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SCSL-04-14-A

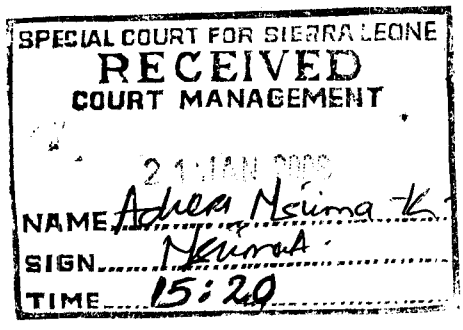
(460 – 554)

SPECIAL COURT FOR SIERRA LEONE

APPEALS CHAMBER

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

Registrar: Herman von Hebel, Registrar



Date: 21st January 2007

The Prosecutor Against Moinina Fofana
Allieu Kondewa

Case No. SCSL -04-14-A

Public Document

FOFANA RESPONSE TO PROSECUTION APPEAL BRIEF

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A. RESPONSE TO GROUND 1: ACQUITTAL OF FOFANA OF MURDER AND OTHER INHUMANE ACTS AS CRIMES AGAINST HUMANITY:

1. Principally, in Ground 1 of the Prosecution's Appeal Brief[1], the Prosecution contends that the Trial Chamber erred in law and in fact in finding that the chapeau elements, namely the general requirements, of crimes against humanity were not satisfied in the case against the Accused persons, including the 1st Respondent (also called "Fofana" herein)[2]. In particular, the Prosecution argues that the Trial Chamber erred in law and in fact in holding in its judgment that "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack"[3]. Based on this finding, the Trial Chamber held that there was lack of proof of "the essential requirement of an attack against the civilian population"[4] as a general element of Crimes against Humanity, which necessarily resulted in the acquittal of Fofana and Kondewa on Count 1 (Murder as a Crime against Humanity) and Count 3 (Other Inhumane Acts as Crimes against Humanity).

2. To start with, Fofana was charged in Count 1 of the Indictment with Murder as a Crime against Humanity, punishable under Article 2(a) of the Statute of the Special Court (herein called "the Statute"). In order to prove this crime, the Defence avers that the Prosecution has to prove the underlying offence, in this case Murder, after the general requirements of the category of Crimes against Humanity have been established. Therefore, even if the underlying offence of Murder is proved, if it is not further proven that the said Murder is a Crime against Humanity, the accused is entitled to an acquittal. Put simply, the Prosecution firstly has to prove that the alleged crime of Murder satisfies the elements of the general requirements of Crimes against Humanity, and then subsequently proceed to prove the *actus reus* and the *mens rea* of the said underlying offence of Murder, being a Crime against Humanity. Where it is found that the alleged Murder does not constitute a Crime against Humanity, there will be no need to prove the elements of the said underlying offence as it will be an action in futility.

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[1] SCSL-04-14-A-810 Prosecution Appeal Brief, filed on 11 December 2007.
[2] Ibid, para. 2.5, p.5.
[3] SCSL-04-14-T-785 Judgment of Trial Chamber 1, para. 693, pp.209-210.
[4] Ibid, para. 694, p.210.

3. According to the Trial Chamber, the general requirements which must be proved to show the commission of a Crime against Humanity contrary to Article 2 of the Statute are:

   (i) There must be an attack;

   (ii) The attack must be widespread or systematic;

   (iii) The attack must be directed against any civilian population;

   (iv) The acts of the Accused must be part of the attack; and that

   (v) The accused knew or had reason to know that his or her acts constitute part of a widespread of systematic attack directed against any civilian population.[5]

   If any one of the above elements or requirements is not proven beyond reasonable doubt, then a Crime against Humanity has not been committed, and the Accused is entitled to an acquittal. The Trial Chamber found that in spite of the fact that the requirement of a widespread attack has been established, in the sense that the attacks occurred over a broad geographical area, the evidence adduced did not prove beyond reasonable doubt that the civilian population was the primary object of the attack.[6] By contrast, it found that the attacks of the CDF were directed against the rebels or juntas who controlled towns, villages and communities throughout Sierra Leone[7], and that the Prosecution itself admitted that the CDF and the Kamajors fought for the restoration of democracy.[8]

4. In the *Kunarac et al Appeal Judgement*,[9] it was stated that the expression "directed against" is an expression which specifies that in the context of a Crime against Humanity, the civilian population *must be made the primary rather than an incidental target* of the attack. The Defence submits that from the evidence adduced in this case, it is crystal clear that the civilian population was never the primary object of the attacks launched. Rather, the Court, as noted, established beyond reasonable doubt[10] that the

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[5] Ibid, para. 690.
[6] Ibid, para. 693, pp.209-210.
[7] Ibid.
[8] Ibid.
[9] ICTY Appeal Judgment, para. 92 (Emphasis added)
[10] Judgment of Trial Chamber 1, para. 694, p.210.

attacks by the Kamajors and CDF targeted the rebels and juntas, inferring that harm on the civilians was merely incidental to the outcome of the attacks.

5. In the foregoing regard, the Prosecution's submission in its Appeal Brief that "it would defeat the purposes of the criminalisation of crimes against humanity if a widespread or systematic attack against a civilian population was excluded from the scope of crimes against humanity, merely because the attacks against civilians occurred simultaneously with attacks against military targets"[11], should, with respect, be dismissed. This is because as the Prosecution itself admits that "the question is whether the civilian population was *deliberately targeted* in a widespread or systematic manner, or whether civilians were merely victims of "unavoidable incidental civilian casualties and damage which may result from legitimate attacks upon military objectives""[12]. As submitted by the Defence herein, the Court itself found that the CDF, of which Fofana was an integral part, did not primarily, or *arguendo* deliberately, target civilians. There is no evidence to prove beyond reasonable doubt that there was an attack primarily directed against the civilian population. Besides, it is the Defence's contention in its response to grounds 3 and 4 of the Prosecution's Appeal that Fofana never committed, ordered, planned, or instigated the commission of any crime found to have been committed during the said attacks by the CDF.

