469)

SCSL-04-14-T
(13897 - 13945)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 27 September 2005

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

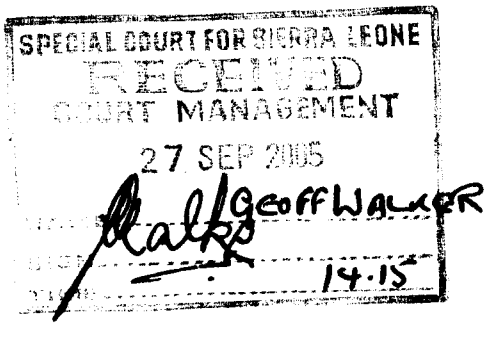
PUBLIC VERSION OF THE PROSECUTION RESPONSE TO FOFANA MOTION FOR JUDGMENT OF ACQUITTAL

Office of the Prosecutor:
Chris Staker
Luc Côté
James C. Johnson
Joseph Kamara
Mohamed Bangura
Marco Bundi
Bianca Suciu

Defence Counsel for Norman
Dr. Bu-Buakei Jabbi
John Wesley Hall, Jr.
Ibrahim Yillah
Clare da Silva

Defence Counsel for Fofana
Victor Koppe
Arrow J. Bockarie
Michiel Pestman
Andrew Ianuzzi

Defence Counsel for Kondewa
Charles Margai
Yada Williams
Ansu Lansana
Martin Michael



1. In accordance with the Order to the Prosecution on Filing, dated 20 September 2005, the Prosecution re-files the Prosecution Response to Fofana Motion for Judgement of Acquittal with redactions as necessary to protect the identity of the witnesses.
2. Footnote 165 incorrectly refers to TF2-079's testimony as being in closed session. TF2-079 testified in open session with the usual witness protection measures in place. Footnotes 179, 180 and 181 refer to witness TF2-210, the proper reference should be to witness TF2-201.

Done in Freetown this 27th day of September 2005.

For the Prosecution,

James C. Johnson

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SCSL-04-14-T
(13707 – 13753)

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SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

Before: Justice Pierre Boutet, Presiding
Justice Bankole Thompson
Justice Benjamin Itoe

Registrar: Mr. Robin Vincent

Date filed: 18 August 2005

THE PROSECUTOR **Against** **Samuel Hinga Norman**
Moinina Fofana
Allieu Kondewa

Case No. SCSL-04-14-T

CONFIDENTIAL

PROSECUTION RESPONSE TO FOFANA MOTION FOR JUDGMENT OF ACQUITTAL

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I. INTRODUCTION

1. The Prosecution files this Response pursuant to Rule 98 of the Rules of Procedure and Evidence ("Rules") to "Fofana Motion for Judgment of Acquittal" ("Fofana Motion") filed on 4 August 2005.
2. The Prosecution submits that the Defence has failed to demonstrate that there is no evidence capable of supporting a conviction on any count of the Indictment and that the Motion should be dismissed in its entirety.
3. The Prosecution notes that in accordance with the Rule 98 standard described below, the Defence is required to demonstrate a clear basis for its Motion by providing specific arguments as opposed to general claims of insufficiency of evidence. Accordingly, in this Response, the Prosecution addresses only those specific issues that have been raised in the Motion. In relation to all other issues, it must be taken for the purposes of this trial that no issue of Rule 98 arises. If the Trial Chamber should, *proprio motu*, question the sufficiency of evidence in relation to a particular Count, the Prosecution respectfully requests that it be afforded its right to respond.

II. STANDARD UNDER RULE 98

4. Rule 98 of the Rules (Motion for Judgment of Acquittal), as amended on 14 May 2005,[1] provides:

> If, after the close of the case for the prosecution, there is no evidence capable of supporting a conviction on one or more of the counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts.

In its amended form, the Rule is almost identical to Rule 98*bis* of the Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"), as amended on 8 December 2004, which reads:

> At the close of the Prosecutor's case, the Trial Chamber shall, by oral decision and after hearing the oral submissions of the parties, enter a judgement of acquittal on any count if there is no evidence capable of supporting a conviction.

[1] The previous version of the Rule, as of 5-7 March 2003, provided: If, after the close of the case for the prosecution, the evidence is such that no reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt on one or more counts of the indictment, the Trial Chamber shall enter a judgment of acquittal on those counts.

The amended ICTY Rule was applied for the first time in the case of *Prosecutor v Naser Oric*,[2] wherein the Trial Chamber and both parties agreed that the amendment did not alter the standard of review to be applied as set out in the jurisprudence of the Tribunal.

5. The degree of proof was established and settled by the ICTY Appeals Chamber in *Prosecutor v Jelisic*. The test for determining whether the evidence is insufficient to sustain a conviction is "whether there is evidence (if accepted) upon which a tribunal of fact *could* be satisfied beyond reasonable doubt of the guilt of the accused on the particular charge in question...; thus the test is not whether the trier of fact would in fact arrive at a conviction beyond reasonable doubt on the Prosecution evidence if accepted, but whether it could".[3] Or put differently, a Trial Chamber should only uphold a Rule 98*bis* Motion if it is "entitled to conclude that no reasonable trier of fact could find the evidence sufficient to sustain a conviction beyond reasonable doubt."[4]
6. In the Rule 98*bis* Decision in *Prosecutor v Milosevic*, the Trial Chamber determined that the test whether there is evidence, if accepted, on which a Trial Chamber could convict, would be applied on the following bases:
    a) Where there is no evidence to sustain a charge, the Motion is to be allowed. This may also apply to *elements* of a charge.
    b) 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. This is true even if the weakness in the evidence derives from the *weight* to be attached to it.
    c) Where there is some evidence, but it is such that its strength or weakness depends on the view taken of a witness's credibility and reliability, and on one possible view of the facts a Trial Chamber could not convict on it, the Motion will not be allowed.[5]

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[2] *Prosecutor v. Oric*, Case No. IT-03-68-T, "Oral Decision," 8 June 2005, p. 8981-9032.
[3] *Prosecutor v. Jelisic*, Case No. IT-95-10-A, "Judgement", 5 July 2001 ("*Jelisic* Appeal Judgement"), at para. 37.
[4] Ibid, para. 56. See also *Prosecutor v. Kamuhanda*, Case No. ICTR-99-54A-T, "Decision on Kamuhanda's Motion for Partial Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence," 20 August 2002, para. 19 and 25. *Prosecutor v. Semanza*, Case No. ICTR-97-20-T, "Decision on the Defence Motion for a Judgement of Acquittal in Respect of Laurent Semanza after Quashing the Counts Contained in the Third Amended Indictment (Article 98bis) of the Rules of Procedure and Evidence) and the Decision on the Prosecutor's Urgent Motion for Suspension of Time-Limit for Response to the Defence Motion for a judgement of Acquittal," 27 September 2001, para.14.
[5] *Prosecutor v. Kordic and Cerkez*, Case No. IT-95-14/2, in its "Decision on Defence Motions for Judgment of Acquittal," 6 April 2000, at para. 28 that, "[g]enerally, the Chamber would not consider questions of credibility and reliability in dealing with a motion under Rule 98*bis*, leaving those matters to the end of the case. However, there is one situation in which the Chamber is obliged to consider such matters; it is where the Prosecution's case has completely broken down, either on its own presentation, or as a result of such fundamental questions being raised through cross-examination as to the reliability and credibility of witnesses that the Prosecution is left without a case. The Fofana Motion fails to substantiate its argument that the "Chamber should not completely ignore issues of credibility given that so many of the Prosecution witnesses have clearly testified in exchange for immunity" (para.

d) The determination whether there is evidence on which a tribunal could convict should be made on the basis of the evidence as a whole.

e) Whether evidence could lawfully support a conviction must depend on the applicable law of the Tribunal and the facts of each case.

f) A ruling that there is sufficient evidence to sustain a conviction on a particular charge does not necessarily mean that the Trial Chamber will, at the end of the case, return a conviction on that charge.

g) When the Trial Chamber makes a finding that there is sufficient evidence, that is to be taken to mean that there is evidence on which a Trial Chamber could be satisfied beyond reasonable doubt of the guilt of the accused.[6]

7. The standard to be applied in determining a Rule 98 motion reflects a number of important principles. First, a Rule 98 motion is not a process that is intended to involve a detailed consideration and evaluation of the evidence presented so far in the case. It is at the end of the trial that the Trial Chamber will be called upon to evaluate carefully all of the evidence as a whole. It would be unnecessarily time-consuming, inefficient, and contrary to the rights of the accused, for the Trial Chamber to undertake a detailed analysis of the evidence at the half-way stage. The purpose of Rule 98 is to save time, by ending the trial proceedings in respect of an indictment, or specific counts in an indictment, for which there is plainly no evidence on which a Trial Chamber could convict. Where there is any doubt as to the sufficiency of the evidence, the trial should proceed, and the question should be resolved by the Trial Chamber at the end of the trial. As has been said by a Trial Chamber of the ICTY:

> It is worth noting the extent and frequency to which Rule 98 *bis* has come to be relied on in proceedings before the Tribunal, and the prevailing tendency for Rule 98 *bis* motions to involve much delay, lengthy submissions, and therefore an extensive analysis of evidentiary issues in decisions. This is in contrast to the position typically found in common law jurisdictions from which the procedure is derived. While Rule 98 *bis* is a safeguard, the object and proper operation of the Rule should not be lost sight of. Its essential function is to bring an end to only those proceedings in respect of a charge for which there is no evidence on which a Chamber could convict, rather than to terminate prematurely cases where the evidence is weak.[7]

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18). The Prosecution submits that credibility may only be considered within the parameters laid down in the jurisprudence.

[6] *Prosecutor v. Slobodan Milosevic*, Case No. IT-02-54-T, "Decision on Motion for Judgement of Acquittal," 16 June 2004, para. 13.

