.

13 Your Honours will read from these paragraphs in this
14 decision, which I say is a correct statement of the law, that
15:34:16 15 what is assumed here is a substantial degree of preparation and
16 organisation, that's found in paragraph 501, and a mass killing
17 event.

18 Now, whether one is dealing with murder, or unlawful
19 killings, or extermination, all of those, taken in the context of
15:34:44 20 being a crime against humanity, we are, in all three cases,
21 dealing with serious killings in a widespread context, or
22 systematic context. So it is not the widespread or systematic
23 element which is the key here. It is the meticulously planned
24 and massive, murderous enterprise which is the key here. That is
15:35:24 25 what the member states, or that is what the allied powers had in
26 mind when they put extermination in the Charter.

27 So I say that none of the evidence that Your Honours have
28 heard in this trial essentially deals with the crime of
29 extermination. We do have very serious cases of murder, in some

1 cases involving a number of individuals. But we do not have, and
2 this is a matter of commonsense again, we do not have the kind of
3 meticulously planned massive murderous enterprise which states
4 had in mind when they created the Nuremburg Charter. That's all
15:36:19 5 on extermination.

6 With regard to the crime of pillage -- this is not
7 something I have handed up to Your Honours.

8 PRESIDING JUDGE: In the case of the crime of
9 extermination, your submission is that there is not a scintilla
15:37:02 10 of evidence, not that there is a lack of sufficient evidence?

11 MR O'SHEA: I'm saying there is not sufficient evidence
12 which is legally capable of amounting to extermination. Because
13 I accept there are examples in the evidence, for example, in
14 Kailahun, there is an instance of 60 people being killed.

15:37:24 15 PRESIDING JUDGE: Yes, I just wanted to get it clear. In
16 other words using the criteria enunciated in *Krstic's* case.

17 MR O'SHEA: See, I'm not saying that numbers is the key by
18 itself. Numbers is relevant, but I'm saying that what we're
19 dealing with here is a massive murderous enterprise which,
15:37:39 20 according to the *Krstic* judgement, that should be a significant
21 part of the relevant population. Those are the words of the
22 Trial Chamber. I would submit that that is a correct statement
23 of law, because that reflects state practice and *opinio juris*.

24 PRESIDING JUDGE: That's fine. Thanks.

15:38:01 25 MR O'SHEA: In other words, extermination is, in a sense,
26 an alternative to genocide, except that it does not require any
27 specific characteristic in the group that's being killed.

28 PRESIDING JUDGE: That's fine. Let's proceed. Pillage.

29 MR O'SHEA: With regard to pillage, Your Honours, it is the

1 Elements of Crimes document adopted by the member states of the
2 International Criminal Court, which is not in that document I've
3 handed up to Your Honours. I can provide a copy afterwards. But
4 it is in the Elements of Crimes, which is the document adopted by
15:38:48 5 member states at the Assembly of State Parties, which, in my
6 submission, correctly reflects the position under customary
7 international law with regard to the crime of pillage.

8 PRESIDING JUDGE: Let's have your submissions on those as
9 to the elements.

15:39:03 10 MR O'SHEA: The elements of the crime of pillage -- have
11 gone astray. The perpetrator must have appropriated certain
12 property. That's the first element. I don't contest that for
13 the purposes of Rule 98 proceedings. The second element is that
14 the perpetrator intended to deprive the owner of the property and
15:39:48 15 to appropriate it for private or personal use.

16 PRESIDING JUDGE: Let's get that again. What's the second
17 element?

18 MR O'SHEA: The perpetrator intended to deprive the owner
19 of the property and to appropriate it for private or personal
15:40:08 20 use.

21 PRESIDING JUDGE: Is that a conjunctive ingredient?

22 MR O'SHEA: If the English is not correct, I can't help
23 that.

24 PRESIDING JUDGE: No, I'm just saying it's conjunctive.

15:40:16 25 MR O'SHEA: Yes, it is.

26 PRESIDING JUDGE: It's a long time since I've -- it is
27 usual in the national system to have conjunctive ingredients.
28 Okay, let's go ahead.

29 MR O'SHEA: I will just go through the elements before I

1 say which elements I contest. The third element is the
2 appropriation was without the consent of the owner. That is not
3 a matter I contest for the purposes of these proceedings. The
4 fourth element is conduct took place in the context of and was
15:40:50 5 associated with international armed conflict, or was in the
6 context of or associated with a non-international armed conflict.

7 Your Honours will find that it's separated in the Elements
8 of Crimes document.

9 For the purposes of Rule 98 proceedings, I'm not making an
15:41:16 10 issue about context, but in the case of some of the evidence, and
11 I leave it to Your Honours to decide which evidence applies here,
12 I do contest the association to armed conflict.

13 JUDGE ITOE: Which ones do you not contest? Which of the
14 elements do you say you do not contest?

15:41:36 15 MR O'SHEA: I do not contest that any of the acts which
16 involve taking of property, which Your Honours have heard
17 evidence on in this case.

18 PRESIDING JUDGE: That is your one.

19 MR O'SHEA: I do not contest that any of those types of
15:41:52 20 acts, in this evidence, took place in the context of an armed
21 conflict. I do, however, contest in relation to some of the
22 evidence that that evidence was associated with the armed
23 conflict. And the distinction there -- am I'm pre-empting,
24 Your Honour.

15:42:16 25 JUDGE BOUTET: That's okay. I was going to ask you.
26 Please, tell me what's the distinction you're trying to make
27 here.

28 MR O'SHEA: The distinction, as is set out in the Elements
29 of Crime document, is between the words "context of" and

1 "associated with." Again, it's conjunctive.

2 Now, in the circumstances of Sierra Leone, any act of
3 taking of property alleged against members of the RUF, I accept,
4 has to be -- whether it be from 1996 to 2002 -- within that time
15:42:57 5 frame, any act of taking of property within that time frame, has
6 to be within the context of an armed conflict. I have to accept
7 that, because an armed conflict is, in one way or another, going
8 on throughout that period.

9 However, when looking at the evidence, one has to consider

10 carefully what is meant by associated with the armed conflict.

11 Going into a town with arms to take over the town and firing
12 shots, et cetera, et cetera, and then taking property, that is
13 associated with an armed conflict, by way of example. However,
14 in an area where there is temporary peace, which is occupied by
15:43:56 15 the RUF, where members of the RUF take property from individuals,
16 who are essentially living in an RUF zone, not in the specific
17 fighting situation, that is in the context of an armed conflict,
18 but it's not associated with the armed conflict. That is the
19 distinction I'm drawing.

15:44:15 20 PRESIDING JUDGE: Interesting.

21 JUDGE BOUTET: So you're saying that in all of those RUF
22 controlled territories, to use that expression, that are "at
23 peace", in other words, no fighting going on in those areas, no
24 active fighting, let's put it this way, going on at that time, so
15:44:37 25 that would not, according to your submission, consider *Krstic*,
26 even though property may be taken away, and so on.

27 MR O'SHEA: As a general proposition, yes. I understand
28 that it's a question of fact, looking at each instance of
29 pillage, or each instance of alleged pillage, I should say, as a

1 defence lawyer.

2 PRESIDING JUDGE: Any authority to support that? If you
3 don't have them, don't bother.

4 MR O' SHEA: Thank you, Your Honour. The authority, of
15:45:06 5 course, is the elements of crimes itself. When one is dealing
6 with customary international law, one always has a case.

7 PRESIDING JUDGE: [Overlapping speakers] because usually
8 when we see authority in this context, I mean case law authority,
9 or opinio juris, again, you can even --

10 MR O' SHEA: As far as I am aware, no Court has yet
11 adjudicated on the distinction between context and associated
12 with.

13 PRESIDING JUDGE: So nothing from the highly skilled and
14 erudite publicists? Nothing from them?

15 MR O' SHEA: I can't claim to have done an exhaustive search
16 academically. I'm pretty sure the cases have not settled that
17 particular issue.

18 JUDGE ITOE: Is the Presiding Judge through? Yes. You
19 have talked of a place where there is a temporary occupation. It
15:46:09 20 is peacefully occupied by the RUF, and some property, you know,
21 is taken by those members. Are you suggesting that even though,
22 you know, the conflict is ongoing, the fact that there is some
23 relative peace in an area on a temporary basis would put the
24 taking out of the context, you know, of it being associated with
15:46:40 25 the war?

