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SCSL-04-14-A
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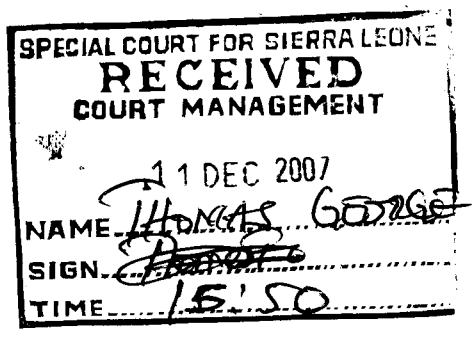
SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBERS

Before: Hon. Justice George Gelaga King, President
Hon. Justice Emmanuel Ayoola
Hon. Justice Renate Winter
Hon. Justice A. Raja N. Fernando
Hon. Justice J. Kamanda

Registrar: Mr. Herman Von Hebel

Date Filed: 11th December 2007



THE PROSECUTOR **Against** **MOININA FOFANA**
ALLIEU KONDEWA

Case No. SCSL-04-14-A

Public

Kondewa Appeal Brief

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I. INTRODUCTION

1. Pursuant to Rule 111 of the Rules of Procedure and Evidence ("the Rules"), Counsel for Allieu Kondewa (the "Defence") file this Appeal Brief containing the submissions of the Defence in its appeal against the Judgement of the Trial Chamber dated 2 August 2007, Case No. SCSL-04-14-T, *Prosecutor v. Moinina Fofana and Allieu Kondewa.*[1]

2. The Defence set out six discrete grounds of appeal in the Kondewa Notice of Appeal[2] filed on 23 October 2007. This Appeal Brief will address each of those grounds.

II. STANDARD OF REVIEW ON APPEAL

3. The standard of review to be applied by the Appeals Chamber in an appeal against a judgement of a Trial Chamber is well established in the case law of the International Criminal Tribunal for the Former Yugoslavia ("ICTY")[3] and the International Criminal Tribunal for Rwanda ("ICTR").[4] It is submitted that the same standards of review are applicable under the Rules and the Statute of the Special Court (the "Statute").

4. Rule 106 of the Rules of Procedure and Evidence provides the rule for general provisions on the appeal procedure. Rule 106 states:

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[1] *Fofana and Kondewa*, SCSL-04-14-785, Judgement, 2 August 2007 (the "Trial Chamber Judgement").
[2] *Fofana and Kondewa*, SCSL-04-14-A-800, Kondewa Notice of Appeal Against Judgment Pursuant to Rule 108, 23 October 2007 (" Defence Notice of Appeal"). Please note that the Defence has inverted the order of Grounds 2 and 3 as set out in the Defence Notice of Appeal so that this Appeal Brief follows a more logical sequence.
[3] See, for example, *Nikolić* Appeal Judgement, paras. 6-9; *Blaškić* Appeal Judgement, paras. 8-24; *Kordić and Cerkez* Appeal Judgement, paras. 13-20. Please note: These citations and all others in this Appeal Brief are in abbreviated form. Full references to these citations are in Appendix A.
[4] See, for example, *Akayesu* Appeal Judgement, para. 178; *Kayishema* Appeal Judgement, para. 320; *Semanza* Appeal Judgement, paras. 7-11.

A. Pursuant to Article 20 of the Statute, the Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:

(i) A procedural error;
(ii) An error on a question on law invalidating the decision;
(iii) An error of fact which has occasioned a miscarriage of justice.

B. The Appeals Chamber may affirm, reverse, or revise the decisions taken by the Trial Chamber.

C. The rules of procedure and evidence that govern proceedings in the Trial Chamber shall apply as appropriate to proceedings in the Trial Chamber.

5. Article 20 of the Statute similarly states sections (A) and (B) of Rule 106 and also adds:

> 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. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone.

6. A party alleging an error of law or fact must show that the alleged error invalidates the decision or occasions a miscarriage of justice.[5] As to errors of law, if the Appeals Chamber finds that an alleged error arose from the application of an incorrect standard applied by the Trial Chamber, the Appeals Chamber may articulate the correct legal standard and review the relevant findings of the Trial Chamber accordingly.[6] As to errors of fact, the standard is the standard of reasonableness – whether the conclusion of guilt beyond reasonable doubt is one which no reasonable trier of fact could have reached.[7] Thus, "[w]hen the evidence relied on by the Trial Chamber could not have been accepted by any reasonable

[5] *Rutaganda,* Appeal Judgement, para. 18.
[6] *Blaškić*, Appeal Judgement, para. 15.
[7] *Blaškić* Appeal Judgement, para. 16; *Tadić* Appeal Judgement, para. 64; *Furundžija* Appeal Judgement, para. 37; *Aleksovski* Appeal Judgement, para. 63; *Čelebići* Appeal Judgement, paras. 434-435; *Akayesu* Appeal Judgement, para. 178; *Museuma* Appeal Judgement, para. 17.

person"[8] or where "the evaluation of the evidence is 'wholly erroneous'"[9] that the Appeals Chamber can substitute its own finding for that of the Trial Chamber.[10]

[8] *Bagilishema* Appeal Judgement, para. 11 citing *Akayesu* Appeal Judgement, para. 232 (citing *Tadić* Appeal Judgement, para. 64). See also *Kunarac* Appeal Judgement, paras. 39 and 40; *Kupreskic* Appeal Judgement, paras.30 and 32; *Čelebići* Appeal Judgement, para. 435.
[9] *Kunarac* Appeal Judgement, para. 39 citing *Kupreskic* Appeal Judgement, para. 30.
[10] *Bagilishema* Appeal Judgement, para. 11 citing *Akayesu* Appeal Judgement, para. 232 (citing *Tadić* Appeal Judgement, para. 64). See also *Musema* Appeal Judgement, para. 18; *Kunarac* Appeal Judgement, paras. 39 and 40; *Kupreskic* Appeal Judgement, paras. 30 and 32; *Čelebići* Appeal Judgement, para. 435.

III. APPEAL GROUND ONE

7. The Defence's first ground of appeal is:

> The majority of the Trial Chamber erred both in law and in fact in finding that the Prosecution had proven beyond a reasonable doubt that Kondewa was individually criminally responsible as a superior, pursuant to Article 6(3), for the crimes committed in Bonthe Town and the surrounding areas under Counts 2,4,5 and 7.

Trial Chamber's Findings

The Law

8. The Trial Chamber sets out the law applicable to individual criminal liability under Article 6(3) of the Statute at paragraphs 235 – 250 of the Trial Chamber Judgement. The Trial Chamber correctly identifies the three elements that the Prosecution's evidence must satisfy to invoke individual responsibility under Article 6(3). These three elements are:

> 1) The existence of a superior-subordinate relationship between the superior and the offender of the criminal act;
> 2) The superior knew or had reason to know that the criminal act was about to be or had been committed; and
> 3) The superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the offender thereof.[11]

9. The Trial Chamber also further correctly identified the "effective control test" as the appropriate test to apply in making a determination as to the existence of a superior-subordinate relationship,[12] acknowledging the well-established jurisprudence from the *ad hoc* tribunals.[13]

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[11] Trial Chamber Judgement, para. 235.
[12] Trial Chamber Judgement, para. 238.
[13] See, for example, *Blaskić* Trial Judgement para. 295; *Stakic* Trial Judgement para. 449 citing *Čelebići* Trial Judgement para. 378; and *Čelebići* Appeal Judgement paras. 192 and 296.

Trial Chamber's Factual and Legal Findings

10. The Trial Chamber sets out its factual findings regarding events occurring in Bonthe District at paragraphs 534 – 565 of the Trial Chamber Judgement. These paragraphs set out the Prosecution's evidence with respect to a number of criminal acts in Bonthe District.

11. At paragraphs 867 – 903 the Trial Chamber sets out its findings regarding the responsibility of Kondewa pursuant to Article 6(3) for those acts. These findings are set out in greater detail below.

Defence Submissions

12. The Defence submits that the Trial Chamber failed to correctly apply the "effective control" test to establish the existence of a superior-subordinate relationship between Kondewa and the perpetrators of criminal acts in Bonthe Town and therefore erred in law in finding Kondewa responsible under Article 6(3) for Counts 2, 4, 5 and 7.

Introduction to Superior Responsibility

13. The standard on the application of superior responsibility[14] is well established by the jurisprudence of the *ad hoc* tribunals. The case law of the ICTR and the ICTY demonstrates the adoption of a rigorous approach with respect to the legal requirements to satisfy a finding of command responsibility, such that very few individuals have been convicted under this mode of liability.[15]

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[14] "Superior responsibility" is used interchangeably with "command responsibility" in recognition that both military commanders and civilians can be found to be in superior-subordinate relationships.

[15] In a recent article on command responsibility, the point is made that of the 99 accused persons who have faced trial before the ICTY and the ICTR, 54 were prosecuted on a theory of command responsibility and only 10 have been convicted [as of April 2007]. See Beatrice I. Bonafe, Finding a Proper Role for Command Responsibility, Journal of International Criminal Justice 5 (2007), 602. An updated Defence review of the case law found 12 cases from the *ad hoc* tribunals where liability under command responsibility was established. Four of these cases are currently under appeal. Please see Appendix B for details on each of these cases.

14. An analysis of the case law demonstrates that the benchmark for establishing the superior-subordinate relationship has been set very high. The "effective control" test demands a high level of evidence and a rigorous analysis of such evidence to show that an accused had effective control over the subordinates and the actual possession of powers of control over the actions of subordinates.[16] Such "effective control" must be established beyond a reasonable doubt.[17]

15. As the Trial Chamber noted, the possession of *de jure* powers is not regarded by the *ad hoc* tribunals as sufficient for the finding of command responsibility if such powers are not accompanied by "effective control."[18] The Trial Chamber also correctly noted that an individual having substantial influence does not support a finding of exercising command responsibility.[19]

16. With civilian superiors, the case law further demonstrates that establishing a superior-subordinate relationship is much more difficult to prove given the general absence of formal powers of control similar to those of military commanders. Again the application of this rigorous approach is seen in the number of cases where findings of command responsibility have been rejected by the tribunals precisely due to the fact that the superior-subordinate relationship could not be established beyond a reasonable doubt.[20]

17. The Defence submits that the Trial Chamber's finding of individual criminal responsibility pursuant to Article 6(3) is not consistent with the restrictive and

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[16] *Čelebići* Trial Judgement, para. 370.
[17] There have been many cases at the *ad hoc* tribunals where military commanders have been found not guilty under command responsibility because, despite their authority in an established chain of command, their "effective control" over their subordinates could not be established beyond a reasonable doubt. See, for example, *Kunarac* Trial Judgement; *Kvocka et al.* Trial Judgment; *Blaskic* Appeal Judgement; *Kordić and Cerkez* Appeal Judgement; *Blagojević and Jokić* Trial Judgement; *Halilović* Trial Judgement; *Limaj et al.* Trial Judgement; and *Hadzihasanovic* Trial Judgement.
[18] Trial Chamber Judgement, para. 238 citing *Čelebići* Appeal Judgement, para. 197 and *Kayishema and Ruzindana* Appeal Judgement, para. 294.
[19] Trial Chamber Judgement, para. 238 citing *Čelebići* Appeal Judgement, para. 266.
[20] The Defence review of the *ad hoc* tribunal case law (Appendix B) shows that with respect to only 4 civilians indicted by the ICTY and the ICTR has the evidence satisfied the standard of the "effective control" test to find a superior-subordinate relationship.

highly analytical approach of the evidence taken by *ad hoc* tribunals in applying this form of liability. Specifically the Defence submits that in finding a superior – subordinate relationship the Trial Chamber has significantly and unacceptably lowered the benchmark that has been well established in the international criminal case law. In failing to correctly apply the "effective control" standard set by the jurisprudence, the Trial Chamber erred in law.

Findings of the Trial Chamber on the Existence of a Superior-Subordinate Relationship

18. The findings as to the existence of a superior-subordinate relationship are set out in paragraphs 868 – 873 of the Trial Chamber Judgement.

19. The Trial Chamber concludes at paragraph 868 that on the evidence it is established beyond reasonable doubt that there was a superior-subordinate relationship between Kondewa and three Kamajor commanders who were in Bonthe: Morie Jusu Kamara (District Battalion commander), Julius Squire and Kamajor Baigeh. Kondewa had authority and control over the actions of these commanders and therefore over the actions of all the Kamajors under their control.[21] The Trial Chamber then states that Morie Jusu Kamara was the overall commander for the Bonthe attack and that he exercised command over Julius Squire, Baigeh, Rambo Conteh and Lamin Gbokambama as well as the Kamajors under their immediate command.[22]

20. The Trial Chamber states that Kondewa exercised "effective control" and had the legal and material ability to give orders by reason of his position in the "High Command" of the CDF and the authority he enjoyed as High Priest in Sierra Leone and particularly in Bonthe. This "effective control" is said to have existed from as early as August 1997.[23] The Trial Chamber also states that it finds that Kondewa had the legal and material ability to prevent the commission of criminal acts by his

[21] Trial Chamber Judgement, para 868.
[22] Trial Chamber Judgement, para 871.
[23] Trial Chamber Judgement, para 869.

subordinate, Morie Jusu Kamara and others and to punish them.[24] On this evidence a superior-subordinate relationship is said to have been established beyond a reasonable doubt.

21. In reaching this conclusion, the Trial Chamber unjustifiably disregarded the evidence of Albert Nallo who testified that Kondewa did not at anytime during the war "command any troops"[25] even though the Trial Chamber had at page 279 of its Judgement put so much credence on the testimony of the said witness by concluding that "Witness Nallo was, in the Chamber's view, the single most important witness in the Prosecution evidence on the alleged superior responsibility of the Accused, particularly Fofana ..... The Chamber has found that he was in regular communication with both the senior leadership of the organisation and the Kamajors fighting on the ground ..... In short, he was in a unique position".

Jurisprudence on the "Effective Control" test

22. The evidentiary standard required to satisfy the test of "effective control" is well established in the jurisprudence of the ICTY and the ICTR. Evidence upon which a finding of effective control has been made include, for example:

- Evidence of direct instruction to commit criminal acts;[26]
- Evidence of actual and repeated giving of orders to subordinates;[27]
- Evidence of actual and persistent punishment of subordinates who did not carry out orders given by the superior with the result that subordinates obeyed

[24] Trial Chamber Judgement, para 870.
[25] Transcript of 15th March 2005, Albert Nallo page 42 lines 25-29.
[26] See for example, *Kajelijeli* Appeal Judgement, para 90, in which the Appeal Chamber confirms the Trial Chamber's finding that there was clear evidence that the Accused both instructed the Interahamwe to kill Tutsis and supervised the attacks.
[27] See for example, *Kayishema and Ruzindana* Trial Judgement, para 502: "In the Bisesero area, for example, witness W testified that Kayishema was directing the massacre of those Tutsi who had sought refuge at the Cave. Witness U, at Karongi Hill, described to the Trial Chamber how Kayishema arrived at this location leading a number of soldiers, gendarmes, and armed civilians, addressed them by megaphone and then instructed them to attack. Upon these orders, the massacres began. These facts have been proven beyond a reasonable doubt."

the superior's instructions and were answerable to him for their acts.[28]

23. Of the 12 persons to date who have been convicted on the basis of command responsibility in the *ad hoc* tribunals, it is noteworthy that in almost every case the accused operated under an established hierarchy of command. The clearest examples of this are the 4 military commanders who have been found criminally liable under the principle of command responsibility.[29] The military, by its nature, requires a highly formalized structure of command in which superiors can control and order their subordinates absolutely and without question, and so it is unsurprising that those in formal positions of military command can be found to be in a position of effective control over those operating below them in the hierarchical structure. Those convicted had the material ability not only to prevent their subordinates from carry out criminal acts by issuing orders to that effect, but also to employ formal military disciplinary procedures to punish any perpetrators of criminal acts.[30]

24. 3 individuals out of the 12 held the position of prison warden or commander of a prison camp.[31] These positions can be analogised to that of a military commander in that those convicted were operating at the highest level in an established chain of command and discipline, in which subordination, observance of orders from *de facto* superiors and punishment in default of such obedience were the accepted

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[28] See, for example, *Aleksovski* Trial Judgement, para. 105: "The evidence moreover showed that the accused could initiate disciplinary or criminal proceedings against guards who committed abuses. This would take the form of the accused reporting to the military police commander and the president of the Travnik military tribunal, who were competent to take the necessary measures...Para. 106: "... it has been proved, as regards the activities within the prison, that the guards obeyed the accused's instructions and were answerable to him for their acts."

[29] The four military commanders are: 1) Blaškić (*Blaškić* Appeal Judgement), *2)* Orić (*Orić* Trial Judgement), *3)* Strugar (*Strugar* Trial Judgement) and *4)* Muyunyi (*Muyunyi* Trial Judgement).

[30] See, for example, *Blaškić* Appeal Judgement para. 84: "The Appeals Chamber also takes note of the *Regulations concerning the Application of International Law to the Armed Forces of SFRY* ...which clearly sets out command responsibility for the failure to punish as a separate head of responsibility. The regulations should have put a commander such as the Appellant on notice of his duty under international law as recognised in the domestic law of the State in whose territory he was to serve as a commander of the armed forces of one of the parties to the armed conflict."

[31] The 3 are: 1) Aleksovski (*Aleksovski* Appeal Judgement), 2) Krnojelac (*Krnojelac* Appeal Judgement), 3) Mucic (*Delalic et al.* Appeal Judgement).

norm. Within the formalised structure of the prisons the accused were able to deploy similar methods of control and punishment of those below them as are found in military contexts.[32]

25. Further, prisons and prison camps are contained spaces and it was clear that within that space the Accused held the highest position of control. In cases where superiors have been found to have effective control over subordinates within an enclosed space, once the evidence moved to events outside of that contained space, the Tribunals have held that the effective control ceased.[33]

26. In addition to these 7 people who fall into the category of military or military-like commanders, one civilian whose was found to have exercised effective control over those within his command can also be analysed in a military context. In this case, the Accused was found to be a *de facto* commander of the Interahamwe and exercised the effective powers of a military commander in organising, supervising and directing the Interahamwe to massacre Tutsis.[34]

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[32] See, for example, *Krnojelac* Trial Judgement, para. 97: "The position of prison warden, in the ordinary usage of the word, necessarily connotes a supervisory role over all prison affairs... The warden held the highest position of authority in the KP Dom and it was his responsibility to manage the entire prison."

[33] See, for example, *Delalic et al.* Trial Judgement, para 142: "The question of who exercised control over the Celebici prison-camp has not been fully clarified and it appears that various groups were involved in its administration. It must be noted that the whole compound was utilised for the accommodation of several units of the MUP and HVO and later the TO, as well as, it would appear, for the storage of some equipment. The part of the compound used for the detention of prisoners seems to have been somewhat separate and security for the prison-camp was separate from that for the barracks in general...(para *752)* It seems clear from the Prosecution evidence, that Zdravko Mucic exercised *de facto* authority over the Celebici prison-camp since about the end of May 1992. There is evidence that he was in authority during the middle of June when Rale Musinovic was commander of the barracks. Mr. Mucic was commander of the prison-camp. As noted at the beginning of this Judgement, **there is a distinction between the Celebici compound as a whole and the Celebici prison-camp**." (emphasis added). See also, *Musema* Trial Judgement para. 881: Although Musema was found to be liable as a superior for the criminal acts of employees of the Tea Factory, no superior-subordinate relationship was found to exist with members of the population of Kibuye Prefecture. Despite a finding that Musema wielded considerable power in the region, the Trial Chamber did not find that Musema exercised *de jure* power and *de facto* control over those individuals.

[34] *Kajelijeli* Trial Judgement, para. 780. Although on appeal the Accused's conviction under Article 6(3) was overturned because he was also found to have direct responsibility under Article 6(1), his responsibility as a superior was taken into account as an aggravating factor at sentencing.

27. Only 4 persons occupying truly civilian positions have been convicted under the principle of command responsibility. However, even those civilians occupied positions of authority which entailed them operating at a high level in a formalised hierarchy of authority and control. Two of the civilians found to be in relationships of effective control with their subordinates occupied high-level political positions within well-structured organisations.[35] In both cases the evidence indicated that those operating at a lower level within the organisation acted only on orders from the accused as their superior, that the accused was aware of this and that the accused in this way directly controlled the acts of the perpetrators of the criminal acts.

28. The final two persons convicted on the basis of command responsibility were both the directors of enterprises, one a radio station[36] and one a publicly owned Tea Factory.[37] As such, both had effective control of those beneath them in that there was a formalised employment structure in place. The Accused therefore had the ability to order those beneath them, as their employees, not to carry out criminal acts and when they did, the ability to punish them through the disciplinary procedures of the company or organisation.

29. There is no precedent in the *ad hoc* tribunals jurisprudence of an individual being held criminally liable on the basis of command responsibility where the position of the accused did not fall within a hierarchy or chain of command in which the individual's position within that chain of command referred directly to their ability to issue orders and to control through their decisions the actions of those beneath them.

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[35] The two are: 1) *Kayishema* (PDC Prefect of Kibuye Prefecture – Prefect is the highest local representative of the government) *Kayishema and Ruzindana* Appeal Judgement; 2) *Barayagwiza* (President of the Coalition for the Defence of the Republic (CDR) at the national level), *Nahimana et al.* Trial Judgement.

[36] *Nahimana* (Office-holding member of governing body of RTLM radio station), *Nahimana et al.* Trial Judgement.

[37] *Musema* (Director, Gisovu Tea Factory - Appointed by presidential decree), *Musema* Appeal Judgement.

30. There are also no cases in which influence gained through a reverence on the part of those around them has been held to constitute a relationship of effective control. No doubt this is because in the absence of a clear chain of command in which real decisions are made, orders given, and punishments handed out, it is almost impossible to establish whether a general sense of respect for an individual in fact translates into an ability to control or to punish on the part of that individual to the degree required to establish "effective control".

31. In the case of civilians, evidence of actual instances where an individual has given orders to his or her alleged subordinates, or has instigated disciplinary procedures and ordered punishments of insubordinates are therefore of paramount importance in establishing the existence of a relationship of "effective control".

32. Appendix B provides a detailed summary chart of these 12 cases in the ICTY and ICTR where superior-subordinate relationship has been established and liability under command responsible attached. Specifically this Chart demonstrates the level of evidence used to establish the existence of "effective control". The Defence submits that the findings of the Trial Chamber in establishing that Kondewa had a superior-subordinate relationship do not meet this evidentiary standard, that the Trial Chamber did not correctly apply the "effective control" test and therefore the Trial Chamber erred in law in finding responsibility of Kondewa pursuant to Article 6(3) of the Statute.

Defence Submissions on Trial Chamber's Findings

33. The Defence submits that great care must be taken in assessing the evidence to determine command responsibility in respect of civilian lest an injustice is done.[38] A review of the evidence relied upon by the Trial Chambers makes it clear that Kondewa's authority over the Kamajors in Bonthe District, including both those specifically named in the judgement and those who are not, falls so far short of what the jurisprudence had previously found to amount to a relationship of "effective control" that it cannot be reconciled with a finding of responsibility

[38] *Kordić and Cerkez* Trial Judgement, para. 840.

under Article 6(3). The evidence referred to by the Trial Chamber in support of its finding of a superior-subordinate relationship between Kondewa and the Kamajors in Bonthe Town, and in particular with Morie Jusu Kamara, Squire and Baigeh is substantially less conclusive than any of the jurisprudence on the establishment of a superior-subordinate relationship requires.

34. The Defence submits that the Trial Chamber erred in law when it concluded that the totality of the evidence proved beyond a reasonable doubt that the "effective control" standard had been met, and that Kondewa was in fact able to prevent the Kamajors from perpetrating criminal acts, or to punish them when they did commit criminal acts. In sum, the Trial Chamber failed to establish a superior-subordinate relationship.

35. This failure to establish a superior-subordinate relationship stems from the underlying evidence and the Trial Chamber's wholly erroneous evaluation of such evidence. The weakness of such evidence as the foundation for any finding beyond reasonable doubt that Kondewa exercised command responsibility is set out below.

1) No evidence of any form of a relationship between Kondewa and Kamara, Squire or Baigeh

36. The Trial Chamber specifically identifies the existence of a superior-subordinate relationship between Kondewa and three Kamajor commanders: Kamara, Squire and Baigeh. The Trial Chamber states that it finds beyond a reasonable doubt that Kondewa had a superior-subordinate relationship with these three individuals and by extension with the Kamajors that were under these three's command.

37. A thorough review of the factual evidence cited by the Trial Chamber in reaching its legal findings[39] on the Article 6(3) responsibility of Kondewa can find no evidence that establishes any sort of a relationship between Kondewa and Kamara, Squire and Baigeh. There is no evidence that Kondewa had ever met any of these

[39] The Trial Chamber states at paragraph 856 that it is relying on facts in paragraphs 721 (i) to (viii) and 765 (i) to (iii), Sections V.2.2., V.2.6.2 and V.2.6.3 as well as paragraphs 856 (i) to (xii).

three, or that he had even spoken to them, let alone gave any sort of an order or attempted to prevent them from acting in a particular way. There is no evidence that there was ever any sort of communication between Kondewa and these three individuals. There is no evidence that Kondewa even knew who Kamara was, let alone knew that he was the District Battalion Commander in Bonthe District.