[7] *Prosecutor v. Hadžihasanović and Kubura*, "Decision on Motions for Acquittal Pursuant to Rule 98 bis of the Rules of Procedure and Evidence," Case No. IT-01-47-T, 27 September 2004, para. 20 ("***Hadžihasanović* Rule**

Accordingly, as a Trial Chamber of the ICTR has said:

> ... the object of the inquiry under Rule 98 *bis* is not to make determinations of fact having weighed the credibility and reliability of the evidence; rather, it is simply to determine whether the evidence – assuming that it is true – could not possibly sustain a finding of guilt beyond a reasonable doubt. That will only be the case where there is no evidence whatsoever which is probative of one or more of the required elements of a crime charged, or where the only such evidence is incapable of belief. To be incapable of belief, the evidence must be obviously incredible or unreliable; *the Chamber should not be drawn into fine assessments of credibility or reliability.* [8]

8. Secondly, in a Rule 98 motion, the Trial Chamber is not concerned with making any kind of determination as to the guilt of the Accused and not only should the Trial Chamber refrain from making evaluations of conflicting evidence, it should also refrain from considering evidence which might be favourable to the Accused. It is at the conclusion of the proceedings, and not at this mid-point, that the Trial Chamber will determine the extent to which any evidence is favourable to the Accused and make a ruling on the overall effect of such evidence in light of the other evidence in the case.[9]

9. Thirdly, at the Rule 98 stage, the Trial Chamber is only required to consider whether there is some Prosecution evidence that could sustain a conviction on each of the counts in the Indictment. Where a single count in the Indictment charges an Accused with criminal responsibility in respect of more than one incident, the Trial Chamber is not necessarily required to make a determination of whether there is sufficient evidence to sustain a conviction for each separate paragraph of the Indictment. Provided that there is evidence which could sustain a conviction for a particular *count*, the trial on that count as a whole can proceed, even if the evidence in relation to one or more paragraphs of the Indictment or one or more modes of liability might not necessarily rise to the standard of Rule 98.[10] The Prosecution submits that this follows from the plain wording of Rule 98.

98bis Decision"); citing *Prosecutor v. Strugar*, "Decision on Defence Motion Requesting Judgment of Acquittal Pursuant to Rule 98 bis," Case No. IT-01-42-T, 21 June 2004, para. 10-20.

[8] *Prosecutor v. Bagosora et al.*, Case No ICTR-98-41-T, "Decision on Motions for Judgement of Acquittal," 2 February 2005, ("***Bagosora* Rule 98bis Decision**"), para. 6 (emphasis added, footnotes omitted).

[9] *Hadžihasanović Rule 98bis Decision*, para. 18.

[10] *Bagosora* Rule 98bis Decision, para. 8-9,. However, it is noted that Trial Chambers of the ICTY have indicated that they *may* enter judgements of acquittal in relation to specific incidents or modes of liability where the evidence on that particular incident or mode of liability does not reach the Rule 98 standard: see, for instance, *Prosecutor v.*

10. Fourthly, where the Defence files a Rule 98 motion, this does not place a burden on the Prosecution to establish that the evidence meets the Rule 98 standard in respect of all aspects of the Prosecution case. If the position were otherwise, this would be inconsistent with the purpose of Rule 98, as it would require the Prosecution and the Trial Chamber to undertake a comprehensive analysis of all of the evidence in the case at the half-time stage.

11. Rather, in a case where the Defence files a Rule 98 motion, the burden is on the Defence to identify the specific issues in respect of which it says that the evidence does not meet the Rule 98 standard. The Prosecution is then only called upon in its response to the Defence Rule 98 motion to address the specific matters raised by the Defence. The burden lies on the Defence to show that there is a clear basis for its Motion. "This involves providing the Chamber with detailed and specific allegations for its consideration: where only a general claim of insufficiency of evidence is made, the Chamber is not able to assess the strength of the case for acquittal".[11] This is consistent with the general principle in international criminal litigation that where a party moves for some relief before a Trial Chamber, the burden is always on the moving party to establish the basis for the relief requested.[12]

III. PERSONAL JURISDICTION UNDER ARTICLE 1(1) OF THE STATUTE

12. The Fofana Motion submits that since it is clear that Fofana does not belong to the category of those bearing the greatest responsibility, the Court no longer has jurisdiction over him. It is argued that the evidence suggests that other persons bear greater responsibility than Fofana, including other members of the CDF and in particular, members of the RUF and AFRC against whom the CDF fought a legitimate armed opposition effort.

Blagojević and Jokić, Case No. IT-02-60-T, "Judgment on Motions for Acquittal Pursuant to Rule 98bis," 5 April 2004, para. 16.

[11] *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, "Decision on Defence Motions for Acquittal," 15 December 2000, para. 14 cited in Fofana Motion at footnote 37.

[12] See, for instance, by way of analogy, *Semanza v. Prosecutor*, Case No. ICTR-97-20-A, "Semanza Appeal Judgement," 20 May 2005, para. 9; *Prosecutor v. Bagosora et al.*, Case No. ICTR-98-41-T, "Decision on Admission of Statements of Deceased Witnesses," 19 January 2005, para. 7; *Prosecutor v. Karemera et al.*, Case No. ICTR-98-44-T, "Decision on Motion by Karemera for Disqualification of Trial Judges," 17 May 2004, para. 10.

13. The issue of personal jurisdiction has previously been canvassed before the Trial Chamber by the Second Accused. In its "Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction on behalf of Accused Fofana" ("Decision on Personal Jurisdiction"), the Trial Chamber found that "the Special Court has personal jurisdiction over the Accused".[13] The issue has therefore been settled, subject to any final appeal against conviction, and a motion for judgment of acquittal is not an appropriate vehicle for revisiting a jurisdictional matter.
14. The Trial Chamber also stated in its Decision on Personal Jurisdiction that the question "whether or not in actuality the Accused is one of the persons who bears the greatest responsibility for the alleged violations of international humanitarian law...is an evidentiary matter to be determined at the trial stage".[14] This must be taken to mean that the full extent of an accused's liability, if any, can only be determined after all the evidence has been heard while the jurisdictional issue must necessarily be determined on the basis of the Indictment and accompanying material. Even at the conclusion of a trial, the Court may be unable to determine precisely the ranking of an accused in terms of bearing the greatest responsibility against a pool of those who could arguably qualify.
15. In response to paragraphs 31-33 and 35-42 of the Fofana Motion, the Prosecution asserts that it is well known that *tu quoque* is no defence in criminal proceedings. The argument "amount[s] to saying that breaches of international humanitarian law, being committed by the enemy, justify similar breaches by a belligerent."[15] The *tu quoque* principle has been rejected in international jurisprudence as flawed in principle since "[i]t envisages humanitarian law as based upon a narrow bilateral exchange of rights and obligations."[16] Furthermore, if the Defence is trying to articulate a defence of necessity in paragraph 32 then this is a matter for the defence case and not for a Rule 98 submission.

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[13] *Prosecutor v Norman, Fofana and Kondewa*, SCSL-04-14-PT, Decision on the Preliminary Defence Motion on the Lack of Personal Jurisdiction filed on behalf of Accused Fofana, 3 March 2004, para. 48.
[14] Ibid, para. 44.
[15] *Prosecutor v Kupreskic* ,IT-95-16-T, 'Judgment', January 14, 2000, para. 51, 515-520.
[16] Ibid. *Prosecutor v. Kupreskic et al., Decision on Evidence of the Good Character of the Accused and the Defence of Tu Quoque*, Case No. IT-95-16-T, Trial Chamber, 17 February 1999; *Prosecutor v. Delalic et al. (Celebici), Decision on the Request of the Accused Hazim Delic Pursuant to Rule 68 for Exculpatory Information*, Case No. IT-96-21-T, Trial Chamber, 24 June 1997, para. 17.

IV. INDIVIDUAL CRIMINAL RESPONSIBILITY

16. The Second Accused is charged with individual criminal responsibility under both Articles 6(1) and 6(3) of the Statute for the eight counts in the Indictment on the basis that international law permits cumulative charging under different modes of liability. Article 6(1) covers planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of a crime referred to in the Statute, while Article 6(3) states that the commission of a crime by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so, and failed to take measures to prevent the acts or punish the perpetrators. Where the legal requirements pertaining to both of these heads are met, and the Trial Chamber chooses to convict only on the basis of Article 6(1), then the accused's superior position should be considered as an aggravating factor in sentencing.[17] Additionally, all three accused are charged with committing the crimes charged in the Indictment by their participation in a joint criminal enterprise. The Motion essentially moves for a judgment of acquittal on all counts in relation to all modes of liability with particular emphasis on the alleged joint criminal enterprise and superior responsibility.
17. The Prosecution does not dispute the general doctrine of personal culpability set out in the Fofana Motion and agrees that the "perpetration of any criminal offence requires the physical carrying out of prohibited conduct, the *actus reus*, accompanied by the requisite psychological element, the *mens rea*."[18] It is for this reason that international criminal law devotes so much attention to the elements of crimes especially since those most culpable may be persons other than the physical perpetrators. In this sense, the Prosecution does not agree that "no individual may be held liable for crimes perpetrated by other persons; instead he must have physically participated in the crime"[19] as participation may take various forms.

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[17] Delalic Appeals Judgment, , para. 745; Brdanin Trial Judgment, paras 284-285.
[18] Fofana Motion, para. 72.
[19] Fofana Motion, para. 72.

Superior Responsibility under Article 6(3)

18. The following elements establish superior responsibility under Article 6(3):

    a. The existence of a superior-subordinate relationship between the accused (superior) and the perpetrator of the crime (subordinate);
    b. The accused knew or had reason to know that the crime was about to be or had been committed;
    c. The accused failed to take the necessary and reasonable measures to prevent the crime or to punish the perpetrator thereof.