6. Similarly, the Defence argues that the Prosecution's reliance on the ICTY *Kunarac Appeal Judgement* in its Appeal Brief as authority that the chapeau elements of Crimes against Humanity were established against Fofana is unhelpful. This is because the attacks in this case, whether random or selective, were, as noted, never directed against the civilian population, but against military targets. By the same stretch, the ICTY *Blagojevic and Jokic Appeal Judgement*[13] cited and relied upon by the Prosecution in its Appeal Brief is distinguishable from the case against Fofana and his co-Accused, because it involved the massacre of thousands of civilians during a military operation in Yugoslavia known as "Krivaja 95", which was held by the Court to be a direct attack against the civilian population. In the case against Fofana as said, the Court found that

[11] Prosecution's Appeal Brief, para. 2.25, p.13.
[12] Ibid.
[13] Ibid, para. 2.23, p.11.

the civilian population was not made the primary object of the attacks. Also, such mass killing of people constituting a massacre never occurred in the CDF case.

7. The Defence also notes that another principle enunciated by the Prosecution to prove ground 1 of its Appeal using the *Kunarac Appeal Judgement* above, is that an attack directed against the civilian population "is intended to exclude *isolated* or *random* acts from the scope of crimes against humanity and to ensure that generally, the attack will not consist of one particular act but of a course of conduct".[14] The Defence finds this legal ingredient to be supportive of Fofana's case in the sense that the Court found many acts of the Kamajors to be isolated, random and unauthorised by the CDF central command. For example, the Court notes in its judgment that "(a)lthough the CDF was a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of central command. Commanders' authority to discipline their men on the ground was entirely their own".[15]

8. Furthermore, relying on the same *Kunarac Appeal Judgement* above, the Prosecution contends in its Appeal Brief that the Trial Chamber failed to consider the factors outlined in the said judgement in determining whether the attack may be said to have been directed against a civilian population or not. The said factors included: a) the means and method used in the course of the attack, b) the status of the victims, c) the number of the victims, d) the discriminatory nature of the attack, e) the nature of the crimes committed in its course, f) the resistance to the assailants at the time, and g) the extent to which the attacking force may be said to have complied with precautionary requirements of the laws of war.[16]

9. The Defence hastens to submit that it is not a mandatory requirement that *all* of the foregoing factors have to be cumulatively proved before an attack can be said to be directed against a civilian population. The said factors are meant to assist the Chamber to determine whether the attack was indeed directed against the civilian population or not.

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[14] Ibid, para. 2.24, p.12. The Trial Chamber also noted this in its judgment, see para. 119, p.34.
[15] Judgment of Trial Chamber 1, para. 721(ii), p.215.
[16] Prosecution's Appeal Brief, para. 2.27, pp.13-14.

The Chamber need not even consider any of the said factors.[17] Notwithstanding this, the Trial Chamber did not only consider some of the said factors in reaching its decision, such as the status of the victims or civilians, but also made use of the dictum by citing it in its judgement.[18] In particular, though the Chamber concurred with the interpretation that the term "civilian population" must be interpreted broadly, it equally conceded that the use of the word "population" does not mean the entire population of the geographical entity in which the attack takes place. It concluded that "the targeting of a select group of civilians, for example, the targeted killing of a number of political opponents, cannot satisfy the requirement of Article 2. [19]

10. The Defence submits that notwithstanding the fact that the said factors need not be considered by the Trial Chamber, it averted its mind to them and even considered some of them in its judgement. The Court did not therefore proceed on an assumption that the attacks were not directed against the civilian population, or that they only occurred in the course of attacks against military targets. As already noted, what the Chamber found was that the primary object of the attacks by the Kamajors and CDF was against the rebels and juntas, and not civilians. This was not an assumption, but a finding of fact.

11. The Defence also submits that the ICTY *Blaskic Appeal Judgement* cited and relied upon by the Prosecution in its Appeal Brief to illustrate that "there is an absolute prohibition on the *targeting* of civilians in customary international law"[20] is inapplicable to this case for the same reason that Fofana and the CDF never targeted the civilian population in their attacks on military targets. Similarly, regarding the fourth and fifth chapeau requirements for the commission of a crime against humanity, the Defence submits that since the Trial Chamber found that the attacks in issue were not directed against any civilian population, it is redundant to argue the said elements, which are interlinked with the underlying issue of whether civilians were in fact primarily targeted for attacks.

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[17] The Prosecution admitted this issue in paragraph 2.33 of its Appeal Brief and even went to the extent of saying in the same paragraph that such an intention to attack the civilian population can still be established even when *none* of the factors are present.
[18] Para. 114 of the Judgment of the Trial Chamber, p.32.
[19] Ibid, paras. 116 and 119, pp. 32-34.
[20] Prosecution's Appeal Brief, paras. 2.28-2.29.

