SPECIAL COURT FOR SIERRA LEONE
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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Interim Registrar:	Lovemore Green Munlo
Date:	21st of October, 2005

PROSECUTOR **Against** SAM HINGA NORMAN
MOININA FOFANA
ALLIEU KONDEWA
(Case No.SCSL-04-14)

DECISION ON MOTIONS FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 98

Office of the Prosecutor:

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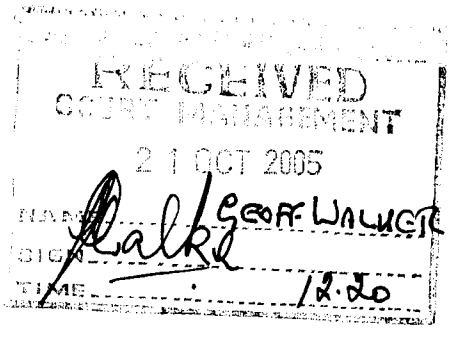

TRIAL CHAMBER I ("The Chamber") of the Special Court for Sierra Leone ("Special Court") composed of Hon. Justice Pierre Boutet, Presiding Judge, Hon. Justice Bankole Thompson and Hon. Justice Benjamin Mutanga Itoe;

MINDFUL of the provisions of the Statute of the Special Court for Sierra Leone;

MINDFUL of the Consolidated Indictment dated the 4th of February, 2004, filed by the Prosecution against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa;

MINDFUL of the fact that the Prosecution closed its case against these three Accused persons on the 14th of July, 2005;

MINDFUL of the written Motions for Judgment of Acquittal filed by Court Appointed Counsel for Norman on the 3rd of August, 2005 and by Court Appointed Counsel for Fofana and for Kondewa on the 4th of August, 2005;

MINDFUL of the written submissions by the Prosecution in response to each Motion for Judgment of Acquittal, filed on the 18th of August 2005;

MINDFUL of the Provisions of the Rules of Procedure and Evidence of the Special Court and in particular, those of Rule 98, as was amended on the 14th of May, 2005;

MINDFUL of the provisions of International Instruments on International Humanitarian Law and in particular, those relating to armed conflict, war crimes, and crimes against humanity;

MINDFUL of the Oral Submissions of the Parties made on the 20th of September, 2005;

AFTER a Chamber Deliberation;

HEREBY RENDERS THE FOLLOWING DECISION:

I. PROCEDURAL HISTORY

1. Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, the three Accused Persons in this case, are jointly indicted and are being jointly tried on an eight-Count Indictment that alleges offences relating to Crimes Against Humanity, Violations of Article 3 Common to the Geneva Conventions and Additional Protocol II and Other Serious Violations of International Humanitarian Law, in violation of Articles 2, 3, and 4 of the Statute of the Special Court for Sierra Leone.

2. On the 14th of July, 2005, the Prosecution, after calling 75 witnesses, three of which were Expert Witnesses, closed its case.

3. Immediately thereafter, and in open Court, each Defence Team for each of the Accused indicated its intention to file a Motion for Judgment of Acquittal in accordance with the provisions of Rule 98 of the Rules of Procedure and Evidence of the Special Court.

4. This was, as ordered by the Court, done by written submissions filed by each of the Defence Teams within the prescribed time limits. The Prosecution in turn, and in writing, replied to each Motion for Judgment of Acquittal and this, within the prescribed time limits as well.

II. SUBMISSIONS OF THE PARTIES

5. In their written submissions, Counsel for Norman submitted that the applicable standard for Rule 98 should be whether a reasonable trier of fact could be satisfied beyond reasonable doubt that the evidence adduced, if believed, could sustain a finding of guilt of the First Accused.[1] Counsel stated that there are two guidelines which may assist the Chamber in its determination as to whether this standard has been met. The first is where no evidence has been adduced by the Prosecution in relation to a count or a charge, an acquittal shall be granted. The second is that a Rule 98 motion will succeed if an essential ingredient for a crime was not made out in the Prosecution's case.[2]

6. Counsel for Norman further submitted that the Chamber may enter a judgment of acquittal with regard to a factual incident or event cited in the Indictment in support of the offence.[3] They contended that where there is some evidence, but it is such that, taken at its highest weight, a Trial Chamber could not convict on it, the judgment of acquittal should be entered. Counsel, further submitted that while an assessment on the credibility and reliability of the evidence is neither necessary nor generally permitted at this stage, where the evidence as to an element is so manifestly unreliable or incredible that no reasonable tribunal of fact could credit it, the evidence should be dismissed.

7. During their Oral presentation Counsel for Norman submitted that notwithstanding the amendment to Rule 98, the test is still one of sufficiency of evidence, and that no new test has been introduced by this amendment.[4]

8. The Prosecution's response in writing was that, in accordance with the Rule 98 standard, the Defence is required to provide specific arguments for their Motion as opposed to general claims of insufficiency of evidence. The Prosecution stated it would address only those specific issues raised in the Motion. In relation to all other issues, the Prosecution stated it must be taken for the purposes of this trial that no issue of Rule 98 arises.[5]

9. The Prosecution then submitted, further, that:

> 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. 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 evidence sufficient to sustain a conviction beyond reasonable doubt."[6]

10. Further, the Prosecution stated that the standard for review is as set out in the ICTY Appeals Chamber Judgment in *Prosecutor v. Jelisic*.[7]

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[1] Norman Motion, para. 7.
[2] *Ibid.*, paras 8-10.
[3] *Ibid.*, para. 11.
[4] Transcript of 20 September 2005, p. 4.
[5] Response to Norman Motion, para. 3.
[6] *Ibid.*, para. 5.
[7] *Ibid.*

11. It contended that 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,[8] and that 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 favorable to the Accused.[9] Further, according to Prosecution, 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.[10]

12. In addition, the Prosecution submitted that 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.[11] It also contended that filing of the Rule 98 motion by the Defence 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, and that the burden is on the Defence to identify specific issues in respect of which it says that the evidence does not meet the Rule 98 standard.[12]

13. In their Oral presentation, the Prosecution do not disagree that the standard of Rule 98 is that of the sufficiency of evidence. The Prosecution then read out the old version of Rule 98, and stated that the Rule 98 standard refers to Counts of the Indictment and not to individual paragraphs of the Indictment.[13]

14. Counsel for Fofana submitted that a more stringent set of standards should apply to our Rule 98 standard given the Special Court's limited jurisdictional and temporal mandates, and that rigorous adherence to the criminal law principle of individual culpability must inform the Chamber.[14]

15. Counsel also stated that the standard is a more subjective one as opposed to the well-known objective standard applied by the *ad hoc* Tribunals.[15]

16. Counsel further submitted that the Chamber should construe Rule 98 in light of Article 1.1, the jurisprudence of the Appeals Chamber and argued that a purposive interpretation should be given to application of Rules. He further observed that the recent changes to the Rules place a higher evidentiary burden on the Prosecution. He further urged the Chamber to ask "not whether the Prosecution's evidence could support a conviction, but instead whether the Prosecution's evidence has in fact been able to support its allegations".[16]

17. Continuing, he stated the Chamber should not completely ignore issues of credibility given that so many Prosecution witnesses have "testified in exchange for immunity", and that "[s]everal witnesses have been implicated in serious crimes under the Statute and, very likely, may have

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[8] *Ibid.*, para. 6.
[9] *Ibid.*, para. 7.
[10] *Ibid.*, para. 8.
[11] *Ibid.*
[12] *Ibid.*, paras 9-10.
[13] Transcript of 20 September 2005, pp. 11-12.
[14] Fofana Motion, para. 7.
[15] *Ibid.*, para. 9.
[16] *Ibid.*, paras 10, 12.

presented biased testimony in order to deflect responsibility for their own actions, thus securing their immunity."[17]

18. Counsel also orally submitted that the ICTY and the Special Court have different mandates; that the Special Court is different and should not just apply the Rules of the ICTY. He argued that there are legal and budgetary constraints for the Special Court; and that there should be a subjective standard applied for Rule 98.[18]

19. The Prosecution then submitted that the amended ICTY Rule was applied for the first time in the *Oric* case where 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.[19]

20. Further, according to the Prosecution, 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.[20]

21. In addition, the Prosecution contended that 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.[21]

22. The Prosecution, again, submitted that where only a general claim of insufficiency of evidence is made, the Chamber is not able to assess the strength of the case of acquittal.[22]

23. In their Oral presentation, Counsel for Kondewa began by reading the old version of Rule 98. He disagreed with the other Defence Teams and the Prosecution that the standard is that of the sufficiency of evidence. He argued that the standard of proof is proof beyond reasonable doubt; and that sufficiency of evidence is confined to Rule 98bis which is the standard at ICTY and ICTR. He further contended that the burden rests on the Prosecution to prove beyond reasonable doubt the guilt of the Accused, and that no evidential burden rests on the Accused at this stage.[23]

24. The Prosecution responded that Counsel for Kondewa have misrepresented the standard for Rule 98. They stated that the Rule 98 standard is "Where there is evidence, if accepted, upon which a tribunal of fact could be satisfied beyond reasonable doubt of the guilt of the accused on a particular charge". The Prosecution stated that the Rule 98 standard is based upon the "sufficiency of evidence and that this standard is coupled with the requirement of proof beyond reasonable doubt in certain instances but not in some. The Prosecution stated that they rely entirely on their written Motions in respect of these submissions.[24]

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[17] *Ibid.*, para. 18.
[18] Transcript of 20 September 2005, p. 25.
[19] Response to Fofana Motion, para. 4.
[20] *Ibid.*, para. 5.
[21] *Ibid.*, referring to *Bagosora* Rule 98 *bis* Decision, para. 9.
[22] *Ibid.*, referring to *Kvocka*, Decision on Defence Motions for Acquittal, 15 December 2005, para. 11.
[23] Transcript of 20 September 2005, pp. 50-51.
[24] *Ibid.*, pp. 51-52.

III. HISTORICAL EVOLUTION OF THE CURRENT RULE 98 ON MOTION FOR JUDGMENT OF ACQUITTAL

25. We recall here that by virtue of Article 14 of the Statute of the Special Court, the Rules of Procedure and Evidence of the International Criminal Tribunal for Rwanda obtaining at the time of the establishment of the Special Court are to be applicable *mutatis mutandis* to the conduct of the legal proceedings before the Special Court.

26. The applicable provisions relating to Motions for Judgment of Acquittal in the ICTR Rules at the time was Rule 98 *bis* which read as follows:

> If after the close of the case for the Prosecution the Trial Chamber finds that the evidence is insufficient to sustain a conviction on one or more counts charged in the indictment, the Trial Chamber, on motion of an accused or *proprio motu*, shall order the entry of a judgement of acquittal in respect of those counts.

27. A corollary of Article 14 of the Statute which we would, in these circumstances, like to highlight, is Article 20(3) of the Statute which stipulates that the Judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda.

28. We would like to observe in this regard, that even though this Article alludes only to the Appeals Chamber of the Special Court, this Trial Chamber considers that it has the latitude, in the spirit of mutual judicial guidance that exists amongst International Criminal Tribunals, and even in the absence of the provisions of Article 20(3) of the Statute, to be guided by the decisions of Our Sister Trial Chambers of the ICTY and of the ICTR, and to those rendered by their Appeals Chamber, particularly where the facts, the law, or the statutory instruments on which their decisions, at the time they were delivered, were based, are in *pari materia* with the cases that we are called to adjudicate upon.