19. The existence of a superior-subordinate relationship is characterized by a direct or indirect,[20] formal or informal hierarchical relationship, whether by virtue of a de jure or de facto position of authority, between the superior and subordinate in which the former has "effective control" over the latter.[21] "Effective control is defined as the material ability to prevent or punish the commission of the offence."[22]

20. As regards the *mens rea*, it must be established that the superior had either actual knowledge, established through direct or circumstantial evidence, that his subordinates were about to commit or had committed crimes within the Court's jurisdiction, or constructive knowledge in the sense of information that would put the superior on notice of the present and real risk of such crimes and alert him to the need for additional investigation into whether the crimes were about to be committed or had been committed by his subordinates.[23] "Knowledge may be presumed if a superior had the means to obtain the relevant information of a crime and deliberately refrained from doing so."[24]

21. The measures required of the superior to prevent the crimes or punish the perpetrators are limited to those within his material possibility in the circumstances.[25] The duty includes

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[20] *Prosecutor v Delalic et al.*, IT-96-21-A, 'Judgment', 20 February 2001 (***'Delalic Appeals Judgment'***) para. 252.
[21] *Prosecutor v. Delalic*, ICTY, IT-96-21-T, 'Judgement', 16 November 1998, (***'Delalic Trial Judgment'***) para. 378; *Prosecutor v. Brdanin*, ICTY, IT-99-36-T, 'Judgement', 1 September 2004, (***'Brdanin Trial Judgment'***) para. 276;
[22] Brdanin Trial Judgment para. 276.
[23] Delalic Appeals Judgment, paras 223, 241; Brdanin Trial Judgment, para. 278.
[24] Brdanin Trial Judgment, para. 278.
[25] Delalic Trial Judgment, para 395; *Prosecutor v Stakic*, IT-97-24-T, 'Trial Judgment', 31 July 2003. para. 423; Brdanin Trial Judgment, para 279.

at least an obligation to investigate the crimes and to report them to the competent authorities, if the superior does not have the power to sanction himself, and may include measures which are beyond his formal powers if their undertaking is materially possible.[26] "The failure to take the necessary and reasonable measures to prevent an offence of which a superior knew or had reason to know cannot be remedied simply by subsequently punishing the subordinate for the commission of the offence."[27] What constitutes such measures is not a matter of substantive law but of evidence.[28] It is not necessary that the superior's failure to act caused the commission of the crime.[29]

22. Article 6(3) is applicable both to military and civilian leaders, be they elected or self-proclaimed, once it is established that they had the requisite effective control over their subordinates.[30]

23. In Fofana's Motion, the Defence argues that the Prosecution has failed to prove that the Second Accused is individually criminally responsible for the crimes referred to in Articles 2, 3, and 4 of the Statute since the responsibility test, as a military superior, has not been met. The Prosecution submits that on the contrary and as shown below, ample evidence has been presented to establish the Second Accused's culpability though command responsibility.

A superior-subordinate relationship existed between the Second Accused and the perpetrators

24. The Defence argues that the Second Accused, had no influential role in the CDF. Despite the title and position he possessed, he had no real authority or effective control over subordinates. He was "nothing more than a glorified storekeeper and occasional conduit for messages to Mr. Norman [...] at most an amateur aide de camp."[31] The Defence further states that the Second Accused was only reacting to Hinga Norman's authority and he lacked power to go against his unlawful orders and compel a different result.

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[26] *Prosecutor v Kordic and Cerkez*, IT-95-14/2-T, 'Judgment', (***'Kordic Trial Judgment'***) 26 February 2001, para. *Prosecutor v Stakic*, IT-97-24-T, 'Trial Judgment', 31 July 2003, para. 461.
[27] Brdanin Trial Judgment, 279.
[28] *Prosecutor v Blaskic*, IT-95-14-A, 'Appeal Judgment', (***'Blaskic Appeals Judgment'***)29 July 2004. para. 72; Brdanin Trial Judgment, 279.
[29] Delalic Trial Judgment, para. 398; Kordic Trial Judgement, para. 447; Brdanin Trial Judgment, para 279.
[30] Brdanin Trial Judgment, paras 281-283.
[31] Fofana Motion, para 44.

25. This may be the theory of the Fofana Defence. However, at this stage in the proceedings, it certainly cannot be suggested that there is no evidence meeting the Rule 98 standard to establish the Second Accused's position of authority. There is evidence that the Second Accused was at all times relevant to the Indictment in a high position of authority, invested with power and responsibility over his subordinates. In the function of Director of War of the CDF, the Second Accused was working side by side with Hinga Norman, the National Coordinator and Allieu Kondewa, the High Priest. There is evidence that together they orchestrated and planned war strategies and attacks and most importantly the commission of unlawful acts. There is evidence that all major decisions were taken in consultation with each other.[32]
26. The evidence indicates that the Second Accused, Hinga Norman and Allieu Kondewa formed the nucleus of the CDF organization. As adamantly put by an insider, "[t]hey have the executive power of the Kamajor society. These people....nobody can take a decision in the absence of this group. Whatever happened, they come together because they are the leaders and the Kamajors look up to them."[33] They were so united in their approach as the three top senior leaders of the Kamajor society, that they were referred to as the Trinity: the Father, the Son and the Holy Ghost.[34] The evidence does not support the Defence theory that the Second Accused was an outsider to the CDF chain of command and merely reacting to other people's orders. However, that is a matter that will fall to be decided at the end of the trial. At this stage, it is clear that there is sufficient evidence on which a reasonable trier of fact could conclude that the Second Accused was in a position of command authority.
27. The Prosecution has presented evidence that the Second Accused possessed both *de jure* and the *de facto* authority over the Kamajors. According to this evidence, among the powers he was invested with, the Second Accused enjoyed jurisdiction over: deploying forces to the war front; making appointments and promoting commanders; passing operational orders and instructions to subordinates; distributing arms and ammunition for battles; addressing Kamajor fighters in meetings before going into battle and reinforcing

[32] Military Expert Report, May 2005, Exhibit 97 at p C-4. See also TF2-014, Mach 14 05 at p. 6
[33] TF2-008, 16 November 04, at p.51
[34] TF2-011, 8 June 05 at p. 31, TF2-014, 15 March 05 at p 28.

unlawful orders given by Hinga Norman and Allieu Kondewa. Finally, the Second Accused had the authority and liberty to independently give unlawful orders to subordinates for which he was never punished, or did not have to account for before a higher authority.

28. [redacted] His position as Director of War and as one of the top leaders of the Kamajor Society was known by everyone in the CDF and that is how everyone treated and referred to the Second Accused[37]. Witnesses, including the military expert, also placed him second in command in the military chain, with specific duties and responsibilities entrusted upon him.[38] As such, the Prosecution submits that there is sufficient evidence for the purposes of Rule 98 to establish the Second Accused's *de jure* position of authority.

29. [redacted] Witnesses TF2-008, TF2-005, TF2-068 have testified that together with Hinga Norman and Allieu Kondewa, the Second Accused was in charge of the fighters and the deployment of forces on the ground.[40] [redacted]

30. [redacted] Witness TF2-014 testified that the Second Accused and

[35] TF2-005, 16 February 05 at pp 54-55, TF2-222, 17 February 05 at pp 95-97.
[36] Exhibit 59.
[37] TF2-159, 9 September 04 at p 53, TF2-008, 16 November 04 at 47, TF2-190, 10 February 05 at 11-13, TF2 134, 3 June 05 at p 26.
[38] TF2-079, 26 May 05 at pp 42, 66, TF2-017, 19 November 04 at p 18, TF2-223, 28 September 04 at p 57, Military Expert Report, May 2005, Exhibit 97 at p C-5.
[39] TF2-005, 15 February 04 at p 101.
[40] TF2-005, 15 February 04 at p. 101; TF2-068 23 November 04 at p 11.
[41] TF2-005, 16 February 05, at p 10.
[42] TF2-017, 19 November 04 at pp. 42, 43, 45.

Allieu Kondewa decided in a meeting at Base Zero that Mustapher Ngobeh must lead the attack on Bo.[43]

31. Witness TF2-223 testified that when Kamajors took over SS Camp in Tiloma Village (two months after the Kenema attack), the Second Accused introduced them to the terrain and briefed them on how to maintain security at the location. The Second Accused thereafter "handed over the whole Camp" to the witness and Kamajors assigned to that area.[44]

32. Further evidence of the power to deploy fighters to the war front and of the power to make appointments was adduced by witness TF2-190. The witness testified that after he was initiated in the Kamajor society by Allieu Kondewa, he went to the war front and engaged in combat at Boamakbengeh, under the instructions of the Second Accused and Musa Kortuwai.[45] After the battle, the witness was promoted by the Second Accused as the leader of the group that was going to capture Singihun[46].

33. Witness TF2-014 also testified that Joseph Koroma was appointed National Director of Operations as a result of a common decision by the Second Accused, Hinga Norman and Allieu Kondewa.[47]

34. Witness TF2-223 testified that sometime after the attack on Kenema, the Second Accused and Allieu Kondewa appointed George Jambawai to take over the administration of the CDF Office in Kenema.[48]

35. The Second Accused's effective control over his subordinates is furthermore made clear by his power to pass down orders and instructions to Kamajor commanders individually and Kamajor fighters generally. The evidence shows indeed that Kamajor commanders only took instructions from Hinga Norman, the Second Accused and Allieu Kondewa.

36. [redacted]

[43] TF2-014, 14 March , 05 at p . 24.
[44] TF2-223 28 September at p 105, 106.
[45] TF2-190, 10 February 05 at p 4. This evidence is outside the timeframe of the Indictment but it has been adduced to show a pattern of the Second Accused' authority over Kamajors fighters.
[46] TF2-190, 10 February 05 at pp 5-6. This evidence is outside the timeframe of the Indictment (1995) but it has been adduced to show a pattern of the Second Accused' authority over Kamajors fighters.
[47] TF2-014, 11 March 05 at p 76.
[48] TF2-223, 28 September 04 Closed Session at p 104.