38. The extent of the evidence that demonstrates any sort of a connection between Kondewa and his alleged subordinates is the evidence of Squire stating that "he refused to accept instructions...unless they came from Norman or Kondewa."[40] This statement at most shows an internally held view on the part of Squire but there was no evidence of Squire ever receiving any instructions from Norman or Kondewa, let alone evidence to show that Squire would in fact only obey such instructions from Norman or Kondewa. This evidence is hardly the basis for concluding the existence of a superior-subordinate relationship.

39. In the absence of any evidence of any relationship between Kondewa and these three commanders, there was no basis on which a reasonable trier of fact could have established a superior-subordinate relationship.

40. The Trial Chamber further erred in finding that Kondewa had, by extension, a relationship with any of the Kamajors in Bonthe, including Rambo Conteh and Lamin Gbokambama, and other unidentified persons.

41. Although it is possible for a superior to be held individually criminally liable for the criminal acts of second-level subordinates, or those one layer removed from the superior, this liability always flows from the superior's relationship of effective control with his direct subordinates, to whom the second level subordinates are in turn directly subordinated. Second level subordinates therefore may be unidentified to the superior, but direct subordinates must be identifiable.[41] If it cannot be shown beyond a reasonable doubt that Kondewa had a relationship of effective control with any direct subordinates who were identifiable to him, including Kamara,

[40] Trial Chamber Judgement, para 856 (xii).
[41] *Strugar* Trial Judgement, para. 363.

Squire and Baigeh, then it logically follows that no relationship of effective control with any second level or unidentified subordinates could have existed.

42. The Defence submits that no reasonable trier of fact could establish a superior-subordinate relationship existed on the paucity of evidence in this instance. For the Trial Chamber to suggest that the evidence established a superior-subordinate relationship on this basis is patently unreasonable.

2) No evidence that Kondewa had authority and control over these Kamajor Commanders

43. The Trial Chamber further stated that on the evidence it had found that Kondewa had authority and control over the actions of these Kamajor commanders.[42]

44. In determining that Kondewa had authority and control over the Kamajors in Bonthe District, the Trial Chamber refers to evidence of an event that occurred in August 1997.[43] This evidence relates to a delegation from Bonthe who went to meet Kondewa in Tihun. From this evidence the Trial Chamber concludes that Kondewa had authority to order investigations for misconduct and hold court hearings, and his ability to threaten the Kamajors with a 'terrible death' if they lied to him.[44]

45. First, this evidence relates to an event that falls outside the time frame of the Indictment[45] and is therefore irrelevant to establishing "effective control". As stated by the Trial Chamber itself, "effective control" must be established at the time

[42] Trial Chamber Judgement, para. 868.
[43] Trial Chamber Judgement, para 869. The Judgement sets out this August 1997 event more fully at paragraphs 297-301 of the judgement. Further, at paragraph 856 (i) and (iv) the Trial Chamber again outlines these facts upon which it relies to make its legal findings on individual criminal responsibility pursuant to Article 6(3).
[44] Trial Chamber Judgement, para. 869, referring to factual evidence in paras. 300 and 301.
[45] *Prosecutor v Norman, Fofana and Kondewa*, Indictment, SCSL-2004-14-PT-003, 5 February 2004 ("Indictment"). The time frame of the Indictment is October 1997 – December 1999.

when the acts charged in the indictment were committed.[46] This evidence does not establish "effective control" over alleged subordinates 6 months later. The Defence submits that the evidence wholly fails to show that the Kamajors who committed the offences charged in the indictment were under the effective control of Kondewa at the time they committed the offences, a fundamental legal requirement for establishing a superior-subordinate relationship.

46. The Trial Chamber also makes a number of statements in paragraphs 868 and 869 relating to Kondewa's status amongst the Kamajors. The Trial Chamber finds that "by virtue of his de jure status as High Priest and de facto status as a superior to these Kamajors in that District, Kondewa exercised effective control over them." The Defence submits that in addition to there being no evidence that Kondewa's *de facto* status with regards the Kamajors was that of a superior, there is also no evidence that his *de jure* status as High Priest enabled him to exercise "effective control" over the Kamajors.[47]

47. Elsewhere in the judgement the Trial Chamber determines that the command Kondewa had over the Kamajors by virtue of his position as High Priest did not amount to a relationship of "effective control".[48] As there was no evidence to suggest otherwise, it is unclear how the Trial Chamber determined that Kondewa's status as High Priest gave him any higher degree of authority in Bonthe.

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[46] Trial Chamber Judgement, para. 240 "In order to hold a commander liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander." citing *Halilović* Trial Judgement, para. 61.

[47] The Trial Chamber further states at paragraph 346 "Because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country". However, the level of "command" referred to clearly is not sufficient to constitute "effective control", as elsewhere the Trial Chamber finds that "[T]his was inconclusive to establish beyond reasonable doubt that Kondewa had an effective control over the Kamajors' (Trial Chamber Judgement, para. 853).

[48] See, for example, Trial Chamber Judgement, para. 721(vii) – '"The Kamajors looked up to Kondewa and admired the man with such powers. The believed he was capable of transferring such powers to protect them. By virtue of these powers Kondewa had command over the Kamajors in the country". At para. 745 this is found insufficient to prove the existence of a superior-subordinate relationship.

48. The Trial Chamber further states that Kondewa himself recognised his authority over the Bonthe area when he refused "to give any areas under his control to a military government but to the democratically elected Government of President Ahmad Tejan Kabbah."[49] This statement is nothing more than a reiteration of the entire *raison d'etre* of the CDF and not evidence of any weight towards establishing Kondewa's actual "effective control" over subordinates.

3) No evidence of Kondewa giving orders

49. The Trial Chamber also states that Kondewa had the "legal and material ability to issue orders to [Morie Jusu] Kamara"[50] and this was further evidence towards his "effective control".

50. The Defence submits that there is no evidence to demonstrate any ability on the part of Kondewa to issue orders to Kamara. There is also no evidence to show that he ever actually issued any order to Kamara. Additionally, there was no evidence in the entire judgement to demonstrate that Kondewa ever, to anyone in any geographic area, directly gave an order during the relevant time frame of the Indictment.

51. A review of the totality of the evidence reveals the following:

(i) paragraph 295-301 relates factual findings of Kondewa giving orders to mount checkpoints, sending delegations and setting up a "court sitting" in Tihun around July-August 1997, some six months before the criminal acts of Kondewa's alleged subordinates took place;

(ii) paragraph 345 refers to Kondewa's role as High Priest in making decisions as to who was to go into combat and who was not, though equating it to a "fortune teller" rather than a giving of orders;

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[49] Trial Chamber Judgement, para. 869.
[50] Trial Chamber Judgment, para. 868.

52. The only other nominally relevant evidence cited by the Trial Chamber in respect of Bonthe District is evidence which in fact demonstrates that Kondewa did not have "effective control". The Trial Chamber states, "[t]he Chamber observes that on 1 March 1998 Kondewa came to Bonthe Town himself leading the third delegation. At the meeting held by Kondewa in Bonthe Town on the same day he publicly acknowledged that he had not allowed his men to enter Bonthe but that they had not listened to his advice and had done what they had done."[51]

53. As the ICTY has stated, it is not just the fact that orders were made, it is whether they were acted on which is an indicator of "effective control".[52] Clearly the fact that the alleged subordinates did not listen to Kondewa demonstrates that he did not have effective control. It is unclear how the Trial Chamber determined that this evidence was further weight towards establishing a superior-subordinate relationship and in its reliance on this evidence was wholly erroneous.

4) No ability to prevent the commission of criminal acts or to punish subordinates

54. The Trial Chamber also concludes that "effective control" is evident in that "Kondewa had both the legal and material ability to prevent the commission of criminal acts by his subordinate Mori Jusu Kamara and other subordinates and to punish them for those crimes."[53]

55. Again there is no evidence on which to base this statement. There is no evidence that any Kamajor was ever actually punished by Kondewa. The only evidence available is in paragraph 300, in which it is suggested that if a lie had been told to Kondewa, 'those responsible for the lie would experience a terrible death'. However, this does not provide evidence that such a punishment would be administered or ordered by Kondewa, or that he would be instrumental in bringing it about. This piece of evidence also falls outside the time frame of the indictment

[51] Trial Chamber Judgement, para. 876.
[52] *Kordić and Cerkez* Trial Judgment, para. 421.
[53] Trial Chamber Judgement, para. 870

and as such is irrelevant to establishing effective control at the time that the crimes were committed.

56. The second potential piece of evidence available on this matter, that Kondewa ordered a court sitting in Gambia, also falls outside the scope of the Indictment.[54] In addition, the evidence does not relate to any of the named Kamajors with whom Kondewa is alleged to have had a superior-subordinate relationship with, and as such does not support a finding that such a relationship existed.

57. Recognising the role of Kondewa as the CDF High Priest cannot automatically result in the inference of powers where there is no evidence to base such an inference nor evidence on which to concretely satisfy the "effective control" test. Further such a finding contradicts an earlier finding by the Trial Chamber who found at paragraph 721 (ii), in its factual findings on Base Zero, that "Commanders' authority to discipline their men on the ground was entirely their own." Again, there is no evidence to suggest that this was different in the Bonthe District.

58. Therefore the Trial Chamber erred in concluding that Kondewa had the material ability to punish any of the Kamajors in Bonthe Town.

5) No effective control by virtue of Kondewa's *de jure* status as High Priest or his *de facto* status as a superior

59. The evidence clearly establishes that Kondewa was in a position of some influence over the Kamajors in Sierra Leone by virtue of his position as High Priest of the CDF. However, this in itself does not support a finding that a superior-subordinate relationship existed between Kondewa and any of the Kamajors. In fact, the *ad hoc* tribunals have consistently found that substantial influence is an insufficient basis for a finding of effective control.[55]

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[54] Trial Chamber Judgement, para. 301. This refers to events in August 1997.

[55] See, for example, *Blagojević and Jokić* Trial Judgement para. 791: "'Substantial influence' over subordinates that does not meet the threshold of 'effective control' is not a sufficient basis

60. Kondewa clearly had broad authority and influence. He gave blessings to the Kamajors and this spiritual role conjured a certain level of reverence.[56] However this did not translate into "effective control". The evidence does not sufficiently demonstrate a superior-subordinate relationship between Kondewa and known perpetrators of the crimes, nor is there credible evidence that Kondewa exercised "effective control" over subordinates who committed crimes.

61. Further, the findings of the Trial Chamber throughout the judgement are inconsistent with a finding that Kondewa was in a relationship of "effective control" with any of the Kamajors in the country.[57] For example at paragraph 853 the Trial Chamber finds:[58]

(i) although Kondewa possessed command over all the Kamajors from every part of the country, this was limited to the Kamajors' belief in mystical powers which Kondewa allegedly possessed;

(ii) that the evidence was inconclusive to establish beyond reasonable doubt that Kondewa had effective control over the Kamajors, in a

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for imputing criminal liability under customary law."; *Kordić and Cerkez* Trial Judgement para. 840: "Substantial influence is not indicative of a sufficient degree of control for liability under Article 7(3)"; *Delalic et al,* Appeal Judgement para. 266: "Substantial influence as a means of control in any sense which falls short of the possession of effective control over subordinates, which requires the possession of material abilities to prevent subordinate offences or to punish subordinate offenders, lacks sufficient support in State practice and judicial decisions."; *Kvočka,* Appeal Judgement para. 144: "Not every position of authority and influence necessarily leads to superior responsibility under Article 7(3) of the Statute:" *Semanza* Trial Judgement paras. 402 and 415: "The requirement of a superior-subordinate relationship of effective control is not satisfied by a simple showing of an accused individual's general influence in the community"; *Stakić*, Trial Judgement para. 459: "What is decisive is the power of effective control for which the mere proof of substantial influence is not sufficient." See also *Naletilić and Martinović* Trial Judgement, para. 68.

[56] Trial Chamber Judgement, para. 721 (vii): "The Kamajors looked up to Kondewa and admired the man with such powers. They believed he was capable of transferring his powers to them to protect them."

[57] Trial Chamber Judgement, para. 316 – finding that during his time at Base Zero Kondewa did not make final decisions about who should be initiated or who should join the Kamajors; Trial Chamber Judgement para. 318 – finding that he was not involved in training Kamajors to fight; Trial Chamber Judgement para. 345 – finding that Kondewa was not a fighter and never himself went to the war front, or into active combat'.

[58] A similar analysis of Kondewa's authority and power can be found at para. 806 of the Trial Chamber Judgement.

sense that he had the material ability to prevent or punish them for their criminal acts;

(iii) that although Kondewa's *de jure* status as the High Priest of the CDF gave him the authority over all the initiators in the country as well as put him in charge of the initiations, this authority did not give him the power to decide who should be deployed to go to the war front and that he never went to the war front himself.

(iv) that while Kondewa could give instruction to the Kamajors, he did so in his position as High Priest, and not in the role of a commander.[59]

62. The Trial Chamber also failed to establish how it concluded that Kondewa's role in Bonthe District was different from his role elsewhere in the country, where the Trial Chamber found that "Kondewa's job was to prepare herbs which the Kamajors smeared on their bodies to protect them from bullets."[60]

Findings more consistent with jurisprudence finding no "effective control"

63. The evidence cited by the Trial Chamber is in fact more consistent with case law in which a finding of effective control has been rejected[61]. This is particularly true since Kondewa's role amongst the Kamajors did not fall into an established chain

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[59] Trial Chamber Judgement para. 345 – "[A]lthough Kondewa could say 'don't go[...]you go' to the Kamajors who were to go to war that day, 'it was similar to a fortune teller saying so."

[60] Trial Chamber Judgement, para. 345. See also para. 326: "Kondewa said 'I am going to give you my blessings [...and] the medicines, which would make you to be fearless if you didn't spoil the law."

[61] See: *Halilović*, Trial Judgement para. 752 - Sefer Halilović possessed a degree of influence as a high ranking member of the ABiH and as one of its founders, yet the Trial Chamber considered that Sefer Halilović's influence fell short of the standard required to establish effective control; *Kvočka* Trial Judgement paras. 410-411 – Kvočka had broad authority and influence within the Omarska camp, however, there did not exist a superior-subordinate relationship between Kvočka and known perpetrators of the crimes, nor was there credible evidence that Kvočka exercised effective control over subordinates who committed crimes; *Niyitegeka* Trial Judgement paras. 475-476 - Niyitegeta was one of the leaders of the attacks, and was usually in the front or middle of the attacking party and carrying a gun. However, the Trial Chamber found no evidence to indicate that Niyitegeka, rather than the other leaders present, were in a superior-subordinate relationship with the attackers in that he could prevent or punish the people at the meeting for their crimes; *Ntagerura et al.* Trial Judgement para. 637 - While the Trial Chamber accepted evidence that Bagambiki requisitioned gendarmes to provide security at a number of sites, there was insufficient evidence that he maintained any control over how these gendarmes carried out their mission upon deployment.

of command or hierarchy which has been prohibitive of a finding of the existence of a superior-subordinate relationship on previous occasions.[62]

64. Kondewa might have been respected and revered because of his spiritual role but the evidence does not support a finding that Kondewa exercised "effective control" over these Kamajors.

Conclusion

65. Based on the above, the Trial Chamber therefore erred in concluding that the totality of the evidence proved beyond reasonable doubt the existence of a specific superior-subordinate relationship between Kondewa and the Kamajors in Bonthe Town. The evidence as relied on by the Trial Chamber falls well below the standard required to establish "effective control" such that no reasonable trier of fact could have concluded beyond doubt that Kondewa had "effective control" to create a subordinate-superior relationship.

66. When viewed in light of the jurisprudence of the ICTY and ICTR, the evidence of Kondewa's acts in relation to the Kamajors in Bonthe Town did not justify a finding of a subordinate-superior relationship of effective control.

67. The Trial Chamber therefore erred in finding Kondewa individually criminally responsible as a superior pursuant to Article 6(3).

68. For the reasons given above, the Defence requests the Appeal Chamber to reverse the finding that Kondewa was individually criminally responsible as a superior, pursuant to Article 6(3), for the crimes committed in Bonthe Town and the surrounding areas under Counts 2, 4, 5 and 7.

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[62] See for example, *Niyitegeka* Trial Judgement para. 477 – The Accused had told an attacker to bring him an old man and young boy so that he could kill them and subsequently told them to remove their corpses, and had instructed Interahamwe to insert a piece of wood into the genitalia of a dead woman. However, the Trial Chamber found that while these acts showed that the attackers carried out the Accused's orders, there was no evidence that they did so in a superior-subordinate hierarchy, or that the Accused had the ability to prevent or punish them for crimes committed.

69. The Defence also requests the Appeal Chamber to make any resulting amendments to the Disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

IV. APPEAL GROUND TWO

70. The second ground of appeal is:

> The Majority of the Trial Chamber erred in both law and fact in finding that the Prosecution had proven beyond a reasonable doubt that Kondewa was individually criminally responsible as a superior pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District.

Trial Chamber's Findings

The Law

71. The Trial Chamber sets out the law on responsibility under Article 6(3) of the Statute at paragraphs 236 – 250 of the Trial Chamber Judgment. The Defence submits that this articulation of the law on command responsibility is correct.

Factual and Legal Findings

72. The factual findings relating to Moyamba District are set out in paragraphs 636 – 666. These paragraphs detail a number of criminal activities that occurred in Moyamba Town and various other communities in the District.

73. The Trial Chamber in making its legal findings with respect to Moyamba district stated that it relied on factual findings listing in paragraphs 721 (i) to 765 (i) to (iii), (viii), and (ix) and 809 (vi), as well as its factual summary as set out in paragraph 938 (i) to (ii).

74. Paragraphs 951 – 955 set out the basis for the Trial Chamber reaching its conclusion "that it was proven beyond reasonable doubt that Kondewa is individually criminally responsible as a superior, pursuant to Article 6(3) for pillage as charged under Count 5 in the Indictment..."[63]

[63] Trial Chamber Judgement, para. 955.

Defence Submissions

75. The Defence reiterates its arguments as set out in Ground 1 to state that the Trial Chamber did not correctly apply the "effective control" test and further submits that there was no legal or factual basis for the Trial Chamber concluding that Kondewa was criminally responsible for pillage under Article 6(3).

76. The Trial Chamber wholly failed to establish a superior-subordinate relationship between Kondewa and the perpetrators of the criminal acts and no reasonable trier of fact could have concluded that Kondewa was criminally responsible for pillage under Article 6(3).

Superior-subordinate relationship

77. At paragraph 951 the Trial Chamber specifically stated that the "evidence is inconclusive to establish beyond reasonable doubt that Kondewa had effective control over the Kamajors, in a sense that he had the material ability to prevent or punish them for their criminal acts in Moyamba District."[64]

78. The Defence submits that the Trial Chamber correctly established that the "evidence is inconclusive".

79. At paragraph 951 the Trial Chamber restates its finding that "although Kondewa had a de jure status as High Priest in the CDF and as such possessed command over all the Kamajors in the country, this was limited to the Kamajors' belief in mystical powers which Kondewa possessed". This assessment of the evidence is correct, in that Kondewa's role within the CDF was not that of a commander or of a leader with the capacity to control or issue orders to the Kamajors. Although his role as a spiritual leader vested in him at most influence over the Kamajors, this was akin to the influence of a 'fortune teller'[65] rather than a commander with effective control over his subordinates. As stated earlier in the Defence submissions, even 'substantial influence' has repeatedly been found to be an insufficient basis for a

[64] Trial Chamber Judgement, para. 951 (emphasis added).
[65] Trial Judgement, para. 345.

finding of a superior-subordinate relationship.[66] The Trial Chamber was therefore correct in concluding that the evidence does not support a finding that Kondewa had "effective control" over any of the Kamajors in the country.

80. The Trial Chamber was also correct in finding that the evidence was inconclusive to prove beyond reasonable doubt that Kondewa had an ability to punish the Kamajors for their criminal acts in Moyamba District. In the absence of a relationship of "effective control" with any of the Kamajors in the country, there was no evidence presented to suggest that Kondewa had an ability to punish the Kamajors for their acts in Moyamba District when he did not have power to punish them for their criminal acts elsewhere.

81. Despite first finding "inconclusive evidence" of effective control which immediately should have eliminated the possibility of there being any responsibility pursuant to Article 6(3), the Trial Chamber proceeds to find that one incident of pillage by Kamajors was done by the "Kamajors who operated under the direct orders of Kondewa."[67]

82. The Trial Chamber states at paragraph 951:

> "The only incident in the Factual Findings made by the Chamber in Moyamba District and which could be attributable to Kondewa for Count 5, Pillage is set out below as follows:
>
> A. In November 1997, Kamajors under the control of Kondewa took TF2-037's Mercedes Benz from his home in Sembehun. The Kamajors said that they were Kondewa's Kamajors and that they had come from Talia, Tihun, Gbangbatoke and other surrounding villages. Three of them introduced themselves as Steven Sowa, Moses Mbalacolor and Mohamed Sankoh. Mohamed Sankoh said he was Deputy Director of War under

[66] See footnote 54 of this Appeal Brief.
[67] Trial Chamber Judgement, para. 954.

Norman. The car was eventually given to Kondewa, who kept the car and used it without permission.

B. On the same occasion, these Kamajors also took a generator, car tires and other gadgets from TF2-073." (emphasis added)

83. Thus, as stated by the Trial Chamber itself, the only evidence it relied on to support a finding that Kondewa had a superior-subordinate relationship with the Kamajors who looted the Mercedes Benz, is his acceptance of the looted car *after* the offence of pillage had been committed and *after* Norman had used the car for a while.[68]

84. The Defence submits that the Trial Chamber made a number of errors in relying on this as the sole piece of evidence to find Kondewa responsible for pillage under Article 6(3).

85. Firstly, no reasonable trier of fact could possibly have concluded responsibility under Article 6(3) on the basis of one incident – the acceptance of a looted car. As already stated, the jurisprudence of the *ad hoc* tribunals demonstrates that the evidentiary standard and the rigor of analysis required to establish a superior-subordinate relationship beyond a reasonable doubt is high. Reliance on one piece of evidence is clearly so far below this standard that no reasonable trier of fact could have established the Article 6(3) responsibility of Kondewa.

86. Secondly, even if the acceptance of the Mercedes-Benz could amount to evidence of the existence of a superior-subordinate relationship, which is not accepted, this evidence is irrelevant as it does not demonstrate the existence of a superior-subordinate relationship before the offence was committed.

87. The Defence submits that it is well established in the jurisprudence, that an accused cannot be held liable under command responsibility for crimes committed by a subordinate *before* the Accused assumed command over that subordinate. At paragraph 240 the Trial Chamber itself notes: "In order to 'hold a commander

[68] Transcript of 15th March 2005, Albert Nallo page 43 lines 20-23.

liable for the acts of troops who operated under his command on a temporary basis it must be shown that at the time when the acts charged in the indictment were committed, these troops were under the effective control of that commander'.[69]

88. Therefore the Trial Chamber erred in law in establishing the existence of a superior-subordinate relationship on the basis of the acceptance of a looted car, an event which occurred after the act of pillage was committed.

89. There is no other possible conclusion than that the Trial Chamber erred in law when at paragraph 955 the Trial Chamber concludes that beyond reasonable doubt Kondewa is individually criminally responsible as a superior under Article 6(3) for pillage when it had itself already stated that the evidence is inconclusive to establish effective control. It is clear that the Trial Chamber further erred when it considered evidence of a looted car as the totality of evidence on which to base such a conclusion.

Conclusion

90. The Defence submits that on the basis of the above, the Trial Chamber clearly erred in concluding beyond a reasonable doubt that Kondewa was individually criminally responsible as a superior pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District. There was no evidence to demonstrate "effective control" – the fundamental element in establishing a superior-subordinate relationship. Without any evidence there was no basis for the Trial Chamber to have found Article 6(3) responsibility. Further the subsequent reliance by the Trial Chamber on evidence of acceptance of a looted car is wholly unreasonable and clearly legally wrong.

91. The Defence requests the Appeal Chamber to reverse the finding that Kondewa was individually criminally responsible as a superior, pursuant to Article 6(3) for pillage under Count 5 in the Moyamba District.

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[69] Citing *Halilovic* Trial Judgement, para. 195 and *Kunarac* Trial Judgement, para. 399 (emphasis added).

92. The Defence also requests the Appeal Chamber to make any resulting amendments to the Disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

V. APPEAL GROUND THREE

93. The third ground of appeal is:

The majority of the Trial Chamber erred both in law and in fact in finding that the Prosecution had proven beyond a reasonable doubt that Kondewa was individually criminally responsible pursuant to Article 6(1) for committing murder as a war crime as charged under Count 2 of the Indictment in Talia / Base Zero.