29. It should also be recalled that Article 14(2) of the Statute of the Special Court provides as follows:

> [T]he Judges of the Special Court as a whole may amend the Rules of Procedure and Evidence or adopt additional rules where the applicable Rules do not, or do not adequately, provide for a specific situation and that in so doing, they may be guided, as appropriate, by the Criminal Procedure Act, 1965 of Sierra Leone.

30. In accordance with this revision, the Judges of the Special Court during the 2nd Plenary Meeting held on the 2nd and on the 7th of March, 2003, pursuant to this provision, adopted a new version of Rule 98 which differed from the once applicable in the ICTR. The new Rule 98 *bis* read as follows:

> 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.

IV. TEXTUAL CONTEXT OF THE CURRENT RULE 98 OF THE SPECIAL COURT

31. Very recently and during the 6th Plenary Meeting of the Judges of the Special Court that was held on the 14th and 15th of May 2005, Rule 98 *bis* was further amended to its current version which now reads as follows:

Rule 98:

> 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.

32. It is on the strength of this provision that the Defence Teams have filed their Motions for Judgment of Acquittal in favour of the 3 Accused Persons and this, in respect of all the charges of the 8-count Indictment.

33. The Chamber recalls here that the phraseology "the evidence is such that no reasonable tribunal of fact could be satisfied beyond a reasonable doubt of the accused's guilt" which existed in the text that was amended has been deleted. It in fact no longer features in the new draft and has been replaced by Our Plenary with the operative phrase of "if there is no evidence capable of supporting a conviction."

V. DELIBERATION

A. APPLICABLE STANDARD UNDER RULE 98 OF THE RULES OF PROCEDURE AND EVIDENCE OF THE SPECIAL COURT

34. In our considered opinion, Rule 98 defines the standard for determining the merits or otherwise of a Motion for Judgment of Acquittal. Guided by the contextual approach to the rule, we do emphasize that in its plain and ordinary meaning, it is limited in scope in the sense that it does not envisage a judicial pronouncement on the guilt or the innocence of the Accused at this stage. What the Rule envisages as an appropriate legal standard, we do observe, is one that limits and restricts a tribunal only to a determination as to whether the evidence adduced by the Prosecution at the close of its case, is such as is legally capable of supporting a conviction on one or more of the counts in the Indictment.

35. In fact, in interpreting this new version of a simply drafted Rule and giving it its natural and ordinary meaning, the Chamber is of the opinion that the evidence adduced by the Prosecution does not, within its present context, need to attain the threshold of the required "proof beyond reasonable doubt" but rather, should only be such as is "capable of supporting a conviction." We stress here, and are of the opinion that the standard is not whether the evidence is such as "should" support a conviction, but rather, such as "could" support a conviction.

B. RULE 98 AND THE "PROOF BEYOND REASONABLE DOUBT" THRESHOLD

36. On the submission by Counsel for Kondewa that the standard of proof the Prosecution is supposed to meet and satisfy at this stage is that of "proof beyond reasonable doubt" as canvassed in the *Jelisic* case[25] which was referred to in the *Strugar* case, we are of the opinion that the proof beyond reasonable doubt standard can and should only be addressed at a later stage of the proceedings.

37. We say this because we are of the opinion, and do take the view, that in our quest at this stage to arrive at a determination as to whether the evidence so far adduced by the Prosecution is capable of supporting a conviction or not, we should not, at this stage, delve into examining factors that are considered as the real basis for justifying a finding of 'proof beyond reasonable doubt' such as an exhaustive analysis or examination of the quality and reliability of the evidence so far available in the records and even the credibility of the witnesses.

38. Indeed, although our decision to uphold or to dismiss the Motions for Judgment of Acquittal is necessarily based on our preliminary appreciation of the evidence so far available for purposes of determining whether such evidence is capable of supporting a conviction or not, we consider that the evaluation of the evidence, its reliability, as well as the credibility of the witnesses, should be kept in abeyance for a later stage, depending on the finding and particularly, on the attitude of the Defence, in the event of a dismissal of the Motion. It is only at the end of the case that we consider it appropriate to determine whether the Prosecution's case against the Accused has been established to the required standard, and this, of "proof beyond reasonable doubt", in order to justify a finding of guilt or a finding of not guilty, should the contrary be the case.

39. As stated in the *Kordic* case, when examining the purpose of Rule 98, it becomes clear that this procedure, at this stage of the Trial, is not to determine the guilt of the accused, which should be made at the end of the case, but instead, to rule on "whether the Prosecution has put forward a case sufficient to warrant the defence being called upon to answer it".[26]

40. Indeed, as was reiterated in the case of *Strugar*, and we quote:

> [...] A decision on Motion pursuant to Rule 98*bis* involves no evaluation of the guilt of the accused in the light of all the evidence in the case at that stage, nor any evaluation of the respective credit of witnesses or the strengths and weaknesses of contradictory or different evidence, whether oral or documentary which is then before the Chamber.[27]

41. We would therefore, within the context of our Rule 98, reserve making at this stage, our finding on whether the "Proof Beyond Reasonable Doubt" threshold has indeed been attained. We consider that it is only at the close of the case for the Defence if we were ever to get to that stage, or alternatively, if the Defence, should we find that there is evidence capable of supporting a conviction on one or more of the counts, decide to exercise their legal rights to rest their case on that of the Prosecution.

42. Should any of these eventualities occur, it would then become necessary for us to proceed to the final stage of assessing the totality of the evidence so far adduced by the Prosecution in relation to the quality and reliability of the evidence, as well as the credibility of the Prosecution Witnesses, in

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[25] *Prosecutor v. Jelisic*, Judgment, 5 July 2001, Appeals Chamber, para. 37.

[26] *Prosecutor v. Kordic*, Decision on Defence Motions for Judgement of Acquittal, 6 April 2000, Trial Chamber, para. 11.

[27] *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004, Trial Chamber, para. 10.

order to determine whether it rises up to the standard threshold of having proved the guilt of the Accused "beyond reasonable doubt" to enable us to enter a verdict of guilty or to acquit on any or on all the counts, if the contrary turns out to be the case.

43. As the Appeals Chamber of the ICTY stated in the *Milosevic* case on this issue:

> Thus if, following a ruling that there is sufficient evidence to sustain a conviction on a particular charge, the Accused calls no evidence, it is perfectly possible for the Trial Chamber to acquit the Accused of that charge if, at the end of the case, it is not satisfied of his guilt beyond a reasonable doubt.[28]

44. In his oral submissions, Counsel for Kondewa, Mr. Charles Margai, as a new addition to his written submissions, argued that the Prosecution's evidence must, at that stage, attain the threshold of "proof beyond reasonable doubt" and that a failure of the evidence to attain that standard must necessarily give rise to the acquittal of his client on all the counts.

45. We are indeed of the opinion that for a Motion for Judgment of Acquittal to be upheld, the evidence led by the Prosecution at that stage of the proceedings, must be such that it could not be concluded, if that evidence is accepted, that the Accused has committed the offence or offences for which he is charged. This implies that from the totality of the evidence adduced by the Prosecution, there is, at that stage, no legal basis that warrants his being put to his defence on one or more of the offences for which he has been indicted even though, we would like to reiterate here, that this is not necessarily conclusive of the fact that he would, at the close of the case for the Defence, be convicted of any of those offences.

46. Put succinctly, as was stated by Trial Chamber II of the ICTY in the *Strugar* case:

> [...] The issue is often shortly stated as NOT being whether, on the evidence as it stands the accused *should* be convicted, but whether the accused *could* be convicted.[29]

47. We recall here that this decision was based on the provisions of Rule 98 *bis* of the Rules of Procedure and Evidence of the ICTY adopted on the 19th of November 1999. It stipulated that the Trial Chamber shall order the entry of a judgment of acquittal "if it finds that the evidence is insufficient to sustain a conviction" on that or those charges. In fact, "insufficiency of evidence" to sustain a conviction as provided for in the ICTY Rules, is not different in context from there being "no evidence capable of supporting a conviction" as provided for in the Rules of the Special Court for Sierra Leone.

48. Applying the standard of "insufficiency of evidence" as provided for in the Rules of Procedure and Evidence of the ICTR, Trial Chamber III of that Tribunal, in their Decision in the case of *Kamuhanda*[30], held that it was not satisfied that "the evidence is sufficient to sustain a conviction" on Count 1 which indicted the Accused for conspiracy to commit genocide. The Chamber, on the other hand, found "that the Prosecution has adduced sufficient evidence to sustain" a conviction on count 6 which alleged Crimes Against Humanity (Rape).

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[28] *Prosecutor v. Milosevic*, Decision on Motion for Judgement of Acquittal, 16 June 2004, Trial Chamber, para. 13 (6).
[29] *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004, Trial Chamber, para. 11.
[30] *Prosecutor v. Kamuhanda*, ICTR-99-54A-T, 20 August 2002.

49. In the *Milosevic* Case, the Appeals Chamber of the ICTY had this to say on this issue of sufficiency and the test to be applied to make a determination as whether a Motion for Judgment of Acquittal pursuant to Rule 98 should be granted:

> The test whether there is evidence if, accepted, on which a Trial Chamber could convict, will be applied on the following bases:
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> (1) Where there is evidence to sustain a charge, the Motion is to be allowed. Although Rule 98 *bis* speaks of the sufficiency of evidence to sustain a conviction on a charge, the Trial Chamber has, in accordance with the practice of the Tribunal, considered the sufficiency of the evidence as it pertains to elements of a charge, whether set out in separate paragraphs or schedule items;
>
> (2) 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. [...][31]

50. Consistent with the standard enunciated in the foregoing case law authorities, to the extent that they reinforce our view on the plain meaning of our Rule 98, we note that the key feature of the test is conceptually grounded on the idea of a judicial assessment of the capability of the evidence to support a conviction which would of course eventually entail a concise evaluation of the counts in the indictment with a view to ascertaining whether there is patently no evidence in respect of any of them upon which a reasonable tribunal of fact could convict the Accused.

51. It follows therefore, that if the evidence available at the close of the case for the Prosecution, is not such as it "could" support a conviction in respect of one or more counts, a Decision of Acquittal should be entered on that or on those counts.

C. ANALYSIS OF THE COUNTS AND THE ISSUES RAISED

52. The Chamber, in the light of the foregoing analysis, will now proceed to examine the Counts and the issues raised by the Defence to sustain the acquittal vis-à-vis the submissions of the Prosecution and the applicable standard which we have already enunciated.

53. In view of the fact that the standard of proof, as we have held, for entering a Decision of Acquittal under Rule 98 is that there is no evidence capable of supporting a conviction on one or more counts, we would, in examining these details, consider very succinctly, the sufficiency of the evidence as it relates to each separate paragraph as charged in the various counts of the Indictment.

[31] *Prosecutor v. Milosevic*, Decision on Motion for Judgement of Acquittal, 16 June 2004, Trial Chamber, para. 13 (1)-(2).