[redacted]

37. Witness TF2-057 also testified to the Second Accused's effective command in Bo and to his criminal conduct. The witness related how his brother and other Temne people were killed as a result of the Second Accused's orders. The witness described how he and his brother were forcefully taken by Kamajors before the Second Accused at the CDF Headquarters in Bo. Witness explained that the Second Accused expressed in their presence that "he had nothing to do with Temnes because Foday Sankoh was a Temne, and it was you who brought the war in this country."[50] The witness explained that he understood that the Second Accused meant that "any Temne man who is brought forward to him, he wouldn't have any regard for him. They would kill him."[51] The witness and his brother, who were Temne, were consequently locked up in a cell.[52] The witness said that 15 days later the Second Accused ordered that his brother be taken out of the cell. The witness heard his brother shouting "Brother they are taking me away, they are taking me away"[53] The witness has never seen his brother since.[54] The witness further testified that the Second Accused ordered out two other men that were also in his cell. The witness observed from his cell as they were carried away and were hacked to death by the Kamajors on the premises of the CDF Headquarters.[55] The witness further testified that the Kamajors "killed most of the Temnes in Bo town".[56]

38. Further illustrations of command responsibility and unlawful orders given by the Second Accused, were adduced by witness TF2-082. The witness testified that after the attack on Koribondo he received a letter from the Second Accused with instructions regarding captured people and looted property. The instructions from the Second Accused were that "whatever thing you captured-whoever you captured you should sent them to him."[57]

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[49] TF2-223, 28 September 04 at pp 41, 95, 100, 101, 102.
[50] TF2-057, 29 November 04 at p 122 and 30 November 04 at p 20, 21.
[51] TF2-057, 30 November 04 at p 21.
[52] TF2-057, 29 November 04 at p 120, 121, 122, 123.
[53] TF2-057, 30 November 04 at p 3.
[54] TF2-057, 30 November 04 at p 3.
[55] TF2-057, 30 November 04 at p 5-6.
[56] TF2-057, 30 November at p 22.
[57] TF2-082, 15 September 04 at p 40.

39. The Prosecution submits that the Second Accused's ability to order the commission of the crimes mentioned above, and the subsequent execution of such by Kamajors is indisputably evidence on the basis of which a reasonable trier of fact could conclude that the Second Accused had effective control over Kamajors' subordinates.

40. The Prosecution has also adduced evidence that the Second Accused on several occasions addressed troops in public meetings before going into battle. The Second Accused often spoke to fighters supporting and reinforcing unlawful orders passed down by Hinga Norman and Allieu Kondewa[58]. Such evidence further emphasizes the Second Accused's position of authority and effective command.

41. The Prosecution emphasizes that contrary to the Defence's contentions "[t]he fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility".[59] The jurisprudence shows that "[T]wo or more superiors may be held responsible for the same crime perpetrated by the same individual if it is established that the principal offender was under the command of both superiors at the relevant time."[60]

42. Witness TF2-222 testified that, in a planning meeting for the Tongo attack and Black December Operation, held at Base Zero in December 1997, Hinga Norman stated that no Junta Forces, their collaborators, and no prisoners of war or their houses must be spared in Tongo, since Tongo determines who wins the war.[61] The Second Accused also spoke to the Kamajor fighters, emphasizing the unlawful orders given by the First Accused. His instructions were: "Now you have heard the National Co-ordinator, any commander failing to perform accordingly and losing your own grounds, just decide to kill yourself there and don't come and report to us."[62] The Chief Priest Allieu Kondewa gave the last command. Kondewa said, "a rebel is a rebel; surrendered, nor surrendered. The time for their surrender has long since been exhausted, so we don't need any surrendered rebels."[63]

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[58] See TF2-222, TF2-190.
[59] Article 6 (4) of the Statute of the Special Court for Sierra Leone.
[60] Pros*ecutor v. Krnojelac*, IT-97-25-T, 'Judgment', 15 March 2002, para. 93.
[61] TF2-222,17 February 05 at p.110, 112, 113, 115.
[62] TF2-222, 17 February 05 at p 119.
[63] TF2-222, 17 February 05 at p 120.

43. Witness TF2-190 testified about a planning meeting that took place in 1998 at Base Zero in which an all-out attack on all areas occupied by the junta forces including the Bo-Koribondo axis was discussed. In this meeting the Second Accused took the stage after Hinga Norman and instructed the fighters present, "so any commander, if you are given an area to launch an attack and you fail to accomplish that mission, do not return to Base Zero."[64] The Second Accused further ordered commanders to launch an attack on the soldiers and destroy them.[65]

44. The Prosecution submits that the power and authority entrusted to the Second Accused, as a top leader of the CDF, is further confirmed by his own admission at Base Zero that he was in charge whenever Hinga Norman was not there.[66] Witnesses TF2-021, TF2-079 reinforced that the prominent people at Base Zero were Hinga Norman, Moinina Fofana and Allieu Kondewa.[67]

45. [redacted] During his time in Kenema, Kamajors under his command committed a great number of atrocities.[69]

46. The Second Accused's authority is also evident from the fact that he was often quoted on the radio reporting about the activities of the Kamajors, such as, to where their front was moving, what they had captured etc. Witness TF2-079 said that there were many reports in this respect made by the Second Accused.[70]

47. The evidence also shows that the Second Accused' s role in the CDF was instrumental in planning and implementing policy and strategy for prosecuting the war.[71] Witness TF2-014 testified that he was the one in charge of putting down on paper the war strategies

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[64] TF2-190, 10 February 05 at p 44.
[65] TF2-190, 10 February 05 at p 83, 84.
[66] TF2-079, 26 May 05 at p 25, 26.
[67] TF2-021, 2 November 04 at p 60., TF2-079, 26 May 05 at p 37.
[68] TF2-223, 30 September 04 at p. 41, 95, 100.
[69] See TF2-042, TF2-033, TF2-152, TF2-154, TF2-039.
[70] TF2-079, 26 May 05 at p 43.
[71] TF2-008, 16 November 04 at p 47; TF2-005, 16 February 05 at p 54, 63; TF2-222, 17 February 05 at p 87. TF2-079, 26 May 05 at p 40.

formulated and dictated by the Second Accused. The Defence goes as far as conceding that such evidence exists and even more the Defence concedes that witnesses have testified that the Second Accused liaised with field commanders and supervised and monitored operations.[72]

48. Finally, the Second Accused, as Director of War, was also invested with the key role of distributing logistics to the fighters. As the military expert testified, one of the most important functions, in any guerilla type army like the CDF, was the logistic supplier, which role was assigned to Moinina Fofana, Hinga Norman's second in command.

> Without munitions guerrilla groups cannot operate; without food they cannot live. It is through control of logistics that a guerrilla commander maintains control of his organization: a dispersed organization such as the CDF or RUF is liable to break up as individual commanders with strong egos strive for independence from central command. This is a natural tendency in lose-knit organizations; but control can be maintained by focusing the supply of munitions without which guerrilla groups cannot operate.
>
> [I]t is no surprise that this important function was vested in Norman's second-in-command, the Director of War Moinina Fofana. [73]

49. [redacted]

The Second Accused knew or had reason to know that the crimes were about to be or were committed by his subordinates and took no action to stop or prevent the crimes

50. The Fofana Motion submits that the Second Accused had no notice of the crimes committed by his subordinates. While this may be the theory of the Fofana Defence, for the purposes of Rule 98 there is clearly evidence on the bais of which a reasonable trier

[72] Fofana Motion para 53.
[73] Military Expert Report, May 2005, Exhibit 97 at p C-5.
[74] TF2-005, 15 February 05 at 106, TF2-017, 19 November 04 at p 96, TF2-017 19 November 04 at p 84.

of fact could conclude the contrary. The Prosecution submits that evidence shows that the Second Accused knew that crimes were about to be committed by virtue of his presence at meetings where unlawful orders were made by his immediate superior Hinga Norman or Allieu Kondewa; or his presence at the crime scene.

51. [redacted] Witness TF2-201 reported that situation reports were almost invariably sent to the Second Accused before they reached Hinga Norman.[76] Finally, the Second Accused knew of the crimes committed by the Kamajors as he himself has ordered their commission on occasion. From these examples, the requisite mens rea can be inferred.

Knowledge through presence at meetings where unlawful orders were given or through presence when crime was committed

52. [redacted] The Second Accused also spoke, reinforcing the unlawful order.[79]

53. Furthermore, witness TF2-014 testified that the Second Accused was present in Norman's room at Base Zero when he received orders from Norman to loot pharmacies and kill. "When you go down to Bo the southern pharmacy should be looted and bring all the medicines to me". Norman said you should kill PC Veronica Bagni of Valunia Chiefdom, the home town of -- chiefdom of Chief Hinga Norman, because 'that woman was against

[75] TF2-068, 18 November 04 Closed Session at p. 74.
[76] TF2-201, 4 November 04 at p 110;
[77] TF2-005, 15 February 05 at pp 105, 106
[78] TF2-005, 15 February 05 at p.106
[79] TF2-222, February 17, 05 at p.119.

our movement".[80] The Second Accused's tacit support of these crimes can again be inferred.

54. There is evidence that Moinina Fofana was present when orders were given by the Hinga Norman to execute rebel collaborators at Nongoba Bullum Chiefdom.[81]

55. Witness TF2-014 testified that Mustapha Fallon was executed in the Poro Bush at Talia, in the presence of the Second Accused Hinga Norman, and Allieu Kondewa.[82]

56. Witness TF2-014 gave evidence that in the presence of the Second Accused and Allieu Kondewa, Hinga Norman ordered the Kamajors to kill the Junta Forces and their sympathizers, including the burning and looting of their properties.[83]

57. TF2-014 testified that orders to kill specific people and burn specific houses in Bo were given to him at Base Zero by Hinga Norman. The orders were made in the presence of the Second Accused.

Knowledge by virtue of situational reports received

58. Witness TF2-222 said situational reports were coming back to Base Zero from the Koribundu and Tongo battle fronts. They were made to Allieu Kondewa then to the Second Accused and then to Hinga Norman.[84]

59. TF2-079 spoke of a situational report that he brought to Base Zero and handed over to the Second Accused. The report talked of a summary execution of a captured junta agent near Panguma.[85] The witness said that there were other reports of similar incidents at the time in the area. Witness went on to say that each time they fought a battle, a situation report would be made by various commanders.[86]

60. [redacted]

[80] TF2-014, 10 March 05 at p 71.
[81] TF2-014, 10 March 04 at p 49.
[82] TF2-014, 10 March 04 at p 51.
[83] TF2-014, 10 March 05 at p. 17-18, 34
[84] TF2-222, 17 February at p 122.
[85] TF2-079, 26 May at p 33-34.
[86] TF2-079, 26 May at p 33-34.