26 MR O' SHEA: It would not take it out of the context of the
27 war, but it would remove it from the words "associated with" the
28 war.

29 JUDGE ITOE: I find difficulties in the distinction you're

1 trying to make between the two. It is a war that takes them
2 there. They got there because they were pursuing the war. It
3 depends on the circumstances --

4 MR O' SHEA: Quite.

15:47:07 5 JUDGE ITOE: -- they found themselves there. Maybe it was
6 after chasing out an enemy and they occupied the place and
7 conflict is still ongoing, you know.

8 MR O' SHEA: It is a question of fact.

9 JUDGE ITOE: Yes.

15:47:23 10 MR O' SHEA: If there was not a distinct between the words
11 context off and associated with, in my submission, those phrases
12 would not be there together in the same sentence.

13 JUDGE ITOE: I don't want to pursue it any further. We
14 have taken note of your this "context of" and "associated with."

15:47:37 15 MR O' SHEA: Yes. I can give one example. The assertion of
16 the one witness who said that Mr Gbao had taken his ear drops and
17 said that this was government property. That, in my respectful
18 submission, is in the context of an armed conflict, but it is not
19 associated with the armed conflict.

15:48:04 20 PRESIDING JUDGE: Counsel, we would begin to be very
21 sensitive to the time here. Let's try and see how far you can
22 get.

23 MR O' SHEA: Very well, Your Honour. The perpetrator was
24 aware of the factual circumstances that established the existence
15:48:22 25 of the armed conflict. That is the last element.

26 PRESIDING JUDGE: Right.

27 MR O' SHEA: I don't take issue with that of the Rule 98
28 proceedings. If I can go back to element number 2, appropriated
29 for private or personal use, in my respectful submission, the

1 evidence that has been asserted by the Prosecution, which could
2 conceivably, arguably, be laid at Mr Gbao's door does not involve
3 appropriation for private or personal use.

4 Lastly, in relation to the issue of pillage, pillage is a
15:49:32 5 war crime. For a war crime to be in existence, it requires more
6 than a violation of International Humanitarian Law. It requires
7 a serious violation of International Humanitarian Law. That's
8 confirmed in the *Tadic* decision on jurisdiction before the
9 Appeals Chamber. That would remove the ear drop incident from
15:50:15 10 the scope of war crimes.

11 In my submission, if Your Honours accept the propositions
12 of law that I've made in relation to the crime of pillage, the
13 evidence that has been adduced in this trial does not reach the
14 Rule 98 standard to Mr Gbao. With regard to forms of liability,
15:51:17 15 *idem*.

16 Your Honours will be pleased to know that's as far as I
17 need to go in these oral submissions.

18 PRESIDING JUDGE: Thank you, Professor O'Shea.

19 MR O'SHEA: I do have a further comment, Your Honour.

15:51:41 20 PRESIDING JUDGE: Right. Let's hear that.

21 MR O'SHEA: That's as far as I need to go with regard to
22 these oral submissions. Of course, they need to be understood in
23 the context of the skeleton argument to see the scope of what
24 we're challenging.

15:52:03 25 There are just two final comments in relation to everything
26 I've just said, if I can umbrella them. First of all, while Your
27 Honours may be reluctant to go into detailed examinations of the
28 law, Your Honours need not shy away from findings of law for the
29 purposes of sufficiency of evidence, if I can put it that way. I

1 know Your Honours are skilful enough to do it in such a way as
2 not to spoil our fun at the end of the case.

3 Secondly, it goes without saying that, as far as we are
4 concerned as lawyers, it is, of course, a matter of some courage
15:53:12 5 to be faced with the situation where you're dealing with the
6 conflict where one of the main features of the conflict, in the
7 eyes of the public, is amputations. To be confronted with a
8 situation, where one of the accused in front of you, does not in
9 fact find himself in a position where he can be legitimately
10 accused of being involved in those amputations, there is a matter
15:53:49 11 of some courage, at the end of the Prosecution case, to say, "We
12 find insufficient evidence of amputations in relation to
13 Mr Gbao." Of course, as Your Honours will know, if that be the
14 case, it is the duty to make that finding. Of course, Your
15:54:15 15 Honours are aware of that. Thank you very much.

16 PRESIDING JUDGE: Thanks. Mr Harrison, your turn.

17 MR HARRISON: I think I will try to be responsive to some
18 of the issues raised by Defence counsel, rather than simply
19 following the original skeleton outline.

15:54:37 20 PRESIDING JUDGE: Yes, quite. Go ahead. We'll give you
21 your allotted time. It's entirely up to you how you want to
22 proceed.

23 MR HARRISON: If I can just tell you at the outset, the
24 elements of the count of pillaging were dealt with slightly
15:54:53 25 different by Trial Chamber II. I don't propose to tell you
26 everything, but one of the differences that Trial Chamber II
27 thought had to be incorporated was they deleted the words of
28 "private or personal use." Otherwise, I think they were
29 relatively consistent with the Norman decision.

1 PRESIDING JUDGE: Thank you, we've seen that.

2 MR HARRISON: Secondly, Ms Alagendra has drawn to my
3 attention that the law with respect to an issue raised by Mr Taku
4 may be fairly clear. It appears to one of the textbooks out of
15:55:40 5 Mr Shabas said Common Article 3 makes it clear it is not
6 civilians which are protected by Common Article 3, it's
7 non-combatants, persons not actively involved in combat, and
8 that's the distinction which Professor Shabas took some time to
9 make clear in his text. I think that's responsive to -- I'm not
15:56:11 10 sure if it was all of the counts that Mr Taku was referring to,
11 but I take it it was at least an attempt to comment on 17 and 18,
12 perhaps even 16. I'm not sure, but I think 17 and 18 would have
13 been covered --

14 PRESIDING JUDGE: I think he was talking about the UNAMSIL.

15:56:28 15 MR HARRISON: Yes. I wasn't sure if it was 15. I'll leave
16 it. The Court remembers.

17 With the Court's permission, I think I'll leave the sole
18 remaining issue addressed by Mr Jordash to about halfway or
19 two-thirds of the way through of my submissions.

15:56:48 20 MR O'SHEA: I'm not being impolite, I promise. Mr Gbao
21 would like to use the restroom.

22 PRESIDING JUDGE: Leave granted. Let's proceed.

23 MR HARRISON: It certainly is the case that the Prosecution
24 submits that there was a joint criminal enterprise in existence.
15:57:12 25 The Prosecution says it's a matter which can be inferred by this
26 Court, the existence of the joint criminal enterprise, in part,
27 by virtue of the widespread and common nature of the offences and
28 crimes that took place.

29 PRESIDING JUDGE: Just a reminder, Mr Harrison, that on the

1 JCE thing, we probably -- your right of response here would be
2 more in line with the Court's injunction if you restrict yourself
3 to Professor O'Shea's submissions on that, because we certainly
4 let him have a little -- an opportunity of putting it in the
15:58:41 5 context of insufficiency of evidence. We indicated to Mr Taku
6 that he should steer clear of any comprehensive analysis of that
7 area, since the Court already indicated that we don't want to be
8 addressed fully on joint criminal enterprise. Confine yourself
9 to Professor O'Shea's position.

15:59:12 10 MR HARRISON: The reason why the Prosecution says the
11 reasonable inference can be drawn is because of the commonality.
12 Firstly, the commonality of the perpetrators of the crime, and I
13 remind the Court as well that, as part of your judicial notice
14 decision --

15:59:26 15 THE INTERPRETER: Your Honours, can learned counsel please
16 go slowly for the interpreters?

17 MR HARRISON: Yes, I apologise. Part of the judicial
18 notice decision, is the word "rebels" was a commonly used term
19 for the RUF. The joint criminal enterprise evidence is that the
16:00:00 20 incidents that took place that are referred to in the skeleton
21 response were committed by members of the RUF and the AFRC.
22 Sometimes the majority of one group, sometimes the majority of
23 the other group. In some instances, it's probably fair to say
24 entirely by one group or the other, in some cases. There is also
16:00:24 25 commonality in the way that the crimes were committed. For
26 example, there is a commonality of forced mining; there's forced
27 farming; there's the use of child soldiers, something went on
28 throughout the conflict; there's the existence of rapes; burning
29 houses; killing of civilians; and amputations. All of those are

1 common features which did not occur in solely one district or
2 isolated areas within a district. There is the commonality of
3 the purpose for which the crimes were committed.