D. FINDINGS - ISSUES RAISED FOR DISMISSAL

(A) Common Elements to the Application of Articles 2 and 3 of the Statute

(1) Crimes Against Humanity

(a) The Law

54. The Indictment charges the Accused persons under Count 1 with Murder as a Crime Against Humanity under Article 2 (a) of the Statute.[32] The Indictment charges the Accused under Count 3 with Inhumane Acts as a Crime Against Humanity under Article 2 (i) of the Statute.[33]

55. The common elements for Crimes Against Humanity include:

(a) there must be an attack;
(b) the acts of the accused must be part of the attack;
(c) the attack must be directed against any civilian population;
(d) the attack must be widespread or systematic;
(e) the accused must know that his acts constitute part of a pattern of widespread or systematic crimes directed against a civilian population.[34]

56. The Chamber endorses the view that an attack constitutes "a course of conduct involving the commission of acts", which need not constitute a military attack.[35] The Chamber, furthermore, agrees that "[t]he widespread characteristic refers to the scale of the acts perpetrated and to the number of victims",[36] and that "[t]he adjective 'systematic' signifies the organised nature of the acts of violence and the improbability of their random occurrence. Patterns of crimes - that is the non-accidental repetition of similar criminal conduct on a regular basis - are a common expression of such systematic occurrence."[37]

57. The Chamber opines that the requirement for an attack to be "directed against" any "civilian population" requires that the civilian population "be the primary rather than an incidental target of the attack".[38] Accordingly, the Chamber adopts the interpretation of the ICTY Appeals Chamber in the *Kunarac* case which stated that:

> The expression 'directed against' is an expression which 'specifies that in the context of a crime against humanity the civilian population is the primary object of the attack'. In order to determine whether the attack may be said to have been so directed, the Trial Chamber will

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[32] Indictment, para. 25.
[33] *Ibid.*, para. 26.
[34] *Prosecutor v. Tadic*, Judgment, 15 July 1999, Appeals Chamber, paras 248 and 251; *Prosecutor v. Kunarac*, Judgment, 12 June 2002, Appeals Chamber, paras 85-100, 102-104 and 336; *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Trial Chamber, para 130.
[35] *Prosecutor v. Kunarac*, Judgment, 22 February 2001, Trial Chamber, para. 387.
[36] *Prosecutor v. Blaskic*, Judgment, 3 March 2000, Trial Chamber, para. 206. *See also Prosecutor v. Tadic*, Judgment, 7 May 1997, Trial Chamber, para. 648; *Prosecutor v. Naletilic*, Judgment, 31 March 2003, Trial Chamber, para. 236.
[37] *Prosecutor v. Kunarac*, Judgment, 22 February 2001, Trial Chamber, para. 429; *Prosecutor v. Kunarac*, Judgment, 12 June 2002, Appeals Chamber, para. 94. *See also Prosecutor v. Naletilic*, Judgment, 31 March 2003, Trial Chamber, para. 236; *Prosecutor v. Semanza*, Judgment, 15 May 2003, Trial Chamber, para. 329 ("'Systematic' describes the organized nature of the attack").
[38] *Prosecutor v. Kunarac*, Judgment, 12 June 2002, Appeals Chamber, para. 92. *See also Prosecutor v. Naletilic*, Judgment, 31 March 2003, Trial Chamber, para. 233; *Prosecutor v. Semanza*, Judgment, 15 May 2003, Trial Chamber, para. 330.

> consider, *inter alia*, the means and method used in the course of the attack, the status of the victims, their number, the discriminatory nature of the attack, the nature of the crimes omitted in its course, the resistance to the assailants at the time and the extent to which the attacking force may be said to have complied or attempted to comply with the precautionary requirements of the laws of war.[39]

58. With respect to the term "civilian population", this Chamber adopts the broader interpretation as further described in the ICTY Trial Judgement in the *Blaskic* case:

> Crimes against humanity [...] do not mean only acts committed against civilians in the strict sense of the term but include also crimes against two categories of people: those who were members of a resistance movement and former combatants - regardless of whether they wore wear uniform or not - but who were not longer taking part in hostilities when the crimes were perpetrated because they had either left the army or were no longer bearing arms or, ultimately, had been placed *hors de combat*, in particular, due to their wounds or their being detained. The specific situation of the victim at the moment the crimes were committed, rather than his status, must be taken into account in determining his standing as a civilian.[40]

59. The Chamber also holds that the targeted population must be predominantly civilian in nature, although the presence of a number of non-civilians in their midst does not change the character of that population as civilian.[41]

(b) Submissions

60. Counsel for Norman submitted that there is no evidence to demonstrate that rather than being sporadic alleged crimes, the offences were committed as part of a widespread or systematic attack against the civilian population.[42] The Prosecution responded that there is evidence that the CDF campaign spread throughout five districts of Sierra Leone and that this campaign involved massive, frequent, large scale actions directed against multiple victims.[43]

61. Counsel for Kondewa submitted arguments relating to the legitimacy of the armed attacks, the proportionality of such attacks and the civilian nature of the population. They submitted that the military attacks on Tongo, Bo and Koribondo were all legitimate armed attacks.[44] They stated that ECOMOG supported the Kamajor attacks and the attacks were not indiscriminate.[45] They submitted further that the evidence demonstrates proportionality.[46] Counsel for Kondewa also stated that civilians were not the targets of attacks and that the police were *de facto* combatants.[47]

62. The Prosecution responded that entire towns and villages cannot be described as military targets so as to legitimize collateral killings of civilians. Attacks on civilians and civilian objects are prohibited and incidental damage must be proportional to the anticipated military advantage.[48] The

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[39] *Prosecutor v. Kunarac*, Judgment, 12 June 2002, Appeals Chamber, para. 90.
[40] *Prosecutor v. Blaskic*, Judgment, 3 March 2000, Trial Chamber, para. 214.
[41] *Prosecutor v. Tadic*, Judgment, 7 May 1997, Trial Chamber, para. 638; *Prosecutor v. Kayishema and Ruzindana*, Judgment, 21 May 1999, Trial Chamber, para. 128.
[42] Norman Motion, paras 103, 167 and 174.
[43] Response to Norman Motion, para. 16.
[44] Kondewa Motion, para 6.
[45] *Ibid.*, paras 6-7.
[46] *Ibid.*, para. 9.
[47] *Ibid.*, paras 10 and 22.
[48] Response to Kondewa Motion, para. 18.

Prosecution stated that Counsel did not specify which attacks should be deemed to be proportional, beyond an imprecise reference to the testimony of the military expert, TF2-EW1.[49] The Prosecution stated that numerous persons not directly involved in the hostilities were targeted.[50] There is ample evidence confirming the civilian status of a large number of victims.[51]

63. Counsel for Kondewa submitted that the initiations performed were not acts committed as part of an attack, and assuming the elements of murder are satisfied, they were not committed in the context of or associated with an armed conflict.[52] The Prosecution responded that the initiation ceremonies were carried out to render Kamajors fearless in battle which established the nexus of the crime to the conflict.[53]

(c) Findings

64. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offences of Murder and Inhumane Acts, as Crimes Against Humanity, as alleged in the Indictment, and that such acts were committed as part of a widespread[54] and/or systematic[55] attack, that took place across four different Districts of Sierra Leone, namely, Kenema,[56] Bo,[57] Moyamba[58] and Bonthe.[59]

65. The Chamber further finds, for the purposes of the Rule 98 Decision, that these offences of Murder and Inhumane Acts were directed against the civilian population[60] and that the Accused acted with knowledge that these acts constituted part of a pattern of widespread or systematic attack.[61]

66. The Chamber finds that the arguments raised by the Defence for Kondewa relating to the legitimacy and proportionality of an armed attack against the civilian population do not apply to the offences charged as Crimes Against Humanity in the Indictment, nor do they apply to the other offences charged in the Indictment pursuant to Article 3 Common to the Geneva Conventions of

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[49] *Ibid.*

[50] *Ibid.*, para. 16.

[51] *Ibid.*, para. 19.

[52] Kondewa Motion, paras 27 and 29.

[53] Response to Kondewa Motion, para. 26.

[54] TF2-015, 11 February 2005, pp. 7-8; TF2-022, 11 February 2005, pp. 49-50 and 50-53; TF2-053, 1 March 2005, pp. 82-85; TF2-030, 25 November 2004, p. 4; TF2-057, 30 November 2004, pp. 21-22; TF2-167, 8 March 2005, pp. 31-37; TF2-014, 11 March 2005, pp. 4-6.

[55] TF2-035, 14 February 2005, pp. 21-28; TF2-022, 11 February 2005, pp. 62 and 64-66; TF2-014, 10 March 2005, pp. 44-46 and 71-75; TF2-165, 7 March 2005, pp. 10-14.

[56] TF2-152, 27 September 2004, pp. 104-105; TF2-053, 1 March 2005, pp. 85-89; TF2-079, 27 May 2005, pp. 6-8; TF2-005, 15 February 2005, CS, pp. 107-109; TF2-021, 2 November 2004, pp. 33-35 and 69-70; TF2-042, 17 September 2004, p. 69.

[57] TF2-001, 14 February 2005, pp. 79-80 and 81-85; TF2-011, 8 June 2005, CS, pp. 29-30; TF2-017, 22 November 2004, CS, pp. 13-14; TF2-201, 4 November 2004, CS, pp. 55-56; TF2-008, 16 November 2004, pp. 105-111; TF2-056, 6 December 2004, pp. 70-72; TF2-140, 14 September 2004, p. 80.

[58] TF2-167, 8 March 2005, pp. 31-37; TF2-168, 3 March 2005, pp. 58-59; TF2-014, 10 March 2005, pp. 60-62; TF2-073, 2 March 2005, pp. 34-39 and 46-50.

[59] TF2-071, 11 Nov 2004, pp. 53-55, 12 November 2004, p. 51; TF2-108, 30 May 2005, pp. 3-6 and 6-14; TF2-147, 10 November 2004, pp. 45-46; TF2-109, 30 May 2005, pp. 31-34; TF2-116, 9 November 2004, pp. 27-28; TF2-134, 3 June 2005, pp. 32-34.

[60] TF2-004, 9 November 2004, pp. 77-82; TF2-005, 16 February 2005, CS, pp. 107-109; TF2-015, 11 February 2005, p. 6; TF2-022, 11 February 2005, p. 46; TF2-035, 14 February 2005, pp. 21-28; TF2-144, 24 February 2005, pp. 68-70; TF2-198, 15 June 2004, pp. 22-23.

[61] TF2-014, 10 Mar 2005, pp. 44-46; TF2-035, 14 February 2005, pp. 21-28; TF2-005, 15 February 2005, CS, pp. 105-107; TF2-011, 8 June 2005, CS, pp. 30-31; TF2-041, 24 September 2004, pp. 22-23.

1949 and Additional Protocol II. Crimes Against Humanity may be committed in times of peace or times of armed conflict. The arguments raised by the Defence for Kondewa relate to charges pursuant to Grave Breaches of Additional Protocol I to the Geneva Conventions, namely Article 57, which proscribes making the civilian population or individual civilians the object of attacks, which this Chamber is not called upon to address because no Accused Person is being charged with any such violation in this trial.

