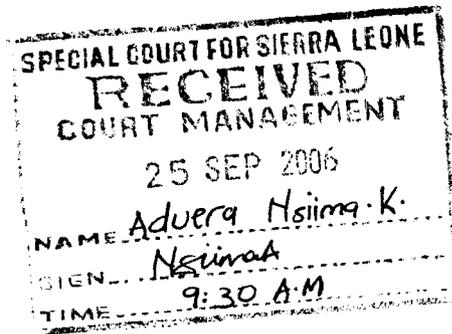


(644)

SCSL 2004-15-T  
C 25189-25101)  
**IN THE SPECIAL COURT FOR SIERRA LEONE**

**THE TRIAL CHAMBER****Before:** The Trial Chamber

Hon. Justice Bankole Thompson, presiding  
 Hon. Justice Pierre Boutet  
 Hon. Justice Benjamin Itoe

**Registrar:** Mr Lovemore G Munlo SC**Date filed:** 25 September 2006

Case No. SCSL 2004 - 15 - T

**In the matter of:****THE PROSECUTOR****Against**

**ISSA SESAY  
 MORRIS KALLON  
 AUGUSTINE GBAO**

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**PUBLIC**

**SKELETAL ARGUMENT FOR ORAL SUBMISSION UNDER RULE 98**

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**SUBMISSION UNDER RULE 98****SKELETAL ARGUMENT****A. Appropriate test for the application of Rule 98**

1. Apart from the need to free the accused from the burden of unjustified allegations hanging over his head, the real function and value of Rule 98 of the Rules of Procedure and Evidence is to expedite the proceedings by narrowing the issues on the indictment, so that the defence does not have to waste time and resources answering unfounded charges, thus unnecessarily lengthening the trial and causing undue delay in the finalisation of the matter.
2. While the Chamber is not required to analyse the viability of individual sentences or paragraphs of the indictment, the defence is entitled to a finding of no case to answer in relation to specific charges, even if several charges are, by choice of the prosecution, incorporated into one 'count' on the indictment. Thus in the case of *Kordic*, it was found that:

The Prosecution case relates to the participation of the accused in the highest levels of government, and the Defence should prepare its case accordingly. In particular, the Defence will not be expected to call evidence concerning municipalities about which no evidence has been given.<sup>1</sup>

3. This Trial Chamber has interpreted Rule 98 as requiring an assessment as to whether there is any evidence *legally capable* of supporting a conviction. [our emphasis]
4. On the one hand, this appears to remove any subjective assessment of how this tribunal or any other might finally evaluate the weight of the evidence. Thus, issues of reliability and credibility are in the main left for consideration at the end of the case. The Chamber is not required to carry out an exhaustive analysis of the evidence with a view to assessing whether the prosecution has

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<sup>1</sup> *Prosecutor v Kordic and Cerkez*, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000 (TC)

reached the appropriate legal standard of proof beyond all reasonable doubt. However, this is essentially no different from the position in other tribunals.

5. On the other hand, the test of Rule 98 is more subjective than that under Rule 98*bis* in the rules of other comparable tribunals in approaching the analysis as to the current state of the evidence. Instead of directing the Trial Chamber to look forward in time to assess what a reasonable trier of fact might decide, it is directed to confront what the position actually is in terms of capacity to form the basis of a conviction, if one analyses the prosecution evidence now. That is to say, 'is it the position that there is evidence legally capable of supporting a conviction', and not 'could a reasonable trier of fact [eventually and in the absence of defence evidence] find that there is evidence supporting a conviction'. However, if there is a difference it is probably slight in its outcome and rather a difference of approach.
6. It follows that there must, in the Chamber's assessment, be *some sufficient* evidence which is capable of supporting the necessary *actus reus* and *mens rea* of a crime charged.
7. While any subjective analysis of the weight of evidence is removed from the scope of any application of Rule 98, an objective analysis remains to a degree. This must be so because as a matter of law evidence must reach a minimum threshold of weight to be capable of supporting a conviction. To suggest otherwise would make a mockery of the judicial process because it would entail the notion that a court will entertain defence evidence extending a trial on charges the evidence supporting which is so thoroughly unreliable and incredible that everyone in the courtroom knows that the defence reposting evidence is complete waste of time. Thus, in *Kordic* it was held that the Chamber's function was to rule on 'whether the prosecution has put forward a case sufficient to warrant the defence being called upon to answer it.'<sup>2</sup> This Chamber has stated that the question is whether on the totality of the evidence