The Trial Chamber's Reasoning

The Law

94. With respect to murder as a serious violation of Article 3 Common to the Geneva Conventions and of Additional Protocol II pursuant to Article 3(a) of the Statute, the Trial Chamber sets out the constitutive elements of the crime at paragraph 146 of the Trial Judgement. These three elements are:

(i) The death of one or more persons;

(ii) The death of the person(s) was caused by an act or omission of the Accused; and

(iii) The Accused intended to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.

95. The Trial Chamber sets out the law with respect to "committing" of crimes under Article 6(1) of the Statute at paragraphs 204 – 205 of its judgement. The trial Chamber states the *actus reus* and the *mens rea* for "committing" as follows:

(i) the *actus reus* for committing a crime consists of the proscribed act of participation, physical or otherwise direct, in a crime provided for in the Statute through positive acts or culpable omission, whether individually or jointly with others;

(ii) the *mens rea* requirement is satisfied if the Prosecution proves that the Accused acted with intent to commit the crime, or with the reasonable knowledge that the crime would likely occur as a consequence of his conduct.[70]

96. The Defence submits that the Trial Chamber's articulation of the law is correct.

Factual and Legal Findings of the Trial Chamber

97. The Trial Chamber found on the evidence that Talia/Base Zero was the headquarters for the Civil Defence Forces high command and existed from about 15 September 1997 to 10 March 1998. Base Zero was the code name to avoid alerting the rebels as to the CDF's whereabouts.[71]

98. At paragraphs 721 (i) to (viii) and 765 (i) to (iii) and paragraphs 920-924 the Trial Chamber outlined its factual findings which it based its legal finding on the individual criminal responsibility pursuant to Article 6(1) and Article 6(3) of Kondewa. These factual findings relate to a number of criminal acts committed in Talia/ Base Zero. The Trial Chamber then proceeds to review responsibility of the Accused for those criminal acts.

99. The Trial Chamber finds Kondewa responsible for a criminal act in Talia/Base Zero. At paragraph 934 the Trial Chamber reaches its conclusion that an incident listed in its factual findings constituted an intentional killing perpetrated by Kondewa. The incident is summarised at paragraph 921 (iii) of the Judgement as follows:

> "Sometime towards the end of 1997, two "town commanders" were brought to Talia. Kondewa took a gun from Kamoh Bonnie, Kondewa's priest, shot and killed one of the town commanders. The next morning witness saw two graves where the bodies of the two town commanders were buried."

100. The Trial Chamber in establishing the *mens rea* requirement states that it finds that "these two men were killed because they were considered to be 'collaborators',

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[70] Trial Chamber Judgement, para 205.
[71] Trial Chamber Judgement, para. 303.

after having been appointed to the position of "town commander" by the rebels, these men organized civilians from their town to assist the rebels."[72]

101. On this basis the Trial Chamber "finds that it has been proven beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for committing murder [2 murders] as a war crime as charged in Count 2 of the Indictment."[73]

Defence submissions

102. The Defence submits that the standard of proof beyond a reasonable doubt in establishing responsibility for Kondewa for committing two murders in Talia/Base Zero was not met by Trial Chamber. This standard was not met because:

> (i) Trial Chamber erred in relying on the testimony of one Prosecution witness whose testimony was skeletal at best from which the Trial Chamber reached a number of unreasonable conclusions on which to establish Kondewa's guilt beyond a reasonable doubt.
>
> (ii) The Trial Chamber further erred in relying solely on the uncorroborated hearsay evidence of one Prosecution witness in reaching the conclusion that the Prosecution had satisfied its burden of proof and demonstrated the guilt of Kondewa for committing murder beyond a reasonable doubt.

Prosecution Evidence

103. Given the severity of the crime of murder and the fact that "committing" constitutes the highest degree of participation by an individual in a crime, proof beyond a reasonable doubt must be firmly established by the Prosecution's evidence.

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[72] Trial Chamber Judgement, para. 934.
[73] Trial Chamber Judgement, para. 937.

104. The factual basis of these killings is set out by the Trial Chamber fully at paragraphs 622 and 623 of the Trial Chamber Judgement. The evidence is from the testimony of one Prosecution witness (TF2-096). She stated that she saw Kamajors enter Talia dancing near the end of 1997 and that two "Town Commanders" were leading the dance. The witness stated that Kondewa and Kamoh Bonnie, Kondewa's priest, were standing behind the town commanders and that she saw Kondewa take a gun from Kamoh Bonnie and shoot one of the Town Commanders. The next morning the witness saw two graves. She was told that the two town commanders were buried within them.[74]

105. This constitutes the sum total of evidence presented by the Prosecution in relation to what the Trial Chamber subsequently establishes as murder and attached responsibility to Kondewa.[75]

106. The evidence of the Prosecution is flawed in a number of respects. Given these flaws it was unreasonable for the Trial Chamber to have found proof beyond a reasonable doubt of Kondewa's responsibility for committing murder.

107. The identification of Kondewa as the perpetrator is not established. The witness, in her testimony states: "I was fetching this water. I saw Pa Kondewa and others and Kamoh Boni."[76] The witness was not asked and did not explain how she knew who Kondewa was and what he looked like nor was the witness asked to identify Kondewa in the Court room.

108. One of the key elements for murder is establishing that one or more persons are actually dead as a result of an act or omission on the part of the perpetrator. The evidence does not establish that the first town commander was dead. The witness only states she saw Kondewa "shoot one of them; then he fell."[77] The witness was

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[74] Trial Chamber Judgement, paras. 622-623.
[75] The Defence would also note tangentially that the Indictment did not specifically charge Kondewa with committing murder.
[76] Transcript, 8 November 2004 pg 25 line 3.
[77] Transcript, 8 November 2004, pg 26 line 15.

not asked if she saw that the town commander was dead. She only knew that "he fell". This does not establish a death.

109. There was absolutely no evidence at all on the actual death of the second town commander, let alone any evidence to suggest that Kondewa committed a second murder.

110. The remaining of the witness testimony is hearsay. The witness stated that she ran away at that moment.[78] She stated that the next morning she was told by a Kamajor that the "two people who were dancing yesterday, they were in those graves."[79] This does not establish with any reliability that the "two people" were the two town commanders. There is hardly reliable evidence from which to make a finding of guilt for committing murder.

111. It is not clear whether this event even falls within the timeframe of the Indictment. The witness states that this happened at "the end of 1997".[80] The Indictment alleges crimes to have occurred in Talia/Base Zero between October 1997 and December 1999.[81]

112. To accept this evidence a number of illogical conclusions must be made. The only way that the Trial Chamber could have found responsibility for committing murder would be if they concluded the following:

(i) The words "he fell" meant "he was dead";

(ii) The reference to the two people in the grave being "the two people who were dancing yesterday" could only possibly refer to those two town

[78] Transcript, 8 November 2004 pg 26 line 18.
[79] Transcript, 8 November 2004 pg 27 lines 15-17.
[80] Transcript 8 November 2004, pg 27 line 23. See also footnote 1268 of the Trial Chamber Judgement which states "TF2-096 describes this incident as occurring near the end of 1997 and during the period when Sam Hinga Norman arrived in Talia, though he was not there when this incident occurred. Norman arrived in Talia arrived mid-September,.."
[81] Paragraph 26 (f) of the Indictment states: "Between about October 1997 and December 1999 in locations in Bonthe District including Talia (Base Zero), Mobayeh, Makose, and Bonthe Town, Kamajors unlawfully killed an unknown number of civilians."

commanders despite the evidence that all the Kamajors who entered Talia that day were dancing;

(iii) That if Kondewa shot one town commander he must have shot the other one as well.

113. No reasonable trier of fact could have reached such conclusions. The Trial Chamber clearly erred in doing so and failed to establish guilt beyond a reasonable doubt.

Hearsay evidence

114. While hearsay evidence is not inadmissible *per se*, it must be approached with caution and be subject to "tests of relevance, probative value and reliability."[82] However such evidence must be reviewed with great care before accepting it as sufficient to make a finding of guilt.[83] The Trial Chamber itself notes that it is aware of the inherent deficiencies attached to hearsay evidence and given such deficiencies, the Trial Chamber states that it should consider any indicia of reliability before according appropriate weight to it.[84] However, despite its own caution, the Trial Chamber proceeds to establish guilt for committing murder solely on the basis on such evidence.

115. A review of the case law of the *ad hoc* tribunals uncovered no precedent for convicting an individual of two murders on the basis of one piece of hearsay evidence. To suggest that the testimony given by TF2-096 was sufficiently reliable and credible to justify such an unprecedented exception in international criminal law is unreasonable.

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[82] *Bagilishema* Trial Judgement, para. 25.
[83] *Vasiljević* Trial Judgement, para. 22: 'In some cases, only one witness has given evidence of an incident with which the Accused is charged or otherwise involving the Accused. The Appeals Chamber has held that the testimony of a single witness on a material fact does not, as a matter of law, require corroboration. In such a situation, the Trial Chamber has scrutinised the evidence of the Prosecution witness with great care before accepting it as sufficient to make a finding of guilt against the Accused'.
[84] Trial Chamber Judgement, para. 264.

116. The *ad hoc* tribunals have disregarded uncorroborated hearsay evidence related to an accused participation in murder because such evidence is seen as unreliable.[85]

117. In another analogous circumstance in the ICTR, the witness saw only the first action of the accused (a rape) in a sequence of events that eventually resulted in what was established as murder but then subsequently ran away. The Tribunal stated that such hearsay evidence lacks sufficient "indicia of reliability" to prove that the individuals were in fact killed as the witness could not provide eye witness evidence that there had been a murder.[86] As a result, the Trial Chamber disregarded this evidence.

118. In instances where circumstantial evidence is used and relied upon, the Defence submits that inferences reasonably to be drawn from the evidence must not only be consistent with Kondewa's guilt but inconsistent with every reasonable hypothesis of Kondewa's innocence. In this case, a number of alternative explanations exist. The town commander could have been subsequently murdered by someone else as the evidence only states that he was shot. There is no evidence on Kondewa's involvement on the death of the second town commander so any number of individuals might be responsible for that death, if it occurred. The room to find other reasonable hypotheses of Mr. Kondewa's innocence and to find other

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[85] See for example, *Imanishimwe* Trial Judgement and Sentence, paras. 403 and 404: "The Chamber emphasises that Witness LC's account of Imanishimwe's participation in the murder of the three Hutu boys is uncorroborated hearsay. In addition to his testimony being uncorroborated, Witness LAI did not specify the basis of knowledge for his account of Imanishimwe's participation in the killing of Second Lieutenant Mbakaniye...Consequently, the Chamber will not take into account the evidence of these witnesses on these matters in making its findings because such evidence is unreliable..."; See also *Gacumbitsi* Trial Judgement para 196: "However, the hearsay evidence of Witness TAS is insufficient, failing corroboration, to establish that the Accused ordered the murder of Marie and Béatrice."

[86] *Muhimana* Trial Judgement, para. 206: "The Prosecution relies on the evidence of Witness AV to establish the allegation that two Tutsi girls, Alphonsine and Colette, were disembowelled and killed on the orders of or in the presence of the Accused... 208. However, Witness AV did not give any eyewitness evidence as to whether the girls were killed, since after watching the rape of Agnes, she crawled away on her stomach. The Chamber finds that Witness AV's hearsay evidence lacks sufficient indicia of reliability to prove that Alphonsine and Colette were killed. 209. The Chamber finds insufficient evidence to establish that two Tutsi girls called Alphonsine and Colette were disembowelled and killed on the orders of or in the presence of the Accused. Consequently, the Chamber dismisses the allegation in Paragraph 7 (b) (i) of the Indictment."

alternative explanations exists. The standard of proof beyond a reasonable doubt clearly did not exist on the basis of the testimony of TF2-096 alone.

Conclusion

119. The Trial Chamber erred in relying on uncorroborated hearsay testimony from one witness. This evidence did not meet the standard of proof required to establish guilt beyond a reasonable doubt. The testimony did not establish Kondewa as the perpetrator of firing a shot, nor did the evidence establish beyond reasonable doubt that this action resulted in the death of a town commander. There was no evidence at all on the death of the second town commander but for the existence of two graves and hearsay evidence stating that the two town commanders were buried there. To suggest that on this basis the Trial Chamber had found beyond reasonable doubt that Kondewa was responsible for committing two murders is wholly erroneous and no reasonable trier of fact could have established Article 6(1) liability for committing murder on this basis.

120. Based on the above, the Defence requests the Appeal Chamber to reverse the finding that Kondewa was individually criminally, pursuant to Article 6(1) for committing murder as a war crime as charged under Count 2 of the Indictment in Talia / Base Zero.

121. The Defence also requests the Appeal Chamber to make any resulting amendments to the Disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

VI. APPEAL GROUND FOUR

122. The fourth ground of appeal is:

> The Majority of the Trial Chamber erred in law in failing to establish the correct *mens rea* requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1) for Counts 2, 4 and 7 in Tongo Fields.

123. In addition to failing to establish the correct *mens rea* requirement, the Defence submits that the Trial Chamber also erred in failing to establish the correct *actus reus* requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1).

The Trial Chamber's Reasoning

The Law

124. The Trial Chamber, following the standard set by the *Vasiljevic* Appeals Chamber,[87] sets out the *actus reus* and *mens rea* of aiding and abetting[88]. It states:

> (i) [T]he accused carries out an act specifically directed to assist, encourage or lend moral support to the perpetration of a certain specific crime. This act must have a substantial effect upon the perpetration of the crime.[89]
>
> (ii) In relation to the *mens rea* of the aider and abetter, the requisite mental element is "knowledge that the acts performed by the aider and abettor assist the commission of the crime by the principle offender.[90]

125. The Trial Chamber further states that the sorts of actions that can constitute aiding and abetting can include such acts as providing assistance, helping, encouraging,

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[87] *Vasiljević* Appeal Judgement, para. 102, See Footnote 292 of the Trial Chamber Judgement.
[88] Trial Chamber Judgement, para 227-231.
[89] Trial Chamber Judgement, para 229.
[90] Trial Chamber Judgement, para 231.

advising, or being sympathetic to the commission of a particular act by the principal offender.[91]

126. After noting that the *actus reus* of aiding and abetting a crime may occur before, during, or after the principle crime has been perpetrated, and the location at which the *actus reus* takes place may be removed from the location of the principle crime, the Trial Chamber goes on to state:

> "The Chamber reiterates, however that the act of the aider and abettor must have a **substantial effect** upon the perpetration of the crime."[92]

127. Clearly, given the emphasis placed on it by Trial Chamber, one of the key elements to establishing liability for aiding and abetting pursuant to Article 6(1) of the Statute is that the act of the accused must have a "substantial" effect on the perpetration of a certain crime.[93]

128. The Defence submits that this articulation of the law by the Trial Chamber is correct.

Factual and Legal Findings of the Trial Chamber

129. At paragraphs 374 – 410 the Trial Chamber sets out its factual findings in relation to crimes that occurred in Tongo Fields. The factual findings detail three attacks on Tongo Town: November 1997,[94] early January 1998,[95] and 14 January 1998.[96] At paragraph 721 the Trial Chamber outlines the facts it relies on to make its legal findings on the individual criminal responsibility pursuant to 6(1) and 6(3) of Kondewa.

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[91] Trial Chamber Judgement, para 228.
[92] Trial Chamber Judgement, para 229 (emphasis added).
[93] See also *Strugar* Trial Judgement, para 349: "However the acts of the aider and abetter must have 'a direct and substantial effect on the commission of the illegal act." ; *Limaj et al* Trial Judgement, para 516; *Galic* Trial Judgement, para 68; *Blagojević and Jokić* Trial Judgement, para 726; *Furundzija* Trial Judgement para 234; *Tadić* Trial Judgement, para 691: "[T]he acts of the accused must be direct and substantial."
[94] Trial Chamber Judgement para 380.
[95] Trial Chamber Judgement para 383.
[96] Trial Chamber Judgement para 389.

130. The Trial Chamber findings with respect to Kondewa focus on the events of a "passing out parade" in 10 – 12 December 1997 when the January 1998 attack on Tongo was discussed.[97] At that meeting, the Trial Chamber states that Kondewa addressed those in attendance. The Trial Chamber states that the comments "effectively supported Norman's instructions and encouraged the Kamajors to kill captured enemy combatants...".[98] On the basis of these comments the Trial Chambers states that it is "satisfied that Kondewa's words had a *substantial* effect on the perpetration of those criminal acts."[99]

131. Kondewa's words were:

> "a rebel is a rebel; surrendered, not surrendered, they're all rebels [...t]he time for their surrender has long since been exhausted, so we don't need any surrendered rebel."[100]

132. The Trial Chamber, to satisfy the *mens rea* element, states that based on Kondewa's awareness that the Kamajors who operated in the towns of Tongo Fields had previously engaged in criminal conduct which was reported to Base Zero, Kondewa "knew it was probable that the Kamajors would commit at least one of these acts in compliance with the instructions issued."[101]

133. On this basis, the Trial Chamber concludes that the speech of Kondewa[102] constituted "aiding and abetting in the preparation [sic] of those criminal acts which were explicitly ordered by Norman, namely killing of captured enemy combatants

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[97] Trial Chamber Judgement, paras. 320 – 321.
[98] Trial Chamber Judgement, para. 735.
[99] Trial Chamber Judgement, paras. 735 and 736 (emphasis added).
[100] Trial Chamber Judgment, para. 321. The Trial Chamber also noted that Kondewa said "I give you my blessings; go my boys, go." However in its factual analysis the Trial Chamber focuses on the first part of Kondewa's comment.
[101] Trial Chamber Judgement, para. 737.
[102] The Trial Chamber progressively inflates the words from being a "comment" to utterances ("uttering these words") to "words" to finally constituting a "speech".

and 'collaborators', infliction of physical suffering or injury upon them and destruction of their houses".[103]

Defence Submissions

134. The Defence submits that the Trial Chamber erred in its application of the "substantial effect" test and erred on both its findings as to the *mens rea* and *actus reus* elements for aiding and abetting.

Mens Rea Element

135. As stated correctly by the Trial Chamber, the *mens rea* for aiding and abetting is knowledge on the part of the Accused that his conduct assists or facilitates in the commission of the crime by the principal offender. It must be established that the aider and abettor was aware that his acts were assisting in the commission of the crime by the principal.[104]

136. In this case, the *mens rea* therefore would be established by demonstrating that Kondewa had knowledge (or awareness) that through the utterance of his words he would be assisting in the commission of subsequent crimes in Tongo.

137. There was no evidence to establish this and the Trial Chamber erred in concluding that that *mens rea* element had been satisfied.

138. The Defence notes that the *ad hoc* tribunals' case law takes two approaches with respect to the knowledge requirement. A stricter approach requires knowledge that the acts of the aider and abettor assist in the commission of a *specific* crime by the principal.[105] The less strict approach is that it is not necessary that the aider and abettor knew the precise crime that was intended or which was actually committed,

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[103] Trial Chamber Judgment, para. 739.
[104] *Strugar* Trial Judgement, para. 350.
[105] See, *Kunarac* Trial Judgemnent, para 392 and *Krnojelac* Trial Judgement, para. 90.

as long as he was aware that one of a number of crimes would probably be committed.[106]

139. In this instance the Trial Chamber adopted the less strict approach with respect to knowledge.[107] However, regardless of the approach taken, it is clear that some basis of knowledge must be demonstrated, either of a specific crime or of the probability of crimes being committed.

140. Here the Trial Chamber states that it has established this knowledge by stating that Kondewa had knowledge that the Kamajors who operated in Tongo Field had previously engaged in criminal conduct based on reports to Base Zero and it was probable that they would commit at least one of those crimes.[108]

141. In establishing that Kondewa did in fact have knowledge of criminal activity in Tongo Fields the Trial Chamber refers to its factual finding at paragraph 721 (ix) of the judgement. This factual finding however refers only to a report given to Fofana and Norman, not Kondewa.[109] Kondewa never received that report, nor was there any other evidence that demonstrated any knowledge on the part of Kondewa of previous criminal activity by Kamajors in Tongo Fields. Therefore, the *mens rea* was not properly established.

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[106] *Blaškić*, Appeals Judgement, para. 50.
[107] Trial Chamber Judgement, para. 737.
[108] Trial Chamber Judgement, para. 737
[109] Paragraph 721 (ix) states: "On 16 February TF2-079 prepared a situation report on events occurring between 19 September and 13 November 1997 in Zone II Operational Frontline which included Lower Bambara and Dodo Chiefdoms. It requested arms and ammunitions and described attacks which had been launched in the area. It also narrated crimes which were committed by Kamajors in that area. The report was endorsed by Musa Junisa, the then Commander-in-Chief of Zone II Operational Frontline and Mohamed Orinco Moosa, his deputy. TF2-079, Junisa and Moosa with 100 other Kamajors then traveled to Base Zero. **At Base Zero they gave the report first to Fofana and then to Norman.** Norman commended their efforts and told them that a good number of that group should return to the area with another senior commander to the keep the area strong and only a few of them should remain at Base Zero to await ammunitions. Seven people including Moosa and TF2-079 stayed at Base Zero." (emphasis added). This same factual finding was made earlier in the Trial Chamber Judgement at paragraph 378.

Actus Reus Element

142. The jurisprudence on the types of acts that constitutes aiding and abetting is well established in international law. As repeatedly emphasised by the Trial Chamber itself, such acts must have a "substantial effect" upon the perpetration of the crime.

143. A review of the jurisprudence of the ICTR and the ICTY shows the spectrum of what acts have been considered to have a "substantial effect." The Defence submits that the words of Kondewa fall well below this standard, such that no reasonable trier of fact could have concluded that their effect could amount to anything resembling "substantial". The following review of the case law of the ICTY and the ICTR sets out the well established jurisprudential standard for acts of aiding and abetting.

ICTR jurisprudence on Aiding and Abetting

144. From a review of the completed cases in the ICTR, twenty individuals have been found guilty of aiding and abetting various crimes during the Rwandan genocide. Appendix C to this Appeal Brief sets out a review of the acts carried out by each accused in these cases that amount to "substantial effect" under the jurisprudence of the ICTR.

145. Of these twenty, seventeen were found to have aided and abetted in the perpetration of a crime through their presence at the scene of the crime and lent their assistance, encouragement or support through a variety of actions. These actions, which were determined to have a "substantial" effect on the perpetration of the crime, included:

(i) providing weapons,[110]
(ii) delivering attackers,[111]
(iii) coordinating attacks,[112]
(iv) targeting victims,[113]

[110] See, for example, *Nahimana et al.*, Judgement and Sentence.
[111] See, for example, *Kajelijeli*, Judgement and Sentence, *Kajelijeli,* Appeal Judgement.
[112] See, for example, *Ntakirutimana* Trial Judgement and Sentence and *Ntakirutimana* Appeal Judgement.

(v) manning checkpoints,[114]

(vi) inciting (short of instigation) attackers,[115]

(vii) or by an approving presence (by virtue of position of authority).[116]

146. In the three cases where the individual found to have aided and abetted was not present at the scene of the crime, the actions carried out that were considered to have had a "substantial" effect upon the perpetration of the crime were:

(i) supplying attackers with weapons and fuel;[117]

(ii) issuing an official directive encouraging the perpetrators, distributing arms, ordering the setting up of roadblocks, giving clear support to the RTLM, visiting prefectures to encourage and congratulate the perpetrators, and directly and publicly inciting acts of violence;[118]

(iii) refusing to assist refugees who had been attacked by soldiers under the accused's command and tacitly approved killings by allowing soldiers under his command to leave the barracks fully armed;[119]

Words of encouragement

147. Of the twenty cases where individuals were found guilty for aiding and abetting in the ICTR, five were found to have spoken words of encouragement. The words were either spoken in conjunction with the individual carrying out another act or were sufficient such that the tribunal considered their effect to be "substantial".

148. These five cases include:

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[113] See, for example, *Kambanda* Trial Judgement and Sentence.
[114] See, for example, *Nzabirinda* Trial Sentencing Judgement..
[115] See, for example, *Kambanda* Trial Judgement and Sentence; *Kambanda* Appeal Judgement.
[116] See, for example, *Ntagerura et al* Trial Judgement and Sentence; *Ntagerura et al* Appeal Judgement.
[117] Juvenal Kajelijeli (the Bourgmestre of Mukingo Commune): *Kajelijeli* Trial Judgement and Sentence.
[118] Jean Kambanda (the Prime Minister of the Interim Government): *Kambanda*, Trial Judgement and Sentence.
[119] Tharcisse Muvunyi (a Lt-Col in the Rwandan Army): *Muvunyi*, Trial Judgement and Sentence.