(2) Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II

(a) The Law

67. The Indictment charges the Accused under Count 2 for Violence to Life, Health and Physical or Mental Well-being of Persons, in particular Murder, as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute.[62] Under Count 4, the Indictment charges the Accused for Violence to Life, Health and Physical or Mental Well-being of Persons, in particular Cruel Treatment, punishable under Article 3(a) of the Statute.[63] The Indictment further charges the Accused for Pillage, punishable under Article 3(f) of the Statute (Count 5), and for Acts of Terrorism, punishable under Article 3(d) of the Statute (Count 6) and for Collective Punishments, punishable under Article 3(b) of the Statute (Count 7).

68. In the Chamber's opinion the application of Article 3 of the Statute requires that the alleged acts of the Accused should have been committed in the course of an armed conflict. We are of the opinion that it is immaterial whether the conflict is internal or international in nature.[64] The Appeals Chamber of this Court and the Appeals Chamber of the ICTY and ICTR have recently restated this proposition. In *Prosecution v. Fofana*, the Appeals Chamber said:

> It has been observed that "even thought he rules applicable in internal armed conflict still lag behind the law that applies in international conflict, the establishment and work of the ad hoc Tribunals has specifically contributed to diminishing the relevance of the distinction between the two types of conflict". The distinction is no longer of great relevance in relation to the crimes articulated in Article 3 of the Statute as these crimes are prohibited in all conflicts. Crimes during internal armed conflict form part of the broader category of crimes during international armed conflict. In respect of Article 3, therefore, the Court need only be satisfied that an armed conflict existed and that the alleged violations were related to the armed conflict.[65]

69. Relying on the ICTY Appeals Chamber in *Tadic* the Chamber rules that "an armed conflict exists whenever there is a resort to armed force between states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a state".[66]

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[62] Indictment, para. 25.

[63] *Ibid.*, para. 26.

[64] *Prosecutor v. Kunarac*, Judgment, 12 June 2002, Appeals Chamber, paras 57 and 58; *Prosecutor v. Celebici*, Judgment, 16 November 1998, Trial Chamber, para. 303; *Prosecutor v. Celebici*, Judgment, 8 April 2003, Appeals Chamber, paras 140 and 150; *Prosecutor v. Anto Furundzija*, Judgment, 10 December 1998, Trial Chamber, para. 132; *Prosecutor v. Blaskic*, Judgment, 3 March 2000, Trial Chamber, para. 161; *Prosecutor v. Brdjanin*, Judgment, 1 September 2004, Trial Chamber, para. 127.

[65] *Decision on Preliminary Motion on Lack of Jurisdiction Materiae: Nature of the Armed Conflict*, 25 May 2004, para. 25.

[66] *Prosecutor v. Tadic*, Decision on Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, Appeals Chamber, para. 70.

70. Common Article 3 applies to "[p]ersons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed *hors de combat* by sickness, wounds, detention, or any other cause", and Additional Protocol II similarly treats the class of non-combatants as "all persons who do not take a direct part or who have ceased to take part in hostilities".[67]

(c) Findings

71. The Chamber has taken judicial notice of the fact that the armed conflict in Sierra Leone occurred from March 1991 until January 2002.[68] The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offences of Murder,[69] Cruel Treatment,[70] Pillage,[71] Acts of Terrorism[72] and Collective Punishments,[73] as Violations of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts were committed during the course of the armed conflict against persons taking no active part in the hostilities.

(B) Crimes Charged in the Indictment (Counts 1 to 8)

1. Murder (Count 1 and 2)

(a) The Law

Count 1

72. This Chamber takes due cognisance of the fact that Murder as a Crime Against Humanity has consistently been defined as the death of the victim resulting from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death. It must also be shown that the victims were persons taking no active part in the hostilities.[74]

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[67] Article 3(1) of Geneva Conventions of 1949. *See Akayesu* Trial Judgement, para. 629.

[68] *Decision on Prosecution Motion for Judicial Notice*, dated the 2nd of June, 2004, Annex I. It was confirmed by the Appeals Chamber in its *Fofana – Decision on Appeal against "Decision on Prosecution's Motion for Judicial Notice and Admission of Evidence"*, 16 May 2005, para. 49.

[69] TF2-190, 10 February 2005, pp. 37-42; TF2-004, 9 November 2004, pp. 64-67; TF2-005, 15 February 2005, CS, pp. 107-109; TF2-014, 10 March 2005, pp. 70-75; TF2-015, 11 February 2005, pp. 6-7; TF2-022, 11 February 2005, pp. 50-53; TF2-040, 21 September 2004, p. 26; TF2-042, 17 September 2004, pp. 66-68; TF2-201, 5 November 2004, CS, pp. 55-56; TF2-223, 28 September 2004, CS, p. 32.

[70] TF2-015, 11 February 2005, p. 6; TF2-004, 9 November 2004, pp. 68-69; TF2-053, 1 March 2005, pp. 82-85; TF2-071, 11 November 2004, pp. 75-76; TF2-088, 26 November 2004, pp. 35-36; TF2-119, 23 November 2004, pp. 111-116.

[71] TF2-014, 10 March 2005, pp. 77-78; TF2-017, 19 November 2004, pp. 85-86, 22 November 2004, pp. 11-12 and 90; TF2-022, 11 February 2005, pp. 57-60; TF2-030, 25 November 2004, pp. 4 and 16; TF2-067, 30 November 2004, pp. 90-92 and 99-100; TF2-008, 16 November 2004, pp. 75-77.

[72] TF2-159, 9 September 2004, pp. 36-40 and 29-33, 10 September 2004, p. 128; TF2-198, 15 June 2004, pp. 31-33; TF2-071, 11 November 2004, p. 57, 12 November 2004, pp. 12-14; TF2-187, 1 June 2005, pp. 15-21; TF2-001, 15 February 2005, pp. 88-97; TF2-140, 14 September 2004, pp. 70 and 78.

[73] TF2-053, 1 March 2005, pp. 82-85; TF2-079, 26 May 2005, pp. 22-24; TF2-154, 27 September 2004, p. 51; TF2-165, 7 March 2005, pp. 7-9 and 10-14; TF2-201, 5 November 2004, CS, pp. 59-61.

[74] *Prosecutor v. Stakic*, Judgment, 31 July 2003, Trial Chamber, para. 584; *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004, Trial Chamber, para. 32; *Prosecuto v. Vasiljevic*, Judgment, 29 November 2002, Trial Chamber, para. 205; *Prosecutor v. Kmojelac*, Judgment, 15 March 2002, Trial Chamber, para. 324.

Count 2

73. The Chamber is of the opinion, as it was held in the *Stakic* case, that to prove Murder, as a Violation of Article 3 Common to the Geneva Conventions and Additional Protocol II punishable under Article 3 of the Statute, it must be established that death resulted from an act or omission of the accused committed with the intent either to kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death. It must also be shown that the victims were persons taking no active part in the hostilities.[75]

(b) Submissions

74. Counsel for Norman submitted that there is no evidence of unlawful killings in Konia, Kebi Town, Kpeyama, Fengehun, Mongere, Bylago, Mobayeh, Makose, Gumahun and Jembeh.[76]

75. Counsel for Norman submitted that witnesses mention his actions only in an administrative context.[77] The Prosecution responded that evidence should be taken in the context and that Norman was the National Coordinator and in the position of command.[78]

76. Counsel for Norman submitted that the attack on police barracks does not amount to unlawful killings as it was legitimate military target.[79] The Prosecution responded that the targeting of an unarmed policeman, not in any way engaged in combat, is illegitimate.[80]

77. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations.

78. Counsel for Kondewa submitted that there are other inferences possible from the circumstantial evidence, as to concluding that murder was committed.[81]

(c) Findings

i. Paragraph 25(a) of the Indictment

79. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place between about 1 November 1997 and about 30 April 1998, at or near Tongo Field,[82] and at or near the towns of Lalehun,[83] Kamboma,[84] Konia[85] and Talama.[86]

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[75] *Prosecutor v. Stakic*, Judgment, 31 July 2003, Trial Chamber, para. 584; *Prosecutor v. Strugar*, Decision on Defence Motion Requesting Judgement of Acquittal Pursuant to Rule 98 *bis*, 21 June 2004, Trial Chamber, para. 32.
[76] Norman Motion, paras 61, 168, 86, 169, 93, 170, 97, 171, 101 and 172.
[77] *Ibid.*, paras 56, 66, 72 and 80.
[78] Response to Norman Motion, para. 77.
[79] Norman Motion, paras 77.
[80] Response to Norman Motion, para. 82.
[81] Kondewa Motion, Para. 26.
[82] The Chamber preliminarily holds that where in the Indictment, the Prosecution charged alleged crimes committed in Tongo Field, the Chamber interpreted this location as referring to town of Tongo, as most of the witnesses have used the terms "Tongo" or "Tongo Field" for a town of Tongo interchangeably. Where there is a reference in the Indictment to the "towns of Tongo Field", the Chamber interpreted it as referring to the smaller towns and villages around town of Tongo. TF2-022, 11 February 2005, pp. 49-53, 70, 93-95 and 55-57; TF2-015, 11 February 2005, pp. 6-7; TF2-027, 18 February 2005, p.p. 85-109; TF2-047, 22 February 2005, pp. 51-53, 108-109, 59-60 and 57-62; TF2-048, 23 February 2005, pp. 10-

80. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Panguma and in Sembehun near Tongo Field.[87]

ii. Paragraph 25(b) of the Indictment

81. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place on or about 15 February 1998, at or near the District Headquarters town of Kenema[88] and at the nearby locations of SS Camp,[89] and Blama.[90]

iii. Paragraph 25(c) of the Indictment

82. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place on or about 15 February 1998, at or near Kenema.[91]

iv. Paragraph 25(d) of the Indictment

83. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in or about January and February 1998, in locations in Bo District including the District Headquarters town of Bo,[92] Koribondo[93] and Fengehun.[94]

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12 and 16-26; TF2-053, 1 March 2005, pp. 82-85 and 107-110; TF2-056, 7 December 2004, pp. 75-76; TF2-079, 26 May 2005, pp. 61-63; TF2-144, 24 February 2005, pp. 61-65.

[83] TF2-013, 24 February 2005, pp. 15-25; TF2-016, 1 March 2005, pp. 34-43 and 49-53.

[84] TF2-015, 11 February 2005, pp. 13-15.

[85] TF2-027, 22 February 2005, pp. 2-4.

[86] TF2-035, 14 February 2005, pp. 21-28 and 49-50.

[87] The Chamber differentiated between Sembehun near Tongo Field, Sembehun in Moyamba District (also spelt as "Sembehua") and Sembehun in Bo District.

[88] TF2-021, 2 November 2004, pp. 70 and 35-36 and 3 November 2004, pp. 36-40; TF2-040, 21 September 2004, pp. 35-36, 67 and 95; TF2-152, 27 September 2004, p. 105; TF2-154, 27 Sept 2004, pp. 43-46 and 56-60; TF2-151, 22 September 2004, p. 16.

[89] TF2-223, 28 September 2004, CS, p.p. 119 and 114-115 and 30 September 2004, CS, pp. 51-52; TF2-201, 5 November 2004, CS, pp. 59-61.

[90] TF2-154, 27 September 2004, pp. 49-51; TF2-152, 27 September 2004, pp. 96-97.

[91] TF2-021, 2 November 2004, pp. 67-69; TF2-033, 20 September 2004, pp. 11-21, 26-27 and 125; TF2-039, 23 September 2004, pp. 109-113; TF2-040, 21 September 2004, pp. 25-26 and 28-30; TF2-042, 17 September 2004, pp. 64-67 and 69; TF2-201, 5 November 2004, CS, pp. 56-59; TF2-223, 28 September 2004, pp. 89-93 and 95-97.