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<sup>2</sup> *Prosecutor v Kordic*, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000, TC, par 11; approved by this Chamber *Prosecutor v Norman, Fofana and Kondewa*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005

adduced by the prosecution, is there, at that stage, no legal basis that warrants the accused being put to his defence on one or more of the offences for which he has been indicted.<sup>3</sup>

8. The only purpose of such an exercise could be to open the possibility of bolstering the otherwise useless prosecution evidence. This goes against the spirit of the notion of burden of proof. In this sense the Trial Chamber is placed in a similar position to an Appeals Chamber in assessing whether the elements for the minimum evidential requirements have been satisfied to sustain the reasonableness of [in this case] a potential conviction.
9. This Chamber has referred with approval to the statement in *Milosevic* to the effect that: 'Where there is some evidence, but it is such that, taken at its highest, a Trial Chamber could not convict on it, the Motion is to be allowed.'<sup>4</sup>
10. Accordingly, in the final analysis there is little discernable difference between the treatment of Rule 98 in this Tribunal and the treatment of Rule 98*bis* of the Rules of other tribunals. If this turns out to be the position through the application of the principles to concrete cases, this will properly reflect the wisdom to adhering to a position which has in reality been developed in common law traditions through centuries of experience.
11. Where there is sufficient evidence potentially to sustain a conviction linking an accused through a form of liability other than direct participation in the crime, then the appreciation of that form of liability involves an assessment of the weight of the evidence which is best left for the end of the case.<sup>5</sup> However, legally capable, according to its ordinary meaning, does entail, where necessary, an appreciation of whether the necessary legal elements of liability are potentially satisfied by at least sufficient evidence to sustain a conviction. This holds good whether one is referring to the basic elements of a crime or

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<sup>3</sup> See *Prosecutor v Norman, Fofana and Kondewa*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005, par 45, SCSL-04-14-T-473.

<sup>4</sup> *Prosecutor v Milosevic*, Decision on Motion for Judgment of Acquittal, 16 June 2004 (TC), par 13 (1)-(2).

<sup>5</sup> See *Prosecutor v Norman, Fofana and Kondewa*, note 1 *supra*

the legally possible ways in which that crime is committed (forms of liability). Thus, the Chamber is not exempted from addressing whether there is sufficient evidence to support forms of liability other than direct participation, for the purposes of assessing whether there is a case to answer.<sup>6</sup>

## **B. Unlawful killings**

### **Count 3: Extermination as a crime against humanity**

12. The prosecution have failed to produce prima facie evidence of a mass killing of a civilian population<sup>7</sup> - that is the killing of a substantial or significant part of a population as required for the purposes of the crime of extermination. This holds for each and every geographical location mentioned in paragraphs 46 to 53 of the Indictment.

13. How many victims amounts to a mass killing?: "A Numerically significant number". *P. v. Krstic* Trial Chamber at para. 502. "In accordance with the principle that where there is a plausible difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned"

14. What amounts to Mass Killing?: "For a single killing to form part of an extermination, the killings must actually form part of a mass killing event. An "event" exists when the (mass) killings have close proximity in time and place."<sup>8</sup>

15. How many victims amounts to a mass killing?: "A Numerically significant number". "In accordance with the principle that where there is a plausible

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<sup>6</sup> See *Prosecutor v Kvočka et al*, Decision on Defence Motions for Acquittal, 15 December 2000 (TC), *Prosecutor v Sikirica*, Judgment on Defence Motion to Acquit, 3 September 2001 (TC), par 105

<sup>7</sup> ICC Elements of Crimes, Article (1)(A)