4 Of course, the purpose being, if you take control of Sierra
16:01:17 5 Leone by any means, including unlawful means. So there is a
6 forcing of civilians to farm; there is expropriating their
7 property, or taking their property from them and produce. There
8 was food-finding missions, which is a form of looting. Of
9 course, you had evidence of RUF members who said that's the way
16:01:49 10 the RUF survived. The word was used more than once, and it was a
11 guerilla army, so food-finding took place throughout the war.
12 The use of child soldiers took place throughout Sierra Leone.
13 There was a widespread taking of bush wives.

14 All of these crimes, and others, were committed with the
16:02:22 15 view to allow the JCE to exercise control over Sierra Leone. It
16 is significant that the crimes took place over such a widespread
17 area and over such a lengthy period of time. The Prosecution
18 says or asks the Court to bear in mind that, even after the
19 junta, after February of 1998, there continued to be fighting by
16:03:01 20 the RUF and the AFRC against those forces that were loyal to the
21 elected government, the Kabbah government, and that fighting was
22 with a view of gaining control of Sierra Leone.

23 Throughout this time, the Court has heard the evidence of
24 communications taking place amongst the various groups. There
16:03:25 25 was communication from Kailahun to Kono, Kailahun to Koinadugu,
26 Bombali, Rosos, and even Freetown. All of that shows the common
27 nature of the joint criminal enterprise.

28 Now, there is some significance in the fact that, during
29 the junta, it was made clear that the AFRC and the RUF were going

1 to control diamonds and they wanted to increase diamond
2 production, and the way they would do so was by forcing more
3 people to mine. That was a conscious decision because they were
4 facing two problems; one was they were under attack and the
16:04:27 5 second was there was no other way to generate revenue. That's
6 the evidence of TF1-371. There was a conscious decision to put
7 into place a means of committing a crime which is the enslavement
8 or forced labour, so that the diamond production could increase
9 so that revenue could be generated to further the end of the war.
16:04:53 10 That forced mining and the forced farming was the means by which
11 the RUF, and those members of the AFRC, who were part of the
12 joint criminal enterprise, furthered the ends of the common
13 purpose.

14 MR JORDASH: I'm sorry to interject. With the greatest of
16:05:18 15 respect to Mr Harrison, I would suggest that these submissions
16 are final closing submissions that don't relate to sufficiency of
17 evidence. They relate to an interpretation of the evidence.
18 What can be inferred from the evidence, perhaps, on one view, is
19 what Mr Harrison says can be inferred, but equally, and if
16:05:45 20 Mr Harrison wishes to advance these submissions, there ought to
21 be an opportunity for the Defence to advance the opposing
22 submissions. There is evidence which suggests something quite
23 different to what Mr Harrison is putting forward. In my
24 respectful submission, both arguments are those which relate to
16:06:06 25 closing submissions, not to submissions at this stage.

26 PRESIDING JUDGE: Mr Harrison? Did you want --

27 MR TAKU: Yes, Your Honour. I rise to support the
28 submission of my colleague. I would like to say one thing very
29 clearly, Your Honours. The RUF is not criminalised or not

1 considered as a criminal organisation, like you have the Nazis
2 during Nuremburg or [indiscernible] in the immediate trial. At
3 least as far as I can understand, they made this case. So those
4 submissions, Your Honours, are not really relevant to any issue,
16:06:55 5 as far as I know, before this Court.

6 PRESIDING JUDGE: Thank you. Mr Harrison, counsel is
7 actually taking a position that these submissions you're making
8 now may well be submissions that are appropriate for final
9 closing arguments. Are these submissions consistent with your
16:07:14 10 skeletal response, or consolidated response, or they're
11 developing out of the submissions of counsel this morning?

12 MR HARRISON: I was trying to be responsive to what I
13 understood to be Mr Taku's submission, as well as I understand
14 that Mr O'Shea is putting before the Court that there could be no
16:07:36 15 liability, at least, for count 10, because there could be no
16 joint criminal enterprise.

17 PRESIDING JUDGE: Your colleagues have taken a point. I
18 think what we need to do here is to allow you to proceed, but
19 noting that, clearly, we are in the context of Rule 98, and
16:08:00 20 arguments that are more appropriate for a final address should
21 actually be reserved for that purpose. I do agree that, in
22 matters of this nature, and considering the complexity of the
23 case we're dealing with, and also the massive nature of the
24 evidence, it is a judgment call as to how one responds. The
16:08:31 25 whole point of asking for the implementing modalities with regard
26 to how we are going to operationalise Rule 98, and both sides
27 having set out the parameters, we should try to remain faithful
28 to those parameters and try, as much as you can, to abbreviate
29 your arguments for the purposes of Rule 98 situation.

1 Indeed, Professor O'Shea did go into JCE, and we cautioned
2 him. It is in the same vein we're asking you to confine yourself
3 to specific submissions which, in a way, present the
4 Prosecution's position in relation to the Rule 98 parameters.

16:09:26 5 I'm not overruling you. I'm only saying see if you can apply the
6 same kind of skills that will enable you not to want to go into
7 great details that would really be more appropriate for a final
8 address. That's all I can say.

9 JUDGE BOUTET: I'm looking at your own submission, your
16:09:51 10 skeleton response, and looking at paragraph 17 on page 6 of your
11 filed documents, is the one where you are addressing these modes
12 of liability, and you are -- and you dealt with JCE in one
13 paragraph of about ten lines, and you have quoted there some
14 witnesses who support your position. Do you wish to add to this?
16:10:21 15 That's what I'd like to know. What you have there is obviously a
16 very succinct position to JCE. That's where we're basically
17 trying to see where you are, that's all.

18 MR HARRISON: It was certainly an attempt to be succinct
19 and I thought it was expected of me to respond a bit more to
16:10:40 20 counsel's issues as they raised them. This is one more skill
21 that I obviously don't have, the one that Justice Thompson was
22 hoping to elicit.

23 PRESIDING JUDGE: You can continue to be succinct. As I
24 say, it's a judgment call. You might be carried away to
16:11:00 25 elaborate and probably go a little more than is required by
26 Rule 98, but use your paragraph there as your road map and when
27 you think you are probably getting a little away from it,
28 restrain yourself. That's all I can say.

29 MR HARRISON: Let me go back then and simply try to follow

1 the counts. First of all, if I can point out the Prosecution
2 takes a somewhat different view of the law with respect to
3 extermination, but that case is set out in the responses for
4 [indiscernible] and we say it says something different.

16:11:40 5 PRESIDING JUDGE: We can hear that, yes.

6 MR HARRISON: Because it's stated in the response, I see no
7 reason to expound upon it a second time.

8 PRESIDING JUDGE: Very well.

9 MR HARRISON: The evidence that has been elicited, or what
16:12:00 10 I should say, a portion of the evidence which has been elicited
11 on counts 3 through 5 has been reproduced. The Prosecution never
12 intended to try to reproduce all of the evidence in the skeleton
13 brief. We, first of all, never thought it was a function and,
14 secondly, we wouldn't be able to do it anyways.

16:12:17 15 With respect to the law, we think it's fair to say, based
16 on the grounds that you don't require a large number of people to
17 be killed in one location. It can be on an aggregate of a number
18 of locations, and so the Prosecution has reproduced, in response,
19 a number of executions. The ones involving the two largest
16:12:45 20 numbers were the ones in Koidu Town where 101 citizens were
21 killed in one instance and, the second one, over 60 people were
22 killed in Kailahun Town.

23 Again, it's a case -- there is widespread and systematic --
24 if I can just say now that the Prosecution disagrees with Mr Taku
16:13:07 25 when he makes references to widespread and systematic. I won't
26 repeat it again. I'm saying it with respect to all of the
27 counts. The widespread or systematic evidence can exist on a
28 countrywide basis. It doesn't have to be on a district basis.
29 The counts referred to all of the areas. The Prosecution has

1 disclosed or it's produced specific districts in order to give
2 further particulars, but the widespread or systematic requirement
3 does not mean it has to be widespread or systematic in a
4 particular district.