[92] TF2-001, 15 February 2005, pp. 81-85 and 85-97; TF2-014, 15 March 2005, pp. 55-56; TF2-017, 22 November 2004, pp. 13-14 and 19; TF2-030, 25 November 2004, pp. 8-9, 11-12 and 16; TF2-056, 6 December 2004, pp. 68-72; TF2-057, 30 November 2004, pp. 21-22; TF2-119, 23 November 2004, pp. 107-109; TF2-198, 15 June 2004, pp. 31-33; TF2-201, 5 November 2004, CS, pp. 55-56; TF2-067, 1 December 2004, pp. 4-6; TF2-156, 25 November 2004, p. 46; TF2-157, 16 June 2004, pp. 14-18.

[93] TF2-014, 15 March 2005, pp. 77-78; TF2-032, 13 September 2004, CS, p. 26, 14 September 2004, pp. 85-86; TF2-140, 14 September 2004, pp. 70 and 78; TF2-157, 16 June 2004, p.p. 10-11, 16-17, 19 and 49; TF2-159, 9 September 2004, pp. 41-49; TF2-162, 8 September 2004, pp. 19-20.

[94] TF2-007, 3 December 2004, pp. 57-58.

84. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Kebi Town and Mongere in Bo District.

85. The Prosecution conceded that there is no evidence of unlawful killings committed in Kpeyama.[95] The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Kpeyama.

v. Paragraph 25(e) of the Indictment

86. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place between about October 1997 and December 1999 in locations in Moyamba District, including Taiama[96] and Ribbi.[97]

87. The Prosecution conceded that there is no evidence of Murder committed in Bylago.[98] The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Bylago.

88. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Sembehun and Gbangbatoke in Moyamba District.

vi. Paragraph 25(f) of the Indictment

89. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place between about October 1997 and December 1999 in locations in Bonthe District, including Talia (Base Zero),[99] Mobayeh,[100] and Bonthe Town.[101]

90. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Makose in Bonthe District.

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[95] Norman Motion, paras 86 and 169; Response to Norman Motion, para. 91.
[96] TF2-190, 10 February 2005, pp. 21-23.
[97] TF2-014, 10 March 2005, pp. 60-61; TF2-068, 17 November 2004, CS, p. 96.
[98] Norman Motion, paras 93 and 170; Response to Norman Motion, para. 96.
[99] TF2-189, 3 June 2005, pp. 12-14; TF2-014, 10 March 2005, pp. 42-43; TF2-096, 8 November 2004, pp. 23-24; TF2-133, 6 June 2005, pp. 4-7; TF2-188, 31 May 2005, pp. 17-21.
[100] TF2-071, 11 November 2004, pp. 71-73.
[101] TF2-116, 9 November 2004, p. 22; TF2-071, 11 November 2004, pp. 57-58, 12 November 2004, pp. 12-14; TF2-147, 10 November 2004, pp. 37, 32, 40-41, 43 and 45-46.

vii. Paragraph 25(g) of the Indictment

91. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place between about 1 November 1997 and about 1 February 1998 in road ambushes at Gumahun, Gerihun and the Bo-Matotoka Highway as part of the Black December Operation.

92. The Prosecution conceded that there is no evidence of Murder committed in Jembeh.[102] The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Murder as a Crime Against Humanity and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, and that such acts took place in Jembeh.

2. Inhumane Acts (Count 3) and Cruel Treatment (Count 4)

(a) The Law

Count 3

93. Consistent with the present state of international criminal law we are of the opinion that to sustain a conviction for Inhumane Acts, the Prosecution must prove "(i) the occurrence of an act or omission of similar seriousness to the other enumerated acts under the Article; (ii) the act or omission caused serious mental or physical suffering or injury or constituted a serious attack on human dignity" and (iii) the act or omission was performed deliberately by the accused or a person or persons for whose acts and omissions he bears criminal responsibility".[103] These ingredients together constitute the *actus reus*.

94. Furthermore, relying on established jurisprudence, the Chamber finds support for the proposition that the *mens rea* is satisfied "[w]here the principal offender, at the time of the act or omission, had the intention to inflict serious physical or mental suffering or to commit a serious attack on the human dignity of the victim, or where he knew that his act or omission was likely to cause serious physical or mental suffering or a serious attack upon human dignity and was reckless as to whether such suffering or attack would result from his act or omission".[104]

Count 4

95. Relying on the *Celebici* decision of the ICTY, The Chamber adopts the definition of Cruel Treatment as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as an intentional act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. We take the view that such acts may include

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[102] Norman Motion, paras 101 and 172; Response to Norman Motion, para. 108.
[103] *Prosecutor v. Vasiljevic*, Judgment, 29 November 2002, Trial Chamber, para. 234.
[104] *Prosecutor v. Krnojelac*, Judgment, 29 November 2002, Trial Chamber, para. 130; *Prosecutor v. Kayishema*, Judgment, 21 May 1999, Trial Chamber, paras 148-153; *Prosecutor v. Vasiljevic*, Judgment, 29 November 2002, Trial Chamber, para. 236.

treatment that does not meet the purposive requirement for the offence of torture.[105] The law requires that it be shown that the victims were persons taking no active part in the hostilities.[106]

(b) Submissions

96. Counsel for Norman submitted that witnesses make no substantive mention of Norman, but only of the Kamajors' alleged involvement in acts of physical violence and infliction of mental harm or suffering without any connection to Norman.[107] Counsel state that there is no evidence that Norman is responsible under Article 6(1) of 6(3) of the Statute.[108]

97. Counsel for Norman submitted that there is no evidence of physical violence and mental suffering in Kamboma and that a Judgment of acquittal should be entered on these incidents.[109] The Prosecution responded that there is evidence on this allegation and that the Defence have erred in this assessment.[110]

98. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations.

(c) Findings

i. Paragraph 26(a) of the Indictment

99. The Trial Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offences of Inhumane Acts as a Crime Against Humanity, and Cruel Treatment as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, that such acts took place between about 1 November 1997 and 30 April 1998, in Tongo Field,[111] Kenema Town,[112] and Kamboma.[113]

100. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offences of Inhumane Acts and Cruel Treatment, as alleged in the Indictment, that such acts took place in Blama.[114]

ii. Paragraph 26(b) of the Indictment

101. The Trial Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Inhumane Acts as a Crime Against Humanity, and Cruel Treatment as a Violation of Common Article 3 to the Geneva Conventions and of Additional

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[105] *Prosecutor v. Delalic et al.*, Judgement, 16 November 1998, Trial Chamber, paras 443 and 552 *cited in* Kriangsak Kittichaisaree, International Criminal Law, Oxford University Press, 2001.
[106] *Prosecutor v. Delalic et al.*, Judgment, 8 April 2003, Appeals Chamber, para. 424; *Prosecutor v. Vasilevic*,Judgment, 29 November 2002, Appeals Chamber, para. 234; *Prosecutor v. Naletilic*, Judgment, 31 March 2003, Trial Chamber, para. 246.
[107] Norman Motion, para. 111.
[108] *Ibid.*, para. 111.
[109] *Ibid.*, para. 113.
[110] Response to Norman Motion, para. 112 *referring to* TF2-015, 11 February 2005, p. 16.
[111] TF2-015, 11 February 2005, p. 6; TF2-022, 11 February 2005, pp. 49-50, 55-60, 66, 70 and 93; TF2-048, 23 February 2005, pp. 10, 12, 16, 28, 32, 35-36 and 40; TF2-144, 24 February 2005, p.72.
[112] TF2-151, 22 September 2004, pp. 5-43, 23 September 2004, pp. 18-91; TF2-144, 25 February 2005, pp. 12, 21, 33, 75-76, 79, 91, 94; TF2-152, 27 September 2005, pp. 96-157, 29 September 2005, pp. 1-36.
[113] TF2-015, 11 February 2005, pp. 11, 22, 24.
[114] TF2-154, 27 September 2004, pp. 35-95.

Protocol II, as alleged in the Indictment, that such acts took place between about November 1997 and December 1999, in the towns of Tongo Field,[115] Kenema,[116] Bo,[117] Koribondo[118] and the Districts of Moyamba[119] and Bonthe.[120]

3. Pillage (Count 5)

(a) The Law

102. The Chamber observes that the terms "pillage", "plunder" and "spoilation" have been varyingly used to describe the unlawful appropriation of private and public property during armed conflict. For instance, The Trial Chamber of the ICTY in the case of *Celebici* noted that "plunder" should be understood as encompassing acts traditionally described as "pillage,"[121] and that pillage extends to cases of "organised" and "systematic" seizure of property from protected persons as well as to "acts of looting committed by individual soldiers for their private gain".[122] In the Chamber's opinion, the crime of Pillage includes the following constitutive elements:

(1) The perpetrator appropriated private or public property;

(2) The perpetrator intended to deprive the owner of the property and to appropriate it for private or personal use;

(3) The appropriation was without the consent of the owner.

(b) Submissions

103. Counsel for Norman submitted that Norman is mentioned by witnesses in their testimony only in an administrative context.[123] They state, furthermore, that the evidence does not satisfy the

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[115] TF2-053, 1 March 2005, pp. 82, 85, 89, 95, 105, 107 and 110; TF2-015, 11 February 2005, pp. 13, 14, 25 and 33; TF2-016, 1 March 2005, p. 33; TF2-022, 11 February 2005, pp. 49, 55, 57, 60, 66, 70 and 93; TF2-035, 14 February 2005, pp. 11-13, 31, 42, 53-54 and 56; TF2-048, 23 February 2005, pp. 10, 12, 16, 28, 32, 35-36 and 40; TF2-144, 24 February 2005, pp. 65 and 72.

[116] TF2-151, 22 September 2004, p. 5-43 and 23 September 2004, pp. 18-91; TF2-144, 25 February 2005, pp. 12, 21, 33, 75, 76, 79, 91 and 94.

[117] TF2-056, 6 December 2004, pp. 69-70, 70-72, 76, 79-80 and 82-83; TF2-017, 22 November 2004, pp. 6-8; TF2-008, 16 November 2004, pp. 105-111; TF2-088, 26 November 2004, pp. 35-37; TF2-198, 15 June 2004, pp. 22-23.

[118] TF2-159, 9 September 2004, pp. 24-33 and 41-49, 10 September 2004, pp. 19 and 97-99; TF2-012, 12 June 2004, pp. 24 and 27; TF2-014, 10 March 2005, pp. 81-83; TF2-032, 15 March 2005, pp. 29, 35, 47 and 52-53; TF2-082, 15 September 2004, pp. 30 and 35; TF2-140, 14 September 2004, pp. 78-80; TF2-157, 16 June 2004, pp. 10, 14 and 20-22; TF2-162, 8 September 2005, p. 15; TF2-176, 17 June 2004, pp. 79-80; TF2-190, 10 February 2005, p. 51; TF2-198, 15 June 2004, pp. 32-33; TF2-201, 5 November 2004, p. 54.