12. The Prosecution further contended that because the Trial Chamber found that the attacks in the conflict were widespread, the only conclusion open to any reasonable trier of fact is that civilians were deliberately targeted and attacked during these attacks.[21] The Defence submits with respect that the said argument is fallacious, because the same trier of fact can also find, and did find in this case, that these widespread attacks were directed not against innocent civilians, but against the rebels and the juntas fighting against the CDF. The mere fact that the attacks were widespread does not also logically mean that civilians were targeted. In fact, the Defence avers that all the factual findings in the present case glaringly illustrated that there was no attack on a mass number of civilians that can qualify or be regarded as "a population". To the contrary, the attacks were respectively directed against the opposing warring factions; and as already argued, a limited and randomly selected number of individuals, and in some cases groups of civilians, incidentally became collateral victims of the attacks.

13. The Defence also submits that the intention of Fofana, as an Accused person, were factually known to the Court as never including any attack on civilians; rather, his intention was that all attacks were to be directed against the rebels and juntas that controlled towns, villages and communities throughout Sierra Leone, in order to regain territories from them and restore democracy in the country.[22] Unfortunately, civilians became collateral victims of the said attacks, in the wake of the potent desire and drive by the CDF and Kamajors to overcome every opposition or resistance to their goal.

14. In the example given by the Prosecution in its Appeal Brief,[23] it was stated that out of more than 1000 civilians who were caught and kept in detention during the second attack on Tongo, only a queue of 150 men and a 12-year old boy were ordered to be killed, and were eventually killed. The rest of the civilians were taken to the hospital quarters in Panguma where the Kamajor Chiefdom Commander there, namely BKJ Sei, addressed and released them after making it abundantly clear to them that upon their next attack in Tongo, the Kamajors would kill everyone who had not left the town. From this incident, the Defence submits that although 151 people were killed, it was obvious that the

[21] Ibid, paras. 3.36, pp.16-17.
[22] Judgment of Trial Chamber 1, paras. 324-325, p.105.
[23] Prosecution's Appeal Brief, para. 3.37, p.17.

Kamajors did not target the entire civilian population of more than 1000 people at Tongo then for murder. Had they been the real targets, the Kamajors would have killed all of them. Also, the fact that the Kamajors merely threatened to kill the rest of the civilians if they did not leave the town makes it clear that what the CDF fighters wanted was not the lives of civilians, but the towns and territories occupied by the rebels and the juntas.

15. Additionally, The Defence notes that the Court found that the CDF had a definite and deliberate policy against the harassment or terrorising of civilians. During the initiation of the Kamajor fighters, for example, the Kamajors were given certain rules and prohibitions that they were bound to follow. Some of these prohibitions "precluded, *inter alia*, the killing of civilians who were not participating in the conflict; the killing of women; looting; and the killing of a surrendered enemy"[24]. The Court further noted in its findings that "the consequence for violating one of these rules was that a Kamajor would lose his immunisation to bullets and would be killed".[25] There are also several instances in this case in which the Kamajor leaders and commanders expressly prohibited the harassment, terrorising or killing of civilians. A case in point was when Kondewa once warned the Kamajors that they were supposed to assist the civilians, and to desist from harassing them and stealing their money.[26] Another instance was when civilians were captured and taken to the football field near the NDMC Headquarters in Tongo. BJK Sei aforesaid came to the field with Siaka Lahai and told the Kamajors that he would dismiss anyone he saw killing people. He then left the headquarters and went to Labour Camp, repeating his order: "Please be careful about the civilians".[27]

16. The Defence reiterates therefore that it was never the policy of the CDF to terrorise civilians, since the Kamajor fighters cannot be said to be terrorising the very civilians they sought to protect. That said, the Defence concedes, however, that sometimes Norman, as absolute head, went overboard in making orders to harass civilians. However, such orders merely reflected his personal excesses more than anything else. This is why another finding of the Court was to the effect that sometimes Norman's

[24] Judgment of Trial Chamber 1, para. 314.
[25] Ibid.
[26] Ibid, para. 620, pp.186-187.
[27] Ibid, para. 392, pp. 126.

instructions to kill and harass civilians were not obeyed. A case in point was at Koribondo.[28] Besides, some Kamajor fighters, as earlier noted, acted on a frolic of their own in harassing civilians.[29]

17. Finally, the Defence for Fofana submits that all the submissions made by the Prosecution in its Appeal Brief failed to establish that the intention of the Kamajors was to direct their attacks on civilians, who were never the primary object of such attacks. The Prosecution has failed to satisfy and prove, beyond reasonable doubt, the chapeau elements of crimes against humanity. As noted earlier, if a crime against humanity has not been established or committed by Fofana, then the specific offence of Murder as a crime against humanity cannot exist in the absence of that general offence under international humanitarian law. It is for this reason that it was not necessary for the Chamber to prove the elements of Murder against Fofana. In conclusion, the Chamber rightly found that Fofana was not guilty of crimes against humanity charged under Count 1 (Murder) and Count 3 (Other Inhumane Acts) of Article 2(a) and 2(i) of the Statute.

B.

RESPONSE TO GROUNDS 3 AND 4: FAILURE TO FIND RESPONSIBILITY FOR PLANNING, ORDERING, INSTIGATING OR OTHERWISE AIDING AND ABETTING THE PLANNING, PREPARATION OR EXECUTION OF CERTAIN CRIMINAL ACTS IN TONGO, KORIBONDO, BO AND KENEMA DISTRICTS:

18. Grounds 3 and 4 of the Prosecution's Appeal Brief are argued together by the Prosecution and the said grounds specifically provide as follows:

> Ground 3: Failure by the Trial Chamber to find *superior responsibility and/or responsibility* for planning, ordering, instigating or otherwise aiding and abetting in the planning, preparation or execution of certain criminal acts in *Kenema District*; [Emphasis added] and

[28] Ibid, paras. 434 and 765(xiii), p.232.
[29] Ibid, para. 721(ii), p.215.