[redacted]

61. Witnesses have testified that reports about the wrongdoings of the Death Squad were made to the Second Accused and were then transmitted to Hinga Norman. The reports stated that whenever the Death Squad went to the war front, they were killing innocent people and looting the property of civilians.[88] [redacted]

62. Witness TF2-014 testified that as National Deputy Director of Operations he had to collect reports from the war front, compile them and submit them to the National Coordinator, Sam Hinga Norman, through the Director of War, Moinina Fofana.[90] The witness testified that he told Moinina Fofana and Hinga Norman about the killing of the Chiefdom speaker of Ribbi Chiefdom, by Kamajor commander Abu Bawote.[91]

Other evidence that proves knowledge

63. [redacted]

64. [redacted]

[87] TF2-068, November 17, 04 at p. 87, 88.
[88] TF2-008, 16 November 04 at p 62; TF2-079, 26 May 05at p 48.
[89] TF2-005, 15 February 05 at p 95; TF2-008, 16 November 04 at p 61.
[90] TF2-014, 11 March 05 at p 54.
[91] TF2-014, 11 March 05 at p.30.
[92] TF2-223, 28 September 04 at p 93-95.
[93] TF2-223, 28 September 04 at p 101.
[94] TF2-223, 28 September 04 at pp. 111-115.
[95] TF2-223, 28 September 04 at pp. 118, 121, 123.

65. [redacted]

66. The Second Accused's knowledge of the crimes committed in Bo is made clear by witness's TF2-057 testimony. The witness related that the Second Accused summoned his brother and witness to the CDF Headquarters in Bo. When the Second Accused learned that they were Temne they were locked up in a cell for weeks. His brother and two other detainees were later killed as a result of the Second Accused' orders.[97] The witness further testified that the Kamajors "killed most of the Temnes in Bo town".[98] The witness heard the Second Accused say what he understood to be an order for the killing of all Temne people in Bo.[99]

67. [redacted]

68. Witness Borbor Tucker testified that he acted on instructions given by Hinga Norman to remove three cars, located in the Special Security Division Headquarters. The three cars, with knowledge of their source, were given to Moinina Fofana, the Third Accused and Prince Brima.[101]

69. [redacted]

[96] TF2-223, 30 September 04 at p. 41, 95, 100.
[97] TF2-057, 29 November 04 at p 122 and 30 November 04 at p 20, 21.
[98] TF2-057, 30 November at p 22.
[99] TF2-057, 30 November 04 at p 21.
[100] TF2-068, November 17, 04 at p. 92
[101] TF2-190, February 10, 05, at p. 60-62
[102] TF2-082, 15 September 04 at p 40.

Failure to Punish

70. [redacted]

71. Evidence was further presented through the testimony of witness TF2-021 who insisted that no punishment was meted out to them for looting properties and the killings of innocent people.[104]

72. [redacted] It would clearly be open to a reasonable trier of fact to conclude from the evidence that the Second Accused's failure to act in stopping the mass killings and physical and mental suffering[106] or to punish the perpetrators amounted to a failure to prevent or punish for the purposes of Article 6(3) of the Statute.

73. Based on the forgoing, the Prosecution submits that sufficient evidence has been provided for a reasonable trier of fact to be satisfied that the Second Accused not only possessed a *de jure* position of authority in the CDF organization, he also exercised effective control over the Kamajors. Indded, there is evidence that the Second Accused had an extremely high degree of authority over CDF subordinates in his position as Director of War and as one of the top three senior members of the CDF.

74. The Defence arguments that Moinina Fofana did not have the authority to, and was not in a position to prevent or stop unlawful acts committed by the Kamajors is not consistent with the evidence. As demonstrated above, the evidence indicates that the Second Accused was invested with a range of important responsibilities which allowed him to exercise effective command over subordinate commanders and Kamajor combatants generally.

75. However the evidence indicates that despite his material authority to do so and the ample notice and knowledge he had of the widespread and systematic atrocities that were being

[103] TF2-017, 22 November 04 Closed Session at pp 77, 78.
[104] TF2-021, November 2, 04 at p. 105
[105] TF2-223, 30 September 04 at p. 41, 95, 100.
[106] TF2-223, 28 September 04 at pp 109 114. See also witnesses TF2-052, TF2-154, TF2-151, TF2-142, TF2-033, TF2-040.

committed by the Kamajors, the Second Accused chose not to do anything. The evidence indicates that no effort or attempt was made by the Second Accused to prevent these crimes or to punish subordinates for their perpetration. The evidence before the court shows indeed that the Second Accused actively and tacitly encouraged the continued perpetration of these crimes.

76. It would clearly be open to a reasonable trier of fact to conclude that the Second Accused's silence in the face of the atrocities committed by the Kamajors does not represent, as the Defence alleges, a lack of authority and effective control. It would be open to a reasonable trier of fact to conclude on the contrary, that such silence was a manifestation of an intent that the horrific crimes be committed.

Individual responsibility under Article 6(1)

77. The Prosecution will set out briefly its interpretation of the elements under Article 6(1), responding as appropriate where its view differs from that of the Defence.

78. Planning is the contemplation of a crime and the undertaking of steps to prepare and arrange for its execution.[107] Instigating means prompting another to commit an offence[108] and is punishable only where it leads to the actual commission of an offence desired by the instigator.[109] Prosecution submits that it is sufficient to prove that the instigation contributed to the perpetration of the crime.[110] Both acts and omissions may constitute instigating, which covers express as well as implied conduct.[111] Ordering a crime entails responsibility when the person in a position of authority uses that authority to convince another to commit an offence,[112] even in the absence of a formal superior-

[107] *Prosecutor v. Akayesku*, ICTR-94-4-T, Judgement, 2 September 1998, (***'Akayesku Trial Judgment'***)para. 480; Brdanin Trial Judgment, para. 268.
[108] *Prosecutor v. Akayesku*, ICTR-94-4-T, Judgement, 2 September 1998, para. 482; Prosecutor v Blaskic, IT-95-14-T, Judgement, 3 March 2000, (***'Blaskic Trial Judgment'***)para. 280; Brdanin Trial Judgment. 269. Akayesu Trial Judgment, para. 482.
[110] Brdanin Trial Judgment , para. 269.
[111] Brdanin Trial Judgment , para. 269.
[112] Akayesu Trial Judgment, para. 483.

subordinate relationship.[113] The Prosecution submits that an accused may be found guilty of planning or ordering even if the contemplated crime was not executed.[114]

79. The Prosecution also submits that to be guilty of planning, instigating or ordering, it is not necessary to show that the accused planned, instigated or ordered the specific crime, or each of the specific crimes, alleged in the indictment. For instance, suppose that an accused participates in the creation of a general plan, or gives a general order, to the effect that no quarter should be given to enemy combatants, or that all villages that are "sympathizers of the enemy" should be eliminated. Suppose that others further down in the chain of command then create plans in more detail to give effect to the general plan, or give more specific orders in order to implement the general order, in which individuals who are deemed to be sympathizers of the enemy are identified, and the means by which they are to be eliminated are specified. Suppose that these identified persons are then killed, imprisoned or terrorized into submission, pursuant to the specific orders, by others even further down in the chain of command. In this example, it is submitted that the accused would be responsible for planning or ordering the crimes in question, even though the accused personally did not determine the specific victims of the crimes, or the specific fate of each victim.
80. In the present case, the Prosecution submits that it would be open to a reasonable trier of fact to conclude on the basis of all of the evidence that all of the crimes alleged in the Indictment were committed pursuant to a single campaign of which the Second Accused was one of the planners and instigators, and which the Second Accused gave orders to implement. On that basis, the Prosecution submits that it would be open to a reasonable trier of fact to conclude that the Second Accused is guilty of planning, instigating and ordering all of the crimes alleged in the Indictment.
81. The evidence indicates that prime leadership and effective control of the CDF was in the hands of Norman as National Coordinator, Fofana as Deputy Director of War, and Kondewa as High Priest. All three accused persons were sitting members of the War

[113] Kordic Trial Judgment, para. 388; Brdanin Trial Judgment, para. 270.
[114] Regarding ordering, see discussion in A. Casesse, International Criminal Law (N.Y., Oxford University Press, 2003), 194. Regarding planning see Kordic Trial Judgment, para. 386 and contra Akayesu Trial Judgment, para. 473.

Council. At meetings of the War Council, political and military issues were discussed, including military operations, welfare and discipline of the Kamajors.

82. [redacted] The Second Accused also spoke to the Kamajor fighters, emphasizing the unlawful orders given by the First Accused.[119]

83. [redacted]

84. [redacted]

[115] TF2-005, February 15, 05 at p.102
[116] TF2-005, TF2-008,TF2-011,TF2-014, TF2-079, TF2-082, TF2-190, TF2-201, TF2-222
[117] TF2-005-February 15, 05 at p.106
[118] TF2-005-February 15, 05 at p.106
[119] TF2-222, February 17, 05 at p 119.
[120] TF2-201, 4 November 2004, pp.106-7.
[121] TF2-201, 4 November 04 at p.42.

[redacted]

85. The Prosecution submits that sufficient evidence that the three accused planned the crimes charged in the Indictment has been presented. The accused directed the physical perpetrators to carry out the acts in furtherance of the plan and intended the crimes or knew that they would be a consequence of the implementation of the plan.