16:14:01 5 With respect to counts 6 through 9, again, the Prosecution
6 relies upon all of the submissions that are made in the response.
7 With respect to count 8, the Prosecution, first of all, says that
8 the common elements are the common elements for inhumane act.
9 The gravamen of the crime is not the act, or it's not a sexual
16:14:53 10 act. According to other inhumane acts, the gravamen of the crime
11 must be if it's an injury to the physical or mental integrity,
12 health and human dignity of the victim of a seriousness and
13 gravity equivalent to other crimes against humanity. It may be
14 well be that in the circumstance of a particular victim, there
16:15:23 15 may well have been a sexual act. That's not the gravamen of the
16 crime. The crime could exist without it.

17 PRESIDING JUDGE: So the gravamen would be what? The
18 affront to human dignity?

19 MR HARRISON: Yes, it would be the injury to the physical
16:15:45 20 or mental integrity --

21 PRESIDING JUDGE: Or affront.

22 MR HARRISON: And human dignity of the [overlapping
23 speakers] --

24 PRESIDING JUDGE: Yes. Right. So that would be the
16:15:50 25 gravamen.

26 MR HARRISON: Because the crime charged is other inhumane
27 acts. That, although it's not clearly stated in the Brima
28 decision, may have been the basis for the words used in the
29 decision, because the words, I suspect, were fairly carefully

1 drafted. What they say in the Brima decision is:

2 "We consider that there is evidence which falls within that
3 category relating to the abductions of women and girls, and
4 forcing them to submit to 'marital' relationships and to perform
16:16:40 5 various conjugal duties. "

6 There is no use of any language in there which
7 incorporates, by necessity, some sexual act into other inhumane
8 acts. The term "conjugal" does not necessarily, or it's not of
9 necessity, required that there be some type sexual intercourse or
16:17:14 10 other sexual act. The Prosecution says the crime is different,
11 and we rely upon the decision of Brima as a basis for maintaining
12 that.

13 PRESIDING JUDGE: Would the term "catchall" be appropriate
14 here?

16:17:38 15 MR HARRISON: That's probably as good as most. I think the
16 Brima Court may have used the word "residual. "

17 THE PRESIDING JUDGE: And I used it also.

18 MR HARRISON: I think in an earlier decision of this Court
19 there was the use of the word "residual" to describe Article
16:17:50 20 2(i).

21 PRESIDING JUDGE: Okay.

22 MR HARRISON: With respect to count 10, the Prosecution is
23 again relying upon that information which is conveyed in the
24 skeleton motion.

16:18:32 25 The evidence, because this is -- the shaping of Mr O'Shea's
26 argument was in the context of using this as an example of why
27 joint criminal enterprise may not be appropriate, but the
28 Prosecution takes the opposite view. We say that this is some of
29 the evidence which shows precisely that, by inference, the Court

1 can conclude there was a joint criminal enterprise, because it is
2 taking place in so many locations over such a lengthy period of
3 time, and by persons who are RUF or described as rebels, or, if
4 they were described as SLA, that would fall within the
16:19:27 5 Prosecution submission on the nature of the joint criminal
6 enterprise. That is the plurality.

7 Again, addressing Mr O'Shea's point with respect to his
8 particular kind, the Court is asked to remember that Mr Gbao is
9 not quite as -- he's not an insignificant figure. He was a
16:19:59 10 Vanguard. He was trained in Liberia, and he was the overall
11 security commander. The evidence that has been before the Court
12 was that he reported only to the persons at the very top of the
13 RUF. Therefore, it would not be at all unreasonable for this
14 Court to find that Mr Gbao was part of a joint criminal
16:20:33 15 enterprise and, in fact, that's what the Prosecution says. It
16 doesn't -- once you're in the joint criminal enterprise, you're
17 either a co-perpetrator or you're not. Now, when it comes to
18 sentencing, there maybe different relations of responsibility
19 which a court would attribute to individuals. But you are either
16:20:57 20 in the joint criminal enterprise or you're not. The Prosecution
21 says that these three accused are part of the joint criminal
22 enterprise.

23 I didn't understand Mr O'Shea to be making any separate
24 submissions with regard to count 11, so the Prosecution will not
16:21:20 25 do so and will simply rely upon the comments that exist in the
26 skeletal response.

27 With respect to count 12 --

28 JUDGE BOUTET: If I may, I would like you to address a
29 little more specifically the concerns raised by Mr O'Shea with

1 respect to -- I know that he's used count 10 as the basis of his
2 arguments and say, well, the same arguments are being transposed
3 to other counts, but he addressed more specifically, and referred
4 to this decision from the Appeals Chamber, ICTY, where they dealt
16:22:02 5 with the issue of what is and what is not joint criminal
6 enterprise. And he proposed that there is no such evidence. In
7 fact, his submission was that, at this juncture of Rule 98 -- I'm
8 not sure if he says insufficient evidence or lack of evidence,
9 but something of that nature. That was his position, they were
16:22:28 10 certainly not sufficient to ask this Court to rule that there is
11 a case to answer for his client, with respect to that count and
12 the other two counts more specifically.

13 He raised the issue, not in the details of every aspect of
14 the joint criminal enterprise, but some aspect of it that he felt
16:22:51 15 should be brought to the attention of the Court, for which, he
16 claims, there is not sufficient evidence, or absence of evidence,
17 whatever are the words he used. I'm not quoting him exactly as
18 to the words he used for that, but along these lines.

19 MR HARRISON: The evidence is that Mr Gbao was a Vanguard.
16:23:13 20 He was recruited into the RUF in 1991. He enters into Sierra
21 Leone in 1991 with other members of the RUF. From very early on,
22 child soldiers were used in the RUF. From the time, or from very
23 early on, in Kailahun District, there was food-finding missions
24 and from about '96/'97, according to the evidence of TF1-330 and
16:23:44 25 108, there was the forced arming, the forced labour in Kailahun
26 District where Mr Gbao was situated.

27 There was also, at least as early as February 1998, because
28 Mr Gbao was a person who arrested, detained, investigated, the
29 60-odd persons who were ultimately executed in Kailahun Town, his

1 involvement in that. There was also his awareness, or his
2 presence, in Kailahun, when there were women and children being
3 brought in to Kailahun Town.

4 The Court can infer from the circumstances that a joint
16:24:48 5 criminal enterprise existed, and a person's role in that. From
6 1996, 1997, up to 2001, it was very widespread, the civilians who
7 were forced to work on farms in Kailahun. The evidence was from
8 TF1-108 that the produce that was taken from the farms would be
9 given to Gbao to be distributed, and it was also the case that
16:25:23 10 any crops or any produce that the civilians grew on their own,
11 that was subject to being appropriated. It was also the case, in
12 Kailahun, that civilians were forced to carry loads. That may be
13 produce going to the border, it may have been ammunition, or it
14 may have been other things going to other locations.

16:25:53 15 According to TF1-330, his evidence was that Gbao was the
16 head commander there. That's from 14 March 2006, pages 24 to 44.
17 That same witness, on the same day, also gave evidence of
18 children 9 to 14 years of age being captured and trained as
19 combatants. There was also evidence given by TF1-113 of Gbao's
16:26:34 20 role in ordering the beating of a woman in Kailahun. Now, that's
21 not a count which was pled, with respect, to Kailahun District,
22 but that is information before the Court. That witness also
23 described Gbao as being the big man in Kailahun.

24 There is also evidence of civilians trying to escape to
16:27:09 25 Guinea, four of them being caught and subsequently executed,
26 where Gbao was the most senior person present. And that was the
27 evidence of TF1-108 on 8 March 2006, on page 50. There was also
28 evidence that Gbao himself had SBUs in the range of ten to 15
29 years of age. That was evidence of TF1-366 on 8 November 2005,

1 pages 66 to 71.

2 This is the nature of the evidence, but the Prosecution
3 says that, by virtue of its extensiveness, extensiveness in terms
4 of duration and territorial scope, allows for what we say is an
16:28:35 5 inescapable conclusion that there was a joint criminal
6 enterprise, of which Gbao was a part.