<sup>8</sup> *Prosecutor v Kayishema & Ruzindana*, Judgment, 21 May 1999 (TC), par 147

difference of interpretation or application, the position which most favours the accused should be adopted, the Chamber determines that, for the purpose of this case, the definition should be read as meaning the destruction of a numerically significant part of the population concerned"<sup>9</sup>

16. The population concerned forming the basis of comparison must belong to a geographical area<sup>10</sup>

**Count 4: Murder as a crime against humanity**

**Count 5: Murder as a violation of common article 3**

17. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) murder as a crime against humanity or a war crime in any of the following locations:

Bo District<sup>11</sup>

Kenema District<sup>12</sup>

Kono District<sup>13</sup>

Koinadugu District<sup>14</sup>

Bombali District<sup>15</sup>

Freetown and the Western Area<sup>16</sup>

Port Loko District<sup>17</sup>

<sup>9</sup> *Prosecutor v. Krstic*, Decision on Defence Motion to Acquit, par 502

<sup>10</sup> *Prosecutor v Sirikica et al*, Decision on Defence Motion to Acquit, par 68

<sup>11</sup> Evidence of killing in Bo with no connection to Gbao made in entire testimony: TF1-054 (30 November 05, 8 – 1 December 05, 33); TF1-044 (7 December 05, 61 – 8 December 05, 31)

<sup>12</sup> Evidence of killing in Kenema with no connection to Gbao made in entire testimony: TF1-035 (5 July 05, 77-6 July 05, 52); TF1-122 (7 July 05, 52-96)

<sup>13</sup> Evidence of killing in Kono with no connection to Gbao made in entire testimony: TF1-077 (20 July 04, 76 – 21 July 04, 83); TF1-217 (22 July 04); TF1-192 (1 February 05, 2-76); TF1-218 (1 February 05, 78-93); TF1-012 (2 February 05); TF1-263 (6 April 05, 5 – 11 April 05, 32)

<sup>14</sup> Evidence of killing in Koinadugu with no connection to Gbao made in entire testimony: TF1-214 (February 98); TF1-197 (21 October 04, 52 – 22 October 04, 19); TF1-329 (2 August 05, 2-60)

<sup>15</sup> Evidence of killing in Bombali with no connection to Gbao made in entire testimony: TF1-096 (13 July 04)

<sup>16</sup> Evidence of killing in Freetown with no connection to Gbao made in entire testimony: TF1-021; TF1-331; TF1-235; TF1-029 (28 November 05, 6-32); TF1-101 (28 November 05, 33-61); TF1-022 (29 November 05, 21-70)

18. In the testimony all of the witnesses dealing with killings there is absolutely no evidence anywhere in the transcripts which can support a finding of the requisite *mens rea* for murder on the part of Gbao, neither premeditation nor intention to kill.<sup>18</sup>
19. Neither his membership of the RUF, nor his position within that organisation can in themselves provide sufficient evidence to sustain a conviction.
20. Further, there is not even a basis for establishing the *actus reus* for murder on the part of Gbao as no evidence goes towards establishing that the death of the victims resulted from the act of Gbao or any other person under his control.
21. Further, there is absolutely no evidence of Gbao having effective control of the perpetrators of crimes in these geographical areas, knowledge that these crimes were committed or that he failed to take reasonable steps in instances where he did know.
22. Neither his membership of the RUF, nor his position within that organisation can in themselves, even potentially, provide sufficient evidence to sustain a conviction.

### **C. Sexual violence**

#### **Count 6: Rape, a crime against humanity**

23. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) rape as a crime against humanity in any of the following locations, throughout the testimony of the relevant witnesses:

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<sup>17</sup> Evidence of killing in Port Loko with no connection to Gbao made in entire testimony: TF1-253 (28 July 04)

<sup>18</sup> *Kayishema & Ruzindana*, Judgment of 21 May 1999, par 140

Kono District<sup>19</sup>

Koinadugu District<sup>20</sup>

Freetown and the Western Area<sup>21</sup>

Port Loko District

24. Such evidence as there is in relation to rape in these locations is at best sporadic, uncontrolled, and devoid of any organised direction, in addition to being totally unconnected to Augustine Gbao in terms of his actions, mental state and location, throughout the testimony of those witnesses relevant to rape.