> Ground 4: Failure by the Trial Chamber to find *responsibility* for planning, ordering, instigating or otherwise aiding and abetting in the planning, preparation or execution of certain criminal acts in *the towns of Tongo Field, Koribondo and Bo District.* [Emphasis added].

Essentially, though ground 3 focusses on Kenema District and ground 4 targets the towns of Tongo Field, Koribondo and Bo District for the offences claimed in the Appeal, the Prosecution has argued both grounds as one, dealing, however, with the individual responsibility of Fofana under Article 6(1) for the crimes committed in Tongo separately from the crimes in Koribondo, Bo and Kenema.

19. Before proceeding to respond to the Prosecution's arguments in the above grounds, it is worthy to note that the Prosecution did not seek in its Appeal Brief to challenge "any of the factual crimebase findings of the Trial Chamber with respect to the attacks committed by Kamajors/CDF forces in Kenema District, or in Tongo, Koribondo or Bo District, or with respect to the crimes which the Trial Chamber found to have been committed in those locations"[30]. What the Prosecution sought in lieu to do is to argue that "the Trial Chamber erred in its findings with respect to the individual criminal responsibility of [the 1st Respondent...] under Article 6(1) of the Statute in respect of the crimes that the Trial Chamber found to have been committed in those attacks"[31].

20. The response to the above grounds will thus concentrate largely on the issues which the Prosecution contends with in its Appeal Brief, in lieu of wholesomely restating factual findings of the Trial Chamber in chronology[32]. In essence, factual findings shall be alluded to in the arguments as may be appropriate.

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[30] Prosecution's Appeal Brief, para. 3.2, p.26, ibid.
[31] Ibid, para. 3.2, p.27, ibid.
[32] As portrayed, for example, in section 3B of the Prosecution's Brief.

Defence Submissions on the Legal and Factual Crimebase Requirements of the Offences Claimed in the Prosecution's Appeal Brief:

(i) TONGO:

a) The Offence of Aiding and Abetting:

21. The Defence for the 1st Respondent, Fofana, notes that the Prosecution takes no issue with the Trial Chamber's finding that the elements of aiding and abetting were satisfied under this rubric.[33] No response is therefore made hereunder.

22. In order to prove grounds 3 and 4 of its appeal, however, the Prosecution submitted that "the Trial Chamber *erred in fact* in finding that *the elements of instigating and planning* were not also satisfied on the part of Fofana in relation to [the crimes for which Fofana was found by the Court to have aided and abetted]".[34] The Defence for Fofana shall, for purposes of coherence, give a systematic response to the Prosecution's submissions; dealing first with the elements of the crime of 'instigating' and relating them to the factual findings on the relevant crime bases, which the Prosecution pleads were not considered by the Court in reaching its decision regarding Fofana. Following in sequence shall be a similar response to the elements of 'planning' under Article 6(1) of the Statute.

b) The Offence of Instigation:

23. On the elements of instigation, the Prosecution, after restating the Court's definition and description of the crime of instigation, firstly argued that in finding Fofana responsible for *aiding and abetting*, the Trial Chamber effectively found that the elements of the *actus reus* of *instigating* were also satisfied.[35] Secondly, the Prosecution concluded that "the main difference between aiding and abetting and instigating is the *mens rea* requirement [of the two offences]."[36] It continued by submitting that "(f)or *aiding and abetting*, it is not necessary for the aider and abettor to have the intent that the crime be committed; it is sufficient that the aider and abettor merely has knowledge that his acts

[33] Para. 3.49, p.42, ibid.
[34] Ibid (Emphasis added).
[35] Para. 3.52, ibid.
[36] Para. 3.53, ibid.

assist in the commission of the principal perpetrator's crime. For *instigating*, it is necessary to show that the accused had intent, in the sense that the accused "intended to provoke or induce the commission of the crime, or had reasonable knowledge that a crime would likely be committed as a result of that instigation".[37]

24. All respect due the Prosecution, the Defence for Fofana submits that the foregoing conclusion is misleading of the Trial Chamber's judgment. The Court, in its judgment, indicated *inter alia* that in order to prove the *actus reus* of instigation, "a *causal relationship between the instigation and the perpetration of the crime must be demonstrated*; although it is not necessary to prove that the crime would not have occurred without the Accused's involvement."[38] For aiding and abetting, the Court held that "*Proof of a cause-effect relationship* between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, *is not required*".[39] The conduct of the aider and abettor must, however, have "a substantial effect upon the perpetration of the crime".[40]

25. Thus, even apart from the key difference in the *mens rea* requirement for the two offences as amply stated above by the Prosecution, it is imperative that for an aider and abettor to be convicted of instigation, his instigating conduct must lead to the perpetration of the crime,[41] and not merely have substantial effect on its outcome. In order words for the crime to lie against the 1st Respondent, there must be a direct causal link between his alleged act of instigation and the actual commission of the crimes referred to by the Prosecution in its Appeal Brief.