7 We're saying that the inescapable inferences that have to
8 be drawn from the evidence, the evidence of the systemic attacks
9 against civilians, that they were made in an effort to regain
16:29:20 10 control of the economic and political power of Sierra Leone, by
11 use of any means, including those means set out in the
12 indictment.

13 Alternatively, the Prosecution says that, based upon this
14 evidence, that the accused possessed the intention to participate
16:30:02 15 in the criminal purpose. Those crimes that were not agreed upon,
16 they were foreseeable, and the accused took the risk that such
17 crimes would be committed.

18 If I could just return -- I have spoken in the last few
19 minutes to some extent about child soldiers. Perhaps it would be
16:30:42 20 preferable to the Court if I simply left with the Court the
21 submissions or the comments that are made in the skeletal
22 response about child soldiers.

23 There is a further reference -- I think Mr Taku was
24 referring to Kenema this morning, TF1-035, in fact, witnessed the
16:31:21 25 SBUs aged ten, 12, 13 in Kenema. That was evidence given on the
26 5th day of July 2005 at page 84.

27 With respect to count 13, the Prosecution is suggesting to
28 the Court that the abduction and enslavement of the citizens of
29 Sierra Leone is one of the strongest and most apparent features

1 of the war that took place here. It was on a very wide scale
2 and, at least for the forced farming, went on from really the
3 beginning of the conflict until the end. The Court will remember
4 witnesses testifying from Kailahun referring to it as being a
16:32:55 5 form of slavery.

6 I don't recall any of the accused dealing at great length
7 with respect to count 13. I suspect it might be somewhat
8 counterproductive if I was then to do so and it's not my
9 intention, unless the Court wishes otherwise.

16:33:36 10 Count 14, the looting and what is colloquially known as the
11 looting and burning count, I've already told you in Trial Chamber
12 II's decision in Brima, they had a slightly different definition
13 of the elements. The Prosecution is saying that it's not just
14 the taking of property, it's this notion of food-finding that was
16:34:11 15 so prevalent. That is a form of appropriation. The evidence of
16 some of the RUF members was that this was the way they survived.
17 It was a guerilla army, and they had to do this on a regular
18 basis, that was the only way they could keep going, and that was
19 the crime that was part of the joint criminal enterprise. It is
16:34:41 20 another one of the strong features of the joint criminal
21 enterprise in combination with the enslavement count.

22 JUDGE BOUTET: The food-finding, as you describe it, in
23 your submission, as such, from the Prosecution's point of view,
24 this is one of the forms of pillage that you say there is some
16:35:05 25 evidence of?

26 MR HARRISON: Yes.

27 JUDGE BOUTET: Okay.

28 MR HARRISON: In addition to that, there is also the other
29 submission that the Prosecution has tried to advance since the

1 outset of the actual destruction, the burning of property, and
2 the Prosecution says that that was done on a wide-scale basis as
3 well. Rather than referring to the instances, I will simply rely
4 upon those matters that exist in the Prosecution response.

16:35:51 5 With respect to counts 15 through 18, the Prosecution is
6 content to rely upon its response. We're saying, firstly, that
7 we think Mr Taku has made an error in his understanding of the
8 law. We think the answer is, with respect to Common Article 3,
9 It doesn't say that only civilians are protected. It's persons
16:36:21 10 out of combat; persons who may be detained; persons ill; persons
11 who are not in or taking an active role in combat.

12 PRESIDING JUDGE: Did he cite any case law authority in
13 support of that contention?

14 MR HARRISON: Not that I recall, but I don't want to be
16:36:48 15 unfair.

16 JUDGE ITOE: He cited Kayishema.

17 PRESIDING JUDGE: He said that that decision, construed
18 properly, did not seem to support that proposition. I think we
19 settled to say that that was a novel proposition, the language
16:37:06 20 used by my learned brother here.

21 MR TAKU: Yes, Your Honour. I did urge Your Lordships to
22 look at that area.

23 PRESIDING JUDGE: To see whether we can accept it as good
24 law.

16:37:18 25 MR TAKU: Exactly, Your Honour. Also, to correct him, I
26 did also mention that, for this combatants as well, other
27 combatants who have surrendered, they will be protected. I did
28 say that.

29 PRESIDING JUDGE: Right. Thanks. Continue, counsel.

1 MR HARRISON: If it assists the Court, there was a
2 relatively brief passage referred to by the Prosecution, which is
3 actually a passage ostensibly under the name of the
4 Secretary-General of the United Nations, but obviously drafted by
16:38:02 5 some member of the United Nations Security Council. It isn't a
6 binding authority on this Court in any, shape or form

7 JUDGE ITOE: I was going to say, those statements, they
8 have a technical and professional connotation, but they appear to
9 me, to be political pronouncements of public relations
16:38:31 10 pronouncements from the office of the Secretary-General. I do
11 not know to what extent a Tribunal would really rely on these for
12 the purposes of arriving at a fair determination of a contentious
13 matter, such as the one we have before us. This is my worry
14 about -- I have seen these quotations, you know, in various
16:38:57 15 places where counsel have factored resolutions of the Security
16 Council, declarations of some ad hoc committees that were set up
17 to draw up a statute, and so on and so forth. I'm very wary
18 about the extent to which we can incorporate them in the judicial
19 process of arriving at a fair determination of the cases before
16:39:24 20 us.

21 PRESIDING JUDGE: Perhaps, if I can continue with the train
22 of my learned brother, the situation would be different where,
23 perhaps, a convention has been concluded and the convention, of
24 course, is judicial notice by the Court and perhaps there is a
16:39:43 25 problem of interpretation in terms of, say, a particular
26 provision of the treaty and then some particular aspect of the
27 travail preparatoire, was invoked to assist. That would be a
28 case where the Court would consider itself able to have recourse
29 to the travail preparatoire, but political statements would be

1 really asking us to go down a perilous road of, in a way,
2 deferring to some political position. It may well have been
3 there was a contrary legal position taken and what was virtually
4 agreed upon was a kind of compromise. That's just the same kind
16:40:32 5 of caution.

6 MR HARRISON: The hint may have started out subtle, but
7 it's subtle any more. I understand. I'll say no more. The
8 Prosecution also wants to make a few brief comments.

9 JUDGE BOUTET: Before you go there, if I may, are these the
16:40:57 10 only comments you wish to make about counts 16, 17 and 18?
11 That's the only comment over and above what you have obviously
12 filed in your skeleton argument.

13 PRESIDING JUDGE: You said you relied upon your written
14 response.

16:41:25 15 MR HARRISON: Yes. In particular, we're relying upon the
16 evidence of four individuals who testified in a public session.
17 Jaganathan, Mendy, Kasoma, Ngondi. In addition to that, there is
18 also the evidence of TF1-366, 360, 071 and 362, to some extent.
19 With respect to at least the two military observers and two
16:41:58 20 peacekeepers, you do have a considerable amount of direct
21 evidence against each of the accused discussing the role which
22 each of the accused took in the events, and, from other
23 witnesses, the RUF member witnesses, you also have some comment
24 upon the direct role of each of the three accused in organising
16:42:31 25 and carrying out the abductions, and other events that took place
26 with the peacekeepers.

27 JUDGE BOUTET: Some of my question had to do with one of
28 the arguments raised by Mr Taku on -- and he referred to Chapter
29 7, not necessarily that I agree or disagree with him. I'm just

1 raising the issue because he raised it. My impression of the
2 evidence, there would appear to be two different type of UN
3 personnel, if I can put it this way. Some that were with the
4 Gambian or some other units, as such, that came to assist; and
16:43:26 5 the military observers that were on the ground, some with
6 weapons, some with no weapons. There seemed to be an argument
7 this morning on this issue. I would like to hear from you, and,
8 furthermore, if you have any assistance to provide us with the on
9 the notion of the allegations you have in your charges. In the
16:43:47 10 count of humanitarian assistance workers, you have an allegation
11 of a widespread attack on UNAMSIL peacekeepers and humanitarian
12 assistance workers. Has there been a concession on this?