**Count 7: Sexual slavery and any other form of sexual violence as crimes against humanity**

25. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) sexual slavery or any other form of sexual violence as a crime against humanity in any of the following locations:

Kono District

Koinadugu District<sup>22</sup>

Freetown and the Western Area

Port Loko District

26. Such evidence as there is in relation to sexual slavery or any other form of sexual violence in these locations is at best sporadic, uncontrolled, and devoid of any organised direction, in addition to being totally unconnected to Augustine Gbao in terms of his actions, mental state and location.

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<sup>19</sup> TF1-217 (22 July 04); TF1-015 (27 January 05, 82 – 31 January 05, 9); TF1-195 (1 February 05); TF1-192 (1 February 05, 2-76); TF1-218 (1 February 05, 78-93)

<sup>20</sup> TF1-212 (8 July 05, 95-118); TF1-329 (2 August 05, 2-60); TF1-213 (2 March 06, 2 – 2 March 06, 33)

<sup>21</sup> TF1-029 (28 November 05, 6-32)

<sup>22</sup> TF1-213 (2 March 06, 2 – 2 March 06, 33, esp. at 25)

**Count 8: Other inhumane act, as a crime against humanity**

27. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) any other inhumane as a as a category of sexual violence and as a crime against humanity in any of the following locations:

Kono District

Koinadugu District

Freetown and the Western Area

Port Loko District

**Count 9: Outrages upon personal dignity, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II**

28. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) outrages upon personal dignity, as a category of sexual violence and a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II in any of the following locations:

Kono District

Koinadugu District

Freetown and the Western Area

Port Loko District

**Forced marriage**

29. There is no crime separate crime of forced marriage under customary international law. It simply does not exist. In terms of the way in which the prosecution expert defines the concept it cannot be an inhumane act in the form of sexual violence, sexual slavery or other form of violence, an outrage upon personal dignity as a war crime and as a category of sexual violence.

Whether sexual violence and mistreatment of a woman falls into the category inhumane act, sexual slavery, other forms of sexual violence is a question of fact in association with the elements of each crime. Forced marriage as a concept adds nothing to the legal evaluation of the guilt or innocence of the accused should therefore be the subject of a finding of no case to answer.

**D. Physical violence: mutilation**

**Count 10: Violence to life, health and physical or mental well-being of persons, in particular mutilation**

30. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) violence to life, health and physical or mental well-being of persons in the form of mutilation as a crime against humanity in any of the following locations, and throughout the testimony of those witnesses relevant to this charge:

Kono District<sup>23</sup>

Kenema District

Koinadugu District<sup>24</sup>

Bombali District<sup>25</sup>

Freetown and the Western Area<sup>26</sup>

Port Loko District<sup>27</sup>

<sup>23</sup> Evidence of mutilation in Kono with no connection to Gbao made in entire testimony: TF1-074 (12 July 04); TF1-064 (19-20 July 04); TF1-077 (20 July 04, 76 – 21 July 04, 83); TF1-217 (22 July 04); TF1-016 (21 October 04, 2-21); TF1-197 (21 October 04, 52 – 22 October 04, 19); TF1-078 (22 October 04, 35 – 27 October 04, 33); TF1-212 (8 July 05, 95-118)

<sup>24</sup> Evidence of mutilation in Koinadugu with no connection to Gbao made in entire testimony: TF1-214 (February 98); TF1-172 (17 May 05, 3-36); 212 (8 July 05, 95-118); TF1-215 (2 August 05, 61-113); TF1-213 (2 March 06, 2 – 2 March 06, 33)

<sup>25</sup> Evidence of mutilation in Bombali with no connection to Gbao made in entire testimony: TF1-096 (13 July 04)

<sup>26</sup> Evidence of mutilation in Freetown with no connection to Gbao made in entire testimony: TF1-021; TF1-331 (22 July 04); TF1-305 (27 July 04, 51- -60); TF1-235; TF1-272 (5 July 05, 6-76); TF1-101 (28 November 05, 33-61); TF1-022 (29 November 05, 21-70)