[119] TF2-166, 8 March 2005, pp. 65-68 and 71-77; TF2-008, 23 November 2004, pp. 23-28; TF2-080, 6 June 2005, pp. 32-33; TF2-165, 7 March 2005, pp. 10-18; TF2-168, 3 March 2005, pp. 61-67; TF2-170, 7 March 2005, pp. 50-56; TF2-173, 4 March 2005, pp. 45-46.

[120] TF2-073, 2 March 2005, pp. 28-39; TF2-014, 10 March 2005, pp. 44-46 and 50, 11 March 2005, pp. 4-6; TF2-071, 11-12 November 2004, pp. 46-48; TF2-096, 8 November 2004, pp. 27-36; TF2-147, 10 November 2004, pp. 54, 56 and 60-62; TF2-166, 8 March 2005, pp. 30-31 and 58-62; TF2-116, 9 November 2004, p. 26; TF2-201, 5 November 2005, pp. 62-63; TF2-071, 11 November 2004, pp. 67-78.

[121] *Prosecutor v. Delalic et al.*, Judgment, 16 November 1998, Trial Chamber, para. 590; *Prosecutor v. Simic et al.*, Judgment, 16 October 2003, Trial Chamber, para. 98.

[122] *Prosecutor v. Delalic et al.*, Judgment, 16 November 1998, Trial Chamber, para. 590; *Prosecutor v. Blaskic*, Judgment, 3 March 2000, Trial Chamber, para. 181; *Prosecutor v. Jelisic*, Judgment, 14 December 1999, Trial Chamber, para. 48.

[123] Norman Motion, para. 127.

mens rea requirement that the perpetrators were intending to appropriate certain property, intending to deprive the owner of the property and to appropriate it for private or personal use.[124]

104. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations.

105. Counsel for Kondewa submitted that there are other inferences available from circumstantial evidence, as to concluding that pillage was committed.[125] They submit that warnings were given to recruits and guarantees to the public that there would be no looting.[126]

106. The Prosecution conceded that there is no direct evidence of burning in relation to Sembehun, Talia, and no direct evidence of looting and burning in Gbangbatoke or Mobayeh.[127]

(c) Findings

107. The Trial Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Pillage as a Violation of Common Article 3 to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment, that such acts took place between about 1 November 1997 and about 1 April 1998, at various locations including in Kenema District,[128] the towns of Kenema,[129] Tongo Field,[130] in Bo District,[131] the towns of Bo,[132] Koribondo,[133] in Moyamba District,[134] the towns of Sembehun,[135] Gbangbatoke,[136] in Bonthe District,[137] the towns of Talia (Base Zero),[138] and Bonthe Town.[139]

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[124] *Ibid.*, paras 134 and 178.
[125] Kondewa Motion, para. 34.
[126] *Ibid.*, para. 99.
[127] Response to Norman Motion, para. 119.
[128] TF2-144, 24 February 2005, p. 72; TF2-033, 20 September 2004, pp. 23-25; TF2-068, 18 November 2004, p. 30; TF2-144, 24 February 2005, pp. 75-76; TF2-151, 23 September 2004, pp. 8 and 61-62; TF2-152, 27 September 2004, p. 103; TF2-022, 11 February 2005, pp. 57 and 93; TF2-053, 1 March 2005, pp. 89 and 100.
[129] TF2-144, 24 February 2005, p. 72; TF2-033, 20 September 2004, pp. 23-25; TF2-068, 18 November 2004, p. 30; TF2-151, 23 September 2004, pp. 8 and 61-62; TF2-152, 27 September 2004, p.103.
[130] TF2-144, 24 February 2005, pp. 75-76; TF2-144, 24 February 2005, p. 72; TF2-053, 1 March 2005, pp. 89 and 100.
[131] TF2-190, 10 February 2005, pp. 49-50; TF2-022, 11 February 2005, pp. 57 and 93; TF2-001, 14 February 2005, pp. 80-81; TF2-008, 16 November 2004, pp. 105-111; TF2-014, 10 March 2005, pp. 68-70; TF2-008, 16 November 2004, pp. 105-111; TF2-014, 14 March 2005, p. 23; TF2-017, 22 November 2004, pp. 6, 11-13 and 15; TF2-030, 25 November 2004, p. 4; TF2-056, 6 December 2004, p. 72; TF2-057, 29 November 2004, pp. 114-116; TF2-067, 30 November 2004, pp. 104, 90-92, 99-100 and 105-106, 1 December 2004, pp. 1-4 and 40-43; TF2-119, 23 November 2004, pp. 105-106; TF2-156, 25 November 2004, pp. 37-38; TF2-032, 13 September 2004, p. 31; TF2-082, 15 September 2004, p. 15; TF2-140, 14 September 2004, p. 79; TF2-159, 9 September 2004, pp. 36 and 55-56; TF2-162, 8 September 2004, pp. 20-28.
[132] TF2-014, 14 March 2005, p.23; TF2-017, 22 November 2004, pp.6, 11-13,15; TF2-008, 16 November 2004, pp.105-111; TF2-030, 25 November 2004, p. 4; TF2-056, 6 December 2004, p. 72; TF2-057, 29 November 2004, pp. 114-116; TF2-067, 30 November 2004, pp. 104, 90-92, 99-100 and 105-106, 1 December 2004, pp. 1-4 and 40-43; TF2-119, 23 November 2004, pp. 105-106; TF2-156, 25 November 2004, pp. 37-38.
[133] TF2-140, 14 September 2004, p. 79; TF2-032, 13 September 2004, p. 31; TF2-082, 15 September 2004, p. 15; TF2-159, 9 September 2004, pp. 36 and 55-56; TF2-162, 8 September 2004, pp. 20-28.
[134] TF2-166, 8 March 2005, pp. 58-62; TF2-017, 19 November 2004, p. 86; TF2-080, 6 June 2005, pp. 32-33; TF2-167, 8 March 2005, pp. 26-30; TF2-168, 3 March 2005, pp. 57-58 and 61-67; TF2-170, 7 March 2005, pp. 52-56.
[135] TF2-073, 2 March 2005, pp. 28-31 and 34-39; TF2-014, 15 March 2005, pp. 47-48.
[136] TF2-096, 8 November 2004, p. 48.
[137] TF2-116, 9 November 2004, pp. 26-28, 30-31 and 38; TF2-068, 18 November 2004, p. 92; TF2-096, 8 November 2004, pp. 53-54; TF2-071, 11 November 2004, pp. 87-88; TF2-147, 10 November 2004, pp. 35, 41, 43, 47-48 and 50-52; TF2-096, 8 November 2004, p. 48.
[138] TF2-068, 18 November 2004, p. 92; TF2-096, 8 November 2004, pp. 53-54.
[139] TF2-147, 10 November 2004, pp. 35, 41, 43, 47-48 and 50-52; TF2-071, 11 November 2004, pp. 87-88.

108. The Chamber finds that there is no evidence capable of supporting a conviction against the Accused in respect of the offence of Pillage, as alleged in the Indictment, that such acts took place in Mobayeh.

4. Acts of Terrorism (Count 6)

(a) The Law

109. As regards this Count, the Chamber notes that in the case of *Galic*, the Trial Chamber of the ICTY provided the definition of the crime of terror as:

> 1. Acts of violence directed against the civilian population or individual civilians not taking direct part in hostilities causing death or serious injury to body or health within the civilian population.
>
> 2. The offender wilfully made the civilian population or individual civilians not taking direct part in hostilities the object of those acts of violence.
>
> 3. The above offence was committed with the primary purpose of spreading terror among the civilian population.[140]

110. However, this Chamber wishes to emphasise that while the charges in the *Galic* case related to violations of Article 15(2) of Additional Protocol I in the context of an international armed conflict, the Decision might be of assistance in interpreting Article 3(d) of the Special Court's Statute.

111. The Chamber notes that Protocol II does not define the term "acts of terrorism", and that whilst Article 4(d) of the aforesaid Protocol prohibits "acts of terrorism" generally and with respect to protected persons, Article 13(d) thereof refers only to a specific type of violence or threat, is one that is directed towards terrorizing the civilian population. In the Chambers opinion, Article 4(d) does encompass Article 13(d) and the latter provision is useful in interpreting the meaning of terrorism in the former provision. Relying on the ICRC Commentaries on Article 51 of the Protocol I, upon which Article 13(d) is based, the Chamber holds that the proscriptive ambit of Protocol II in respect of "acts of terrorism" does extend beyond acts of threats of violence committed against protected persons to "acts directed against installations which would cause victims terror as a side-effect."[141]

112. The Chamber concludes that the crime of Acts of Terrorism is comprised of the elements constitutive of Article 3 Common to the Geneva Conventions as well as the following specific elements:[142]

> 1. Acts or threats of violence directed against protected persons or their property.
>
> 2. The offender wilfully made protected persons or their property the object of those acts and threats of violence.

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[140] *Prosecutor v. Galic*, Judgment, 5 December 2003, Trial Chamber, para. 133.

[141] ICRC, *Commentary on the Additional Protocols*, at 1375.

[142] *See Prosecutor v. Galic*, Judgment, 5 December 2003, Trial Chamber, para. 133. While the charges in the *Galic* case related to violations of Article 15(2) of Additional Protocol I in the context of an international armed conflict, it does serve as a useful precedent for interpreting Article 3(d) of the Special Court's Statute.

3. The acts or threats of violence were committed with the primary purpose of spreading terror among protected persons.

(b) Submissions

113. Counsel for Norman submitted that the evidence relating to Count 6 does not show that the actions of the perpetrators were premeditated or that they were politically motivated. They state that the witnesses who give evidence on terrorizing the civilian population did not make any substantive mention of Norman.[143]

114. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations.

(c) Findings

115. The Trial Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Terrorism as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment.[144]

5. Collective Punishments (Count 7)

(a) The Law

116. This Chamber notes that Article 3 of the Statute of the Special Court Statute is a verbatim reproduction of Article 4 of Additional Protocol II to the Geneva Conventions and "collective punishments" in Article 3(b) of the Statute derives its origins from similar provisions in the Geneva Conventions and Additional Protocols.

117. The Chamber also further notes the ICRC commentaries on the prohibition of Collective Punishments in Article 4 which concluded that:

> [Collective punishments] should be understood in its widest sense, and concerns not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) as the ICRC had originally intended. The prohibition of collective punishments was included in the article relating to fundamental guarantees by consensus. That decision was important because it is based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation.[145]

118. Based on Article 4 of Additional Protocol II to the Geneva Conventions, Article 33 of the Fourth Geneva Convention and Commentaries on the aforesaid Article 33, the Chamber is of the view that the constitutive elements of the crime of collective punishments under Article 3(b) of the Statute are comprised of, in aggregation, the elements constitutive of Common Article 3 crimes and these two other specific elements, to wit, (i) a punishment imposed upon protected persons for acts

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[143] Norman Motion, paras 142 and 143.
[144] TF2-159, 9 September 2004, pp. 24-33 and 41-49; TF2-022, 11 February 2005, pp. 51-53; TF2-027, 18 February 2005, pp. 79-87; TF2-047, 22 February 2005, pp. 60-68; TF2-159, 9 September 2004, pp. 32-38; TF2-033, 20 September 2004, p. 30; TF2-079, 26 May 2005, pp. 20 and 23; TF2-187, 2 June 2005, pp. 17-37.
[145] *Commentary on the Additional Protocols*, at 1374.

that they have not committed and (ii) the intent, on the part of the offender, to punish the protected persons or group of protected persons for acts which form the subject of the punishment.