(i) aiding and abetting acts of sexual violence by allowing the crime to take place on or near the premises of the bureau communal, while the Accused was present and facilitating the acts through his words of encouragement;[120]

(ii) aiding and abetting genocide by issuing a directive to the *prefets* encouraging and reinforcing the *Interahamwe* who were committing mass killings of the Tutsi civilian population in the prefectures; visiting several prefectures to incite and encourage the population to commit massacres by congratulating the people who had committed the killings; addressing public meetings, and the media, at various places in Rwanda and directly inciting the population to commit acts of violence against Tutsi and moderate Hutu;[121]

(iii) aiding and abetting genocide by inciting other assailants while himself participating in attacks;[122]

(iv) aiding and abetting genocide by often driving around with a megaphone in his vehicle, mobilising the population to come to CDR meetings and spreading the message that the Tutsi would be exterminated; and further by publicly announcing that if President Habyarimana were to die, the Tutsis would not be spared[123]

(v) aiding and abetting genocide by distributing weapons and transporting attackers, *in conjunction with* his words of encouragement that would have reasonably appeared to give official approval for the attacks given that the Accused was a minister in the Interim government[124].

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[120] Jean Paul Akayesu (the Bourgmestre of Taba Commune): *Akayesu*, Trial Judgement.
[121] Jean Kambanda (the Prime Minister of the Interim Government): *Kambanda*, Trial Judgement and Sentence.
[122] Clement Kayishema (the Prefect of Kibuye Prefecture): *Kayishema and Ruzindana*, Trial Judgement.
[123] Hassan Ngeze (a journalist and politician): *Nahimana et al.*, Trial Judgement and Sentence.
[124] Emmanuel Ndindabahizi (a minister in the Interim Government): *Ndindabahizi* Trial Judgement and Sentence.

ICTY jurisprudence on aiding and abetting

149. Seventeen individuals have been found guilty of aiding and abetting various crimes in the former Yugoslavia in the ICTY jurisprudence. Appendix D sets out the details of these 17 cases and the activities that met the standard required by the "substantial effect" test.

150. Of these seventeen, 12 were present at the scene of the crime and lent their support through actions that were considered to have a "substantial" effect on the perpetration of the crime. These actions included delivering, detaining, designating, or interrogating victims or through their approving presence (by virtue of their position of authority).[125]

151. Of those 5 individuals who were not present at the scene of the crime, the acts carried out that reached a standard of "substantial" effect were:

(i) lending of personnel and equipment under Accused's command to the forcible transfer operation in and around Srebrenica;[126]

(ii) publicly espousing the strategic plan to create a separate Bosnian Serb state and making inflammatory, discriminating, and threatening public statements in support of the forcible transfer campaign;[127]

(iii) conducting a military campaign on protected areas of Dubrovnik;[128]

(iv) supporting police, paramilitaries, and JNA to maintain a system of arrests and detentions of non-Serb civilians, deliberately denying adequate medical care to detainees, and facilitating the continuation of the forced labour programme by appointing members to its administration.[129]

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[125] See, for example, *Limaj et al.* Trial Judgement, *Kunarac et al.* Trial Judgement.
[126] Vidoje Blagojevic (commander of the Bratunac Brigade) and Radislav Krstić (Chief of Staff of the Drina Corps): *Blagojević and Jokic* Appeal Judgement; *Krstić* Appeal Judgement.
[127] Radoslav Brdjanin (leading Bosnian Serb political figure): *Brdjanin* Appeal Judgement.
[128] Miodrag Jokic (commander of the Yugoslav Navy's Ninth Naval Sector): *Jokić*, Sentencing Judgement.
[129] Blagoje Simic (highest ranking civilian official in Bosanski Samac): *Simic et al.*, Appeal Judgement.

Words of encouragement

152. Of the seventeen total cases, 2 were found to have spoken words of encouragement. Those 2 cases found the following acts to constitute having a "substantial" effect on the commission of the crimes:

(i) aiding and abetting murder, torture, forcible transfer/deportation by publicly espousing the strategic plan to create a separate Bosnian Serb state and making inflammatory, discriminating, and threatening public statements in support of the forcible transfer campaign;[130]

(ii) aiding and abetting murder by encouraging his soldiers to brutally mistreat a victim at his base, designating him as "game" that could be mistreated and humiliated by his soldiers at random, preventing him from leaving the location, instructing the co-detainees not to tell anybody about what they had witnessed at the base, instructing the driver to give false information about the whereabouts of the victim, and giving direct orders with regard to the burial of the body.[131]

Kondewa's Words

153. The case law of the *ad hoc* tribunals clearly sets out the range of acts that could constitute an act which has a "substantial effect" upon the perpetration of the crime. The utterance of a sentence by Kondewa clearly does not fall anywhere within the spectrum of the sort of acts considered to have "substantial effect" on the perpetration of a crime.

154. The case law review demonstrates that a majority of cases on aiding and abetting rest on the presence of the accused at the scene of the crime[132] in addition to an act that might include words of encouragement. For the Trial Chamber to suggest that the utterance of these 28 words alone - a rebel is a rebel; surrendered, not surrendered, they're all rebels [...t]he time for their surrender has long since been

[130] Radoslav Brdjanin (a leading Bosnian Serb political figure): *Brdjanin* Appeal Judgement.
[131] Vinko Martinovic (an HOS commander): *Naletilić and Martinović* Appeal Judgement.
[132] See paras. 144 and 149 of this Appeal Brief.

exhausted, so we don't need any surrendered rebel – amounts to an act even remotely analogous to any of the acts as set out in the case law of the ICTR and the ICTY is to erroneously misapply the "substantial effect" test and unacceptably extends the concept of aiding of abetting in international criminal law.

155. The Defence further submits that to suggest that those words alone had a substantial effect on the perpetration of crimes that took place more than one month later in another geographic area is unreasonable. Although Mr. Kondewa was admired and well-respected,[133] his words – and in this case one sentence - were not an elixir or potent charm that could legally render their effect as "substantial" to the perpetration of the crimes. Therefore the *actus reus* of aiding and abetting was not established.

Conclusion

156. For the reasons given above, the Defence submits that the Trial Chamber erred in concluding that the evidence established beyond reasonable doubt both the *mens rea* and *actus reus* requirements for liability for aiding and abetting pursuant to Article 6(1) of Counts 2, 4, 5 and 7 in Tongo Fields.

157. The Defence submits that there was no evidence to establish that Kondewa had the requisite knowledge that crimes probably would be committed. Further, the Defence submits that no reasonable trier of fact could have concluded that the words of Kondewa had a 'passing out parade" satisfied the "substantial effect" test that is well established in the *ad hoc* tribunals' jurisprudence.

158. For the reasons given above, the Defence requests the Appeal Chamber to reverse the finding that Kondewa was individually criminally responsible, pursuant to Article 6(1), for aiding and abetting Count 2, 4, 5 and 7 in Tongo Fields.

[133] Trial Chamber Judgement, para. 735.

159. The Defence further requests the Appeal Chamber to make any resulting amendments to the Disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

VII. APPEAL GROUND FIVE

160. In the event that the Appeal Chambers does not accept the Defence arguments for overturning the convictions for Counts 2, 4 and 5, the Defence sets out Ground five. Ground five is:

> The Majority of the Trial Chamber erred in law in entering convictions under Count 7 as well as under Counts 2-5 stating it was permissible to do so even where the underlying facts for the conviction are the same.

Trial Chamber's Reasoning

The Law

161. The Trial Chamber sets out the applicable law on cumulative convictions as follows:

> "The Chamber is of the view that an Accused may only be convicted of multiple criminal convictions under different statutory provisions, but based on the same conduct, "if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other."[134]

162. The Defence submits that this reiteration of the law on cumulative convictions is correct.

Legal Findings

163. The Trial Chamber first states that it found the elements of the offences of murder (Count 2), cruel treatment (Count 4) and collective punishments (Count 7) had been established against Kondewa in Tongo District. The Trial Chamber further states that it found the elements of murder (Count 2), cruel treatment (Count 4), pillage (Count 5) and collective punishments (Count 7) were established against Kondewa in Bonthe.[135]

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[134] Trial Chamber Judgement, para. 974 (following the reasoning set out in the *Čelebići* Appeal Judgement, para. 412).
[135] Trial Chamber Judgement, para. 975.

164. The Trial Chamber then states that the offence of collective punishments under Article 3(b) of the Statute requires two materially distinct elements. Earlier in its Judgement, the Trial chamber set out the constitutive elements of the crime of collective punishments under Article 3(b) of the Statute as follows:

> "(i) A punishment imposed collectively upon persons for omissions or acts that they have not committed; and
> (ii) The Accused intended to punish collectively persons for these omissions or acts or acted in the reasonable knowledge that this would likely occur." [136]

165. Although the Trial Chamber states that the "punishment" which the offence of collective punishment is based on can be a lesser offence than murder, pillage or cruel treatment[137], it notes that in this case the Prosecution has pleaded "punishments" that consist only of the specific crimes enumerated in Counts 1-5.

166. Despite this, the Trial Chamber then states that "punishments" should be understood in its broadest sense and the term refers to all types of punishments. The Trial Chambers states that "the *actus reus* of the offence of collective punishment therefore does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment. Nor is it required, in order to find liability for collective punishments, that the *mens rea* of any of these offences needs to be satisfied."[138]

167. Therefore, in the Trial Chamber's view, because the *actus reus* and the *mens rea* of collective punishments can be broader than the "punishments" of Count 1-5, it is permissible to enter convictions under Count 7 as well as Counts 2-5.

Defence Submissions

168. The Defence submits that the Trial Chamber erred in law in extending the content of "punishments" in the collective punishments count to acts broader than those

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[136] Trial Chamber Judgement, para. 180.
[137] Trial Chamber Judgement, para. 978.
[138] Ibid.

specifically set out in the Indictment. In doing so, the Trial Chamber erred in entering convictions for Counts 2-5 and Count 7.

169. The Trial Chamber must use the Indictment as the basis of the case that the Prosecution is pleading. As the Trial Chamber has previously stated, the Indictment is the "fundamental accusatory instrument"[139] and the "foundation upon which every prosecution stands."[140]

170. The Indictment, in setting out Count 7, states:

> "At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in Counts 1 through 5...The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces."[141]

171. As stated, the Trial Chamber itself notes that in its Indictment the Prosecution pleaded "punishments" that consisted specifically of the crimes enumerated in Counts 1-5. The Trial Chamber also stated earlier in its Judgement that Count 7 "relates to the Accused's alleged responsibility for the commission by the CDF, largely Kamajors, of the crimes charged in Counts 1 through 5 in order to punish the civilian populations for their support to, or failure to actively resist, the combined RUF/AFRC forces."[142]

172. While the Trial Chamber states that "punishment" should be understood in its broadest sense, in this instance the Prosecution chose specifically to plead Count 1-5 as the basis for Count 7. Under the Indictment as it has been pleaded, Count 7 is entirely based on the conduct set out in Counts 2, 4, and 5.

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[139] *Norman, Fofana, and Kondewa*, Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, para. 6.
[140] Ibid. Separate Concurring Opinion of Judge Itoe, para. 25.
[141] Indictment, Para. 28 [note that terrorizing the civilian population as Count 6 is also included within this paragraph].
[142] Trial Chamber Judgement, para. 176.

173. The Defence submits that the Trial Chamber erred when it suggested and applied the reasoning that the *actus reus* of the offence of collective punishment does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment. This might be the case if the Indictment had been pleaded in another way, specifically pleading punishments broader than punishments contained in Counts 1-5. However it was not. As pleaded, Count 7 is based on the same conduct as Counts 2, 4 and 5. Effectively the crimes of Counts 2, 4 and 5 are absorbed into Count 7.[143] Therefore no distinct element is required for Counts 2, 4 and 5.

174. Accordingly and as per the applicable law as set out by the Trial Chamber, where an additional element is only required for one of the Counts, then the Accused should be convicted on that Count, but not on the other Count (or Counts) for which no distinct element is required.[144] Establishing collective punishments requires the additional element of demonstrating "punishments" imposed collectively upon persons for omissions or acts that they have not committed. In this case, the "punishments" are Counts 1-5. The additional element is to demonstrate the collective nature of those punishments. Therefore, the Trial Chamber should have only convicted Kondewa on Count 7 but not Counts 2,4 and 5.

Conclusion

175. The Defence submits that the Trial Chamber erred in law in extending the Indictment to include "collective punishments" as acts broader than Counts 1-5. If the Appeal Chambers reaffirms Kondewa's responsibility pursuant to Article 6(1) and Article 6(3) for Counts 2, 4 and 5, the Defence submits that the Appeal

[143] The case law of the ad hoc tribunals state that where the crimes are based on the same facts and the same criminal conduct, there can be no cumulative convictions where one count is absorbed into the other. For example, in the ICTR, the Trial Chamber has held that it is improper to convict an accused person for genocide and murder because the offence of murder is subsumed into the counts of genocide. See, for example, *Kayishema and Ruzindana* Trial Judgement, para. 577.
[144] Trial Chamber Judgement, para. 978.

Chamber should revise the findings of the Trial Chamber and impose liability only under Count 7.

176. The Defence also requests the Appeal Chamber to make any resulting amendments to the Disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

VIII. APPEAL GROUND SIX

177. The sixth ground of appeal is:

> The Majority of the Trial Chamber erred both in law and in fact in finding that the Prosecution had established beyond a reasonable doubt that Kondewa was individually criminally responsible pursuant to Article 6(1) for committing the crime of enlisting a child under the age of 15 years into an armed force or group.

The Trial Chamber's Reasoning

The Law

178. The Trial Chamber sets out the law on "Enlisting Children under the Age of 15 into Armed Forces or Groups or Using Them to Participate Actively in Hostilities" at paragraphs 182 – 199 of the Judgement.

179. The Trial Chamber notes that the Indictment charges Kondewa with the offence of enlisting or using children under the age of 15 in hostilities.[145] It recalls the preliminary motion filed by the Accused Norman whereby the Appeals Chamber ruled that the offence of recruitment of child soldiers below the age of 15 did in fact constitute a crime under customary international law.[146] It is specifically noted that the Appeal Chamber decision dealt with the offence of "recruitment" only.[147]

180. The Trial Chamber also highlights the fact that the Statute, in Article 4(c) uses the terms "conscription", "enlistment" and "using" children to participate in hostilities. However in the Indictment, Count 8 also refers to "initiation" of children.[148] The specific elements of the crime for enlisting and using children under the age of 15 are then listed.[149]

181. The specific elements of enlisting children under the age of 15 years into armed groups or forces, as set out by the Trial Chamber, are:

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[145] Trial Chamber Judgement, para. 182.
[146] Trial Chamber Judgement, para. 184, [Citing to 'Appeal Decision on Child Recruitment', para. 53]
[147] Trial Chamber Judgement, para.190.
[148] Trial Chamber Judgement, para. 190.
[149] Trial Chamber Judgement, paras. 195-196.

(i) One of more persons were enlisted, either voluntarily or compulsorily, into an armed force or group by the Accused;

(ii) Such person or persons were under the age of 15 years;

(iii) The Accused knew or had reason to know that such person or persons were under the age of 15 years; and

(iv) The Accused intended to enlist the said person into the armed force or group.[150]

Factual and Legal Findings of the Trial Chamber

182. The Trial Chamber recounts the testimony of three former child soldiers in paragraphs 667 – 687 of the Trial Chamber Judgement. More general factual findings on the use of child soldiers throughout Sierra Leone are also made at paragraph 688.

183. At paragraphs 971 and 972 the Trial Chamber found that the Prosecution had established beyond a reasonable doubt that Kondewa was individually criminally responsible pursuant to Article 6(1) for committing the crime of enlisting a child under the age of 15 into an armed force or group.

184. The Trial Chambers reaches this conclusion based on the testimony of one Prosecution Witness, TF2-021.[151]

185. The Trial Chamber made a number of factual findings with respect to TF2-021's testimony. These include: while TF2-021 was at Base Zero he was initiated with some 20 other young boys; the initiation was "performed" by Kondewa who gave them potions to rub on their bodies and told the boys "that they would be made powerful for fighting"; the boy subsequently received training [though not by Kondewa] and was sent to Masiaka on his first mission; in 1999 the witness was

[150] Trial Chamber Judgement, para. 195.
[151] This testimony is recounted in Trial Chamber Judgement, paras. 674 – 682.

initiated into the Avondo secret society [though not initiated by Kondewa], a society that was headed by Kondewa.[152]

186. On this evidence, the Trial Chamber concludes "it is beyond reasonable doubt that Kondewa...when initiating the boys, was also performing an act analogous to enlisting them for active military service."[153] The particular acts that the Trial Chambers concludes are analogous to enlistment are giving the initiates potions and telling them that they would be made strong for fighting. The Trial Chamber further found that there can be no mistaking a boy of 11 for a boy of 15 and therefore Kondewa knew that the boy was under 15. The fact that the boy was given a second initiation when he was thirteen years old into a secret society headed by Kondewa was also seen as an act of enlistment and reaffirmed the Trial Chamber's view that Kondewa's responsibility was established beyond a reasonable doubt.[154]

Defence submissions

187. The Defence submits that the Trial Chamber's evaluation of the evidence was wholly erroneous. The Trial Chamber made a number of errors in reaching its legal finding on the responsibility of Kondewa, including:

(i) The Trial Chamber conflates initiation and enlistment to reach the legal conclusion that initiation can equate to enlistment;
(ii) On the basis of this conclusion the Trial Chamber then effectively makes enlistment a crime that can reoccur numerous times to the same child within the same fighting group, which is legally and factually untenable;
(iii) On the basis of unclear witness testimony and contradictory conclusions on the meaning this testimony by the Trial Chamber, the Trial Chamber erroneously attributes responsibility to Kondewa for enlistment of children under the age of 15 years.

[152] Trial Chamber Judgement, para. 968 (i) to (iv).
[153] Trial Chamber Judgement, para. 970.
[154] Trial Chamber Judgement, para. 970.

188. Given these errors, the Trial Chamber erred in law and fact in concluding that the evidence established beyond a reasonable doubt that Kondewa was responsible for the crime of enlisting a child under the age of 15 years into an armed force or group.

A. Conflating initiation and enlistment

189. The Defence submits that the Trial Chamber erred in conflating initiation and enlistment and reaching the conclusion that acts of initiation are analogous to enlistment. There is no basis in law or fact to conclude that initiation is an action that is similar to enlistment.

190. The Trial Chamber correctly noted that the language of Article 4 (c) of the Statute uses the terms "conscription", "enlistment", and "using [children] to participate actively in hostilities". However, it was further noted that the Indictment makes reference to "initiation" of children into the armed forces or group,[155] though Count 8 charges the Accused with enlisting or using children under the age of 15 years.

191. In this instance, Kondewa is charged with the crime of "enlisting". The Defence first submits that if the Prosecution, by its use of the language "initiate or enlist" in the Indictment was attempting to equate initiation with enlistment it was required to present some evidence to attempt to establish that. This was never done. No evidence was ever put before the Trial Chamber to demonstrate that initiation was the equivalent of enlisting in international law. To the contrary, there is evidence led by the Prosecution that "initiation into the Kamajor traditional society is completely different from military recruitment"[156]. Perhaps because of this evidentiary black hole, the Trial Chamber recognised the need for clarification on the use of the various terms. The Trial Chamber states:

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[155] Paragraph 29 of the Indictment states "At all times relevant to this indictment, the Civil Defence Forces did, throughout the Republic of Sierra Leone, initiate or enlist children under the age of 15 years into armed forces or groups, and in addition, or in the alternative, use them to participate actively in hostilities."

[156] Transcript of 15th March 2005, Albert Nallo page 9 lines 10-13.

"The Chamber deems it necessary to examine these terms and their relevance to this case, specifically, whether "enlistment", "using children to participate actively in hostilities", and also "initiation" of children into the armed forces or groups, are prohibited under customary international law."[157]

192. The Trial Chamber then proceeds to examine the use of the term "recruitment", distinctions between forced and voluntary enlistment, the phrase "using children to participate actively in hostilities" and the phrase "armed forces or groups".[158]

193. However despite stating a need for an examination of whether initiation of children is prohibited under customary international law, the Trial Chamber merely states:

"The Indictment also charges the Accused with "initiation" of child soldiers, which is not listed as an offence in the Statute. However, it is the opinion of the Chamber that evidence of "initiation" **may be relevant** in establishing liability under Article 4 (c) of the Statute." [159]

194. The Trial Chamber's next examination of initiation then occurs at paragraph 970 of the Trial Chamber Judgment where Kondewa's actions are said to be 'analogous to enlisting for active military service' and on that basis the Chamber determines guilt for child enlistment.

195. The Trial Chamber's sole basis for making such an analogy appears to be because the evidence that Kondewa told initiates "they would be made strong for fighting". From this sentence, the Trial Chamber then makes a logic leap: "the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service."[160]

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[157] Trial Chamber Judgement, para. 190.
[158] Trial Chamber Judgement, paras. 191-197.
[159] Trial Chamber Judgement, para. 198 (emphasis added).
[160] Trial Chamber Judgement, para. 970 (emphasis added).

196. The Defence submits that it is not at all clear how such an act is analogous to an act of enlistment, voluntary or forced and that the Trial Chamber erred in reaching that conclusion.

197. The Chamber concedes in paragraph 969 that initiation does not necessarily amount to enlistment, and it adds that initiation may be carried out for other reasons. The Chamber notes elsewhere in the Judgment that initiation of Kamajors served other ends: Kamajors were traditionally hunters, responsible for "protecting communities from both natural and supernatural threats said to reside beyond the village boundaries"[161], and the system of initiations into Kamajor society was 'a process by which traditional societies prepared their members for their entry into manhood or womanhood. This preparation involved training men to fight, and to be unafraid of the battlefield'[162]

198. Yet somehow this particular circumstance of initiation, in the Trial Chamber's view, distinguishes it from other initiations and elevated it to "enlistment", a crime under customary international law. Why is it that initiation is acceptable in one context but not in another?

199. The Defence submits that the Trial Chamber erred in law in equating initiation and enlistment. The Defence submits that no reasonable trier could reach such a conclusion, based on the factual findings of one particular initiation and the broader evidence as to the actual role of initiation within the Kamajor society and the CDF, that Kondewa committed the crime of enlisting a child under the age of 15 into an armed force or group on this basis.

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[161] Trial Chamber Judgement, para. 60.
[162] Trial Chamber Judgement, para. 62 (footnote 55). See also, testimony of Albert Nallo on the 15th March 2005 at page 9, lines 10-13: "Q. But you do agree with me, Mr Witness, that initiation into the Kamajor traditional society is completely different from military recruitment? A. Yes, My Lord." and page 11,L 8-10: Q. Basically you can have somebody going through the Kamajor initiation but not opting for military recruitment? A. Yes, My Lord."

Trial Chamber establishes "enlistment" as a re-occurring crime

200. The Defence submits that the Trial Chamber then compounded its error in suggesting that the second initiation of TF2-021 into the Avondo society was further evidence of Kondewa's guilt for the crime of enlistment because the Avondo society was headed by Kondewa, and the certificate of initiation into the secret society bore Kondewa's signature.[163] This seems to suggest that on this evidence the Trial Chamber concludes that Kondewa enlisted TF2-021 again.

201. The Trial Chamber's reasoning leads to a number of untenable conclusions. First, the Trial Chamber effectively makes enlisting a perpetual activity, that can occur to the same child within the same armed force over and over. TF2-021, according to the Trial Chamber was enlisted the first time when he was initiated at Base Zero. Then TF2-021 was enlisted again when he was initiated into the Avondo Society in 1999.

202. Secondly, the Trial Chamber, in reaching the legal finding that it did, blurs the status of the TF2-021 prior to its "enlistment" as a child combatant by Kondewa and narrows the definition of child combatant by concluding that it was at the point when Kondewa enlisted TF2-021 that he became a child combatant, not when he was already with the CDF and carrying out such activities as carrying looted property for the Kamajors.[164]

203. The act of "enlistment" logically suggests perpetrating a change in the status of a child. It is the act of the transformation of an individual from being a child to becoming a child soldier that makes the enlisting (or conscripting or recruitment) a crime. However, according to the Trial Chamber's reasoning, TF2-021 when he was captured by the Kamajors from the RUF in 1997 and forced to carry looted property had not yet been recruited as a child combatant.

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[163] Trial Chamber Judgement, para. 970.
[164] Trial Chamber Judgement, para. 968 (i).

204. If it is accepted that TF2-021 was a child combatant prior to his initiation, the conclusion is that he was effectively enlisted three times into the CDF as a child combatant. Such a conclusion is both illogical and untenable.

Unclear witness testimony of an initiation on the basis of which the Trial Chamber attributes responsibility to Kondewa for enlistment

205. Finally, even if the untenable conclusion that initiation equals enlistment is accepted, the Defence submits that the Trial Chamber bases its finding that "in this circumstance," initiation amounted to the crime of enlistment on very unclear witness testimony and contradictory conclusions of its own factual findings. For the Trial Chamber, it is this particular initiation that made it different from other initiations that were not "enlistment". The Defence submits that the Trial Chamber erred in giving so much weight to testimony that was unclear and therefore unreliable.