26. Without proving the necessary elements of the *actus reus* of instigation relative to Fofana, the Prosecution leaps to the assumption that the *actus reus* of aiding and abetting and that of instigation are one and the same, and that the key difference in the two crimes merely rests in their respective *mens rea* requirements. The Defence for Fofana submits

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[37] ibid. (Emphasis added).
[38] Judgment of Trial Chamber 1, 2nd August 2007, para. 223, p.68. (Emphasis added).
[39] Ibid, para. 229.
[40] Ibid.
[41] Kordic and Cerkez Appeal Judgment, para. 27.

that none of the factual findings referred to by the Prosecution established a direct causal link between Fofana's prohibited conduct and the perpetration of the crimes found by the Court. It is untenable, for example, for the Prosecution to conclude that "Fofana's speech at the December 1997 Passing Out Parade went far beyond merely giving encouragement and support to the commission of [the crimes at Tongo Fields]" and that it "can only be understood *as a direct threat to the Kamajors* that they would face death or other serious consequences if they failed to carry out Norman's orders."[42]

27. Apart from the fact that Fofana's said speech came after the fact, to wit after Norman's absolute orders to the Kamajors to conduct pending operations[43], the speech was made within a military context, intended at launching attacks on military targets; it was bereft of any intention to instigate criminals to commit specifically outlined crimes.[44] In particular, the Court found that "(d)uring his speech, Fofana told the fighters to attack the villages where the juntas were located and to "destroy the soldiers finally from where they were[...] settled".[45]

28. Additionally, the Court, as noted, made several findings of situations in which failure to obey specific orders by Norman were met with nothing but grumbles by him. In April 1998 at the New Police Barracks in Bo Town, for example, the Court found that "Norman complained that the Kamajor chiefs, in particular Fofana, had lied to him about the burnt down police barracks and policemen killed in Bo Town. Norman said that he felt deceived after having seen the barracks intact and the police at the parade".[46] Whilst this finding speaks good of the intentions of Fofana vis-à-vis his conduct during the period of the Indictment, it similarly undercuts and weakens the Prosecution's argument that "the only conclusion open to a reasonable trier of fact is that Fofana had the necessary intent for instigating, and that the elements of instigating are therefore

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[42] Prosecution's Appeal Brief, para. 3.52, pp. 42-43. (Emphasis added)
[43] The Court found that Norman 'had given instructions for the pending operations and that the Kamajors should follow those instructions', Judgment of Trial Chamber 1, para. 323, p.104.
[44] See Fofana's speech at para. 324, p.105, ibid.
[45] Ibid, para. 325, p.105.
[46] Ibid. para. 809 (viii), pp.243-244. At Koribondo too, the Court found that 'Norman scolded the Kamajors for not having done the work he had told them to do, in particular to destroy all houses; except for three...', para. 765 (xiii), p.232.

satisfied".[47] It equally gives a doubtful twist to Nallo's testimony relied upon by the Prosecution that "if the Kamajors did not follow orders they would cut off your ear or kill you".[48]

29. On the *mens rea* requirement of instigation, the Defence for Fofana submits that there is nothing in Fofana's speech at the December 1997 Passing Out Parade to show that he intended to provoke or induce the commission of the crimes outlined by the Prosecutor, or that he had reasonable knowledge that a crime would likely be committed as a result of that alleged instigation. To the contrary, Fofana laid emphasis on the Kamajors not losing their grounds[49], which shows that his encouragement was geared towards the capture of Tongo, and never to encourage fighters to commit offences. There was therefore no evidence to the effect that Fofana instigated the commission of crimes in Tongo.

30. Furthermore, the Defence submits that from the circumstantial evidence available to the Court, it is not the case that the only inference that can be drawn from the circumstances is that Fofana induced or provoked the Kamajors to commit crimes. The other more probable inference could be that he encouraged the Kamajors to fight and capture Tongo. Thus, because of his encouragement and knowledge of Norman's orders to the Kamajors to commit crimes, he was held criminally liable for aiding and abetting, but not instigation, which the Prosecution failed to prove beyond reasonable doubt. On Fofana's speech at the passing out parade in early January 1998, for example, the Court held that "[(a)lthough this speech contained an instruction to "attack the villages", "destroy the soldiers" and "capture Koribondo" and was given by Fofana in his position as Director of War to his subordinates, it did not include the instruction to commit criminal acts".[50]

31. Besides, the Court, as noted, made a number of findings about to the true nature and objective of the attacks by the Kamajors devoid of any criminal intention. It found, *inter*

[47] Prosecution's Appeal Brief, para. 3.54, p.44.
[48] Ibid, para. 352, p.44.
[49] Judgment of Trial Chamber 1, para. 721(x), p.217.
[50] Ibid, para. 766, p.232.

alia, that though the requirement of a widespread attack was established[51], "the evidence adduced [by the Prosecution] does not prove beyond reasonable doubt that the civilian population was the primary object of the attack". By contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone...".[52] Also, the Court found that "(a)lthough the CDF was a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of central command. Commanders' authority to discipline their men on the ground was entirely their own".[53] Such findings only further weaken any attempt to impute an intention to instigate stated crimes upon Fofana.

c) <u>The Offence of Planning</u>:

32. The Prosecution submits under this rubric in its Appeal Brief that the only conclusion open to any reasonable trier of fact on the findings of the Trial Chamber and the evidence it accepted, is that the crimes found by the Court were "committed pursuant to a plan, that it was specifically part of the plan that crimes would be committed in the second and third attacks on Tongo, that the crimes were in fact perpetrated, and that Fofana acted with intent that a crime provided for in the Statute be committed or with reasonable knowledge that the crime would likely be committed in the execution of that plan".[54] It then concluded that "the only issue on appeal is whether Fofana participated *substantially* in the planning".[55]