13 MR HARRISON: Yes, the humanitarian assistance workers,
14 that was one of the matters that Mr Jordash raised this morning.

16:44:10 15 JUDGE BOUTET: And there is a concession on this by the
16 Prosecution that there is no evidence on this?

17 MR HARRISON: That's correct..

18 JUDGE BOUTET: I'm making reference more specifically to
19 humanitarian assistance workers.

16:44:24 20 MR HARRISON: Yes. Sometimes it becomes confusing when you
21 are eliminating words from the indictment, do we cross it out or
22 leave it in. But we are conceding, as a matter of fact, that
23 there was no evidence led by the Prosecution with respect --

24 JUDGE ITOE: We are happy you conceded, because the Bench,
16:44:44 25 in its own pre-hearing deliberations were going to take you on
26 that. None of us remembered ever recording evidence, anyway,
27 humanitarian assistance workers were ever taken hostage.

28 MR HARRISON: That's certainly true.

29 JUDGE ITOE: You were fair enough as a Prosecutor to

1 concede that to the Defence.

2 MR HARRISON: If I could just make a response to Mr Taku's
3 earlier argument, there were, in fact, two distinct categories of
4 UN personnel here. There were the military observers, of which
16:45:30 5 Jaganathan was one and Mendy was the other. They were the two
6 witnesses who testified. The peacekeepers who testified were
7 Kasoma and Ngondi. With respect to the first two, the
8 Prosecution says that there really ought not to be any
9 contemplation that, in any way, these were persons involved in
16:45:53 10 combat, because they were not in any way participating in combat
11 and they were not carrying arms; they were simply observers.
12 They were abducted, both in Bombali, and remained in custody, I
13 think, for 23 days.

14 As I understand the point being raised by Mr Justice
16:46:20 15 Boutet, there may be slightly different considerations with
16 regard to peacekeepers, but the Prosecution's submission is the
17 same for the peacekeepers as well. We say that Common Article 3
18 does not require that a person be a citizen. It's not only
19 citizens who get protection.

16:46:39 20 JUDGE BOUTET: No, that's not my -- the argument that was
21 put forward was not that they were -- they need to be
22 non-combatants. The question is, it is your position, from what
23 I understand, that those coming under the command of Ngondi and
24 Kasoma, they were peacekeepers, in your view, and they do come
16:47:10 25 within the ambit of what is prohibited there, so they are part of
26 the peacekeepers and therefore are entitled to that protection.
27 That's your position?

28 MR HARRISON: That's correct.

29 JUDGE ITOE: Maybe they're not involved in combat.

1 MR HARRISON: That's what the Prosecution --

2 JUDGE ITOE: That's what you're saying?

3 MR HARRISON: Yes.

4 JUDGE BOUTET: I just want to make sure I understand

16:47:26 5 clearly your position on that. That's why I put it to you. I'm
6 not concluding, I'm just asking you the questions. That's fine.

7 PRESIDING JUDGE: Of course, the point remains, and I don't
8 know whether Mr Taku has actually thought carefully about it,

9 that the evidence shows that they had invoked Chapter 7 and, by
10 reason of that, they had disabled themselves from the benefit of
11 the protection, but that would seem to be the position -- the

12 Prosecution would disagree with that. The emphasis on Chapter 7

13 was very distinct here this morning. I thought that actually
14 complicated the issue that if there was evidence that, at the

16:48:15 15 time of the alleged criminal acts, they, in fact, had invoked
16 Chapter 7, then, in his thinking, according to his reasoning,
17 they have deprived themselves of the benefit of the protection.

18 Of course, that is also part of his premise that the benefit of
19 the protection only goes to civilians. That position you

16:48:52 20 disagree with, as a matter of law.

21 MR HARRISON: Yes. The evidence from, in particular,

22 Kasoma was he was authorised to use force to save his life, or

23 the life of others. In essence, it was self-defence. The common
24 law certainly recognises self-defence, anyway. And it would be a

16:49:23 25 curious twist of the law if in an a volatile situation a person,
26 regardless of his function, could not act in self-defence.

27 PRESIDING JUDGE: Yes. In other words, the issue of

28 Chapter 7 was a red herring, so to speak, in that kind of

29 context. If, from your interpretation, there was an entitlement

1 to use self-defence -- forcing self-defence, then the invocation
2 of Chapter 7 was relevant for that purpose. We don't know --

3 MR HARRISON: I have to admit, I didn't even remember that
4 Chapter 7 was invoked here. I'm not sure if it was.

16:50:02 5 JUDGE ITOE: Chapter 7 was invoked.

6 PRESIDING JUDGE: We said Chapter 7 was invoked.

7 JUDGE ITOE: It was relevant at the time. His argument was
8 that if they were acting on that Chapter 7, then they weren't
9 entitled to the protection. That is supposed to be extended to

16:50:15 10 civilians. They were poised as a military force to participate
11 in combat.

12 PRESIDING JUDGE: We will examine that area, if it becomes
13 necessary in our analysis, anyway. Thank you. You can go ahead.
14 We wanted to take a short break and come back and see how far we
15 can get with your --

16:50:36 15

16 MR HARRISON: I can tell you now that I don't envision
17 being much more than another 15 to 25 minutes, in that range.

18 PRESIDING JUDGE: Right. Then we can take a short break.

19 [Break taken at 4.48 p.m.]

17:10:26 20 [Upon resuming at 5.07 p.m.]

21 PRESIDING JUDGE: Mr Harrison, let's complete our work for
22 today. Go ahead. They'll join us. Mr Taku is here
23 representing.

24 MR HARRISON: I was just going to make a couple of comments
17:10:55 25 about superior responsibility, or superior command
26 responsibility. These comments were particularly directed
27 towards the first and second accused. The Prosecution is saying,
28 and maintains, that they were in positions of authority, as was
29 the third accused, but the evidence is, I think, more obvious,

1 with respect to the first and second accused. With respect to
2 the third accused, there was evidence that he was the overall
3 security commander, the IDU commander, that he also oversaw the
4 G5. That evidence is from TF1-371 on 1st August. Also from
17:11:53 5 TF1--

6 JUDGE BOUTET: Not too quickly. We will run into some
7 difficulties soon. You were saying that he oversaw the G5 and
8 you had TF --

9 MR HARRISON: That evidence from was from TF1-371 on
17:12:13 10 1 August 2006 and, secondly, from TF1-361 on 19 July 2005, pages
11 60 to 62. There was other evidence that Gbao had the right to
12 pass military orders in the absence of the commander who was
13 above him. That was TF1-360. Other evidence that if Gbao
14 decides punishment, whatever he decides, he would take it to
17:12:54 15 Sesay. There was evidence of TF1-366 on 17 November 2005. And
16 that, after investigation, Gbao passed an order to Sesay, who
17 passed it to Bockarie, who had the final say, and then Bockarie
18 passed it back to Sesay and then to Gbao, and then to the MP
19 commander for implementation. That was TF1-366, again on
17:13:28 20 17 November 2005. The page numbers were 31 to 35. There was
21 also evidence of Gbao being the chairman of the joint security
22 board of investigation, which, in fact, comprised the IDU, MP and
23 IO and G5 and that Gbao was in charge of all of these at a
24 national level. So, on the basis of the evidence, it would be --

17:14:18 25 MR JORDASH: Apologies, Your Honour.

26 PRESIDING JUDGE: Accepted.

27 MR HARRISON: The Prosecution says it would be open --

28 JUDGE ITOE: You said he was part of the joint security
29 investigation board. This came from what witness?

1 MR HARRISON: That was TF1-071, 27 January 2005, pages 46
2 to 48.

3 JUDGE ITOE: Thank you.

4 MR HARRISON: The Prosecution is saying that it would be
17:15:04 5 open to a reasonable trier of fact to conclude that the accused
6 were in command and control of several thousand RUF troops. And
7 that crimes were committed in the district set out in the
8 indictment and, at the time period set out in the indictment.

9 The Prosecution says that each of the accused did have
17:15:47 10 reason to know of some of the crimes, and there is evidence which
11 demonstrates actual knowledge as well as constructive knowledge.
12 First of all, with respect to child soldiers, Prosecution says
13 there is actual knowledge of the use of child soldiers throughout
14 the war, and that their use was widespread, that there would have
17:16:21 15 been knowledge of looting or food-finding, knowledge that the
16 abduction of adults and children was a primary way that the RUF
17 increased its ranks. And actual knowledge on the part of Gbao of
18 forced farming and other forms of enslavement in Kailahun
19 District.