86. Committing means physical participation in a crime, directly or indirectly, or failing to act when such a duty exists, coupled with the awareness of the substantial likelihood that a criminal act or omission will occur as a consequence of the conduct.[123]

87. Witness TF2-014 testified about the Second Accused's direct involvement in the commission of murder. Witness said that one Alpha Dauda Kanu, a Kapra that he knew was killed in an oil palm plantation when going towards Mokusi. Kanu was killed by Dr Allieu Kondewa, Hinga Norman, Moinina Fofana. "He was hacked to death, and we took off his skin." Witness was present. Some of Kanu's body parts were taken and "They said that they are going to prepare a garment and a walking stick for Chief Hinga Norman and a fan, which is called a "controller", so as to use those things in order to become very powerful."[124]

88. Witness TF2-014 testified that he knew Mustapha Fallon who was executed in the Poro Bush at Talia, in the presence of Hinga Norman, Moinina Fofana, Allieu Kondewa and others. Mustapha Fallon who is also a Kamajor was killed because Allieu Kondewa wanted human sacrifice in order to guarantee the protection of the fighters. The brother of Mustapha Fallon pleaded for his life with Norman but to no avail. Hinga Norman gave three hundred thousand Leones to the deceased brothers appealing to them not to tell anyone what transpired[125]

89. In order to prove that an accused aided or abetted a crime as an accessory to the principal perpetrator, it must be demonstrated that the accused carried out an act or omission that consisted of practical assistance, encouragement or moral support to the principal, before

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[122] TF2-201, 4 November 04 at p.97-98.
[123] *Prosecutor v. Kvocka et al.*, ICTY IT-98-30/1-T, Judgement, (***'Kvocka Trial Judgment'***)2 November 2001, para. 251; *Prosecutor v Tadic*, IT-94-1-A, 'Judgment', 15 July 1999 (***'Tadic Appeals Judgment'***) para. 188; Prosecutor v Simic et al., IT-95-9-T, Judgement, 17 October 2003, (***'Simic Trial Judgment'***) para. 137.
[124] TF2-014 10 March 05 at pp 54-55.
[125] TF2-014 10 March 05 at pp.50-52

during or after the act of the principal.[126] The acts of the principal offender that the accused is alleged to have aided and abetted must be established.[127] The act of assistance must have a substantial effect on the commission of the crime by the principal offender but need not have caused the principal's act.[128] The presence of a superior at the scene of a crime may be viewed as an indicator of, but is not sufficient to prove, encouragement or support.[129]

90. The required mens rea is knowledge in the sense of awareness that the acts of the accused assisted in the perpetration of the crime.[130] It is not necessary to show that an aider and abettor knew of the precise crime that was intended or committed "as long as he was aware that one of a number of crimes would probably be committed, including the one actually perpetrated."[131] The accused must also be aware of the basic characteristics of the crime, including its requisite mens rea, but need not share the intent of the principal offender.[132]

91. [redacted]

[126] Tadic Appeals Judgment, para. 229; *Prosecutor v Aleksovski*, IT-95-14/1-A, 'Judgment', 24 March 2000.('***Aleksovski Appeals Judgment***'), paras 163-164; Delalic Appeals Judgment, para. 352; *Prosecutor v Furundzija*, IT-95-14/1-T, 'Trial Judgment', 10 Dec 1998, para. 235, para. 249; *Prosecutor v Vasiljevic*, IT-98-32-T, 'Judgment', 29 November 2002, paras 70-71; *Prosecutor v Vasiljevic*, IT-98-32-T, 'Appeal Judgment', 25 February 2004, ('***Vasiljevic Appeals Judgment***'), para. 102; *Naletilic*Trial Judgement, para. 63; Simic Trial Judgement , para. 161.
[127] Brdanin Trial Judgment, para. 271.
[128] Brdanin Trial Judgment, para. 271.
[129] Brdanin Trial Judgment, para. 271.
[130] Vasiljevic Appeals Judgment, para. 102; Blaskic Appeals Judgment, para. 49.
[131] Brdanin Trial Judgment, para. 272.
[132] Aleksovski Appeals Judgment, para. 162.
[133] TF2-223, 28 September 04 CS at pp 109, 114.
[134] TF2-223, 28 September 04 CS at p 55.

[redacted]

92. The Prosecution further submits that the evidence shows that the Second Accused encouraged and approved of the killings of police officers and other civilians committed by the Kamajors in Kenema as he was reported to be, the highest authority in charge of the Kamajors affairs in Kenema at that time.[137]

93. The Second Accused actively and expressly supported the unlawful killings and burning of houses by the Kamajors that occurred in Tongo and during the Black December Operation. [redacted] The Second Accused also spoke to the fighters present, reinforcing Hinga Norman unlawful orders.[139]

94. [redacted] This evidence shows how the Second accused encouraged subordinates to loot while at the war front.

95. [redacted]

96. Witness TF2-014 spoke of the Second Accused's involvement in a mission to get rid of all rebels and their collaborators suspected to be based around the surrounding villages to Base Zero.[143] The witness testified that the Second Accused designated two persons who

[135] TF2-223 28 September 04 at p CS 105, 106.
[136] TF2-223, 28 September 04 at pp. CS 118, 119, 121, 123.
[137] TF2-223, 30 Septemebr 04 at p. 41, 95, 100.
[138] TF2-222, 17 February 05 at p.110, 112, 113, 115. and TF2-005 15 February, 05 at pp. 105, 106 .
[139] TF2-222, 17 February 05 at p. 119.
[140] TF2-082, 15 September 04 at p 40.
[141] TF2-223, 28 September 04 at p 101.
[142] TF2-223, 28 September 04 at p. 93-95
[143] TF2-014 10 March at pp.40-41

knew the terrain, to accompany him and help witness carry out the operation to eliminate collaborators, at Dodo village in Jong Chiefdom, Bonthe District. The killings were carried out accordingly. [144]

97. Witness also stated he was ordered by the Second Accused and Hinga Norman to go to a village called Baoma to pursue collaborators, as they had received information from one Kamajor commander based there that rebels had been infiltrating in the trade fair. At Baoma a civilian was identified as being a collaborator and was consequently executed.[145]

98. The Prosecution submits that Defence's allegations in paragraph 79 of their motion negating the Second Accused's direct involvement in an operation to get rid of collaborators is contrary to the evidence. As shown above, witness TF2-014 did not independently decided to perpetrate the killings of the alleged rebel collaborators as alleged by the Defence. He was in fact directly ordered to do so by the Second Accused and Hinga Norman.

99. The evidence further shows how Second Accused actively and expressly supported the unlawful killings and burning of houses by the Kamajors that occurred in Tongo and during the Black December Operation. [redacted]

100. At this meeting, the Second Accused also spoke to the Kamajors fighters emphasizing the unlawful orders given by the First Accused. His instructions were: "Now you have heard the National Co-ordinator, any commander failing to perform accordingly and losing your own grounds, just decide to kill yourself there and don't come and report to us."[147] [redacted]

[144] TF2-014, 10 March 04 at p 41.
[145] TF2-014, 10 March 05 at p. 49
[146] TF2-222, 17 February 05 at p.110, 112, 113, 115. and TF2-005 15 Feb, 05 at pp. 105, 106
[147] TF2-222, February 17-18, 05 at p 119.
[148] TF2-005 15 February, 05 at p 107.

101. Witness TF2-057 related how his brother and other Temne people were killed as a result of the Second Accused's orders.[149] The witness further testified that the Kamajors "killed most of the Temnes in Bo town".[150] The witness explained how non-Mende people were singled out and were hacked to death by Kamajors at check points mounted in the way out of Bo.[151] The Prosecution submits that these killings can be directly imputed to the Second Accused, as a direct result of the comments and unlawful orders given by him at the CDF Headquarter. Alternatively, the Prosecution argues that at the very least these further killings were a foreseeable consequence of the Second Accused active inducement in relation to the killings of Temne people.
102. Based on the foregoing, the Prosecution submits that sufficient evidence has been provided for a reasonable tribunal to conclude that the Second accused planned, instigated, committed, ordered and aided and abetted the crimes charged in the Indictment thus engaging his individual criminal responsibility under Article 6(1).

Joint Criminal Enterprise

103. The jurisprudence of international tribunals has established that persons who contribute to the perpetration of crimes in execution of a common criminal purpose may be subject to criminal liability as a form of "commission" pursuant to Article 6(1) of the Statute.[152]
104. The following elements establish the existence of a joint criminal enterprise:[153]
    1. A plurality of persons;
    2. The existence of a common plan, design or purpose which amounts to or involves the commission of a crime listed in the Statute; and
    3. The participation of the accused in the execution of the common plan.
    4. Shared intent to commit a crime in furtherance of the common plan; or
    5. Where the crime charged was a natural and foreseeable consequence of the execution of the enterprise, participation in the enterprise with the

[149] TF2-057, 29 November 04 at p 122 and 30 November 04 at p 20, 21.
[150] TF2-057, 30 November at p 22.
[151] TF2-057, 30 N November at pp 34, 35, 37, 38, 40, 44.
[152] Tadic Appeals Judgment, para. 190; Vasiljevic Appeals Judgment, para. 95. *Prosecutor v Ojdanic* et al., IT-99-37-A, 'Appeal Decision on Dragoljub Ojdanic's Motion Challenging Jurisdiction- Joint Criminal Entreprise', 21 May 2003, para. 20; *Prosecutor v. Krnojelac*, IT-97-25-A, 'Judgment', 17 September 2003, (***'Krnojelac Appeals Judgment'***)paras 28-32, para.73; Brdanin Trial Judgment, para. 258.
[153] Kvocka Trial Judgment, para. 266; See also Tadic Appeals Judgment, para. 227.

awareness that such a crime was a possible consequence of its execution.[154]

105. Furthermore, an accused can be found criminally liable for aiding and abetting the participants of a joint criminal enterprise. Where this occurs, the accused will be criminally responsible for aiding and abetting all of the crimes that were committed in the course of that joint criminal enterprise.[155] For the reasons given below, it would be open to a reasonable trier of fact to conclude that all of the crimes alleged in the Indictment were committed as part of a single joint criminal enterprise of which the Second Accused was a participant. The evidence below that the Second Accused aided and abetted the crimes alleged in the Indictment could therefore also be taken by a reasonable trier of fact to be evidence that the Second Accused aided and abetted the joint criminal enterprise, and that accordingly, he aided and abetted all of the crimes alleged in the Indictment.