33. Furthermore, the Prosecution takes issue with the Court's finding that though "Fofana was present and contributed to the discussion at the subsequent commanders' meeting in December 1997 at Base Zero where plans to attack Tongo were discussed,....(i)n the absence of any evidence showing how Fofana contributed to the discussion and decision at this meeting, the Chamber finds that in the circumstances there is no evidence to prove beyond reasonable doubt that Fofana either planned the commission of [the] additional

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[51] Ibid, para. 692, p.209
[52] Ibid, para. 693, pp.209-210.
[53] Ibid, para. 721(ii), p.215.
[54] Prosecution's Appeal Brief, para. 3.57, p.45.
[55] Ibid.(Emphasis added).

crime of looting or that he aided and abetted in the planning, perpetration or execution of [the] additional crime in Tongo."[56]

34. The Defence submits that throughout the trial, the Prosecution adduced no evidence to prove beyond reasonable doubt the commission of the crimes outlined above. What the Prosecution now attempts to do is to seek to prove the said situation in its Appeal Brief by circumstantial evidence. It suggests that a holistic analysis of the circumstantial evidence before the Court somehow imputes a substantial participation by Fofana in the direct planning of the offences that were committed in Tongo, Koribondo, Bo and Kenema.[57]

35. In particular, the Prosecution submits that since Fofana was present at the December 1997 Commanders' Meeting at which the second and third attacks on Tongo were discussed, and at the First and Second January 1997 Commanders' Meeting at which the attacks on Koribondo and Bo were discussed, and also because Fofana was said to be present at a meeting with Norman and Nallo in which the attacks on Koribondo and Bo were further discussed,[58] the only conclusion open to any reasonable trier of fact is that at these meetings Fofana was not just *present*, but that he was an active participant who therefore had reasonable knowledge that crimes would be committed or executed based upon the presumed discussions held in the said meetings.

36. The Defence submits that apart from the fact that there is no evidence showing the specifics of what was discussed at any of the said meetings, as well as no evidence showing that planning the attacks was even part of the agenda of the meetings, the Court especially held that there is no evidence to show what contribution, if any, that Fofana made at these meetings.[59] Consequently, it is contended that, for the purpose of the crime of planning as adduced from the findings of the Court, knowledge of crimes to be committed later by the Kamajors cannot be imputed to Fofana by reference.

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[56] Ibid, para. 3.58, p.45; see also Judgment of Trial Chamber 1, para. 725, p.219.
[57] Prosecution's Appeal Brief, para. 3.60, p.46.
[58] Ibid, para. 3.66, pp.47-48.
[59] Judgment of Trial Chamber 1, para. 725, p.219.

37. The Defence notes that in its reliance on circumstantial evidence to state and defend its Appeal, the Prosecution relied on various isolated references to ICTR and ICTY cases for admissibility of circumstantial evidence to either prove material facts[60], or ground a conviction[61]. What, however, is missing from these references, is the admission of the Appeals Chamber in those cases that a reasonable Trial Chamber could only reach such conclusions "beyond reasonable doubt", and either based on "a free assessment of the evidence before it"[62], or "under particular circumstances"[63]. In the ICTY case of *The Prosecutor -v- Brdanin*, the Appeals Chamber unambiguously held that "[a] Trial Chamber does not have to explain every decision it makes, as long as the decision, with a view to the evidence, is reasonable (...) It is settled jurisprudence that a Trial Chamber may only find an accused guilty of a crime if the Prosecution has proved each element of that crime and the applicable mode of liability, as well as any fact indispensable for entering the conviction beyond a reasonable doubt."[64] Again, the Defence submits that the Prosecution wholly failed in discharging this duty against Fofana regarding the offences of planning and instigation.

(ii). KORIBONDU, BO AND KENEMA:

(a) The Offence of Planning:

38. As indicated earlier, the Prosecution could not adduce any direct evidence in its Appeal Brief to show that Fofana actually planned or designed the commission of any crime which was later committed or executed, at both the preparation and execution phases. It also failed to prove that such planning, if any, *substantially contributed* to the crime committed. Similarly, the Prosecution could not prove in its Appeal Brief any direct evidence to show that Fofana had the required *mens rea* for criminal planning or that he acted with intent that a crime prescribed by the Statute be committed or that he had reasonable knowledge that a crime would likely be committed in the execution of that plan. It thus sought to prove the crime of planning by circumstantial evidence.

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[60] *Gacumbitsi -v- The Prosecutor*, ICTR-2001-64-A, paras. 72 & 115.
[61] *Kamuhanda -v- The Prosecutor*, ICTR-99-54A-A, para. 241.
[62] Ibid.
[63] *Gacumbitsi*, ibid, para.115.
[64] ICTY-IT-99-36-A, paras. 11-12, 3 April 2007.

39. In particular and as partly noted earlier, the Prosecution relied on the following circumstances to prove the offence of "planning" against Fofana in its Appeal Brief:

a. The presence and participation of Fofana at the December 1997 Commanders' Meeting at which the second and third attacks on Tongo were discussed;

b. The presence of Fofana at the first and second January 1997 Commanders' Meetings at which the attacks on Koribondo and Bo were discussed;

c. The presence of Fofana at the meeting with Norman and Nallo in which the attacks on Koribondo and Bo were further discussed, as well as the finding of the Trial Chamber that Nallo initially did the planning of the Koribondo attack and then submitted the plan to Fofana, who then submitted it to Norman.

d. The fact that Fofana was one of the key components of the leadership structure, to wit, that he was part of the CDF "Holy Trinity" at Base Zero;

e. Fofana's duties as Director of War, including to plan and execute the strategies for war operations, to select commanders to go to battle and to act as the overall boss of the commanders based at Base Zero.[65]

40. In answer to sub-paragraphs (a) and (b) of the circumstantial findings above, the Defence repeats paragraphs 32 to 37 of this Response.