17:17:05 20 There is also this knowledge which was widely disseminated
21 of criminal acts which went under the heading of, for example,
22 Operation Pay Yourself, which was a movement of people retreating
23 Freetown in approximately February of 1998. There was a
24 dissemination on that. And the evidence that you had, was, as it
17:17:37 25 was interpreted to me, a permission to carry out criminal acts,
26 such as looting and pillaging. There were other operations which
27 you've heard about, which would have been widely known amongst
28 the RUF as well, such as Operation No Living thing, Operation
29 Spare No Soul.

1 With respect to Operation Pay Yourself, there has been
2 evidence before you of actual knowledge on the part of Sesay and
3 Kailahun, they being present, and some witnesses have testified
4 as to the role of each of them in Operation Pay Yourself. And
17:18:44 5 for another simple example of knowledge, actual knowledge on the
6 part of one of the accused, the accused Gbao was, according to
7 the evidence, present when over 60 people were executed in
8 Kailahun District, at least for part of the execution.

9 I wanted to advise the Court that there was evidence given
17:19:36 10 in response to a point raised by Mr Taku early this morning. I
11 think he talked about there being evidence given that events took
12 place on or about the time of the mango season. Just so the
13 Court knows, TF1-304 in fact did give evidence about the timing
14 of the mango season, and the reference is located --

17:20:00 15 JUDGE ITOE: TF1?

16 MR HARRISON: 304. And the transcript reference is
17 13 January 2005, page 50. I think that was a smaller point
18 within a broader argument that Mr Taku was canvassing, which is
19 that the evidence of timing could not be relied upon and it is
17:20:35 20 the sort of evidence that had to be given by an expert. Well,
21 the Prosecution says that's wrong. It doesn't have to be given
22 by an expert. Secondly, it's a question for this Court to
23 consider --

24 JUDGE ITOE: I think it dwelled on the precision, it's not
17:20:52 25 that an expert, as such, said it had to be precise. It's talking
26 of the dry season or the rainy season. It did not have the
27 element of precision. I don't think Mr Taku really intended that
28 expert evidence should have been called. It was more on
29 precision, and on the issue of the killings, and so on, or the

1 offences being widespread and systematic. Those were the two
2 issues which he raised in his submissions.

3 MR HARRISON: It was raised in his written material that
4 the Prosecution should have called experts, and the Prosecution
17:21:30 5 says that's wrong.

6 The Prosecution tried to make it very clear in the second
7 paragraph of the submission that we handed up that if defects to
8 the indictment are being asserted, this is not the place to do
9 it. We understood Mr Taku to be making assertions that the
17:22:01 10 indictment is defective in certain respects.

11 JUDGE ITOE: Are you saying counsel cannot raise issues
12 related to the defect of an indictment at this stage?

13 MR HARRISON: Yes. The statements of law are set out in
14 paragraph two, and the challenges to the indictment should be
17:22:30 15 made in a preliminary motion under Rule 73. That was stated by
16 Trial Chamber II in the *Brima* decision, the decision on joint
17 defence request for leave to appeal; from decision on defence
18 motions for judgment of acquittal and, in addition to that, the
19 international tribunals have held on a number of occasions that
17:23:01 20 assertions to defects in an indictment are beyond the scope of
21 Rule 98bis, and I don't think it's helpful for me to read out all
22 of the ones that are reproduced in footnote 4 of the Prosecution
23 skeletal response.

24 PRESIDING JUDGE: Just give your paragraph. What's the
17:23:22 25 paragraph again, two?

26 MR HARRISON: It's the second paragraph, and it's
27 footnote 4.

28 PRESIDING JUDGE: Yes.

29 MR HARRISON: If I can just close off this point with one

1 passage, which is from *Semanza*, one of the ICTR cases that
2 Mr Taku, in particular, is familiar with, that held that, "It is
3 wholly unacceptable to raise such matters halfway through the
4 trial." We say that's the answer to any arguments that are
17:23:58 5 advanced. I think it's only by Mr Taku with respect to defects
6 in the indictment.

7 JUDGE ITOE: You say it is wholly what?

8 PRESIDING JUDGE: Unacceptable.

9 JUDGE BOUTET: Unacceptable.

17:24:08 10 JUDGE ITOE: It is unacceptable to do what?

11 MR HARRISON: The passage reads, "It is wholly unacceptable
12 to raise such matters halfway through the trial," the matter
13 being a challenge or a complaint with respect to a defective
14 indictment.

17:24:29 15 PRESIDING JUDGE: Yes.

16 MR HARRISON: Just for the benefit of Mr Justice Itoe, that
17 would be at footnote 5 in the Prosecution's response. We don't
18 suggest that the Defence cannot raise it at the end of the case.

19 PRESIDING JUDGE: Yes, I was just going to come to that.

17:25:01 20 Clearly there is authority for them to do that. They can revisit
21 jurisdictional issues and particularly issues of that nature, but
22 it's not a Rule 98 procedure. Right.

23 MR HARRISON: To the extent that the second accused, in
24 particular, suggests that the Prosecution is relying upon acts
17:25:40 25 outside of the time frame set out in the indictment, the
26 Prosecution accepts that, if it is outside the time frame of the
27 indictment, it isn't going to help prove that particular
28 incident, but it may still be relevant to showing the widespread
29 or systematic nature of any crime.

1 What we do say is there is evidence before the Court that
2 falls within the time frame set out in the indictment for each
3 and every count, and those examples that Mr Taku sought to rely
4 upon this morning do not undermine the Prosecution's case,
17:26:25 5 because there remains evidence inside the time frame for every
6 count.

7 I don't think there is much more I can say that would
8 assist you. I have tried to review some of the issues that
9 Mr Taku was canvassing and, I think, perhaps, by just leaving it
17:26:56 10 with my comments about defects to the indictment, that may be a
11 preferable way to address it.

12 JUDGE BOUTET: [Microphone not activated].

13 THE INTERPRETER: Your Honour's mic is not on.

14 JUDGE BOUTET: Sorry. Mr Prosecutor, I have a few
17:27:18 15 questions for you. They are directed to locations you have
16 alleged. My research at this time has failed to reveal that you
17 had any evidence, it's over and above what has been conceded or
18 agreed to. I refer here, and, as I say, it was a limited
19 research at this moment, but I would like you to tell me where
17:27:43 20 you have evidence of Mortema. I refer here to count 5 in the
21 Kono District. The concession is that there is no evidence for
22 Koindu, Willifeh, Biaya and there is also Mortema. There doesn't
23 seem to be any evidence of murders, even though the Defence
24 appears to have conceded that. In Mortema, I am not talking
17:28:15 25 about other locations.

26 MR HARRISON: Off the top of my head, I think TF1-366 gave
27 evidence about that, and it may have been the case that --

28 JUDGE BOUTET: He did give evidence, but not murders. It's
29 focused on murder, in Mortema. 366, indeed, has testified as to

1 some other issue, but not murder. Anyhow, that's the reference
2 you have for that particular --

3 MR HARRISON: That's just off the top of my head. If
4 you'll allow me to pull out a couple of binders.

17:28:56 5 JUDGE BOUTET: I have a few more, if you don't mind. While
6 you turn around, you may as well --

7 MR HARRISON: I better get them right first.

8 JUDGE BOUTET: It's about sexual violence, Kissy Town Camp.
9 We've not been able to find at this stage any evidence regarding
10 this camp. There may be under some different name or location,
11 but if you can assist us, that would be very helpful.

12 MR HARRISON: I think the indictment says Kissy Town and
13 then says Kissy Town Camp, if I'm right.

14 JUDGE BOUTET: Yes.

17:29:32 15 MR HARRISON: The evidence that we have is for -- the
16 individual talks about Kissy Town, in particular. I don't
17 remember right now if anywhere in that transcript the word "camp"
18 is also used after Kissy Town.