<sup>27</sup> Evidence of mutilation in Port Loko with no connection to Gbao made in entire testimony: TF1-253 (28 July 04, 2-31)

**E. Pillage****Count 14: Pillage in violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II**

31. The prosecution have failed to produce prima facie evidence that Augustine Gbao planned, instigated, ordered or committed (pursuant to paragraph 38 of the Indictment) pillage.
32. Pillaging occurs where the perpetrator appropriate property by consent of the owner for private or personal use in the context of and associated with an armed conflict not of an international character. In order to constitute a war crime the conduct must also constitute a serious act of pillaging.
33. It is submitted that there is no act of pillaging under this definition attributable to Gbao in any part of Sierra Leone, nor any indication that he knew of or had control over others who perpetrated such acts, or that he failed to take any steps against those he did have control over and discovered committing such acts.

**ACCORDINGLY**, it is requested that the Chamber find no case to answer and acquit Gbao on the following counts:

1. Count 3: Extermination
2. Count 10: Physical violence - mutilation
3. Count 14: Pillage

**FURTHER**, it is requested that the Chamber find no case to answer with respect to:

1. Murder with respect to the geographical areas of Bo District, Kenema District, Kono District, Koinadugu District, Bombali District, Freetown and the Western Area, and Port Loko District

2. Rape with respect to the geographical areas of Kono District, Koinadugu District, Bombali District, Freetown and the Western Area, and Port Loko District
3. Sexual slavery with respect to the geographical areas of Kono District, Koinadugu District, Bombali District, Freetown and the Western Area, and Port Loko District
4. Inhumane acts as a category of sexual violence respect to the geographical areas of Kono District, Koinadugu District, Bombali District, Freetown and the Western Area, and Port Loko District
5. Forced marriage
6. Outrages upon personal dignity as a category of sexual violence with respect to the geographical areas of Kono District, Koinadugu District, Bombali District, Freetown and the Western Area, and Port Loko District

  
ANDREAS O'SHEA

  
JOHN CAMMEGH

Court appointed counsel for Augustine Gbao

25th September 2006, in preparation for oral argument on 16<sup>th</sup> October 2006

**LIST OF AUTHORITIES**

- Prosecutor v Kordic and Cerkez*, Decision on Defence Motions for Judgment of Acquittal, 6 April 2000 (TC)
- Prosecutor v Norman, Fofana and Kondewa*, Decision on Motions for Judgment of Acquittal Pursuant to Rule 98, 21 October 2005 (TC)
- Prosecutor v Milosevic*, Decision on Motion for Judgment of Acquittal, 16 June 2004 (TC)
- Prosecutor v Kvočka et al*, Decision on Defence Motions for Acquittal, 15 December 2000 (TC)
- Prosecutor v Sikirica*, Judgment on Defence Motion to Acquit, 3 September 2001 (TC)
- Prosecutor v Kayishema & Ruzindana*, Judgment, 21 May 1999 (TC)
- Prosecutor v. Krstic*, Decision on Defence Motion to Acquit (TC)
- Prosecutor v. Krstic*, Judgment, 2 August 2001 (TC)
- Prosecutor v. Akeyesu*, Judgment, 2 September 1998 (TC)
- Prosecutor v. Bagilishema*, Judgment, 7 June 2001 (TC)
- Prosecutor v. Blaskic*, Judgment, 3 March 2000 (TC)
- Prosecutor v. Jelusic*, Judgment, 14 December 1999 (TC)
- Prosecutor v. Kupreskic*, Judgment, 13 January 2000 (TC)
- Prosecutor v. Musema*, Judgment, 27 January 2000 (TC)
- Prosecutor v. Rutaganda*, Judgment, 6 December 1999 (TC)
- Prosecutor v. Vasiljevic*, Judgment, 29 November 2002 (TC)
- Prosecutor v. Stakic*, Judgment, 21 July 2003 (TC)
- Prosecutor v. Blaskic*, Judgment, 3 March 2000 (TC)
- Prosecutor v. Multinovic*, Decision on Ojdanic Motion Challenging Jurisdiction (AC)
- Nuremberg Judgment, Trial of the Major War Criminals before the IMT (1947)*