41. In answer to sub-paragraph (c) of the findings above, the Defence firstly submits that the mere presence of Fofana at the meeting with Norman and Nallo in which the attacks on Koribondo and Bo were further discussed is not enough to convict Fofana of the offence of planning the crimes committed in the said crime bases. The Court's specific finding is to the effect that "Norman *met* with Nallo before the Koribondo and Bo attacks at Base Zero and gave him specific instructions for these two attacks, while Fofana was present."[66] This finding is crystal clear as to the non-role of Fofana in the said meeting;

[65] See paras. 3.66-3.70 of the Prosecution's Appeal Brief.
[66] Judgment of Trial Chamber 1, para. 765 (vii), p.231. (Emphasis added).

the meeting was not for, with or about Fofana, nor was any instruction directed to him to plan or execute any plan, he was merely present. In fact, there is no evidence to show that planning was even part of the discussions at that meeting.

42. Besides, Norman more often chose to deal directly with Nallo because "he was the only literate Director"[67] in the entire CDF structure. Nallo largely assisted Fofana in the latter's functions as Director of War. In fact, the Court finds that Nallo wrote everything for Fofana while the latter planned in Mende.[68] However, given that Norman had restructured the entire CDF along "military" lines,[69] the specifics of Fofana's planning in Mende, himself being an illiterate, may not have been exactly known since Nallo was the only arbiter to determine that. This is further diminished by the Court's conclusion, based on Nallo's testimony, that "(t)he strategies for war operations, which Fofana and Nallo planned together, did not include the killing of innocent civilians, looting of property or raping of women".[70]

43. There is also ample judicial finding to show that Nallo did not only do both local and overall national planning, but that he was several times directly involved as "overall commander"[71] in the execution of his war plans and operations; Fofana'a name in the planning was often merely an appendage. In particular, the Court finds that "(i)n his capacity as Deputy National Director of Operations, Nallo was responsible for transmitting general and specific instructions from Norman to the warfront commanders, for collecting reports he received from the frontline upon his visits and transmitting them to Fofana before presenting them to Norman, and bringing arms and ammunitions to the fighters (...) The local operational planning for the attack on Koribondo was done at Kpetewoma, Nallo was the intermediary between Norman at Base Zero and Joe Tamidey...".[72]

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[67] Ibid, para. 340, p.109.
[68] Ibid.
[69] Ibid, paras. 348-358.
[70] Ibid, para. 340, pp.110.
[71] Ibid, para. 765 (vii), p.231.
[72] Ibid, para. 765 (viii - x), p.231.

44. What the foregoing finding essentially illustrates is that Fofana's involvement as an intermediary between Nallo and Norman was only after the fact, namely, to receive reports from Nallo about the frontline after Norman's specific instructions have been passed on to the fighters and/or executed by them. The Defence submits that where Fofana is said to have merely passed on Nallo's already prepared plan for the attack on Koribondo to Norman,[73] such conduct cannot be taken to mean that he made a substantial contribution to the said planning, considering Fofana's illiteracy and the elite relationship that existed between Norman and Nallo who were the two literate men in the directorate or upper echelons of the CDF.

45. Furthermore, in answer to sub-paragraphs (d) and (e) of the findings above, the Defence avers that the fact that Fofana was a key element of the CDF leadership structure is itself no clear indication that he was involved in the planning of criminal activities, due regard been had to the Court's finding that his greatest pre-occupation was for the attack and capture of areas and towns under rebel or Junta control, and not to commit crimes.[74] Similarly, the fact that his duties as National Director of War included the planning and execution of strategies of war does not suffice to prove that he actually planned and executed war strategies. As noted above, Fofana's role and relationship with Nallo showed that Fofana was merely a figurehead as far as the planning and execution of war operations was concerned; Nallo did all the planning and execution. Consequently, the Defence submits that since the proposed guilt of Fofana is not the only inference that can be drawn from the circumstantial evidence of planning, which the Prosecution seeks to rely on for its Appeal, the said circumstantial evidence falls short of proving the crime of planning, beyond reasonable doubt.[75]

46. Regarding the *mens rea* requirement for the offence of planning, the Prosecution relied upon the ICTY Appeal Judgment in the case of *Kordic and Cerkez*[76] to submit that "Fofana acted with the intent that the crimes be committed or with reasonable knowledge

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[73] Ibid, para. 334, p.107.
[74] Ibid, paras. 324-325, p.107, and para. 721 (iv), p.216.
[75] *The Prosecutor -v- Brdanin* ICTY-IT-99-36-A, paras. 11-12.
[76] Prosecution's Appeal Brief, para. 3.72.

that the crime would likely be committed in the execution of that plan".[77] It is the submission of the Defence that the extended *mens rea* requirement of the above judgment in the sense of an 'awareness of the substantial likelihood that a crime will be committed in the execution of a plan' does not apply to Fofana for the reasons stated as follows:

47. Firstly, for *mens rea* to lie, an *actus reus* must be established. The Defence has reiterated that there is no evidence that Fofana actually contributed in the plan to attack Koribondo, Bo or Kenema, or any place at all. This being the case, even if he later became aware of the likelihood that a crime will be committed in the execution of a plan that he did not make or contribute in making, he cannot be said to have the *mens rea* for that crime. Secondly, the findings of fact by the Court that the strategies which Fofana and Nallo planned together did not include the killing of innocent civilians, looting of property or raping of women[78], as well as that the evidence adduced by the Prosecution does not prove beyond reasonable doubt that "the civilian population was the primary object of the attacks [by the CDF]"[79] say it all. Thirdly, the Defence avers that the fact that Fofana was present and heard the instructions given by Norman to commit criminal acts is not sufficient at law to impute on Fofana knowledge of the criminal acts to be committed, unless it is certain that Norman's orders or instructions are, for example, *always* obeyed. If they are not always obeyed, as sufficiently illustrated in this Brief, the instructions can merely convey a possibility that the crime may be committed, but definitely not *knowledge* that the crimes will certainly be committed. It is trite law that any reasonable doubt about the existence or non-existence of such knowledge must be settled in favour of the Accused.