19 JUDGE BOUTET: I thought you were using Kissy Town.

17:30:12 20 MR HARRISON: If I'm reading with the Court, in the correct
21 way --

22 JUDGE BOUTET: If you look at 55 on the indictment, it says
23 "Camps such as Superman Camp and Kissy Town or (Kissy Town
24 Camp)." I'm not sure. You have the whole combination.

17:30:35 25 MR HARRISON: If you look two lines above that, it says
26 Kissy Town, so they have repeated Kissy Town twice.

27 JUDGE BOUTET: It is all the same as far as the Prosecution
28 is concerned, Kissy Town and Kissy Town Camp?

29 MR HARRISON: Yes.

1 JUDGE BOUTET: Okay.

2 MR HARRISON: At any rate, there is one witness, I think it
3 might be TF1-016.

4 JUDGE BOUTET: TF1-016 we have, yes.

17:31:05 5 MR HARRISON: I think Ms Alagendra might be able to help
6 us. I think it is 016, and I think that is one of the witnesses
7 who talks about Kissy Town, and my recollection is that the
8 transcript does not use "camp."

9 JUDGE BOUTET: It says Kissy Town.

17:31:23 10 MR HARRISON: That's my recollection of the transcript
11 right now.

12 JUDGE BOUTET: And the same counts, Koinadugu District, you
13 have allegations about Kabala. We've not been able, to this
14 stage, look at any evidence regarding sexual violence in Kabala.

17:31:41 15 Maybe there is. I'm just saying, at this stage, it's just a
16 preliminary review. So any assistance you can provide is -- and
17 this is in paragraph 56 of the indictment, Koinadugu, such as
18 Kabala, Koinadugu, and so on.

19 JUDGE ITOE: Did I follow Mr Jordash properly when he said
17:32:05 20 the Prosecution made a concession about Kissy Town Camp, also?

21 PRESIDING JUDGE: He said the Defence conceded. It was the
22 Defence, he said, who conceded that there were sexual acts at
23 Kissy Town Camp.

24 MR JORDASH: Yes. There is evidence, as I recall, of Kissy
17:32:21 25 Town Camp at Kissy Town.

26 PRESIDING JUDGE: The Defence conceded it this morning.

27 JUDGE ITOE: Who made the concession?

28 PRESIDING JUDGE: The Defence.

29 JUDGE ITOE: The Defence, oh, I see.

1 MR JORDASH: On the basis that there was evidence that
2 Kissy Town Camp was at Kissy Town.

3 JUDGE BOUTET: You have conceded that?

4 MR JORDASH: Yes.

17:32:42 5 PRESIDING JUDGE: Was that the evidence of TF1-016, two
6 females? Was that the evidence of TF1-016?

7 MR HARRISON: I gave that number, but Ms Alagendra is going
8 to correct me, no doubt.

9 JUDGE BOUTET: I am almost through with my questions. One
17:33:12 10 more on --

11 MR HARRISON: Ms Alagendra has found it. It is TF1-016,
12 the date of the transcript is 21st October 2004. That's in
13 reference to Kissy Town.

14 JUDGE BOUTET: Yes. That's fine. The question was Kabala,
17:33:46 15 but you're looking for it. Count 10, any evidence of physical
16 violence? Evidence in Wonedu, which is one of the allegations
17 you have, regarding mutilations. I don't think there was a
18 concession on that. Mr Jordash, did you concede that one?
19 Wonedu, for count 11. There is an allegation that -- at this
17:34:37 20 stage, we cannot locate any evidence of mutilation, which is one
21 of the allegations.

22 MR JORDASH: I don't think there was evidence of
23 mutilation, but I do think there is evidence of physical
24 violence. Forced labour and physical violence.

17:34:56 25 JUDGE BOUTET: I'm referring more specifically to 62, Kono
26 District. 61 refers to widespread physical violence, as such,
27 but the specificity of 62 says mutilated an unknown number of
28 civilians in various locations, including Wonedu.

29 MR JORDASH: My recollection of the evidence, although, I

1 haven't -- I don't know this for certain, but my recollection of
2 the evidence is that there was no evidence of mutilations at
3 Wonededu. There was evidence of physical violence of a different
4 type, but not mutilation.

17:35:33 5 JUDGE BOUTET: That's why I specifically asked a question
6 about mutilations.

7 MR JORDASH: Yes. I would suspect, although we seemed to
8 have missed that in our searches. In relation to Mortema, we
9 have completed a search and it would appear that there isn't any
17:35:48 10 evidence of killings.

11 JUDGE BOUTET: There is not?

12 MR JORDASH: No. I think we missed that through
13 miscommunication in our team, which is unfortunate.

14 JUDGE BOUTET: And one last one. That's okay. These are
17:36:21 15 the only ones I have at this moment, Mr Prosecutor.

16 MR HARRISON: Could I ask that we be able to look overnight
17 and make a filing tomorrow if we find something or not. I think
18 Mr Jordash may be right about both Mortema and Wonededu. Kabala,
19 quite frankly, I don't know.

17:36:46 20 PRESIDING JUDGE: Counsel, we thank you for your --

21 MR TAKU: Your Honours, I rise with regard to just two
22 issues.

23 PRESIDING JUDGE: Well, we didn't, in fact, provide for
24 responses.

17:37:02 25 MR TAKU: Yes, Your Honour.

26 PRESIDING JUDGE: Is this so material that you --

27 MR TAKU: With regard to joint criminal enterprise, my
28 colleague, Mr O'Shea, has dealt with that appropriately, so I
29 would not want to revisit it. But with knowledge, Your Honours,

1 I had wanted to submit on that. I didn't have the opportunity
2 because, Your Honours took the position that submissions, on that
3 particular element, knowledge, may not be appropriate.

17:37:44 4 Now, the Prosecutor has mentioned it in the presentations
5 on the question of knowledge, and I feel I have at least two
6 jurisprudence.

7 PRESIDING JUDGE: Why not submit them to us later on in
8 writing.

9 MR TAKU: I will do that, Your Honour.

17:37:55 10 PRESIDING JUDGE: Does anybody have any authorities they
11 want to submit to us? You are free to do that. Mr Jordash, is
12 there something you wanted to intervene on?

13 MR JORDASH: I did have two remarks to make, and I was
14 hoping to make in reply.

17:38:10 15 PRESIDING JUDGE: Is it something so material we'll be
16 missing it if we don't hear you?

17 MR JORDASH: One isn't.

18 PRESIDING JUDGE: The other is?

19 MR JORDASH: One, from the nature of the debate concerning
17:38:20 20 Mr Taku's submissions about peacekeepers.

21 PRESIDING JUDGE: Yes.

22 MR JORDASH: We would say for the first accused that the
23 issue is one of the fact, whether the peacekeeper stepped into a
24 combatant role, therefore, it's not appropriate to decide that.

17:38:36 25 PRESIDING JUDGE: In other words, that should guide us in
26 our deliberations?

27 MR JORDASH: Indeed.

28 PRESIDING JUDGE: Professor O'Shea, is there anything you
29 might want to add that is so material and new that you can't

1 submit in writing?

2 MR O' SHEA: Yes. There is one sentence I can add, now I've
3 been given the opportunity, in relation to this issue of
4 inference, which Mr Harrison raised.

17:39:01 5 PRESIDING JUDGE: Yes.

6 JUDGE ITOE: You raised it first. Remember you raised it
7 as well.

8 MR O' SHEA: Fair enough, Your Honour.

9 JUDGE ITOE: When you brought in the issue of
10 circumstantial evidence from which inferences can be drawn.

11 MR O' SHEA: Yes. There is one thing I think the Court
12 should be aware of, which is that the law on the elements of
13 joint criminal enterprise requires that the acts of the accused
14 are in furtherance of the agreement. So you cannot infer from
15 the acts, the agreement, because of that.

16 PRESIDING JUDGE: Yes. That's elementary law. At this
17 point, I think we will adjourn this Rule 98 proceeding to
18 Wednesday, 25th October 2006 at 9.30 a.m. for the oral decision
19 on the motion for judgment of acquittal.

17:40:22 20 [Whereupon the hearing adjourned at 5.37 p.m.,
21 to be reconvened on Wednesday, the 25th day
22 of October 2006, at 9.30 a.m.]

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