206. The testimony of TF2-021 was given on 2 November 2004. The transcript states:

> Q. Witness, what did you do at the graveyard?
>
> A. We were told that if anybody sleeps there you would be sleeping – **if anybody died for you, whether its your grandfather or any of your family members, he would come and give you something, which would make you very powerful to fight.** That's why they took us to the graveyard."[165]

207. The Trial Chamber, in its factual findings at paragraph 968 (ii) stated that the evidence, based on this above transcript was that "Kondewa performed the initiation and told the boys that they would be made powerful for fighting...."[166] It appears that it is on these factual findings that the Trial Chamber makes initiation analogous to enlistment.

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[165] Transcript, 2 November 2004 pg 40 lines 28- pg 41 line 4 (emphasis added).
[166] Trial Chamber Judgement, para. 968 (ii).

208. However, at paragraph 317 of the Trial Chamber Judgement on the basis of the exact same testimony by TF2-021 the Trial Chamber reaches a completely different factual finding stating:

> "317. An example of a Base Zero initiation of fighters was one that involved a group of 400 candidates who were gathered naked in the bush while singing...After one week the initiates were gathered at a graveyard in the middle of the night and allowed to bathe. **The initiates were told that if anyone had died for them, that person would return to them in the graveyard and give them something to make them powerful fighters**..."[167] (emphasis added)

209. In one place in the Judgement the Trial Chamber states that Kondewa was the one who told the boys they would be "made powerful for fighting" and in another place the Trial Chamber concludes that "anyone [who] had died for them...[would] give them something to make them powerful fighters." The evidence was unclear, even to the Trial Chamber itself.

210. Regarding the potion the transcript states:

> "A. After they had beaten us they made something inside a drum, which they called in Mendi nesi – it's a potion.
> Q. What is done with this potion?
> A. We all brought a rubber – a sass-man rubber, and it was put in it, but before they could put it in the rubber, they told us that that potion is our protection and, when we go to fight, that's what we would smear on our body for the fight, together with a ronko."[168]

211. There was no clarification on this testimony. It is unclear who "they" are when the witness testified that "they told us that potion is our protection." It is unclear how the Trial Chamber took this testimony and concluded the factual finding as "He [Kondewa] gave them a potion to rub on their bodies before going into battle."

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[167] See Trial Chamber Judgement, footnote 474 referencing this evidence to the testimony of TF2-021.
[168] Transcript, 2 November 2004, pg. 42 lines 11-19.

212. The Defence submits that even if the Appeal Chamber finds that initiation is analogous to enlistment, the evidence relied on by the Trial Chamber was so unreliable and contradicted by the Trial Chamber judges themselves, that the Trial Chamber erred when it relied on this evidence as the basis of establishing guilt beyond a reasonable doubt of Kondewa enlisting children under the age of 15.

Conclusion

213. Based on the above, the Defence submits that the Trial Chamber erred in law when it concluded that initiation and enlistment are analogous. The Defence submits that no reasonable trier of fact could have concluded that in one circumstance an initiation was beyond reasonable doubt the same as enlistment given the totality of the evidence suggesting otherwise and the reliance on unclear and therefore unreliable testimony from one Prosecution witness.

214. For the reasons given above, the Defence requests the Appeal Chamber to reverse the finding that Kondewa was individually criminally responsible, pursuant to Article 6(1), for the crime of enlisting a child under the age of 15 years into an armed force or group.

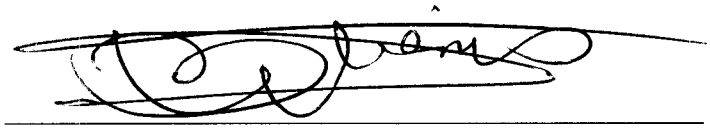
215. The Defence also requests the Appeal Chamber to make any resulting amendments to the disposition of the Trial Chamber Judgement and to decrease the sentence imposed on Kondewa to reflect the reduced criminal liability.

IX. SUBMISSIONS ON SENTENCING

216. The Defence does not specifically appeal against the Sentencing Judgement of the Trial Chamber dated 9 October 2007 in Case No. SCSL-04-14-T, *Prosecutor v. Fofana and Kondewa.*[169] However the remedies requested by the Defence with respect to the above six grounds of appeal against the Trial Chamber's Judgement include requests that the Appeal Chamber decrease the sentence imposed on Kondewa to reflect the decreased criminal liability.

217. There is established practice at the *ad hoc* tribunals of the Appeals Chamber itself imposing a new sentence following any findings of additional or reduced criminal liability by the Appeals Chamber.[170] The Defence submits that the appropriate course for this Appeals Chamber would be to for the Appeals Chamber itself to impose a reduced sentence following any findings of reduced criminal liability by the Appeals Chamber in this appeal.

11th December 2007



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[169] *Prosecutor v. Fofana and Kondewa*, SCSL-04-14-T-796, Judgement on the Sentence of Moinana Fofana and Allieu Kondewa, 9 October 2007.
[170] See for example, *Blaskić* Appeal Judgement, *Aleksovski* Appeal Judgement and *Krnojelac* Appeal Judgement.

APPENDIX A

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***Kvočka* Appeal Judgement**	Prosecutor v. Kvočka et al, IT-98-30/1, "Judgement", Appeals Chamber, 28 February 2005 http://un.org/icty/kvocka/appeal/judgement/index.htm
***Kvočka* Trial Judgement**	Prosecutor v. Kvočka et al, IT-98-30/1, "Judgement", Trial Chamber, 2 November 2001 http://un.org/icty/kvocka/trialc/judgement/index.htm
***Limaj et al* Trial Judgement**	Prosecutor v. Limaj et al, IT-03-66-T, "Judgement", Trial Chamber, 30 November 2005 http://un.org/icty/limaj/trialc/judgement/index.htm
***Muhimana* Trial Judgement**	Prosecutor v. Muhimana, ICTR- 95-1B-T, "Judgment and Sentence", Trail Chamber, 28 April 2005 http://69.94.11.53/ENGLISH/cases/Muhimana/judgement.htm
***Musema* Trial Judgement**	Prosecutor v. Musema, ICTR-96-13-T, "Judgement and Sentence", Trial Chamber, 27 January 2000 http://69.94.11.53/ENGLISH/cases/Musema/judgement.htm
***Musema* Appeal Judgement**	Prosecutor v. Musema, ICTR-96-13-A, "Judgement", Appeals Chamber, 16 November 2001 http://69.94.11.53/ENGLISH/cases/Musema/appealchamber.htm
***Muvunyi*, Trial Judgement and Sentence**	Prosecutor v. Muvunyi, ICTR-00-05, "Judgment and Sentence", Trail Chamber, 12 September 2006 http://69.94.11.53/ENGLISH/cases/Muvunyi/judgement.htm

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***Nahimana et al.*, Trial Judgement and Sentence**	Prosecutor v. Nahimana et al., ICTR-99-52-T, "Judgement and Sentence", Trial Chamber, 3 December 2003 http://69.94.11.53/ENGLISH/cases/Ngeze/judgement/judg&sent.pdf
***Naletilić and Martinović*, Trial Judgement**	*Prosecutor v. Naletilić and Martinović,* IT-98-34-T, "Judgement", Trial Chamber, 31 March 2003 http://un.org/icty/naletilic/trialc/judgement/index.htm
***Naletilić and Martinović* Appeal Judgement**	*Prosecutor v. Naletilić and Martinović,* IT-98-34-A, "Judgement", Appeals Chamber, 3 May 2006 http://un.org/icty/naletilic/appeal/judgement/index.htm
***Ndindabahizi* Trial Judgement and Sentence**	Prosecutor v. Ndindabahizi, ICTR-2001-71-I, "Judgment and Sentence", Trial Chamber, 15 July 2004. http://69.94.11.53/ENGLISH/cases/Ndindabahizi/judgement.htm
***Ndindabahizi*, Appeal Judgement**	Prosecutor v. Ndindabahizi, ICTR-2001-71-A, "Judgment", Appeals Chamber, 16 January 2007 http://69.94.11.53/ENGLISH/cases/Ndindabahizi/appealchamber.htm
***Nikolić* Appeal Judgement**	Prosecutor v. Nikolić, IT-02-60/1-A, "Judgment", Appeals Chamber, 8 March 2006. http://www.un.org/icty/mnikolic/appeal/judgement/nik-aj060308-e.pdf
***Niyitegeka* Trial Judgement**	Prosecutor v. Niyitegeka, ICTR-96-14-T, "Judgement," Trial Chamber, 16 May 2003 http://69.94.11.53/ENGLISH/cases/Niyitegeka/judgement/index.htm
***Ntagerura et al.* Trial Judgement and Sentence**	Prosecutor v. Ntagerura et al., ICTR-99-46-T, "Judgement and Sentence," Trial Chamber, 25 April 2004 http://69.94.11.53/ENGLISH/cases/Imanishimwe/judgement/judgment-en.pdf
***Ntagerura et al.* Appeal Judgement**	Prosecutor v. Ntagerura et al., *ICTR-99-46-A,* "Judgment", Appeals Chamber, 7 July 2006 http://69.94.11.53/ENGLISH/cases/Ntagerura/appealchamber.htm
***Ntakirutimana*, Trial Judgement and Sentence.**	Prosecutor v. Ntakirutimana, ICTR-96-10 & ICTR-96-17-T, "Judgment and Sentence", Trail Chamber 21 February 2003 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/judgement.htm
***Ntakirutimana* Appeal Judgement**	*Prosecutor v. Ntakirutimana,* ICTR-96-10-A and ICTR-96-17-A "Judgment", Appeals Chamber, 13 December 2004 http://69.94.11.53/ENGLISH/cases/NtakirutimanaE/appealchamber.htm
***Nzabirinda* Trial Sentencing Judgement**	Prosecutor v. Nzabirinda , *ICTR-2001-77-T,* "Sentencing Judgment", Trial Chamber, 23 February 2007. http://69.94.11.53/ENGLISH/cases/Nzabirinda/judgement.htm
***Oric* Trial Judgement**	Prosecutor v. Oric, IT-03-68-T, "Judgement", Trial Chamber, 30 June 2006 http://un.org/icty/oric.trialc/judgement/ori-jud060650e.pdf

***Rutaganda* Appeal Judgement**	Prosecutor v. Rutaganda,, ICTR-96-3-A, "Judgment" Appeals Chamber, 26 May 2003 http://69.94.11.53/ENGLISH/cases/Rutaganda/appealchamber.htm
***Semanza* Trial Judgement**	Prosecutor v. Semanza, ICTR-97-20-T, "Judgment," Trial Chamber, 15 May 2003 http://69.94.11.53/ENGLISH/cases/Semanza/judgement/index.htm
***Semanza* Appeal Judgement**	Prosecutor v. Semanza, ICTR-97-20-A, " Judgment" Appeals Chamber, 20 May 2005 http://69.94.11.53/ENGLISH/cases/Semanza/appealchamber.htm
***Simić* Appeal Judgement**	Prosecutor v. Simić, IT-95-9-A, "Judgement", Appeals Chamber, 28 November 2006 http://un.org/icty/simic/appeal/judgement-e/sim-acjud061128e.pdf
***Stakić* Trial Judgement**	Prosecutor v. Stakić, IT-97-24-T, "Judgement", Trial Chamber, 31 July 2003 http://un.org/icty/stakic/trialc/judgement/index.htm
***Strugar* Trial Judgement**	Prosecutor v. Strugar, IT-01-42-T, "Judgement", Trial Chamber, 31 January 2005 http://www.un.org/icty/strugar/trialc1/judgement/index2.htm
***Tadić* Trial Judgement**	Prosecutor v. Tadić, IT-94-1-T, "Judgement", Trial Chamber, 7 May 1997 http://un.org/icty/tadic/trialc2/judgement/index.htm
***Tadić*, Appeal Judgement**	Prosecutor v. Tadić, IT-94-1-A, "Judgement", Appeals Chamber, 15 July 1999 http://un.org/icty/tadic/appeal/judgement/index.htm
***Vasiljević* Trial Judg**	Prosecutor v. Vasiljević, IT-98-32-T, "Judgement", Trial Chamber, 29 November 2002 http://un.org/icty/vasiljevic/trialc/judgement/index.htm
***Vasiljević* Appeal Judgement**	Prosecutor v. Vasiljević, IT-98-32-A, "Judgement", Appeal Chamber, 25 February 2004 http://un.org/icty/vasiljevic/appeal/judgement/index.htm
***Zelenovic* Appeal Judgement**	Prosecutor v. Zelenovic, IT-96-23/2-A, "Judgment on Sentencing Appeal" Appeals Chamber, 31 October 2007. http://www.un.org/icty/zelenovic/appeal/judgement/zel-sj071031e.pdf

III. Other Article

Beatrice I. Bonafe, Finding a Proper Role for Command Responsibility, Journal of International Criminal Justice 5 (2007) [attached at Appendix E]

APPENDIX B: ICTY and ICTR Jurisprudence on Command Responsibility

ICTY

ACCUSED	POSITION	Existence of SUP/SUB RELATIONSHIP (establishment of "effective control")	KNOWLEDGE	LIABILTY
1.Zlatko Aleksovski *Prosecutor v Aleksovski*, IT-95-14/1-T, Judgment, 25 June 1999 *Prosecutor v Aleksovski*, IT-95-14/1-A, 24 March 2000	Warden, Kaonik Prison	With prison guards: • Power to give prison guards orders • Concrete evidence that the accused could initiate disciplinary or criminal proceedings against guards who committed abuses as it was part of formalized operational procedure with prison system With HVO guards: • No effective control because soldiers could enter the prison without the guards being able to do anything	• Accused lived inside the prison and therefore must have been aware of the ill treatment of detainees; • 5 witnesses testified that the accused had witnessed their abuse by guards and encouraged it.	Command responsibility liability for physical detention conditions and the mistreatment to which prisoners were subjected within the Kaonik compound [upheld on appeal]
2. Tihomir Blaskić *Prosecutor v. Blaskić*, IT-95-14-T, Judgement,	Commander of the HVO armed forces in Central Bosnia	• Had authority to attach troops from military police to his forces for ad hoc missions • Accused himself said that the Military Police were under his command at the	• Reports that the accused received from the commanders of the Nikola Subic Zrinski Brigade are evidence that he was fully informed of the developments of their mission on	Command responsibility for various crimes against humanity.

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ACCUSED	POSITION	Existence of SUP/SUB RELATIONSHIP (establishment of "effective control")	KNOWLEDGE	LIABILTY
3 March 2001 *Prosecutor v Blaskić*, IT-95-14-A, Judgement, 29 July 2004		time of the criminal events which took place at Loncari and Ocehni ci • Accused regularly addressed orders to the Military Police. Those orders took many different formsand referred both to organisational aspects and to the conduct of the troops. Moreover, the accused also gave the Military Police several combat preparation orders and combat orders. • Accused deployed units involved in the crimes in the area where the crimes were committed.	the ground • By giving orders to the Military Police in April 1993, when he knew full well that there were criminals in its ranks, the accused intentionally took the risk that very violent crimes would result from their participation in the offensives.	[upheld on appeal]
3. Milorad Krnojelac *Prosecutor v Krnojelac*, IT-97-25-T, judgement, 15 March 2002 *Prosecutor v Krnojelac*, IT-97-25-A, judgement, 17 September, 2003	Warden of the KP Dom Prison	• Position of prison warden connotes a supervisory role over all prison affairs. This general understanding of the position of warden accords with the structure of the KP Dom prior to the conflict ; • Warden was responsible for all the convicted male detainees, business units, and work sites associated with the prison. • The deputy warden, commander of the guards, chief of service for rehabilitation and the head of the economic unit were all subordinate to the warden • The warden also retained jurisdiction	• Evidence that the accused knew Muslim civilians were being illegally detained at the KP Dom because of their ethnicity. Upon his first arrival at the KP Dom, he asked who was being detained and for what reason. He was told that the prisoners were Muslims and that they were being detained because they were Muslims (TC100) • Accused represented the KP Dom in discussions with visiting representatives of the International Committee of the	Article 6(3) liability for Persecution, Inhumane Acts and Cruel Treatment. [upheld on appeal]

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ACCUSED	POSITION	Existence of SUP/SUB RELATIONSHIP (establishment of "effective control")	KNOWLEDGE	LIABILTY
		over all detainees in the KP Dom. When any of the detainees had matters of concern they were always taken by the guards to see the Accused.	Red Cross ("ICRC") with respect to the detention of all detainees at the KP Dom. • In view of the widespread nature of the beatings at the KP Dom and the obvious resulting physical marks on the detainees, the Accused could not have failed to learn of them, • The consequences of the mistreatment upon the detainees, the resulting difficulties that some of them had in walking, and the pain which they were in must have been obvious to everyone. • The Trial Chamber noted that the Accused held the position of warden for 15 months, during which time he went to the KP Dom almost every day of the working week. While there he would go to the canteen. • Accused was personally told about non-Serb detainees being beaten	

ACCUSED	POSITION	Existence of SUP/SUB RELATIONSHIP (establishment of "effective control")	KNOWLEDGE	LIABILTY
4.Zdravko Mucic ("Celebici Camp") *Prosecutor v. Delalic et al.*, IT-96-21-T, Judgement, 16 November 1998 *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001	Commander, Celibici Prison Camp	• Mucic was in a *de facto* position of superior authority over the Celebici prison-camp • Mucic had the authority to release detainees • Mucic had all the powers of a commander to discipline camp guards and to take every appropriate measure to ensure the maintenance of order; • He could confine guards to barracks as a form of punishment and for serious offences he could make official reports to his superior authority at military headquarters. Further, he could remove guards, as evidenced by his removal of Esad Landzo in October 1992; • • He had authority over the guards and could issue orders such as requesting additional food for detainees.	• Crimes committed in the Celebici prison-camp were so frequent and notorious that there is no way that Mr. Mucic could not have known or heard about them. Despite this, he did not institute any monitoring and reporting system whereby violations committed in the prison-camp would be reported to him	Article 6(3) liability for Inhuman Treatment, Cruel Treatment, Torture and various others. [upheld on appeal]
5. Nasir Oric *Prosecutor v. Oric*, IT-03-68-T, Judgement, 30 June 2006 [currently on appeal]	Member of Srebenica War Presidency Chief of Staff of the Srebrenica Armed Forces	• Took military decisions as chief of staff on behalf of the Commander; • Evidence from minutes of meetings demonstrated that he asserted authority over the Srebrenica Armed Forces staff; • Evidence from guards and prisoners	• Credible testimony from witnesses confirmed the accused visited Serb detainees • Those detained themselves gave evidence that Oric visited them and knew about their	Article 6(3) liability for Murder and cruel treatment as perpetrated by the Srebrenica

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ACCUSED	POSITION	Existence of SUP/SUB RELATIONSHIP (establishment of "effective control")	KNOWLEDGE	LIABILTY
		that demonstrated that he could influence the events at the Srebrenica Police Station.	condition • One witness said Oric himself participated in his mistreatment • Accused involved in exchanges of prisoners which put him on notice as to their condition	military police.
6. Pavle Strugar *Prosecutor v Strugar*, IT-01-42-T, Judgement, 31 January 2005 [currently on appeal]	Lieutenant-General Yugoslav People's Army (JNA)	• Accused had authority to give direct combat orders not only to the units under his immediate or first level command, but also to units under his command at a second or lower level; • Accused had authority to sign on behalf of the JNA a proposal for normalization of life in Dubrovnik, which included an undertaking by the JNA to guarantee an absolute ceasefire of all its units, and an undertaking to guarantee the safety of the citizens and the cultural monuments of Dubrovnik; • Accused promoted to rank of Lieutenant-General for successfully directing and commanding; • Accused had authority to apply all disciplinary measures prescribed by law	• Knowledge early on in the attack that the seriousness of the situation had been thought by the ECMM to warrant a protest in Belgrade at the highest level would have put the accused on notice at least that shelling of Dubrovnik beyond what he had anticipated in his order was occurring.	Article 6(3) liability for Attacks on civilians and Destruction or wilful damage done to institutions dedicated to religion

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7.Jean-Bosco Barayagwiza *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence, 3 December 2003 [currently on appeal]	President of the Coalition for the Defence of the Republic (CDR) at the national level Principal founder of RTLM radio station.	• Activities of CDR members and *Impuzamugambi* were initiated by or undertaken in accordance with the accused's direction as leader of the CDR party. • Accused was present at meetings, at demonstrations and at roadblocks where CDR members and Impuzamugambi were marshalled into action by party officials, including Barayagwiza or under his authority as leader of the party; • Promoted the policy of CDR for the extermination of the Tutsi population and supervised his subordinates, the CDR members and *Impuzamugambi* militia, in carrying out the killings and other violent acts.	• Observed crowds chanting "Let's exterminate them" at CDR meetings. • Witnesses gave evidence that the Accused monitored CDR roadblocks to see how many Tutsis were being killed.	Command responsibility for Genocide, direct and public incitement to genocide
8. Juvénal Kajelijeli *Prosecutor v. Kajelijeli*, ICTR-98-44-T, Judgement and Sentence, 1 December 2003 *Prosecutor v.*	Leader of Interahamwe with control over Interahamwe in Mukingo commune	• *De facto* effective control over the Interahamwe as a civilian; • Instructed the Interahamwe to kill and exterminate Tutsis and ordered them to dress up and start the work, and directed further *Interahamwe* to join the attack; • Played a vital role in organizing and facilitating the *Interahamwe* in the	• Assailants reported back daily to Kajelijeli on what had been achieved • Evidence that accused had meeting on evening of killings to gain information on what had happened • Witness gave evidence they had told Accused they had 'eliminated	Liability under Article 6(3) and 6(1) for Genocide and Extermination. Found. Appeal against concurrent convictions under 6(1) and

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Kajelijeli, ICTR-98-44-A, Judgement, 23 May 2005		massacre at Ruhengeri Court of Appeal by procuring weapons, rounding up the *Interahamwe* and facilitating their transportation; • Ordered and supervised attacks; • Bought beers for the *Interahamwe* while telling them that he hoped they had not spared anyone.	everything'. • Accused told assailants to 'fine-comb this area so that we do not have a single Tutsi left', and assailants promised they would do so.	6(3) upheld, and responsibility as a superior taken into account as an aggravating factor at sentencing.
9. Clément Kayishema *Prosecutor v. Kayishema and Ruzindana*, ICTR-95-1-T, 21 May 1999	PDC (Christian Democratic Party) Prefect of Kibuye Prefecture Prefect is the highest local representative of the government, and is the trustee of the State Authority	• Gendarmes waited for 2 days to begin massacre until accused ordered them to; • Accused was in position to order Bourgmestres not to follow instructions from the Minister of the Interior, which he did.	• Evidence presented that Accused not only knew and failed to prevent, but orchestrated and invariably led the massacres • Fact that he himself participated means that it is self-evident that he knew his subordinates were about to attack.	Article 6(3) liability for Genocide. [upheld on appeal]
10.Alfred Musema *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January 2000 *Prosecutor v. Musema*, ICTR-96-13-A, Judgement,	Director, Gisovu Tea Factory. (Appointed by presidential decree)	• *De jure* power and *de facto* control over Tea Factory employees and the resources of the Tea Factory; • Accused exercised legal and financial control over employees of the Gisovu Tea Factory, particularly through his power to appoint and remove these employees from their positions; • Accused was in a position, by virtue	• Personally present at attack sites. • Participated in some attacks.	Article 6(1) and 6(3) responsibility for Genocide and Crimes Against Humanity. [upheld on

16 November 2001		of these powers, to take reasonable measures, such as removing, or threatening to remove, an individual from his or her position at the Tea Factory if he or she was identified as a perpetrator of crimes; • Accused was in a position to take reasonable measures to attempt to prevent or to punish the use of Tea Factory vehicles, uniforms or other Tea Factory property in the commission of such crimes.		appeal]
11.Tharcisse Muvunyi *Prosecutor v Muvunyi*, ICTR-2000-55A-T, Judgement, 12 September 2006 [currently on appeal]	Interim Commander of the Ecole des sous-officiers (ESO) in Butare	• Authority over the school's soldiers and other military personnel. As such the Accused had effective control over the ESO soldiers who conducted the attacks; • Had all the material and human resources at ESO at his disposal and could have sent troops to prevent or punish the commission of the said crimes; • Gave instructions that the Bicunda family should not be harmed during the attack on the Groupe scolaire	• Circumstances under which the attacks took place were such the the Accused knew or had reason to know about them. • Knew that refugees were being taken away to be killed as evidenced by his attempt to save one of them, from the Bicunda family that he had specifically ordered be spared.	Command responsibility for Genocide.
12.Ferdinand Nahimana *Prosecutor v. Nahimana et al.*,	Office-holding member of governing body of RTLM	• Responsible for editorial policy of radio station which conveyed message of ethnic hatred and a call for violence against the Tutsi population.	• On a Radio Rwanda broadcast while the genocide was taking place the accused said he was happy that RTLM had been instrumental in awakening the majority population to stand up	Command responsibility for Direct and public incitement to genocide