(b) Submissions

119. Counsel for Norman submitted that the witnesses who give evidence on terrorizing the civilian population did not make any substantive mention of Norman.[146]

120. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations.

(c) Findings

121. The Trial Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Collective Punishments as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, as alleged in the Indictment.[147]

6. Enlisting Children Under the Age of 15 Years into Armed Forces or Groups or Using Them to Participate Actively in Hostilities (Count 8)

122. The Indictment charges the Accused with Enlisting Children Under the Age of 15 Years Into Armed Forces or Groups or Using Them to Participate Actively in Hostilities, "an Other Serious Violation of International Humanitarian Law", punishable under Article 4(c) of the Statute.

(a) The Law

123. Article 4(c) of the Statute prohibits:

> Conscripting or enlisting children under the age of 15 years into armed forces or groups or using them to participate actively in hostilities.

124. Based on Article 4(c) of the Statute, Article 77(2) of Additional Protocol I, Article 4(3)(c) of Additional Protocol II, Articles 8(2)(b)(xxvi), 8(2)(e)(vii) of the Rome Statute, and relevant interpretations of the foregoing international instruments by the Preparatory Committees on the Establishment of an International Criminal Court specifically in respect of the offences of conscripting, enlisting, and using children under the age of 15 years in military operations, the Chamber holds that the elements common to the aforementioned offences are as follows:

(i) The perpetrator conscripted or enlisted one or more persons into an armed force or group or used one or more persons to participate actively in hostilities;
(ii) Such person or persons were under the age of 15 years;
(iii) The perpetrator knew or had reason to know that such person or persons were under the age of 15 years;
(iv) The conduct took place in the context of and was associated with an armed conflict;

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[146] Norman Motion, paras 142-143.
[147] TF2-187, 2 June 2005, pp. 17-37; TF2-022, 11 February 2005, pp. 51-53; TF2-027, 18 February 2005, pp. 79-87; TF2-047, 22 February 2005, pp. 60-68; TF2-159, 9 September 2004, pp. 32-38; TF2-033, 20 September 2004, p. 30; TF2-079, 26 May 2005, pp. 20 and 23.

(v) The perpetrator was aware of factual circumstances that established the existence of an armed conflict.

(b) Submissions

125. Counsel for Norman submitted that the witnesses who give evidence of using child soldiers do not make any substantive mention of Norman.[148] They state there is no evidence that Norman actively approved of the use of child soldiers.[149]

126. Counsel for Norman submitted that the evidence does not show that child soldiers were conscripted through some form of compulsory recruitment. The evidence of Expert Witness TF2-EW2 demonstrated that conscription was not used by the CDF but that chiefdoms sent young men to assist the Kamajors as a fundamental tenet of Kamajor society.[150] The fact that some witnesses testified that they saw children carrying weapons is not sufficient to meet the standard of actively participating in the hostilities. The fact that a child has a weapon does not mean that they are enlisted or conscripted.[151]

127. Counsel for Fofana submitted that the Prosecution have failed to present sufficient evidence that Fofana bears individual criminal responsibility for these allegations. Counsel for Fofana submit that there is no evidence that Fofana planned, instigated, ordered, or committed the conscription or enlistment of anyone into the CDF, and not persons under the age of fifteen years.[152]

128. Counsel for Kondewa submitted that the report of Expert Witness TF2-EW2 highlights the case of orphaned children provided for by the CDF.[153]

(d) Findings

129. The Chamber finds that there is evidence capable of supporting a conviction against the Accused in respect of the offence of Enlisting Children Under the Age of 15 Years Into Armed Forces or Groups or Using Them to Participate Actively in Hostilities, throughout the Republic of Sierra Leone, as a Serious Violation of International Humanitarian Law, as alleged in the Indictment.[154]

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[148] Norman Motion, paras 152.
[149] *Ibid.*, paras 154 and 161.
[150] *Ibid.*, paras 153 and 161.
[151] *Ibid.*, para 156.
[152] Fofana Motion, para. 109.
[153] Kondewa Motion, para. 37.
[154] TF2-EW2, 16 June 2005, pp. 15-25 and 33-34; Exhibit 100, Roisin de Burca, Report on the Situation in Sierra Leone in Relation to Children with the Fighting Forces, 4 May 2005; TF2-004, 9 November 2004, pp. 73-83; TF2-005, 15 February 2005, CS, pp. 109-110; TF2-014, 11 March 2005, p. 15; TF2-017, 19 November 2004, pp. 14-17 and 89; TF2-021, 2 November 2004, pp. 33, 37-38, 43-44, 67-70, 85 and 102, 4 November 2004, p. 36; TF2-032, 13 September 2004, pp. 54 and 83-84; TF2-080, 6 June 2005, pp. 34-37; TF2-140, 4 September 2004, pp. 73, 83 and 94-96; TF2-201, 5 November 2004, pp. 62-63; TF2-218, 6 June 2005, pp. 16-17 and 20-27.

(C) The Accused's Individual Criminal Liability Under Articles 6(1) and 6(3) of the Statute

130. The Chamber recognizes, as a matter of law, generally, that Article 6(1) of the Statute of the Special Court does not, in its proscriptive reach, limit criminal liability to only those persons who plan, instigate, order, physically commit a crime or otherwise, aid and abet in its planning, preparation or execution. Its proscriptive ambit extends beyond that to prohibit the commission of offences through a joint criminal enterprise, in pursuit of the common plan to commit crimes punishable under the Statute. Furthermore, Article 6(3) of the Statute holds superiors criminally responsible for the offences committed by their subordinates, where a superior has knowledge or reason to know that subordinate(s) are about to or have committed an offence and that superior fails to take the necessary and reasonable measures to prevent or to punish the perpetrators thereof.[155]

131. The Chamber is of the opinion that a determination of the Accused liability depends to a degree on the issues of fact and weight to be attached to the evidence, which require an assessment of the credibility and reliability of that evidence. These issues, however, do not arise for determination at this stage. The Chamber has, however, reviewed the evidence as it is relevant to the modes of participation of each Accused in the alleged crimes, and finds, for the purposes of the Rule 98 standard, that the Accused participated in each of the crimes charged in Counts 1 to 8 of the Indictment. The Chamber, therefore, is not in a position at this stage to dismiss any of the modes of liability as alleged in the Indictment and accordingly rejects the Defence Motions in this regard.

VII. DISPOSITION

FOR THE FOREGOING REASONS, THE CHAMBER pursuant to Rule 98:

1) **FINDS NO MERIT IN THE MOTION** of each Accused, namely, Sam Hinga Norman, Moinina Fofana and Allieu Kondewa, for a Decision of Acquittal in respect of one or more counts in the Indictment and accordingly **DISMISSES the said Motions.**

2) Notwithstanding the above finding, the Chamber further **FINDS** in respect of particular allegations contained in each count of the Indictment as follows:

   1. That there is no evidence capable of supporting a conviction against the Accused Persons in respect of the offence of Murder as a Crime Against Humanity, punishable under Article 2(a) of the Statute and Murder as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, in respect of the following areas:

      (i) Panguma near Tongo Field, as charged in paragraph 25(a) of the Indictment;

      (ii) Sembehun near Tongo Field, as charged in paragraph 25(a) of the Indictment;

      (iii) Kebi Town in Bo District, as charged in paragraph 25(d) of the Indictment;

      (iv) Mongere in Bo District, as charged in paragraph 25(d) of the Indictment;

[155] Kriangsak Kittichaisaree, International Criminal Law, Oxford University Press (2001), p. 251.

(v) Kpeyama in Bo District, as charged in paragraph 25(d) of the Indictment;

(vi) Bylago in Moyamba District, as charged in paragraph 25(e) of the Indictment;

(vii) Sembehun in Moyamba District, as charged in paragraph 25(e) of the Indictment;

(viii) Gbangbatoke in Moyamba District, as charged in paragraph 25(e) of the Indictment;

(ix) Makose in Bonthe District, as charged in paragraph 25(f) of the Indictment;

(x) Jembeh, as charged in paragraph 25(g) of the Indictment;

(xi) Gumahun, as charged in paragraph 25(g) of the Indictment;

(xii) Gerihun, as charged in paragraph 25(g) of the Indictment;

(xiii) Bo-Matotoka Highway, as charged in paragraph 25(g) of the Indictment;

2. That there is no evidence capable of supporting a conviction against the Accused Persons in respect of the offence of Inhumane Acts as a Crime Against Humanity, punishable under Article 2(i) of the Statute and Cruel Treatment as a Violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(a) of the Statute, in respect of Blama, as charged in paragraph 26(a) of the Indictment;

3. That there is no evidence capable of supporting a conviction against the Accused Persons in respect of the offence of Pillage as a violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(f) of the Statute, in respect of Mobayeh, as charged in paragraph 27 of the Indictment;

3) **CONSEQUENTLY**, in light of the findings dismissing the Motions, and pursuant to Rule 85, each of the Accused person is hereby put to his election to call evidence, if he so desires.

Hon. Justice Bankole Thompson attaches his Separate and Concurring Opinion,

Done in Freetown, Sierra Leone, this 21st day of October, 2005

Hon. Justice Benjamin Mutanga Itoe | Hon. Justice Pierre Boutet, Presiding Judge, Trial Chamber I | Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

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TRIAL CHAMBER I

Before:	Hon. Justice Pierre Boutet, Presiding Judge Hon. Justice Bankole Thompson Hon. Justice Benjamin Mutanga Itoe
Interim Registrar:	Lovemore Green Munlo
Date:	21st of October, 2005

PROSECUTOR	Against	SAM HINGA NORMAN MOININA FOFANA ALLIEU KONDEWA (Case No.SCSL-04-14-T)

SEPARATE AND CONCURRING OPINION OF HON. JUSTICE BANKOLE THOMPSON ON DECISION ON MOTIONS FOR JUDGMENT OF ACQUITTAL PURSUANT TO RULE 98

Office of the Prosecutor:

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Court Appointed Counsel for Sam Hinga Norman:

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John Wesley Hall, Jr.
Tim Owen Q.C.

Court Appointed Counsel for Moinina Fofana:

Victor Koppe
Michiel Pestman
Arrow Bockarie
Andrew Ianuzzi

Court Appointed Counsel for Allieu Kondewa:

Charles Margai
Yada Williams
Ansu Lansana
Martin Michael
Susan Wright

I. INTRODUCTION

1. For an avoidance of doubt, let me start this Separate and Concurring Opinion by emphasizing that I have no disagreement with the Unanimous Decision of the Trial Chamber.

2. I do strongly and unreservedly endorse the said Decision in so far as the disposition of each of the present Motions for Judgment of Acquittal filed by the Accused persons herein is concerned. I also support without hesitation the exposition as to what is the precise legal standard mandated by Rule 98 in determining the merits of a Motion for Judgment of Acquittal within the jurisdiction of the Special Court for Sierra Leone. I also agree with the expositions on the different applicable legal principles and with the specific findings of fact on the issues raised for dismissal as set out in the Decision.