106. Accountability does not result from mere membership in the enterprise and contrary to the argument in the Fofana Motion,[156] the Prosecution is not advancing a concept of criminal organizations such as that provided for under Articles 9-11 of the Charter of the Nuremberg Tribunal. The common plan, which must amount to or involve an understanding or agreement between two or more persons that they will commit a crime, need not have been pre-arranged and may "materialize extemporaneously and be inferred from the fact that a plurality of persons acts in unison to put the plan into effect or from other circumstances.[157] It must be demonstrated that the accused took action, broadly defined to include both direct and indirect participation, to contribute to the implementation of the common plan.[158] While the Prosecution must prove that the accused acted in furtherance of the common plan, it is not necessary to prove that the offence would not have occurred but for the accused's participation.[159]

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[154] Brdanin Trial Judgment, para. 265; See also Tadic Appeals Judgment, para. 228.
[155] See *Prosecutor v. Vasiljević, Judgement*, Case No. IT-98-32-A, Appeals Chamber, 25 February 2004, para. 102 ("In the context of a crime committed by several co-perpetrators in a joint criminal enterprise, the aider and abettor is always an accessory to these co-perpetrators, although the co-perpetrators may not even know of the aider and abettor's contribution").See Also Kvocka Judgment para 249.
[156] Fofana Motion, paras 86, 91
[157] Tadic Appeals Judgment, para. 227; Pros*ecutor v. Krnojelac*, IT-97-25-T, 'Judgment', 15 March 2002, para. 80.; Simic Trial Judgement, para. 158, (esp. footnote 288; Furundzija, IT-95-17/1-A, Judgement, 21 July 2000, para. 119.
[158] Brdanin Trial Judgment, para. 263.
[159] Ibid.

107. The Fofana Motion does not address the element of a plurality of persons except to note for the sake of argument the possibility of a joint criminal enterprise among the top leadership of the CDF in relation to which it is argued that Fofana did not have the relevant intent.[160] The Prosecution submits that evidence describing meetings where the First, Second and Third Accused were consistently in attendance, along with other members of the CDF, and where the implementation of the common plan was discussed,[161] is sufficient to satisfy the first element of the joint criminal enterprise.
108. The Indictment alleges that Norman, Fofana and Kondewa and other subordinate members of the CDF shared a common plan, purpose or design to use any means necessary to defeat the RUF/AFRC forces and to gain and exercise control over the territory of Sierra Leone. "This included gaining complete control over the population of Sierra Leone and the complete elimination of the RUF/AFRC, its supporters, sympathizers, and anyone who did not actively resist the RUF/AFRC occupation of Sierra Leone."[162] The Defence claims that the purpose of the CDF was to defend its homeland and liberate the country from the RUF and AFRC at the direction of the Government, and asserts that if crimes occurred they were the fault of renegade commanders and individual Kamajors and not the result of a criminal policy.[163] The evidence in relation to superior and direct criminal responsibility clearly contradicts this assertion. Furthermore, the Prosecution submits that a liberation effort fuelled by an intention to kill and resulting in actual killings of innocent civilians labeled as sympathizers, collaborators or supporters, and involving the destruction and looting of towns with large civilian populations, is clearly unlawful and entails criminal responsibility.
109. The Prosecution submits that the evidence adduced clearly shows the Second Accused's substantial participation in the criminal enterprise and its shared intent to commit the crimes in furtherance of the common plan.
110. The evidence in relation to planning has been set out above and the Prosecution submits that this evidence demonstrates a clear agreement between the three accused and

[160] Fofana Motion, para. 93.
[161] See testimony of TF2-005, TF2-008, TF2-014, TF2-068, TF2-079, TF2-222.
[162] Indictment, 4 February 2004, para. 19.
[163] Fofana Motion, para. 92.

subordinate members of the Kamajors to use any means necessary, including the terrorization of the civilian population through killings, serious physical and mental injury, collective punishment and pillage, to meet the objective of eliminating the RUF/AFRC and its supporters and sympathizers. The plan included the use of child soldiers. The evidence shows that the National Coordinator, Director of War and the High Priest were at the centre in the implementation of the plans of the Kamajors.[164]

111. The evidence indicates that the First, Second and Third Accused utilised the CDF structure to achieve the strategic objectives of the CDF, in particular the Kamajors, in holding meetings and planning military operations with subordinates from Base Zero. At Base Zero, there were different meeting locations, called Walihuns. Only important and secret meetings of the leaders were held in Walihun I, which was attended by Hinga Norman, Moinina Fofana, Allieu Kondewa , and top commanders whom they suggested to attend.[165] Thus, the Second accused had intimate and integral knowledge of the war machinery of the Kamajor militia.

112. The Second Accused, Hinga Norman and Allieu Kondewa gave orders to subordinates that were carried out and situational reports from subordinates about the execution of these orders were made to all three Accused.[166]

113. On the basis of the evidence, it would be open to a reasonable trier of fact to conclude that the objectives of what was portrayed as a defensive policy and strategy could only be realised through the commission of war crimes and attacks against civilians amounting to crimes against humanity. This is evident from the evidence of the widespread nature of the campaign of terror and the manner in which it was directed from Base Zero and organized from district to district.

114. As evidence of the agreement between the three accused and subordinate members of the Kamajors, Witness TF2-157 stated that he attended a meeting called by Hinga Norman at which Norman said, "the first thing I am telling you is that I am the one that sent the Kamajors to Koribundu. If they were ready to capture this town, that they should not leave anything unturned; they should not leave even a town – a house; that even if they

[164] TF2-008, 16 November 04 at p.82
[165] TF2-079, 26 May 05, closed session at p. 39.
[166] TF2-014, TF2-017, TF2-079, TF2-223.

met people they should kill all of you."[167] TF2-159 testified that the Second Accused and Allieu Kondewa were present at the meeting held at the Barri and Hinga Norman introduced them to the crowd gathered.[168]

115. Witness TF2-222 gave evidence that Norman addressed a passing out parade of Kamajor fighters, in the presence of the Second Accused and Kondewa, in which he stated that no Junta Forces or their collaborators must be spared in Tongo, since Tongo determines who wins the war.[169] The Second Accused also spoke to the Kamajor fighters, emphasizing the unlawful orders given by the First Accused.[170]

116. The evidence also shows the Second Accused's participation in the planning and execution of the operation to kill suspected collaborators and rebel sympathizers alleged to have infiltrated around Baze Zero and at Boama Village. [171]

117. TF2-008 gave evidence that Norman, Fofana and Kondewa were seen to be at the centre of administering the affairs of the Kamajors and because of this, the Kamajors relied on these three men.[172] They were the executive power in the CDF and all major decisions were taken in consultation with each other[173].

118. Alternatively, it would be open to a reasonable trier of fact to conclude that the full extent of the crimes committed by the three accused and individual Kamajors was objectively a natural and foreseeable consequence of the common plan to instil fear in the population and use criminal means to wipe out the RUF/AFRC.

119. On the basis of the evidence, a reasonable trier of fact could conclude that each accused participated in the joint criminal enterprise *inter alia* by attending and participating in CDF leadership and War Council meetings; using radio communications to coordinate troop and supply movements and supplying status reports; coordinating or directing troop movements; coordinating or directing weapons and supply distribution; organizing CDF recruitment, initiation and training; organizing financial and resource support; and organizing and/or participating in the initiation processes.

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[167] TF2-157, 16 June 04, 21.
[168] TF2-159, 9 September 04 at pp 51-52.
[169] TF2-222, 17 February 05 at p.110
[170] TF2-222, 17 February 05 at p 119.
[171] TF2-014, March 10, 05 at p. 49
[172] TF2-008,16 November 04 at p.51.
[173] Military Expert Report, May 2005, Exhibit 97 at p C-4. See also TF2-014, March 14 05 at p. 6

120. The evidence indicates that Fofana was the National Director of War of the CDF and a member of the War Council. He was physically present and participated in the planning for the attacks on Tongo, Koribundo, Bo, Kenema and Bonthe. He issued orders and received reports about operations from subordinate commanders to whom he provided logistics including arms and ammunition. He carried out these acts with the intention that subordinates would commit unlawful killings, physical violence lootings and burnings, and that children would be enlisted to assist in the war effort. Alternatively, he participated in the enterprise with the awareness that such crimes were a possible consequence of its execution.

121. Several witnesses have testified that the Second Accused exercised the role of providing logistics, when being requested for, for various front lines.[174] Logistics included both fighting and social logistics. Social logistics were comprised of morale boosters like cigarettes, tobacco leafs, alcohol. TF2-079 testified that the Director of War had wide authority in this respect.[175]

122. [redacted]

123. [redacted]

[174] TF2-223, 28 September 04 at p 37; TF2-008, 16 November at p 47; TF2-201, 4 November 04 at p 97; TF2-082, 16 September 04 117.
[175] TF2-079, 26 May 05 at p. 42; TF2-201, 4 November 04 at p 97.
[176] TF2-223, 28 September 04 at pp 15, 23, 25.
[177] TF2-223, 28 September 04 at p 35.
[178] TF2-223, 28 September 04 at p 38, 39.
[179] TF2-210, November 04 4-5, 04 at p.42
[180] TF2-210, November 04 4-5, 04 at p.56

[redacted]

124. The Prosecution submits that it would be open to a reasonable trier of fact, on the basis of the evidence of a joint criminal enterprise as outlined here and when considered together with the evidence as a whole, to convict the Second Accused. It would be open to a reasonable trier of fact to conclude that all of the crimes alleged in the Indictment were committed as part of a single joint criminal enterprise of which theSecond Accused was a participant, and that accordingly the Second Accused is guilty of committing (as a participant in a joint criminal enterprise) all of the crimes alleged in the Indictment.

COUNTS 1-5

125. The Prosecution submits that Defence arguments pertaining to these counts allege nothing more than that the Prosecution did not present sufficient evidence to show that the Second Accused bears individual responsibility for these charges. The jurisprudence clearly establishes that such broad allegations do not meet the requirements for a Rule 98 Motion. As stated previously, the burden is on the Defence to identify the specific issues in respect of which it says that the evidence presented is insufficient.[182]
126. Consequently, the Prosecution does not find it necessary to provide further specifics under these Counts other than the evidence that has previously been presented in this Response which already demonstrates the evidence of the Second Accused's individual criminal responsibility in relation to these charges.