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ICTR-99-52-T, Judgement and Sentence, 3 December 2003 [currently on appeal]			and halt to Tutsi enemy. • Described the radio's broadcasting as a complement to bullets	

Appendix C: Review of ICTR jurisprudence for acts amounting to "aiding and abetting"

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
1. Jean Paul Akayesu *Prosecutor v. Akayesu*, ICTR-96-04-T, Judgement, 2 September 1998 *Prosecutor v. Akayesu*, ICTR-96-04-A, Appeal Judgement, 1 June 2001	Bourgmestre, Taba Commune	• Allowed acts of sexual violence to take place on or near the premises of the bureau communal while he was present on the premises; • Facilitated the commission of these acts through his words of encouragement in other acts of sexual violence; • By virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.	Aiding and abetting rape
2. Paul Bisengimana *Prosecutor v. Bisengimana*, ICTR-00-60-T, Judgement and Sentence, 13 April 2006	Bourgmestre, Gikoro commune	At Musha Church: • Awareness that weapons such as guns and grenades were distributed to Interahamwe militiamen and other armed civilians by members of the Rwandan Army and the fact that these weapons would be used to attack Tutsi civilians seeking refuge; • Presence during the attack, along with Laurent Semanza, soldiers from the Rwandan Army, Interahamwe militiamen, armed civilians and communal policemen such that it would have had an encouraging effect on the perpetrators and given them the impression that he endorsed the killing of Tutsi civilians gathered there; • Possessed the means to oppose the killings in his commune but remained indifferent to the attack. At Ruhanga Church: • Despite his position as bourgmestre and his knowledge of the facts that the refugees at Musha church had been attacked, failue to take active steps to protect	Aiding and abetting extermination, murder

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
		the Tutsi refugees; • Possessed the means to oppose the killings of Tutsis in his commune but remained indifferent to the said attacks; • Presence when a murder was committed with the awareness that such presence would encourage the criminal conduct of the principal perpetrator and give the impression that he endorsed the murder and where he had the means to oppose the killing but remained indifferent.	
3.Sylvestre Gacumbitsi *Prosecutor v. Gacumbitsi*, ICTR-01-64-T, Judgement, 17 June 2004	Bourgmestre, Rusumo Commune	• Drove and led the attackers in a convoy; • Presence at multiple crime scenes.	Aiding and abetting genocide
4.Samuel Imanishimwe *Prosecutor v. Ntagerura et al.*, ICTR-99-46-T, Judgement and Sentence, 25 February 2004 *Prosecutor v. Ntagerura et al.*, ICTR-99-46-A, Judgement, 7 July 2006	Lieutenant, Rwandan Army	• Presence at the crime scene; • Presence at previous acts of mistreatment; • Frequency of such behaviour at his camp; • Failure to prevent the mistreatment; • Previous orders authorising mistreatment.	Aiding and abetting torture
5. Juvenal Kajelijeli *Prosecutor v. Kajelijeli*, ICTR-98-44-T,	Bourgmestre, Mukingo Commune	• Drove an attacker to a place where he was provided with grenades; • Facilitated transportation of others to the crime scene by supplying fuel for the	Aiding and abetting genocide

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ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Judgement and Sentence, 1 December 2003 *Prosecutor v. Kajelijeli*, ICTR-98-44-A, Judgement, 23 May 2005		vehicles; • Procured weapons for the attackers.	
6. Jean Kambanda *Prosecutor v. Kambanda*, ICTR-97-23-T, Judgement and Sentence, 4 September 1998 *Prosecutor v. Kambanda*, ICTR-97-23-A, Appeal Judgement, 19 October 2000	Prime Minister, Interim Government	• Issued a directive to the prefets encouraging and reinforcing the Interahamwe who were committing mass killings of the Tutsi civilian population in the prefectures; • Participated in the distribution of arms and ammunition to members of political parties, militias and the population knowing that these weapons would be used in the perpetration of massacres of civilian Tutsi; • Ordered the setting up of roadblocks (manned by mixed patrols of the Rwandan Armed Forces and the Interahamwe) with the knowledge that these roadblocks were used to identify Tutsi for elimination; • Gave clear support to RTLM with the knowledge that it was a radio station whose broadcasts incited killing, the commission of serious bodily or mental harm to, and persecution of Tutsi and moderate Hutu and encouraged RTLM to continue to incite the massacres of the Tutsi civilian population, specifically stating that this radio station was "an indispensable weapon in the fight against the enemy"; • Visited several prefectures to incite and encourage the population to commit these massacres including by congratulating the people who had committed these killings; • Addressed public meetings, and the media, at various places in Rwanda directly and publicly inciting the population to commit acts of violence against Tutsi and moderate Hutu (including uttering an incendiary phrase which was subsequently	Aiding and abetting genocide

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ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
		repeatedly broadcast).	
7.Clement Kayishema *Kayishema and Ruzindana*, ICTR-95-01-T, Judgement, 21 May 1999 *Kayishema and Ruzindana*, ICTR-95-01-A, Judgement, 1 June 2001	Prefect, Kibuye Prefecture	• Inciting assailants; • Transported gendarmes to the attack; • Presence at the attack.	Aiding and abetting genocide
8. Mikaeli Muhimana *Prosecutor v. Muhimana,* ICTR-95-01B-T, Judgement and Sentence, 28 April 2005 *Prosecutor v. Muhimana,* ICTR-95-01B-A, Judgement, 21 May 2007	Conseiller, Kibuye Prefecture	• Presence during rapes which occurred at the same time and in the same area where he had previously committed rape; • Committed rape in the presence of two associates who also committed rape; • Permitted an Interahamwe to take a woman away so that he could "smell the body of a Tutsi woman"; she was raped several times over a period of two days.	Aiding and abetting rape
9. Alfred Musema *Prosecutor v. Musema*, ICTR-96-13-T, Judgement and Sentence, 27 January	Director, Gisovu Tea Factory	At Gitwa Hill: • Armed with a rifle, arrived at the site of the attack in a vehicle belonging to the factory; • Accompanied by employees of the factory wearing blue uniforms;	Aiding and abetting murder, serious bodily and mental harm

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
2000 *Prosecutor v. Musema*, ICTR-96-13-A, Judgement, 16 November 2001		• Shot into the crowd of refugees. At Rwirambo Hill: • Armed with a rifle, arrived at the site of the attack followed by four factory vehicles carrying Interahamwe. At Muyira Hill: • Some attackers arrived in factory vehicles; • Factory employees dressed in their uniforms were among the attackers; • Arrived at the location armed with a rifle which he used during the attack. At Muyira Hill (again): • Armed with a rifle, led the attack and the attackers, who included the Interahamwe and employees of the factory; • Personal vehicle and vehicles belonging to the factory were seen at the site of the attack; • Personally shot at the refugees. At Mumataba Hill: • Present when factory vehicles transported attackers including factory employees to the site; • Present during attack; • Left the site with the attackers. At Nyakavumu Cave: • Part of a convoy headed to the site including factory vehicles carrying factory employees; • Armed with a rifle and present at the attack.	

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ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
10.Tharcisse Muvunyi *Prosecutor v. Muvunyi*, ICTR-00-55A-T, Judgement and Sentence, 12 September 2006	Lieutenant-Colonel, Rwandan Army	• Refused to assist refugees when soldiers from his camp attacked them; • Implicitly allowed soldiers under his command to leave their camp fully-equipped with arms and ammunition to attack refugees; • Tacitly approved the killing of the majority of refugees by instructing soldiers not to kill or otherwise harm members of a particular family.	Aiding and abetting genocide
11. Hassan Ngeze *Prosecutor v. Nahimana et al.*, ICTR-99-52-T, Judgement and Sentence, 3 December 2003	Journalist and politician	• Secured and distributed weapons to attackers; • Manned and supervised roadblocks where targets were identified; • Mobilised the population to attend party meetings and spread the message that Tutsis would be exterminated; • Publicly announced that if Habyarimana died, Tutsis would not be spared.	Aiding and abetting genocide
12.Emmanuel Ndindabahizi *Prosecutor v. Ndindabahizi*, ICTR-01-71-T, Judgement and Sentence, 15 July 2004 *Prosecutor v. Ndindabahizi*, ICTR-01-71-A, Judgement, 16 January 2007	Minister, Interim Goverment	• Distributed weapons; • Transported attackers; • Words of encouragement.	Aiding and abetting genocide, extermination
13.Eliezer Niyitegeka	Minister,	• Presence and jubilation during a particularly gruesome killing.	Aiding and

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Prosecutor v. Niyitegeka, ICTR-96-14-T, Judgement and Sentence, 16 May 2003 *Prosecutor v. Niyitegeka*, ICTR-96-14-A, Judgement, 9 July 2004	Interim Government, journalist		abetting murder
14.Elizaphan Ntakirutimana *Prosecutor v. Ntakirutimana,* ICTR-96-10 & 17-T, Judgement and Sentence, 21 February 2003 *Prosecutor v. Ntakirutimana,* ICTR-96-10 & 17-A, Judgement, 13 December 2004	Pastor, religious leader	• Conveyed armed attackers to various crime scenes; • Identified targets to attackers.	Aiding and abetting genocide, extermination
15.Gerard Ntakirutimana *Prosecutor v. Ntakirutimana,* ICTR-96-10 & 17-T, Judgement and Sentence, 21 February 2003	Medical doctor	• Attended a meeting with attackers; • Procured gendarmes and ammunition for an attack; • Pursued refugees.	Aiding and abetting genocide, extermination

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Prosecutor v. Ntakirutimana, ICTR-96-10 & 17-A, Judgement, 13 December 2004			
16. Joseph Nzabirinda *Prosecutor v. Nzabirinda*, ICTR-01-77-T, Sentencing Judgement, 23 February 2007	Youth organizer, local businessman and politician	• Attended several meetings with attackers; • Present during an attack; • Failure to object to killings; • Manned roadblocks in his secteur which were used to target victims.	Aiding and abetting murder
17.Georges Rutaganda *Prosecutor v. Rutaganda*, ICTR-96-3-T, Judgement and Sentence, 6 December 1999 *Prosecutor v. Rutaganda*, ICTR-96-3-A, Judgement, 26 May 2003	Businessman, politician, part owner of RTLMC	• Delivered and distributed arms to attackers at various crime scenes, once armed with a rifle and machete of his own; • Directed armed attackers into position to surround refugees; • Armed presence in military uniform at a crime scene.	Aiding and abetting murder, serious bodily and mental harm

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
18.Vincent Rutaganira *Prosecutor v. Rutaganira*, ICTR-95-1-T, Sentencing Judgement (Summary), 14 March 2005	Conseiller, Mubuga Secteur	• Close proximity (few metres) to attackers and crime scene; • Failure to use influence to protect population and prevent crimes.	Aiding and abetting extermination
19. Obed Ruzindana *Kayishema and Ruzindana*, ICTR-95-01-T, Judgement, 21 May 1999 *Kayishema and Ruzindana*, ICTR-95-01-A, Judgement, 1 June 2001	Prominent civilian	• Provision of transportation and weapons.	Aiding and abetting genocide
20. Laurent Semanza *Prosecutor v. Semanza*, ICTR-97-20-T, Judgement and Sentence, 15 May 2003 *Prosecutor v. Semanza*, ICTR-97-20-A,	MRDN member, former bourgmestre	• Brought attackers and weapons to site of massacre.	Aiding and abetting genocide, extermination, murder

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Judgement, 20 May 2005			

APPENDIX D: Review Of ICTY Jurisprudence For Acts Amounting To "Aiding And Abetting"

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
1. Zlatko Aleksovski *Prosecutor v. Aleksovski*, IT-95-14/1-T, Judgement, 25 June 1999 *Prosecutor v. Aleksovski*, IT-95-14/1-A, Judgement, 20 March 2000	Warden, Kaonik Prison	• Presence during body-searches which included insults, threats, thefts, and assaults of detainees; • Failure to repress/object to same as required by position; • Passive presence as detainees were taken away to serve as human shields.	Aiding and abetting outrages upon personal dignity
2. Haradin Bala *Prosecutor v. Limaj et al.*, IT-03-66-T, Judgement, 30 November 2005	Guard, Llapushnik Camp	• Blindfolded victim and delivered him to barn where he remained present while victim was beaten.	Aiding and abetting torture
3. Vidoje Blagojevic *Prosecutor v. Blagojevic and Jokic*, IT-02-60-T, Judgement, 17 January 2005 *Prosecutor v. Blagojevic and Jokic*, IT-02-60-A, Judgement, 9 May 2007	Commander, Bratunac Brigade	• Detention of hundreds of Bosnian Muslim men (brigade); • Practical assistance to the transfer operation (brigade).	Aiding and abetting genocide, persecution,

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
4. Radoslav Brdjanin *Prosecutor v. Brdjanin*, IT-99-36-T, Judgement, 1 September 2004 *Prosecutor v. Brdjanin*, IT-99-36-A, Judgement, 3 April 2007	Politician	• Bore responsibility for decisions of the ARC Crisis Staff: • Demanded the disarmament of non-Serbs through announcements and decisions setting deadlines concerning the surrender of weapons and providing for the eventual forceful confiscation of weapons; • Made inflammatory and discriminatory statements of moral support; • Made further threatening public statements which had the effect of terrifying non-Serbs into wanting to leave the territory of the ARK, thus paving the way for their deportation and/or forcible transfer by others. • Established the Agency for the Movement of People and Exchange of Properties in Banja Luka; • Espoused the strategic plan, the very nature of which was to create a separate Bosnian Serb state, from which most non-Serbs would be permanently removed.	Aiding and abetting murder, torture, forc. transfer, deportation, destruction, persecution
5. Anto Furundzija *Prosecutor v. Furundzija*, IT-95-17/1-T, Judgement, 10 December 1998 *Prosecutor v. Furundzija*, IT-95-17/1-A, Judgement, 21 July 2000	Commander, Jokers (HVO)	• Encouraged a co-accused to commit rape by his presence and continued interrogation of the victim, a woman, who was brought into detention, kept naked and helpless before her interrogators and treated with cruelty and barbarity.	Aiding and abetting rape
6. Dragan Jokic *Prosecutor v. Blagojevic*	Chief of Engineering Zvornik Brigade	• Coordinating, sending and monitoring the deployment of brigade heavy digging equipment and personnel to operate this equipment to dig mass	Aiding and abetting

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ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
and Jokic, IT-02-60-T, Judgement, 17 January 2005 *Prosecutor v Blagojevic and Jokic*, IT-02-60-A, Judgement, 9 May 2007		graves at mass execution sites.	murder, extermination, persecution
7. Miodrag Jokic *Prosecutor v. Jokic*, IT-01-42/1-S, Sentencing Judgment, 18 March 2004 *Prosecutor v. Jokic*, IT-01-42/1-A, Judgement on Sentencing Appeal, 30 August 2005	Naval commander	• Conducted a military campaign on Dubrovnik during which hundreds of shells were fired on the Old Town with knowledge of its protected status and the presence of a substantial number of civilians.	Aiding and abetting Murder, cruel trmt, unlawful attacks, devastation, destruction
8. Radislav Krstic *Prosecutor v. Krstic*, IT-98-33-T, Judgement, 2 August 2001 *Prosecutor v. Krstic*, IT-98-33-A, Judgement, 19 April 2004	Chief of Staff, Drina Corps	• Corps personnel organised transportation; scouted for sites to be used for detention and execution; guarded prisoners; were present immediately prior to, and during killings; and committed killings; • Corps equipment was engaged in tasks relating to the burial of the victims.	Aiding and abetting Genocide, murder, persecution, extermination
9. Dragoljub	Leader of recon unit,	• Brought victim to location where she was gang-raped by his soldiers;	Aiding and abetting rape,

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Kunarac *Prosecutor v. Kunarac et al.*, IT-96-23 &23/1-T, Judgment, 22 February 2001 *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/1-A, Judgment, 12 June 2002	Foca Tactical Group	• Brought two victims to location to be raped by other men; • Brought group of women to location to be raped by soldiers; • Assisted in setting up conditions at house where women were enslaved.	torture, enslavement
10. Radomir Kovac *Prosecutor v. Kunarac et al.*, IT-96-23 &23/1-T, Judgment, 22 February 2001 *Prosecutor v. Kunarac et al.*, IT-96-23 & 23/1-A, Judgment, 12 June 2002	Member of "Dragan Nikolic Unit"	• Held a woman in his apartment and allowed another to stay there and rape her.	Aiding and abetting rape
11. Esad Landzo *Prosecutor v. Delalic et al.*, IT-96-21-T, Judgement, 16 November 1998 *Prosecutor v. Delalic et al.*, IT-96-21-A, Judgement, 20 February 2001	Guard, Celebici Camp	• Facilitated the fatal beating of a detainee by taking him to the principals.	Aiding and abetting murder
12. Vinko Martinovic	Commander, HOS	• Encouraged his soldiers to brutally mistreat victim at his base;	Aiding and

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Prosecutor v. Naletilic and Martinovic, IT-98-34-T, Judgement, 31 March 2003 *Prosecutor v. Naletilic and Martinovic*, IT-98-34-A, Judgement, 3 May 2006		• Designated victim "game" that could be mistreated and humiliated by his soldiers at random; • Preventing victim from leaving the location; • Instructed co-detainees not to tell anybody about the incident; • Instructed driver to give false information about the whereabouts of the victim; • Gave direct orders with regard to the burial of the body.	abetting murder
13. Blagoje Simic *Prosecutor v. Simic et al.*, IT-95-9-T, Judgement, 17 October 2003 *Prosecutor v. Simic et al.*, IT-95-9-A, Judgement, 28 November 2006	Press of Crisis Staff, Bosanski Samac	• Worked together with police, paramilitaries, and JNA to maintain system of arrests and detentions of non-Serb civilians; • Failed to heed his responsibility to ensure the safety of the population; • Deliberately denied adequate medical care to detainees; • Contributed to continuation of forced labour programme by assigning new administrator; • Appointed exchange committee and consulted on detainee exchanges	Aiding and abetting persecution
14. Mitar Vasiljevic *Prosecutor v. Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002 *Prosecutor v. Vasiljevic*, IT-98-32-A, Judgement, 25 February 2004	Paramilitary (White Eagles) in Visegrad	• Prevented victims from escaping by escorting them to river at gun-point and standing behind them with other offenders shortly before shooting started.	Aiding and abetting Murder, inhuman acts, persecution
15. Simo Zaric *Prosecutor v. Simic et al.*, IT-95-9-T,	Member of BSA and prominent citizen of	• Conducted interrogations with non-Serb prisoners who had been beaten.	Aiding and abetting

ACCUSED	POSITION	ACTS OF ASSISTANCE CONSIDERED "AIDING AND ABETTING"	LIABILTY
Judgement, 17 October 2003 *Prosecutor v. Simic et al.*, IT-95-9-A, Judgement, 28 November 2006	Bosanski Samac		persecution
16. Dragan Zelenovic *Prosecutor v. Vasiljevic*, IT-98-32-T, Judgement, 29 November 2002 *Prosecutor v. Vasiljevic*, IT-98-32-A, Judgement, 25 February 2004	Member of "Dragan Nikolic Unit", *de facto* MP	• Along with other men, arrested a group of Muslims and took them to a temporary detention facility where the women were interrogated and threatened with sexual assault and murder; • With another man, interrogated a woman while other man threatened her with rape and murder; in the course of the interrogation she was taken by soldier to room where ten soldiers raped her.	Aiding and abetting rape
17. Zoran Zigic *Prosecutor v. Kvocka et al.*, IT-98-30/1-T, Judgement, 2 November 2001 *Prosecutor v. Kvocka et al.*, IT-98-30/1-A, Judgement, 28 February 2005	Reserve officer, Keraterm Camp	• Took victim, following a beating by others, to another room and asked him for information while another man was being beaten in the same room; when the victim did not comply, the soldier administering the other beating called the victim a liar, grabbed his ear, and held a knife to it.	Aiding and abetting persecution, torture

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Appendix E: Copy of Beatrice I. Bonafe Article

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SYMPOSIUM

COMMAND RESPONSIBILITY BETWEEN PERSONAL CULPABILITY AND OBJECTIVE LIABILITY

Finding a Proper Role for Command Responsibility

Beatrice I. Bonafé*

Abstract

This article examines the role that command responsibility currently plays in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). The ad hoc tribunals rely in principle on a broad concept of command responsibility – which can be applied to all superiors, including political and civilian ones. However, in practice, accused persons have only rarely been successfully charged under this form of liability. Indeed, recent case law has gradually adopted a rigorous approach with respect to the legal requirements of command responsibility. This has made it more difficult to establish criminal liability of superiors who have not directly participated in the commission of international offences. The ad hoc tribunals have expressed an explicit preference for forms of 'direct' liability where the accused can be convicted both under 'direct' and command responsibility. While the ICTY and ICTR have progressively interpreted other international legal concepts to deal effectively with collective crimes committed by leaders of organized groups, they seem to have confined command responsibility to international crimes perpetrated in typical military-like contexts.

1. Introduction

International criminal law provides for the criminal liability of individual persons who commit international crimes. On one hand, it necessarily focuses on the individual conduct of specific perpetrators. On the other, international crimes are seldom isolated acts of individual offenders. Most of the time, they are committed as a part of large scale atrocities that can only be carried out by a plurality of organized perpetrators. In such cases, it can be very difficult to ascribe individual criminal liability to the members of the criminal group, who

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Journal of International Criminal Justice **5** (2007), 599–618 doi:10.1093/jicj/mqm030

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have contributed to the commission of international crimes in varying degrees. International criminal law is characterized by the dilemma of being an individual-oriented body of law, which, however, must generally deal with collective — if not state — criminal phenomena. Command responsibility, together with other forms of liability (e.g. the theory of 'joint criminal enterprise'), are legal notions that were developed by international criminal law to specifically address these phenomena.

As is well known, international crimes are often carried out by hierarchically organized groups. Generally, certain members of the group, say subordinates, have physically perpetrated the crimes, whereas other members, say commanders, have not physically committed any crimes. Nonetheless, due to the structural organization of the group it is possible to conclude that commanders have in some way contributed to the commission of the relevant crimes. Commanders may have conceived of, planned, ordered, instigated, encouraged or tolerated the commission of these crimes. At first sight, it may seem obvious that such a contribution of commanders to the commission of international crimes should attract individual criminal responsibility. However, it can be very difficult to fit the contribution of commanders into the categories of international criminal law, and to demonstrate their criminal liability.

A typical task of commanders is to make decisions on behalf of the entire 'unity', that is, the commander and his subordinates taken together. Yet, subordinates are essentially required to obey and execute superior orders. Thus, as commanders are supposed to give orders, they are consequently responsible for the proper execution of such orders. When international crimes are committed by subordinates, this situation is difficult to appraise from the viewpoint of international criminal law. The entire 'unity' may be said to be responsible both for committing the *actus reus* and for possessing the requisite *mens rea*, but it is much more problematic to identify the precise individual criminal responsibility of each member of such unity. Indeed, in such cases the *actus reus* and *mens rea* are separated among the members of the group. Executioners have physically perpetrated the crimes 'but do not clearly manifest a guilty mind for doing so'. On the contrary, superiors 'often have a clearer guilty mind since they are often the ones that designed or set in motion a given' criminal plan, but these superiors 'do not often manifest guilty acts since they do not normally engage in murder, rape, or torture, and they rarely give orders that direct specific acts of murder, rape or torture'. Therefore, it may turn out that no individual person is fully accountable.[1]

Thus, when the superior has not physically committed any crime and it is not possible to demonstrate his or her 'direct' criminal liability — for example, for having ordered the commission of the relevant crimes — recourse can be had to the concept of command responsibility. Accordingly, a commander can be held criminally liable for not having prevented or punished international crimes committed by his or her subordinates despite having knowledge of such crimes.

1 L. May, *Crimes Against Humanity* (Cambridge: Cambridge University Press, 2005), at 140–145.

Command responsibility was originally elaborated to deal with widespread international crimes committed in hierarchical military contexts in order to ascribe criminal responsibility to senior commanders. In cases like *Yamashita* or the *Tokyo* trial,[2] command responsibility was clearly viewed as a tool to facilitate the attribution of international criminal responsibility to commanders, and in particular to high-ranking officers.

When the ad hoc tribunals were established, almost 40 years had elapsed since *Nuremberg* and *Tokyo*, and many aspects were still controversial with respect to command responsibility. The post-WWII trials which had relied on this form of liability faced strong criticism. Thus, from the very beginning, the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) have been confronted with the task of delineating the elements of command responsibility, and of applying a notion which could be regarded as generally acceptable.

Indeed, this form of liability can play a significant role under international criminal law. Command responsibility is regarded as one of the most important tools at the disposal of international tribunals to 'establish the criminal responsibility of local or central leaders of countries whose military, political or administrative structures have been involved in the commission of serious international crimes'.[3]

A considerable body of case law has by now addressed the issue, and arguably the nature as well as the elements of command responsibility can be regarded as well established under customary international law.[4] The ad hoc

2 See *infra* note 14.

3 C. Del Ponte, 'Prosecuting the Individuals Bearing the Highest Level of Responsibility', 2 *Journal of International Criminal Justice* (JICJ) (2004) 516, at 517.