3. As regards the reasoning behind the judicial formulation of the applicable legal standard in respect of a Rule 98 Motion, I feel judicially compelled to add some of my own considered thoughts in this Separate and Concurring Opinion on some key aspects of the judicial reasoning, so as to emphasize and reinforce the said judicial analysis on this crucial aspect of the Decision. These relate to two key aspects of the Chamber's reasoning, namely: (i) the methodological approach of the Chamber to reliance upon the jurisprudence of other international criminal tribunals in developing and formulating its reasoning, and (ii) the scope of the judicial discourse on the prescribed legal standard under Rule 98.

4. I shall accordingly, in the succeeding paragraphs, confine and channel my reasoning to three aspects of these issues: the historical aspect, the interpretive aspect, and the analytical aspect.

II. THE HISTORICAL ASPECT

5. Let me begin this part of my Opinion by observing that the historical aspect relates to the procedural development of Rule 98 as the prescriptive or regulatory norm for determining the merits of a Defence Motion for Judgment of Acquittal. In this regard, a cursory examination of the legislative development of the rule reveals that since its adoption in its original form from the ICTR

Rules of Procedure and Evidence it has only been amended once; that was on the 14th day of May, 2005. In its original form, it was in these terms:

> "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."

6. In its present form the Rule provides thus:

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

III. THE INTERPRETIVE ASPECT

7. With the historical aspect set in context, I opine that, given the formulation of the exisiting Rule 98, the proper methodology to be adopted in addressing the delicate judicial task of statutory interpretation[1] is essentially contextual and purposive.[2] The object of this approach is to discover the plain and ordinary meaning of the Rule. It is instructive to note that historically, the plain meaning rule of statutory interpretation originated in England in the *Sussex Peerage case.*[3] In that case, Lord Tindal wrote:

> "If the words of the Statute are in themselves precise unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt

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[1] Underscoring the complexity of the judicial task of statutory interpretation, it is worth noting that there are two rival schools of thought as to what it entails. One is the traditional school; the other is the modern school. According to the former, the primary task of a court when interpreting a statutory provision or rule is to give effect to the intention of the legislature, that is, using the rules of language, supplemented by the rules of interpretation, to discover what law the legislature intended to enact and how the law was intended to apply to facts such as those before the court. The modern view, however, suggests that the function of statutory interpretation is to give effect to the intention of the legislature in so far as that intention is discoverable from the language of the text. Where the intention is not evident, resort must be had to the rules of statutory construction. See Ruth Sullivan, *Statutory Interpretation,* Ontario: Irwin Law, 1997 on this subject.

[2] The contextual approach to statutory interpretation enjoins that the statutory provision or rule be interpreted in context, including the rest of the statute or relevant legislative instrument, the legal context generally, and the external context in which it must operate. The purposive approach enjoins an interpretation that brings into focus the purpose of the legislation or body of rules, both as a whole and in respect of the specific provision or rule to be interpreted. The judicial norm is to prefer the interpretation consistent with either the context or purpose rather the contrary interpretation.

[3] (1841) 11 Cl & Fin 85 at 143.

> arises from the terms employed by the legislature, it has always been held a safe means of collecting the intention, to call in aid the ground and cause of making the statute, and to have recourse to the preamble...and "the mischief's which (the makers of the Act) intended to redress."

8. In this regard, it must be emphasized, as a rudimentary principle, that if the rule is unambiguous, the plain meaning of the words must be applied.[4] In my view, it is an erroneous disposition, when the meaning of the rule is plain and unambiguous, to embark upon a discovery of the perceived intent of the rule and construe it accordingly. To do so is to disregard the language of the rule itself. There is settled jurisprudence in support of the proposition that if the language of a rule is clear and unambiguous, there is no need to construe it. All that the plain meaning rule of interpretation does is to require courts to distinguish between clear or plain meaning, on the one hand, and ambiguous or doubtful meaning, on the other. Hence, it is not a tenable position that it is mandatory to resort to decided cases for guidance in interpreting a rule where the language is plain and unambiguous, except if the operative or key phrase which is the subject of interpretation has been given a technical legal meaning.

9. Admittedly, it may sometimes be judicially prudent to look elsewhere for jurisprudential support for the plain and unambiguous meaning once that meaning has been determined and applied. Such an exercise is a judicial option, and not a mandate. I take it to be trite knowledge that the language of a rule is deemed ambiguous if it can be understood in more than one way. [5] In the specific context of Rule 98, there is no ambiguity about the legal standard to be applied. It is difficult to discern how the concept of "evidence capable of supporting a conviction" can be understood in more than one way. There is, in my judgment, nothing difficult to comprehend about the rule. It does not lack clarity or precision. Further, there is clearly no evidence to suggest that the Judges, in their legislative role, intended the phraseology "capable of supporting a conviction" to carry or bear any meaning beyond its ordinary sense. Hence, it is not necessary to have recourse to case-law authorities far afield or, extrinsically, to the *travaux preparatoires*, to seek guidance to interpret and apply the plain and ordinary meaning of the Rule.

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[4] See, for example, the U.S. District Court's opinion in the case, *United States v. American Trucking Ass'n*, 310 U.S. 534 (1940) to this effect:

> "If the words are clear, there is no room for construction. To search elsewhere for a meaning beyond or short of that which they disclose is to invite danger, in the one case, of converting what was meant to be open and precise, into a concealed trap for the unsuspecting..."

10. *Ex hypothesi*, if the language of Rule 98 was unintelligible, unclear, and imprecise, it would not be hard to see why recourse to the jurisprudence of other international criminal tribunals for guidance may be necessary or prudent. In this context, it must readily be acknowledged that our sister international criminal tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have had occasion to interpret provisions similar to Rule 98. Hence, it would be proper, in the interest of consistency and coherence in building a solid and intelligible body of international criminal jurisprudence to have recourse, persuasively, to their case-law authorities to unravel the semantic difficulty created by the perceived or discovered ambiguity. Such persuasive value, however, will depend on how closely related the contexts of the statutory provisions or rules are, linguistically and legally. Evidently, this is an issue that requires careful discernment and judiciousness in resolving, recognizing that sometimes perceived linguistic and legal affinities may turn out to be superficial.

11. We have held in our Unanimous Decision[6] that the legal formula of "insufficiency of evidence to sustain a conviction" as prescribed by Rule 98 *bis* of the Rules of Procedure and Evidence of the ICTR and that of "no evidence capable of supporting a conviction" are not different in context. In effect, our reasoning is that in context the two concepts are linguistically and legally close. But this merely enhances the persuasive value of the principle in *Prosecutor v. Kamuhanda*[7] only for the purposes of supporting the plain and unambiguous meaning interpretation given to our own Rule 98. However, not to have recourse to the jurisprudence of other tribunals where the meaning of a statutory provision or rule is plain and unambiguous does not infringe any express or implied doctrine of judicial amity or comity, a key feature of the evolving international judicial culture. This leads me to the analytical aspect.

IV. THE ANALYTICAL ASPECT

12. My approach in so far as the analytical aspect is concerned is, again, essentially to reinforce the analytical foundation of the main Decision in so far as it correctly enunciates the applicable legal

[5] To ignore the plain and unambiguous language of a statutory provision or a rule or other regulatory instrument in search of some presumed legislative intent from extrinsic sources, whether from rules of construction, legislative history, or other extrinsic sources, is like raising a cloud of dust and then complain that one cannot see.
[6] Page. 9 para. 47.
[7] ICTR-99-54-A-T, 20 August 2002.

standard stipulated by Rule 98 as that of whether the evidence adduced by the Prosecution is one that is capable of supporting a conviction. Accordingly, I postulate that from its plain and unambiguous meaning, derived from its context and purpose, Rule 98 is restrictive in nature and scope in that it authorises a limited judicial inquiry, at this stage of the trial, merely as to whether the evidence adduced by the Prosecution, at the close of its case, is evidence which is legally capable of supporting a conviction on one or more counts in the indictment. Hence, I opine that by no stretch of the legal imagination can it be plausibly maintained that the existing Rule 98, in contrast to the old Rule 98, does admit of the option, at this stage, of a judicial evaluation of the credibility or reliability of the evidence with a view to determining the ultimate question of the guilt or innocence of the Accused beyond reasonable doubt. Unquestionably, such an option will be both premature and pre-emptive, and, decidedly, at variance with a core feature of the criminal adjudicatory process.

13. Evidently, from its plain and unambiguous sense, the test mandated by Rule 98 is whether the prosecution's evidence is such that it is not legally capable of supporting a conviction on one or more counts. A variation of the same theme is whether the said evidence is legally incapable or inefficacious in supporting a conviction. In effect, that is the controlling concept in determining the merits of a Motion for Judgment of Acquittal pursuant to Rule 98. The Rule admits of no requirement that the tribunal of fact be satisfied beyond reasonable doubt of the guilt of the Accused at this stage. To import the reasonable doubt formula into the Rule 98 equation is tantamount to a procedural incongruity.

14. Any adoption of a formula incorporating the notion of reasonable doubt in the process of interpreting the existing Rule 98 does come perilously close to a veiled application of the familiar concept of '*an unreasonable verdict or one that cannot be supported having regard to the evidence*', relevant to the appellate phase of criminal proceedings in common law jurisdictions. In that sphere, one approach is to treat the concepts of 'unreasonableness' and 'unsupportability' as syntactically synonymous. Such an approach is logically mistaken because it rests on the assumption that "unreasonableness" and "unsupportability" are necessarily mutually inclusive. This is not so. It is clearly legally conceivable that evidence may be unreasonable because it manifests some grave logical inconsistency or lack of conformity with reason whereas evidence which is incapable of supporting a conviction may be evidence that is manifestly defective or weak without necessarily reflecting a logical flaw. In that sense, they may properly be regarded as conceptual disjuncts.

15. Perhaps, it may be useful to shed some further light on the issue by alluding to the familiar distinction between a question of law and a question of fact. In that sense, it seems to me beyond

argument that whether on the evidence as it stands, at the close of the prosecution's case, the Accused could be lawfully convicted is a matter of law. Unless there is some rule of law to the contrary, a ruling that there is evidence capable of supporting a conviction has no legal effect upon the persuasive burden of proof which rests throughout upon the prosecution. Where a court has ruled that the prosecution's evidence is capable of supporting a conviction, the Accused has the legal option of calling or not calling evidence. Where he exercises or does not exercise that option, the question to be decided, in the ultimate analysis, by the court is whether having regard to the totality of the evidence before it, it is satisfied beyond reasonable doubt that the Accused is guilty. This is question of fact.[8] Finally, it is worth emphasizing that by electing to call evidence, an accused person does not thereby relieve or diminish the burden on the prosecution to prove its case beyond reasonable doubt.

V. CONCLUSION

15. Based on the foregoing considerations, I, accordingly, subscribe to the main Decision in every respect, and by this Separate and Concurring Opinion, reinforce the analytical foundation of the reasoning as to the correct applicable legal standard prescribed by Rule 98.

Done in Freetown, Sierra Leone, this 21st day of October, 2005

Hon. Justice Bankole Thompson

[Seal of the Special Court for Sierra Leone]

[8] *May v. O'Sullivan* (1995) 92 CLR 654 for this rationalization. This rationalization is implicit in both statutory and case-law authorities found in the criminal procedural laws of most common law jurisdictions, including the Sierra Leone - See sections 192, 193, 194 of the Criminal Procedure Act No. 32 of 1965 of Sierra Leone.