COUNTS 6-7

127. The Fofana Motion argues that Counts 6 and 7 have never before been charged or tried before an international tribunal, that the "concepts" of terrorism and collective punishments represent a vehicle for carrying out other crimes and that they are pleaded as "umbrella crimes". The Defence submits that their inclusion in the Indictment violates

[181] TF2-210, November 04 4-5, 04 at p.97-98
[182] See para 8 of this response.

the principle of *nullum crimen sine lege*. Furthermore it is argued that the crimes have no identifiable elements.[183]

128. The Prosecution submits that a Rule 98 Motion is not the appropriate place to raise a jurisdictional challenge or an argument that the charges in the Indictment are vague because the elements are difficult to identify. Rule 72 sets out the procedure for preliminary motions on such issues. It is unacceptable to raise them half way through the trial.[184]

129. In any event, it is well established that Common Article 3 and the core of Additional Protocol II are part of international customary law entailing individual criminal responsibility.[185] The core of Additional Protocol II is contained in its Article 4(2) – fundamental guarantees - which reaffirms and supplements Common Article 3. The ICTR has held that all the crimes listed in Article 4 of the ICTR Statute, which mirrors Article 3 of the Special Court's Statute, are covered by Article 4(2) of Additional Protocol II.[186] According to the ICTR, "[t]he list in Article 4 of the Statute...comprises *serious* violations of the fundamental humanitarian guarantees which...are recognized as part of international customary law. In the opinion of the Chamber, it is clear that the authors of such egregious violations must incur individual criminal responsibility for their deeds."[187]

130. Thus, in relation to acts of terrorism and collective punishments, the so-called "Tadic conditions"[188] for an offence to be subject to prosecution are fulfilled. The alleged violations constituted an infringement of a rule of international humanitarian law; the rule

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[183] Fofana Motion, paras 99-107.
[184] See *Prosecutor v Semanza*, ICTR-97-20-T, Decision on the Defence Motion for a Judgement of Acquittal, 27 September 2001, paras 18-19.
[185] *Prosecutor v Tadic*, IT-94-1-A, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995.para 98, 102, 117, 127, 129, 134; *Prosecutor v Tadic*, IT-94-1-T, 'Opinion and Judgment', 7 May 1997, para 611-613; Akayesu Trial Judgment, para 608, 610, 615, 617.
[186] *Prosecutor v Musema*, ICTR-96-13-T, 'Judgment', 27 January 2000, para. 241.
[187] Akayesu Trial Judgment, para. 616; See also Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, S/2000/915, 4 October 2000, para. 14, "Violations of common article 3 of the Geneva Conventions and of article 4 of Additional Protocol II thereto committed in an armed conflict not of an international character have long been considered customary international law, and in particular since the establishment of the two International Tribunals, have been recognized as customarily entailing the individual criminal responsibility of the accused."
[188] *Prosecutor v Tadic*, IT-94-1-A, 'Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction', 2 October 1995., para. 94.

was customary in nature; the violations were serious; and the violations entailed individual criminal responsibility under customary or conventional law.

131. The expression "terrorism", when used in the Geneva Conventions or Additional Protocols, takes its meaning from the fact that the expression is used in the context of conduct occurring in an armed conflict. As is stated on the website of the International Committee of the Red Cross (ICRC): "These provisions [referring to "terrorism"] are a key element of IHL [international humanitarian law] rules governing the conduct of hostilities i.e. the way military operations are carried out. They prohibit acts of violence during armed conflict that do not provide a definite military advantage. It is important to bear in mind that even a lawful attack on military targets can spread fear among civilians. However, these provisions outlaw attacks that specifically aim to terrorise civilians, for example campaigns of shelling or sniping of civilians in urban areas."[189]

132. The accused Galic was charged before the ICTY with "Violations of the Laws or Customs of War (unlawfully inflicting terror upon civilians as set forth in Article 51 of Additional Protocol I and Article 13 of Additional Protocol II to the Geneva Conventions of 1949) punishable under Article 3 of the Statute of the Tribunal." Furthermore, evidence of terrorization of civilians has been factored into convictions on other charges in ICTY cases.[190] The Prosecution makes its submissions as to the elements of the crime of terrorizing the civilian population with reference to the Galic Judgement, and noting the Majority's view in that case that it was only necessary to decide whether the Tribunal had jurisdiction over the crime of terror to the extent relevant to the charge in that case.[191]

133. The scope of the offence of terrorizing the civilian population is broad and encompasses both threats and acts of violence. Whether or not unlawful acts do in fact spread terror among the civilian population can be proved either directly or inferentially. It can be demonstrated by evidence of the psychological state of civilians at the relevant time,[192] including the civilian population's way of life during the period, and the short and long term psychological impact. Since actual infliction of terror is not a constitutive legal

[189] See International Committee of the Red Cross, "International humanitarian law and terrorism: questions and answers", http://www.icrc.org/Web/Eng/siteeng0.nsf/iwpList74/0F32B7E3BB38DD26C1256E8A0055F83E
[190] See *Prosecutor v Galic*, IT-98-29-T, 'Judgment and Opinion', 5 December 2003, (***'Galic Trial Judgment'***) para. 66.
[191] Galic Trial Judgment, para. 87.
[192] W. Fenwick, 'Attacking the Enemy Civilian as a Punishable Offence', Duke Journal of Comparative and International Law, Vol. 7, 1997, 539 at 562.

element of the crime of terror, there is no requirement to prove a causal connection between the unlawful acts of violence and the production of terror.[193] Terror may be taken to connote extreme fear.[194]

134. "Primary purpose" signifies the *mens rea* of the crime. The Prosecution must prove both that the accused accepted the likelihood that terror would result from the illegal acts (or, that he was aware of the possibility that terror would result) and that that was the result which he specifically intended.[195] The infliction of terror upon the civilian population need not have been the sole motivation for the attack but must have been the predominant purpose served by the acts of threats of violence.

135. Thus, according to the Prosecution, the elements of the crime are as follows:

- the Accused or his subordinate directed acts or threats of violence against the civilian population or individual citizens not taking a direct part in hostilities causing death or serious injury to body or health within the civilian population;
- the Accused wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts;
- the acts were committed with the primary purpose of spreading terror among the civilian population.[196]

136. To the extent that the charges appear as "umbrella crimes", reference may be made to the practice of the ICTY which has allowed evidence of campaigns of terror to be factored into convictions on other charges. For example, in the Blaškic case "the atmosphere of terror reigning in the detention facilities" was part of the factual basis leading to convictions for the crimes of inhuman treatment and cruel treatment (a violation of the laws or customs of law).[197]

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[193] Galic Trial Judgment, para. 134.
[194] Galic Trial Judgment, para. 137.
[195] Galic Trial Judgment, para. 136; See also Additional Protocol II, Article 13.
[196] Galic Trial Judgment, para. 133.
[197] *Blaškic* Trial Judgement, paras 695, 700, and 732-3.

COUNT 8

137. The Defence alleges that no evidence has been presented capable of supporting a conviction under Count 8. The Defence submits that the Second Accused did not plan, instigate, order or commit the conscription or enlistment in the CDF of persons under the age of fifteen. The Defence also states that based on the evidence the Second Accused did not have notice or knowledge that such acts occurred.

138. On the contrary, the Prosecution submits that the evidence adduced before the court shows the Second Accused's individual criminal responsibility under this charge.

[redacted]

139. Witness TF2-140 was initiated into the Kamajor society as a child combatant. He testified that whilst at Bo, he met the Second Accused. The witness said that being a CDF member, he stayed near the Bo CDF Headquarters, in a house located right behind the one where the Second Accused was living.[199]

140. [redacted] Other evidence shows that child combatants between the age of 10 and 14 were used in the CDF and they were referred to as 'small hunters'. Witness TF2-079 testified that he saw children carrying "AK47's, grenades and some were having machetes." The witness saw them patrolling with the commanders of Base Zero and some were used as bodyguards. TF2-021, a child combatant testified that the 'big men at Base Zero were Papay Konde, Moinina Fofana, Hinga Norman'.[201]

141. The Prosecution submits that the evidence of the Second Accused's presence at the meeting at Base Zero as one of the most senior members of the CDF, where child combatants were praised for their good work, not only shows notice or knowledge of the

[198] TF2-017, 19 November 04, Closed Session at p 87-90.
[199] TF2-140, 14 September 04 ,at pp 86, 87, 88, 114, 141.
[200] TF2-201, 5 November 04 Closed Session at pp 62-63.
[201] TF2-021, 2 Nov 04 at p 60.

use of child combatants by the CDF, it also shows that the Second Accused tacitly encouraged these acts. Further evidence of knowledge can also be inferred from the fact that the Second Accused was based at Base Zero in late 1997 and early 1998 and that he made frequent visits thereafter.

V. CONCLUSION

142. The Prosecution submits that on the basis of the evidence presented during its case, a representative portion of which has been set out in these submissions, it would be open to a reasonable tribunal of fact to be satisfied beyond reasonable doubt of the guilt of the Accused under all counts of the Indictment. The Prosecution reiterates that the Trial Chamber is not called upon to undertake a detailed consideration and evaluation of the evidence at this stage and submits that it has dispelled any doubt about the sufficiency of the evidence with respect to all the issues raised by the Defence. It must also be emphasized that the attempt by the Defence to blur the distinction between sufficiency of evidence and jurisdictional issues should not be allowed to deflect the Trial Chamber from the standard and principles inherent in Rule 98.

143. On the basis of the evidence, a reasonable trier of fact could conclude that the Accused was a party to an orchestrated campaign extending systematically to diverse geographical crime bases. It is open to a reasonable trier of fact to conclude that each of the jointly charged defendants participated in the campaign to the full extent alleged in the Indictment.

144. For all of the aforementioned reasons, the Prosecution submits that the Defence Motion should be dismissed in its entirety.

Done in Freetown this 18th day of August 2005.

For the Prosecution,

Luc Côté

James C. Johnson

Joseph Kamara

Bianca E. Suciu

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