4 For pre-WWII practice, see J.W. Garner, 'Punishment of Offenders against the Laws and Customs of War', 14 *American Journal of International Law (AJIL)* (1920) 87–88. With respect to post-WWII practice, see W.H. Parks, 'Command Responsibility for War Crimes', 62 *Military Law Review* (1973) 1–104; W.D. Burnett, 'Command Responsibility and a Case Study of the Criminal Responsibility of Israeli Military Commanders for the Pogrom at Shatila and Sabra', 107 *Military Law Review* (1985) 71–189; C.N. Crowe, 'Command Responsibility in the Former Yugoslavia: The Chances for Successful Prosecution', 29 *University of Richmond Law Review* (1994–1995) 191–233; L.C. Green, 'Command Responsibility in International Humanitarian Law', 5 *Transnational Law and Contemporary Problems* (1995) 319–371; B.D. Landrum, 'The Yamashita War Crimes Trial: Command Responsibility Then and Now', 149 *Military Law Review* (1995) 293–301; E.J. O'Brien, 'The Nuremberg Principles, Command Responsibility, and the Defence of Captain Rockwood', 149 *Military Law Review* (1995) 275–291; W.J. Fenrick, 'Some International Law Problems Related to Prosecutions before the International Criminal Tribunal for the Former Yugoslavia', 6 *Duke Journal of Comparative and International Law* (1995–1996) 103–125; H.S. Levie, 'Command Responsibility', 8 *Journal of Legal Studies* (1997–1998) 1–18; B.B. Jia, 'The Doctrine of Command Responsibility in International Law', 45 *NILR* (1998) 325–347; I. Bantekas, 'The Contemporary Law of Superior Responsibility', 93 *AJIL* (1999) 573–595; W.J. Fenrick, 'Art. 28', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court* (Baden-Baden: Nomos Verlagsgesellschaft, 1999) 515–521; A. De Andrade, 'Les supérieurs hiérarchiques', in H. Ascensio, E. Decaux, A. Pellet (eds), *Droit international pénal* (Paris: Pedone, 2000) 201–210; M. Lippman, 'The Evolution and Scope of Command Responsibility', 13 *Leiden Journal of International Law* (2000) 139–170; M. Damaška, 'The Shadow Side of Command Responsibility', 49 *American Journal of Comparative Law* (2001)

tribunals have successfully fulfilled their task of clarifying the definition of command responsibility. This is not without consequences for the notion of command responsibility and the role it can play in bringing the perpetrators of international crimes to justice.

On one hand, command responsibility has a much broader scope than it had 60 years ago when it received its first fully-fledged judicial recognition in *Yamashita*. Today, it can also be relied upon to convict civilian or political leaders. Nowadays, in principle, command responsibility is applicable to all (military and civilian) superiors. That is why the concept is increasingly referred to as 'superior responsibility'. On the other hand, in practice, command responsibility is one of the forms of liability that is least likely to lead to successful convictions under international criminal law. Perhaps surprisingly, command responsibility is successfully applied only in a very limited number of cases. Of the 99 accused persons who have faced trial before the ICTY and the ICTR,[5] only 54 were prosecuted on a theory of command responsibility and only 10 have properly been convicted.[6] Many other accused persons holding authority positions could have been charged under command responsibility but were not.

The present article will examine the case law of the ICTY and ICTR in order to see how and why command responsibility has such a narrow application. It will be maintained that, first, international tribunals have applied command responsibility in a very rigorous manner. With respect to early cases, which had applied command responsibility in very broad terms, modern case law has relied on a more rigorous definition of command responsibility to make it conform more closely with the principle of individual criminal responsibility and its corollaries, and in order to draw a clear distinction between 'direct' and command responsibility. Secondly, ad hoc tribunals have gradually displayed an explicit preference for 'direct' criminal liability, where the accused can be convicted under both 'direct' and command responsibility. Thus, despite its very broad scope, command responsibility is successfully applied only in more traditional military-like contexts, where, it is easier to demonstrate command responsibility and guarantee a strict adherence to the principle of individual criminal responsibility at the same time.

455–496; K. Ambos, 'Superior Responsibility', in A. Cassese, P. Gaeta, J.R.W.D. Jones (eds), *The Rome Statute of the International Criminal Court: A Commentary* Vol. 1 (Oxford: Oxford University Press, 2002) 823–872; A. Cassese, *International Criminal Law* (Oxford: Oxford University Press, 2003), at 200–211.

5 To date (April 2007), 33 persons have faced trial before the ICTR and 66 before the ICTY.

6 These do not include accused persons who have pleaded guilty under either Art. 7(3) of the ICTY Statute (Todorović, and Obrenović) or Art. 6(3) of the ICTR Statute (Kambanda, and Serushago). As will be discussed subsequently, these also do not include problematic cases of defendants convicted under both the direct and the command responsibility modes of liability (Kayishema, Musema, Barayagwiza and Nahimana).

2. The Nature of Command Responsibility

Command responsibility is provided under Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute. The wording of these provisions is almost identical. The fact that a crime under the jurisdiction of the Tribunal

> was committed by a subordinate does not relieve his or her superior of criminal responsibility if he or she knew, or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.

Today, this can be regarded as the customary definition of command responsibility. Similar definitions are reflected in various international instruments.[7] However, there is one aspect that this definition does not clarify: is command responsibility a means of indirectly holding a superior responsible for the criminal acts carried out by his or her subordinates? Or rather, is the superior criminally liable for his or her personal misconduct, that is, for not having prevented such crimes or for not having punished those responsible?[8]

It is only very recently that the ICTY has taken a clear stand on the nature of command responsibility. In *Halilović*, the Tribunal endorsed the following notion of command responsibility:

> The Trial Chamber finds that under Article 7(3) command responsibility is responsibility for an omission. The commander is responsible for the failure to perform an act required by international law. This omission is culpable because international law imposes an affirmative duty on superiors to prevent and punish crimes committed by their subordinates. Thus 'for the acts of his subordinates' as generally referred to in the jurisprudence of the Tribunal does not mean that the commander shares the same responsibility as the subordinates who committed the crimes, but rather that because of the crimes committed by his subordinates, the commander should bear responsibility for his failure to act. The imposition of responsibility upon a commander for breach of his duty is to be weighed against the crimes of his subordinates; a commander is responsible not as though he had committed the crime himself, but his responsibility is considered in proportion to the gravity of the offences committed. The Trial Chamber considers that this is still in keeping with the logic of the weight which international humanitarian law places on protection values.[9]

Thus, under the doctrine of command responsibility, superiors are not indirectly liable for the crimes of their subordinates. Command responsibility is not a form of vicarious liability.[10] Superiors are held accountable, on their *own* account, for the breach of a precise duty of supervision arising from their

7 See for example, Art. 87 of Additional Protocol I, Art. 6 of the ILC Draft Code of Crimes against the Peace and Security of Mankind (*YILC*, 1996, Vol. II (2), at 25), Art. 28 of the ICC Statute, and Art. 6(3) of the SCSL Statute.

8 On this point see the article by Chantal Meloni in this issue of the *Journal*.

9 Judgment, *Halilović* (IT-01-48-T), Trial Chamber, 16 November 2005, § 54 ('*Halilović* trial'). See also Judgment, *Hadžihasanović and Kubura* (IT-01-47-T), Trial Chamber, 15 March 2006, §§ 69–75 ('*Hadžihasanović* trial'). See L. Zegveld, *The Accountability of Armed Opposition Groups in International Law* (Cambridge: Cambridge University Press, 2002), at 111.

10 This has been repeatedly stressed in the ad hoc tribunals' case law, from the *Delalić* trial, *infra* note 12, § 239, to the *Hadžihasanović* trial, *ibid.*, § 92.

position of authority and control over their subordinates. It is due to the existence of such a legal duty that the omission of superiors — who have failed to prevent or punish the crimes of their subordinates — entails their criminal responsibility under international law. The rationale of command responsibility is that, if the commander had exercised his duty of supervision properly, the crimes would not have been carried out, or at least the responsible subordinates would have been punished, thus deterring future offences.[11] This construction of command responsibility, therefore, presupposes the existence of a particular superior–subordinate relationship and the effective power of the superior to prevent, stop or punish the relevant crimes.

As mentioned earlier, this form of liability is not limited to military commanders, who institutionally exercise a high degree of control over their subordinates, and who have specific powers to impose their will on the troops under their command: civilian superiors can also incur command responsibility when they have effective control over their subordinates and possess the power necessary to prevent or punish the crimes committed by subordinates but fail to do so.

Thus, *ratione personae*, the ad hoc tribunals have upheld a broad notion of command responsibility to include non-military as well as military superiors. However, *ratione materiae*, command responsibility has a narrow scope, as it focuses on the actual duties and powers of the superior over his or her subordinates.

The notion at issue is very important, since identifying the precise object and purpose of command responsibility is necessary to interpret and delineate its elements under international law, such as the superior–subordinate relationship and the required *mens rea*. Moreover, a clear definition of the nature of command responsibility has allowed international tribunals to distinguish it from other forms of 'direct' liability, in particular from 'ordering' the commission of international crimes. Finally, this particular conception of command responsibility has allowed ad hoc tribunals to distance themselves from the vague, sometimes dubious, and much criticized notion of command responsibility applied in the post-WWII cases.

3. The Elements of Command Responsibility: A Rigorous Approach

The ad hoc tribunals have made a significant contribution to the definition of command responsibility. Early cases still show some uncertainty, and it took some time to address the various problematic aspects of command responsibility. But now the elements of this form of liability are settled and result from a consistent case law.

The Trial Chamber Judgment in *Delalić* is undoubtedly the landmark decision concerning this form of liability. Subsequent case law has repeatedly referred

11 Cassese, *supra* note 4, at 200–211.

to and applied the elements of command responsibility identified in *Delalić*. While the ICTY regarded as evident that the commission of international crimes by subordinates is a necessary prerequisite of command responsibility, it listed three essential elements of command responsibility for the failure to act:

(i) the existence of a superior–subordinate relationship;
(ii) the superior knew or had reason to know that the criminal act was about to be or had been committed; and
(iii) the superior failed to take the necessary and reasonable measures to prevent the criminal act or punish the perpetrator thereof.[12]

The third element, that is, the concrete measures that the superior can take to prevent or punish the crimes committed by his or her subordinates, is closely connected to the first one and must essentially be established on a case-by-case basis depending on the actual power of the superior facing trial.[13] For these reasons, the following analysis will concentrate on the *mens rea* element and on the superior–subordinate relationship. These are the two main aspects in which the ad hoc tribunals' case law has contributed to the clarification of the definition of command responsibility.

A. The Mens Rea *Requirement*

The *mens rea* of command responsibility was the most controversial aspect of the post-WWII trials. Notably, some judgments in those trials were criticized for having adopted an excessively broad interpretation of the *mens rea* required to hold commanders criminally liable under international law.[14] In particular,

12 Judgment, *Delalić and others* (IT-96-21-T), Trial Chamber, 16 November 1998, § 346 ('*Delalić* trial').

13 The ICTY has consistently held this view, from the *Delalić* trial, *ibid.*, §§ 394–395, to the *Hadžihasanović* trial, *supra* note 9, § 123.

14 In particular, the *Yamashita* case (US Military Commission, Manila, *In re Yamashita*, judgment of 7 December 1945, *International Law Review (ILR)*, Vol. 13, at 255; and US Supreme Court, judgment of 4 February 1946, in *ILR*, Vol. 13, at 269) has been the object of much criticism with respect to the way in which the Military Commission established, or rather, presumed the existence of the requisite knowledge on the part of the accused. In his dissenting opinion, Justice Murphy pointed out that nowhere had Yamashita been charged with direct responsibility for having personally committed or ordered the crimes in question, nor had it been alleged that he had any knowledge of their commission. Yamashita was simply accused of failure to provide the effective control of his troops as required by the circumstances. Justice Murphy's main point was that the laws of war simply did not attach criminal liability to such a failure: 'No one denies that inaction or negligence may give rise to liability, civil or criminal. But it is quite another thing to say that the inability to control troops under highly competitive and disastrous battle conditions renders one guilty of a war crime *in the absence of personal culpability*. Had there been *some element of knowledge of direct connection with the atrocities* the problem would be completely different' (at 278). See also A.F. Reel, *The Case of General Yamashita* (Chicago: The University of Chicago Press, 1949). In addition to the *Yamashita* case see, in particular, US Military Tribunal, Nuremberg, *In re List and others*, judgment of 19 February 1948, in *ILR*, Vol. 15, at 632 ('*Hostages* case'); US Military Tribunal, Nuremberg, *In re Von Leeb and others*, judgment of 28 October 1948, in *ILR*, Vol. 15, at 376 ('*High Command*

the commander's knowledge of the crimes was presumed: (i) from the official position of the accused in the state hierarchy; and (ii) from the notorious and widespread character of the international crimes committed by subordinates. On one hand, the underlying idea was that high-ranking superiors could not have been unaware of crimes committed by their subordinates due the fact that a duty of effective control is inherent in the functions of commanders, who must not only establish appropriate mechanisms to be informed of the proper execution of their orders by subordinates but who are also obliged to acquire supplementary knowledge where ordinary information appears inadequate.[15] On the other hand, when international crimes were so notorious, widespread and carried out according to the same pattern, it seemed possible to infer that such crimes could only have been perpetrated with at least the commander's tacit approval. Thus, in most cases, it was possible to presume the requisite *mens rea* on the part of the commander.

The ICTY first, and then also the ICTR, opted for a more careful approach to this element of command responsibility. In *Delalić*, the ICTY concluded that the 'knew or had reason to know' standard set in Article 7(3) of the Statute must be interpreted as requiring the commander: (i) to have 'actual knowledge, established through direct or circumstantial evidence, that his subordinates were committing or about to commit crimes referred to under Articles 2 to 5 of the Statute'; or (ii) to have 'in his possession information of a nature, which at least, would put him on notice of the risk of such offences by indicating the need for additional investigation in order to ascertain whether such crimes were committed or were about to be committed by his subordinates'.[16]

This definition makes clear that command responsibility is not a form of strict liability. The *mens rea* of the commander must always be established beyond reasonable doubt, even if by way of circumstantial evidence. It cannot be presumed.[17]

In addition, this definition makes it impossible to rely on the 'should have known' test in the sense of a 'duty to know'. Since the psychological element

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case'); and IMTFE, Tokyo, *In re Hirota and others*, judgment of 12 November 1948, in *ILR*, Vol. 15, at 356 ('*Tokyo* trial'). These are all cases in which high-ranking officials were charged with international crimes. In all these cases, it was beyond question that the offences had been committed by subordinates on a large scale. The only question concerned the standard of responsibility of commanders for such offences.

15 The importance of the position of the accused in the state hierarchy in these cases can certainly be understood in light of the fact that they were all high-ranking officers. Yamashita was the highest commander of the Japanese Army in the Philippines. In the *Hostages* case, the accused were all high-ranking officers of the German Army in Greece, Yugoslavia, Norway and Albania. In the *High Command* case, the accused were among the highest ranking officers in American custody and all held important staff or command positions in the German military. Finally, the accused persons in the *Tokyo* trial were notably 28 of the former leaders of Japan: prime ministers, foreign ministers, war ministers, navy ministers, finance ministers, education ministers, home affairs ministers, overseas ministers, presidents of the planning board, chiefs of army general staff, ambassadors and military leaders.

16 *Delalić* trial, *supra* note 12, § 383.

17 *Ibid.*, § 386.

is 'determined only by reference to the information in fact available to the superior',[18] the latter is not liable for failing to acquire such information. In other words, the Tribunal explicitly rejected the existence of a 'duty to know' on the part of the commander. Such a 'duty to know' had been asserted on various occasions by the Prosecution on the basis of the post-WWII case law, but the ICTY and ICTR have consistently denied its existence under customary international law.[19] However, this does not mean that the Prosecution has to prove that the commander possessed specific information about the crimes committed or about to be committed by his subordinates, as even general information in the possession of the commander would be sufficient.[20] In other words, a showing that the superior had 'alarming information' in his possession would be enough to prove that he 'had reason to know'.[21]

It is clear that, when compared to previous case law, the ad hoc tribunals have adopted a rigorous approach. The psychological requirement under command responsibility is now precisely defined and cannot be presumed. It can certainly be established, as noted earlier, by way of circumstantial evidence. However, the *mens rea* of superiors cannot be inferred from their status alone.[22] It is also excluded that the *mens rea* of commanders can be inferred merely from the general context surrounding the commission of international crimes.[23]

18 Judgment, *Strugar* (IT-01-42), Trial Chamber, 31 January 2005, § 369 ('*Strugar* trial').

19 For the first time, the Appeals Chamber of the ad hoc tribunals took this view in *Delalić and others* (IT-96-21-A), 20 February 2001, §§ 226–230 ('*Delalić* appeal').

20 *Ibid.*, § 238.

21 *Ibid.*, § 232. The question is extensively dealt with in Judgment, *Krnojelac* (IT-97-25-A), Appeals Chamber, 17 September 2003, §§ 155–171 ('*Krnojelac* appeal').

22 See Judgment, *Kajelijeli* (ICTR-98-44A), Trial Chamber, 1 December 2003, § 776 ('While an individual's hierarchical position may be a significant *indicium* that he or she knew or had reason to know about subordinates' criminal acts, knowledge will not be presumed from status alone'). See also Judgment, *Kamuhanda* (ICTR-99-54), Trial Chamber, 22 January 2004, § 607 ('*Kamuhanda* trial').

23 In *Bagilishema*, the Appeals Chamber deemed it necessary 'to make a distinction between the fact that the Accused had information about the general situation that prevailed in Rwanda at the time, and the fact that he had in his possession general information which put him on notice that his subordinates might commit crimes'. Thus, in the absence of information concerning the likely criminal conduct of his subordinates, the Appeals Chamber upheld the Trial Chamber's finding of the lack of the required *mens rea* under command responsibility (Judgment, *Bagilishema*, (ICTR-95-1), Appeals Chamber, 3 July 2002, § 42). A similar approach can be identified in other cases as well. In *Delalić and others*, only Mucić was found guilty under command responsibility. In establishing his *mens rea*, the fact that the crimes were 'frequent and notorious' was certainly significant (*Delalić* trial, *supra* note 12, § 770). However, the ICTY did not rely on the general context alone. Among other examples of direct knowledge, Mucić personally 'admitted in his interview with the Prosecution that he was aware that crimes were being committed in the prison-camp at Celebici' (§ 769). Similarly, in *Krnojelac*, the ICTY found the accused liable for torture under command responsibility, since he was not only aware of the general criminal context but also personally witnessed the beating of one detainee (Judgment, *Krnojelac* (IT-97-25), Trial Chamber, 15 March 2002, §§ 312–313, '*Krnojelac* trial'). Thus, the Appeals Chamber concluded that the accused possessed sufficiently alarming information about the criminal conduct of his subordinates: 'The Appeals Chamber holds that the external context (i.e. the circumstances in which the detention centre was set up) and the internal

B. The Superior–Subordinate Relationship

An analysis of the case law of the ad hoc tribunals shows that the major obstacle to the application of command responsibility is the establishment of the superior–subordinate relationship.

Most post-WWII cases attached great importance to the *de jure* position of the accused. When the accused was a supreme military commander or a top political leader, the existence of a superior–subordinate relationship was almost taken for granted. Thus, the official position in the state hierarchy was sufficient to infer that the superior had authority over the subordinates who committed international crimes. For example, while Yamashita pleaded that the widespread guerrilla activities in the region made it almost impossible to exercise control over his troops and that he did not know that such crimes had been committed, the US Military Commission held that, due to his position, Yamashita should nonetheless have detected and prevented the crimes committed by his subordinates.[24] The International Military Tribunal for the Far East (IMTFE) took a similar approach when it held that:

> A Cabinet member may resign. If he has knowledge of ill-treatment of prisoners, *is powerless to prevent future ill-treatment*, but elects to remain in the Cabinet thereby continuing to participate in its collective responsibility for protection of prisoners, he willingly assumes responsibility for any ill-treatment in the future.[25]

The ICTY and ICTR adopted a very different approach. They abandoned a formal criterion — the *de jure* position of the accused — for a more fact-sensitive criterion, namely, the effective control of the superior over his or her subordinates. It must be stressed that such a particularly stringent requirement directly derives from the conception of command responsibility adopted by the ad hoc tribunals. It is the effective control over the subordinates,

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context (i.e. the operation of the centre, in particular, the widespread nature of the beatings and the frequency of the interrogations), taken together with the facts that Krnojelac witnessed the beating inflicted on Zekovic ostensibly for the prohibited purpose of punishing him for his failed escape, that after this event at least one other detainee, witness FWS-73, was the victim of acts of torture and that the Trial Chamber dismissed Krnojelac's claim that he was unaware of any punishment inflicted as a result of Zekovic's escape, mean that no reasonable trier of fact could fail to conclude that Krnojelac had reason to know that some of the acts had been or could have been committed for one of the purposes prohibited by the law on torture. Krnojelac had a certain amount of general information putting him on notice that his subordinates might be committing abuses constituting acts of torture. Accordingly, he must incur responsibility pursuant to Art. 7(3) of the Statute' (*Krnojelac* appeal, *supra* note 21, §§ 165–171). A similar approach was taken in the *Hadžihasanović* trial (*supra* note 9). More explicitly, in *Gacumbitsi*, the ICTR could not 'find that the Accused knew or had reason to know that such acts [of rape] were being perpetrated because of their widespread character' (Judgment, *Gacumbitsi* (ICTR-01-64), Trial Chamber, 17 June 2004, § 225, '*Gacumbitsi* trial'). However, the Trial Chamber was able to infer the *mens rea* of the accused under command responsibility from his responsibility for instigating the said crimes and, particularly, from the fact that the Chamber had already established his intent (§ 228).

24 See *supra* note 14.

25 *Tokyo* trial, *supra* note 14, at 367–368 (emphasis added).

and therefore, the ability and duty to prevent or stop the commission of crimes by the subordinates, which entails — when such a duty is breached — the criminal responsibility of the superior. Since the *Delalić* case, the ICTY expressed the opinion that

> a position of command is indeed a necessary precondition for the imposition of command responsibility. However, this statement must be qualified by the recognition that the existence of such a position *cannot be determined by reference to formal status alone.* Instead, the factor that determines liability for this type of criminal responsibility is the *actual possession, or non-possession, of powers of control over the actions of subordinates.*[26]

Thus, to say that a superior–subordinate relationship existed between the accused and the perpetrators of international crimes, it must be established that the (military or civilian) superior exercised effective control over the perpetrators, 'in the sense of having the material ability to prevent and punish the commission of these offences'.[27] Accordingly, the ICTY has rejected the 'substantial influence' theory. In other words, the adoption of the effective control criterion excludes that the mere influence of the superior over the subordinates suffices for finding a superior–subordinate relationship.[28]

With respect to military commanders, the possession of *de jure* powers is not regarded by the ad hoc tribunals as sufficient for the finding of command responsibility if it does not take the shape of effective control.[29] Thus, in many cases, military commanders were found not guilty under command responsibility because their effective control over the subordinates could not be established beyond reasonable doubt.[30]

With respect to civilian superiors, the existence of a superior–subordinate relationship may be even more difficult to prove. Indeed, political leaders and civilian superiors rarely posses formal powers of control similar to those of military commanders. This does not mean that they cannot exercise *de facto* control over subordinates,[31] but this can be very difficult to demonstrate. Thus, except for some dubious convictions under both 'direct' and command

26 *Delalić* trial, *supra* note 12, § 370 (emphasis added).

27 *Ibid.*, § 378.

28 The Appeals Chamber in the *Delalić* appeal, *supra* note 19, § 266, concluded that '[n]othing relied on by the Prosecution indicates that there is sufficient evidence of State practice or judicial authority to support a theory that substantial influence as a means of exercising command responsibility has the standing of a rule of customary law, particularly a rule by which criminal liability would be imposed'.

29 *Delalić* appeal, *supra* note 19, § 197.

30 See Judgment, *Kunarac* (IT-96-23&23/1-T), Trial Chamber, 22 February 2001; Judgment, *Kvočka and others* (IT-98-30/1-T), Trial Chamber, 21 November 2001 ('*Kvočka* trial'); Judgment, *Blaškić* (IT-95-14), Appeals Chamber, 29 July 2004 ('*Blaškić* appeal'); Judgment, *Kordić and Čerkez* (IT-95-14/2), Appeals Chamber, 17 December 2004 ('*Kordić* appeal'); Judgment, *Blagojević and Jokić* (IT-02-60-T) Trial Chamber, 17 January 2005; *Halilović* trial, *supra* note 9; Judgment, *Limaj* (IT-03-66-T), Trial Chamber, 30 November 2005; *Hadžihasanović* trial, *supra* note 9.

31 Thus, in *Musema*, the ICTR found that the accused, the director of a public tea factory, had exercised effective control over his employees, but not over the 'villageois' plantation workers: Judgment, *Musema* (ICTR-96-13), Trial Chamber, 27 January 2000, §§ 880–881 ('*Musema* trial').

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responsibility that will be examined below, the ICTR — which mainly deals with political and civilian offenders — has generally rejected charges made under command responsibility, precisely due to the fact that the superior–subordinate relationship could not be established beyond reasonable doubt.[32]

The rigorous approach of the ad hoc tribunals to command responsibility was confirmed in a recent case which raised the particular question of commanders' liability for crimes committed by subordinates before the commander took office.

Reversing the decision of the Trial Chamber,[33] the Appeals Chamber held that an accused cannot be charged under command responsibility for crimes committed by a subordinate before he assumed command over that subordinate.[34] At first sight, this may appear to be a clarification of minor importance. However, this decision deals with the very concept of command responsibility under international law.[35] In rejecting the position strongly supported by the dissenting judges, the Appeals Chamber took the view that, in order to establish command responsibility, the relationship between the commander and his or her subordinates must be carefully taken into account. Indeed, if this form of liability is firmly grounded on the duty of supervision of the commander and if it applies only to cases in which there is a failure to exercise such a duty, it seems very difficult to conclude that liability could be found with respect to international crimes committed before the establishment of the commander–subordinates relationship.[36]

32 See Judgment, *Akayesu* (ICTR-96-4), Trial Chamber, 2 September 1998; Judgment, *Ntakirutimana* (ICTR-96-10, ICTR-96-17), Trial Chamber, 21 February 2003; Judgment, *Semanza* (ICTR-97-20), Trial Chamber, 15 May 2003 ('*Semanza* trial'); Judgment, *Niyitegeka* (ICTR-96-14), Trial Chamber, 16 May 2003; *Kamuhanda* trial, *supra* note 22; Judgment, *Ntagerura and others* (ICTR-96-10A), Trial Chamber, 25 February 2004 ('*Cyangugu* trial'); *Gacumbitsi* trial, *supra* note 23.

33 Decision on Joint Challenge to Jurisdiction, *Hadžihasanović and others* (IT-01-47-T), Trial Chamber, 12 November 2002.

34 Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, *Hadžihasanović and others* (IT-01-47-A), Appeals Chamber, 16 July 2003.

35 C. Greenwood, 'Command Responsibility and the *Hadžihasanović* Decision', 2 *JICJ* (2004) 598–605.

36 The question was very controversial, and it is interesting to note that the *Hadžihasanović* judge (*supra* note 9) felt the need to comment upon the Appeals Chamber's decision: '*Bien que les motifs avancés par les deux Juges dissidents méritent d'être développés, la Chambre se limitera à faire sienne une considération d'ordre pragmatique avancée par le Juge Shahabuddeen. Étant donné qu'en temps de guerre, le commandement des troupes change régulièrement, il existe un risque sérieux de voir la chaîne de responsabilité interrompue au fur et à mesure de ces changements de fonction. En effet, pour reprendre le cas d'espèce présenté ci-avant, si le supérieur en fonction de commandement au moment de la commission d'un crime est remplacé très peu de temps après sa commission, il est très probable que les auteurs de ce crime demeurent impunis et qu'aucun commandant ne soit tenu pénalement responsable au regard des principes de la responsabilité du supérieur hiérarchique. Force est de constater qu'en ce cas, la logique militaire, laquelle a pour but de faire régner l'ordre interne et la discipline nécessaires au fonctionnement des forces armées, et dont le devoir de punir est le corollaire, reste en défaut de pouvoir atteindre ses objectifs*' (§ 199). Moreover, the Trial Chamber affirmed a '*devoir rétroactif de punir fondé sur une connaissance préalable*' (§§ 180–185), which is difficult to reconcile with the aforementioned position. Thus, is the commander, who discovers that his new subordinates have committed certain crimes, and who, therefore, had sufficient alarming

4. 'Direct' v. Command Responsibility

The case law of the ad hoc tribunals is particularly interesting, not only because it has made a clear distinction between 'direct' and command responsibility but also because it has displayed a clear preference for the former, when an accused can be convicted under both modes of liability. This partially explains the very limited number of convictions under command responsibility.

Post-WWII cases exhibited a certain blurring between 'direct' and command responsibility. It is not always clear where the dividing line between direct participation and failure to exercise the duty of supervision lies. In particular, on a number of occasions, command responsibility seemed to imply the approval or acquiescence of the commander. For example, in *Yamashita*, the US Military Commission held that 'the crimes were so extensive and widespread, both as to time and area, that *they must either have been wilfully permitted by the accused, or secretly ordered by him*'.[37] In the *Tokyo* trial, the policy of the entire government and military leaders was characterized as being criminal in nature, as if the Tribunal were relying on a sort of joint criminal enterprise *ante litteram*. This confusion is probably due to the method adopted in these cases to infer individual responsibility from the features of the general criminal context. But from the viewpoint of a rigorous application of international criminal law standards, it is far less acceptable.

Thus, 40 years later, the ad hoc tribunals were still left with the task of clarifying the distinction between 'direct' and command responsibility. Early cases, in particular, of the ICTR, relied on a definition of command responsibility that was ambiguous in certain respects. For example, in *Kayishema and Ruzindana*, the Tribunal held:

> Where it can be shown that the accused was the *de jure* or *de facto* superior and that *pursuant to his orders the atrocities were committed*, then the Chamber considers that this must suffice to [find] command responsibility.[38]

Accordingly, in establishing Kayishema's command responsibility, the Tribunal only demonstrated the existence of a superior–subordinate relationship. The Tribunal considered it to be self-evident that the accused knew or had reason to know about the crimes, as they had been carried out pursuant to his orders. An analysis of the failure to punish the perpetrators was considered superfluous.[39] In other words, command responsibility was largely inferred from 'direct' criminal liability. To require the crimes to be ordered by the superior as a condition for holding him accountable under command

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information to put him on notice about the commission of similar crimes before he took office, responsible for not having inquired further and punished his subordinates? Apparently, not. But this may entail an unequal treatment of newly appointed commanders with respect to incumbent commanders.

37 See *supra* note 14, at 256.

38 Judgment, *Kayishema and Ruzindana* (ICTR-01-67), Trial Chamber, 21 May 1999, § 223 (emphasis added).

39 *Ibid.*, § 505.

responsibility is clearly at odds with the nature of command responsibility. However, subsequent cases do not reflect the hesitation that characterized the earlier decisions.

Similarly, the ad hoc tribunals' case law is not a paragon of clarity when we turn to the distinction between the elements of command responsibility and the requirement of 'ordering' international crimes, which is undoubtedly one of the most appropriate forms of 'direct' liability for commanders. Thus, on one hand, in order to establish the 'direct' criminal responsibility of the accused for having ordered international crimes, the ICTR has required the superior–subordinate relationship to be demonstrated.[40] However, in *Kamuhanda*, it explicitly rejected such a position.[41] On the other hand, the ICTY has constantly held that 'ordering' is a form of liability which requires that,

> at the time of the offence, an accused possessed the authority to issue binding orders to the alleged perpetrators. A formal superior–subordinate relationship between the person giving the order and the one executing it is not a requirement in itself.[42]

In the end, the ICTY approach seems more appropriate. 'Direct' criminal responsibility focuses on the personal conduct of the accused, not on the relationship between the accused and other perpetrators. While command responsibility is firmly grounded on effective control over the subordinates and on the actual power of the superior to prevent or punish crimes committed by the subordinates, 'direct' criminal responsibility implies no such requirement. To hold a superior accountable for having ordered international crimes, a position of authority seems sufficient.

However, the particular nature of command responsibility does not exclude any overlap with 'direct' liability. What if the accused is found criminally liable under both 'direct' and command responsibility?

As already noted, and despite some initial uncertainties, the ad hoc tribunals have gradually displayed a clear preference for 'direct' criminal responsibility. According to a now well-established jurisprudence, commanders are preferably held accountable for their direct participation in the commission of international crimes. But it took a certain period of time to reach an explicit affirmation in that regard.

In the beginning, the ICTY deemed it possible to convict the accused under both 'direct' and command responsibility. If a choice had to be made, then either the command position or the direct participation in the offence was taken into account at the sentencing stage as aggravating factors.[43]

40 See *Semanza* trial, *supra* note 32; *Cyangugu* trial, *supra* note 32; *Gacumbtsi* trial, *supra* note 23.

41 *Kamuhanda* trial, *supra* note 22, § 612 ('The finding of a position of authority for purposes of "ordering" under Art. 6(1) is not synonymous with the presence of "effective control" for purposes of responsibility under Art. 6(3). It is settled that the two provisions are distinct: and, in our view, so are the considerations for responsibility under them.').

42 *Strugar* trial, *supra* note 18, § 331.

43 Thus, in the *Delalić* trial, *supra* note 12, the ICTY did not consider direct and command responsibility to be mutually exclusive forms of liability (§ 1223). Then the Appeals Chamber clarified that, '[w]here criminal responsibility for an offence is alleged under one count pursuant to both

However, the ICTY soon clarified its approach and considered it inappropriate to convict an accused under both 'direct' and command responsibility.[44] The tribunal, therefore, had to choose the more appropriate form of liability.[45]

Today, the consistent case law of the ICTY has further advanced in this direction, and the Tribunal now asserts a clear preference for 'direct' criminal responsibility. Initially, some trial judgments held that it is not only impossible to convict the accused for the same facts under both 'direct' and command responsibility, but also that forms of 'direct' liability should certainly be preferred.[46] Then, the Appeals Chamber in *Blaškić* definitely settled the matter:

> The Appeals Chamber considers that the provisions of Article 7(1) and Article 7(3) of the Statute connote distinct categories of criminal responsibility. However, the Appeals Chamber considers that, in relation to a particular count, it is not appropriate to convict under both Article 7(1) and Article 7(3) of the Statute. Where both Article 7(1) and Article 7(3) responsibility are alleged under the same count, and where the legal requirements pertaining to both of these heads of responsibility are met, a Trial Chamber should enter a conviction on the basis of Article 7(1) only, and consider the accused's superior position as an aggravating factor in sentencing.[47]

Art. 7(1) and Art. 7(3), and where the Trial Chamber finds that both direct responsibility and responsibility as a superior are proved, even though only one conviction is entered, the Trial Chamber must take into account the fact that both types of responsibility were proved in its consideration of sentence. This may most appropriately be considered in terms of imposing punishment on the accused for two separate offences encompassed in the one count. Alternatively, it may be considered in terms of the direct participation aggravating the Art. 7(3) responsibility (as discussed above) or the accused's seniority or position of authority aggravating his direct responsibility under Art. 7(1)' (*Delalić* appeal, *supra* note 19, § 745).

44 In *Karadžić and Mladić*, the ICTY had already held that, while the conditions for command responsibility under Art. 7(3) were 'unquestionably' fulfilled, 'the type of responsibility incurred is better characterized by Art. 7(1) of the Statute', and in particular by 'ordering' the crimes allegedly committed under the authority of the accused (Review of the Indictment pursuant to Rule 61 of the Rules of Procedure and Evidence, *Karadžić and Mladić* (IT-95-5/18), Trial Chamber, 11 July 1996, §§ 82–83). For early cases in which the Tribunal entered only the conviction under Art. 7(1), see Judgment, *Aleksovski* (IT-95-14/1), Appeals Chamber, 24 March 2000, § 183, and *Kvočka* trial, *supra* note 30, § 570.

45 See *Krnojelac* trial, *supra* note 23, § 173 ('The Trial Chamber has established the criminal responsibility of the Accused pursuant to both Art. 7(1) and Art. 7(3). However, the Trial Chamber is of the view that it is inappropriate to convict under both heads of responsibility for the same count based on the same acts. Where the Prosecutor alleges both heads of responsibility within the one count, and the facts support a finding of responsibility under both heads of responsibility, the Trial Chamber has a discretion to choose which is the most appropriate head of responsibility under which to attach criminal responsibility to the Accused'). A similar approach was taken in Judgment, *Naletilić and Martinović* (IT-98-34-T), Trial Chamber, 31 March 2003, §§ 78–81, and Judgment, *Galić* (IT-98-29), Trial Chamber, 5 December 2003, § 177 ('*Galić* trial').

46 Judgment, *Krstić* (IT-98-33-T), Trial Chamber, 2 August 2001, § 605 ('*Krstić* trial'); Judgment, *Stakić* (IT-97-24-T), Trial Chamber, 31 July 2003, §§ 463–467 ('*Stakić* trial').

47 *Blaškić* appeal, *supra* note 30, § 91.

The subsequent ICTY case law has, thus, convicted those accused, who could have been found guilty under both 'direct' and command responsibility under Article 7(1) only taking the command position into account as an aggravating factor.[48]

As far as the ICTR is concerned, a more ambiguous approach has been followed. As noted earlier, this tribunal has mainly tried civilians and, in various cases, political leaders. When it has been possible to establish the requirements of command responsibility, this always concerned offenders already found guilty under some form of 'direct' liability. Thus, except for one individual case concerning a military commander,[49] findings of command responsibility by the ICTR have always led to findings of 'direct' criminal responsibility. It is true that this happened only in a very limited number of cases.[50] However, this approach seems highly questionable in light of the clear and consistent position taken by the ICTY. Only very recently has the Appeals Chamber endorsed such an approach.[51]

Indeed, the appropriateness of the solution in question lies in the fact that 'direct' criminal liability in large part absorbs, or merges with, command responsibility. For example, if it is established beyond doubt that a commander has physically participated in the commission of international crimes and that he possessed the requisite *mens rea*, then to convict him under command responsibility (on top of directly committing the crime), it would only be additionally necessary to establish the existence of a superior–subordinate relationship. His knowledge has already been established and it is unlikely that the commander had previously adopted measures to prevent the commission of the crime. Arguably, this reasoning can explain the concise statement of the ICTY in *Krstić* according to which 'any responsibility under Article 7(3) is subsumed under Article 7(1)'.[52] It is to be hoped that the ICTR case law will be brought in line with that of the ICTY, for example, by reversing the double convictions entered in the *Media* trial currently under appeal.[53]

From a more general perspective, the preference for 'direct' criminal responsibility helps to explain the very limited number of superiors convicted by the ad hoc tribunals under command responsibility. Thus, a number of superiors

48 Judgment, *Brdjanin* (IT-99-36-T), Trial Chamber, 1 September 2004, §§ 284–285; *Kordić* appeal, *supra* note 36, § 34; Judgment, *Jokić M.* (IT-01-42/1-A), Appeals Chamber, 30 August 2005, §§ 22–27 ('*Jokić* appeal').

49 See *infra* note 60.

50 Except for the guilty pleas (Kayishema and Serushago), it was only in two early cases that the Appeals Chamber did not explicitly reject convictions under both Arts 6(1) and 6(3) of the ICTR Statute. These are *Kayishema and Ruzindana* (ICTR-95-1-A), Appeals Chamber, 21 May 1999, and *Musema* trial, *supra* note 31.

51 ICTR, *Kajelijeli* (ICTR-98-44A), Appeals Chamber 23 May 2005, § 81.

52 See *Krstić* trial, *supra* note 46.

53 Judgment, *Barayagwiza and others* (ICTR-99-52-T), Trial Chamber, 3 December 2003 ('*Media* trial'). Two accused have been found guilty under both direct and command responsibility (Barayagwiza and Nahimana).

have preferably been convicted under forms of 'direct' liability, like 'ordering'[54] 'aiding and abetting',[55] and 'joint criminal enterprise'.[56] In the end, this approach in a certain sense turns command responsibility into a particular sub-category of 'direct' criminal responsibility. The command position of the accused is then only treated as relevant, as an aggravating circumstance, at the sentencing stage.[57]

Finally, these developments in the international case law show that command responsibility does not have a primary role in attributing international criminal responsibility in contexts of collective and organized criminality. On one hand, there are cases of accused persons in leadership positions who are not even charged under command responsibility. More interestingly, recent case law has developed a new form of 'direct' liability that is ever-increasingly relied upon to deal with international crimes perpetrated by organized groups, and that can considerably facilitate the establishment of the individual criminal responsibility of members of a criminal group. This development concerns the theory of joint criminal enterprise.[58] On the other hand, when it is not possible to rely on either command responsibility or joint criminal enterprise, the criminal liability of commanders is more often appraised by recourse to 'aiding and abetting'. Instead of bearing the greater responsibility, in the end, the role of commanders is reduced to that of simple accomplices. While this development can be understandable, since it is much easier to prove 'aiding and abetting' than command responsibility, it completely subverts the purpose for which the latter was elaborated.

54 See for example, *Blaškić* appeal, *supra* note 30, and *Galić* trial, *supra* note 45.

55 See for example, *Krnojelac* trial, *supra* note 23, and *Jokić* appeal, *supra* note 48.

56 See for example, *Krstić* trial, *supra* note 46, *Kvočka* trial, *supra* note 30, and *Stakić* trial, *supra* note 46.

57 More precisely, as the Trial Chamber of the ICTY held in the *Krstić* trial, *ibid.*, § 709: 'A high rank in the military or political field does not, in itself, lead to a harsher sentence. But a person who abuses or wrongly exercises power deserves a harsher sentence than an individual acting on his or her own. The consequences of a person's acts are necessarily more serious if he is at the apex of a military or political hierarchy and uses his position to commit crimes. It must be noted though that current case law of the Tribunal does not evidence a discernible pattern of the Tribunal imposing sentences on subordinates that differ greatly from those imposed on their superiors.'

58 Both command responsibility and joint criminal enterprise are notions elaborated to deal with collective crimes. However, under joint criminal enterprise, various co-perpetrators can equally be found guilty for international crimes if the Prosecutor demonstrates: (i) the existence of a plurality of offenders, (ii) the existence of an arrangement amounting to the commission of an international crime, (iii) the participation of the accused in the common design and (iv) that the participants in the joint criminal enterprise shared the same criminal intention. Therefore, two main aspects differentiate joint criminal enterprise with respect to command responsibility: namely, the direct participation of the accused in the commission of the crime, and the required *mens rea*. On the notion of joint criminal enterprise, see N. Piacente, 'Importance of the Joint Criminal Enterprise Doctrine for the ICTY Prosecutorial Policy', 2 *JICJ* (2004) 446–454, S. Powles, 'Joint Criminal Enterprise. Criminal Liability by Prosecutorial Ingenuity and Judicial Creativity?', 2 *JICJ* (2004) 606–619, and more recently, the symposium 'Guilty by Association: Joint Criminal Enterprise on Trial' in 5 *JICJ* (2007) 67–226.

5. Cases of 'Pure' Command Responsibility

As noted earlier, only in a very few cases have persons accused in cases before the ad hoc tribunals been convicted under command responsibility.

On the one hand, the ICTR has struggled in applying command responsibility to local or central political leaders, such as *bourgmestres*, prefects, ministers and leaders of political parties.[59] Findings of command responsibility have only been possible with respect to defendants also found guilty for the same offences under forms of 'direct' liability. In one single case, the ICTR convicted an accused under Article 6(3) alone.[60] The accused, Imanishimwe, was the commander of the Cyangugu military camp. Although the Trial Chamber established his 'direct' criminal liability for crimes against humanity and war crimes (murder, imprisonment and torture), it also found Imanishimwe guilty of extermination and genocide under command responsibility alone.

Similarly, before the ICTY, the defendants finally found guilty under Article 7(3) were all military commanders. Mucić was the commander of a prison camp at Čelebići, and was found guilty under Article 7(3) of the Statute for war crimes committed at the prison camp. Krnojelac was the commander of the PK Don camp, and was held accountable for failure to prevent or punish war crimes and crimes against humanity committed by his subordinates at the detention camp. Naletilić was the commander of a Bosnian Croat military unit, and Martinović was the commander of one of its sub-units. The ICTY established their command responsibility essentially for war crimes. Strugar was a General of the JNA Army and he was found to have command responsibility in connection with certain war crimes. Finally, two military commanders of the Bosnian Army, Hadžihasanović and Kubura, have been found guilty under Article 7(3) for war crimes.

This case law shows three interesting aspects. First, accused persons are seldom convicted under command responsibility alone. With the exception of Strugar, Hadžihasanović and Kubura, all the defendants convicted under command responsibility were also found guilty of having directly committed international crimes, under different counts. This has undoubtedly facilitated the task of establishing command responsibility. Secondly, the ad hoc tribunals have only employed a theory of command responsibility when convicting military commanders, particularly mid- or low-level commanders. This confirms the difficulty of relying on command responsibility — and the difficulty of establishing the requisite superior–subordinate relationship — with respect not only to civilian superiors but also to military leaders. Thirdly, command responsibility has generally been established with respect to war crimes, that is, the most traditional breaches of the military commander's duty of supervision under international humanitarian law.

59 See *supra* note 32.

60 *Cyangugu* trial, *supra* note 32. The accused in question was Imanishimwe, See also Judgement, *Muvunyi* (ICTR-2000-55), Trial Chamber, 12 September 2006.

Thus, command responsibility has essentially been successful with respect to international crimes — most of the time, war crimes — committed in the typical hierarchical military context of the conduct of hostilities. That is why it seems more appropriate to maintain the traditional label of 'command responsibility', instead of 'superior responsibility'.

Indeed, it seems that the common tools of international criminal law, in particular 'direct liability', remain ill-equipped to deal with certain criminal phenomena. Take, for example, attacks against towns and civilian populations. In *Strugar*, the Prosecution was not able to demonstrate the 'direct' criminal responsibility of Strugar, a General of the JNA Army, for the attack on Dubrovnik: it was not shown that the accused had either ordered the commission of war crimes against the civilian population or that he had aided and abetted the commission of these crimes. Thus, instead of relying on 'direct' liability, the Prosecution had to turn to the more appropriate theory of command responsibility.[61] In these typical 'military criminality' situations, command responsibility arguably still has a certain role to play. In such circumstances, it is much more difficult for the commander in chief of troops that perpetrate war crimes in a planned or organized manner (as during a military attack) to avoid criminal responsibility even if his 'direct' liability cannot be demonstrated. The requirements of command responsibility can be more easily inferred from his formal powers and the general criminal context.

6. Concluding Remarks

Command responsibility has been the object of both great expectations and much criticism. On one hand, command responsibility is perceived as an indispensable tool to ascribe criminal responsibility to military and political leaders for international crimes committed at the collective and state level. On the other hand, the doctrine of command responsibility has raised much concern, in particular in the past.[62] In particular, command responsibility has sometimes been perceived as a fallback position for prosecutors, and a way to improperly expand the scope of individual criminal responsibility.

An analysis of the ad hoc tribunals' case law does not support either of these two extreme perceptions. Despite its broad scope, the ad hoc tribunals have clearly adopted a rigorous approach towards 'superior' responsibility from the viewpoint of the principle of individual criminal responsibility for international crimes. The elements of command responsibility have now been clearly defined and applied in a significant number of cases.

This makes reliance on command responsibility much more difficult when compared to the post-WWII cases. The establishment of the superior–subordinate relationship, in particular through the effective control test, has

61 *Strugar* trial, *supra* note 18.

62 See *supra* note 14.

been the real obstacle to demonstrating the responsibility of superiors for failure to prevent or punish international crimes carried out by subordinates.[63] And even when such a requirement was met (most of the time with respect to military commanders), a rigorous standard of *mens rea* had to be established.[64] However, this is not enough to establish liability under command responsibility. Due to the preference accorded to 'direct' criminal responsibility, various defendants who could have been found guilty under command responsibility were instead convicted under Article 7(1) or 6(1) alone.

The very small number of 'pure' command responsibility cases can be explained in the light of both the difficulty of proving its constitutive elements, and the preference given to 'direct' liability. While the ad hoc tribunals rely ever more frequently on particular forms of direct participation, such as joint criminal enterprise, the application of the doctrine of command responsibility is confined to a very limited number of military commanders.

Thus, early efforts to develop a workable tool to deal with the criminal responsibility of political and military leaders when international atrocities have been committed in the framework of organized command structures seem to have been largely unsuccessful. Other forms of liability are better suited to address collective criminality. In the case law of the ad hoc tribunals, command responsibility has gradually seen its role confined to more traditional cases of crimes committed in military hierarchical contexts, a role undoubtedly appropriate for a form of liability 'ultimately predicated upon the power of the superior to control the acts of his subordinates'.[65]

63 This raises an interesting issue regarding the relationship between state and individual responsibility for international crimes. While the state agency relationship is established according to an 'overall control' test, the superior–subordinate relationship is established according to a more stringent test, namely, the 'effective control' test affirmed in *Nicaragua* by the International Court of Justice, and rejected in *Tadić* by the ICTY with respect to military groups (see Judgment, *Tadić* (IT-94-1-A), Appeals Chamber, 15 July 1999).

64 This may be a difficult task for the Prosecution. See, for example, Judgment, *Bagilishema* (ICTR-95-1), Trial Chamber, 7 June 2001, and *Hadžihasanović* trial, *supra* note 9.

65 *Delalić* trial, *supra* note 12, § 377.