48. In the light of the foregoing, the Defence submits that the Trial Chamber was right in not holding Fofana as bearing individual criminal responsibility under Article 6(1) of the Statute for the offence of planning.

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[77] Ibid, para. 3.74.
[78] Judgment of Trial Chamber 1, para. 340, pp.110.
[79] Ibid, para. 693, p.209.

(b) *The Offence of Aiding and Abetting the Planning or Preparation of Crimes:*

49. The Prosecution, whilst not taking issue with the Trial Chamber's articulation of the elements of 'aiding and abetting' the planning, preparation or execution of a crime, submits in summary as follows: *i)* that the only conclusion open to any reasonable trier of fact on the basis of the Trial Chamber's findings is that Fofana had knowledge that the crimes found by the Court would be committed in the course of the attacks committed as part of an "all-out offensive"; *ii)* that Fofana's substantial contribution to the planning of the operations in which these crimes were committed assisted planners and executors of the crimes; *iii)* that given "Fofana's seniority and stature at Base Zero" and his attendance of CDF planning meetings, his participation in the said meetings must have encouraged or lent moral support to the planners and executors of the crimes committed in the attacks on Koribondo, Bo and Kenema;[80] and *iv)* that Fofana's act of supplying logistics, including arms, ammunition and vehicle to the Kamajor fighters had a substantial effect upon the perpetration of crimes by them on Kebi and Bo towns.[81]

50. Whilst admitting that an Accused can be individually responsible for aiding and abetting a crime under Article 6(1) of the Statute where the said Accused provides assistance and support to those planning, preparing or executing the crime, the Defence again submits that there is no direct evidence to prove that Fofana actually aided and abetted in the planning, preparation or execution of crimes committed in Koribondo, Bo and Kenema. The Defence avers that the Prosecution has sought to prove the Accused's guilt for the said crime by resorting to circumstantial evidence put together in its Appeal Brief.

51. In the above light, the Defence, firstly, takes issue with the Prosecution's submission that 'Fofana had knowledge that the crimes found by the Court would be committed in the course of the attacks committed as part of an "all-out offensive"'. Apart from the fact that there was no factual finding to support this submission, the circumstances relied upon by the Prosecution to support the claim cannot, and did not in anyway, constitute circumstantial evidence to show that Fofana aided and abetted in the planning,

[80] Prosecution's Appeal Brief, para. 3.82, pp.52-53.
[81] Ibid, para. 3.85, p.54.

preparation or execution of criminal acts during the 'all-out offensive' referred to. As already noted in this Response, the Court finds that the strategies which Fofana and Nallo planned together did not include the killing of innocent civilians, looting of property or raping of women[82]. Similarly, the Court, as highlighted herein, noted that the evidence adduced by the Prosecution did not prove beyond reasonable doubt that "the civilian population was the primary object of the attacks [by the CDF]"[83] and that the Prosecution itself admitted that "the CDF and the Kamajors fought for the restoration of democracy".[84] In the absence of any specific crime that can be directly attributed to an Accused, the foregoing findings form the circumstantial basis on which leaders of the CDF are portrayed and their motives or indirect intentions determined.

52. In response to the second and third limbs of the Prosecution's submissions under this rubric, the Defence restates its earlier arguments that Fofana's seniority and stature at Base Zero and his mere presence in meetings did not suggest that he *knew* of any plans to commit *criminal* acts, not to talk of assisting *substantially* in the planning, preparation or execution of same. Fofana, as noted, was always more concerned with his drive to attack and capture towns or territories under rebel or Junta control. The details of what was discussed in the meetings he attended were not revealed; the evidence only shows that the object of the meetings was to discuss the attacks to be launched against towns under rebel/junta control. There is no evidence that any planning or preparation was discussed. Consequently, if nothing was planned or prepared, Fofana's presence at these meetings could not in anyway lend support or encouragement to the planners. Even if such a plan or preparation existed, the Defence submits that the Prosecution still has the added burden of proving, beyond reasonable doubt, how Fofana assisted in the planning or preparing of the crimes committed, which it has woefully failed to do.

53. Finally, the Defence takes issue with the Prosecution's view that Fofana's act of supplying logistics, including arms, ammunition and vehicle to the Kamajor fighters had a substantial effect upon the perpetration of crimes by them on Kebi and Bo towns. The

[82] Judgment of Trial Chamber 1, para. 340, pp.110.
[83] Ibid, para. 693, p.209.
[84] Ibid.

Defence submits that the conclusion reached by the Trial Chamber on this issue in its judgment is both instructive and exhaustive. The Court, for ease of reference, stated as follows: "Furthermore, the Chamber finds that Fofana provided logistics to launch military attacks on Kebi and Bo Towns. Although at this stage Fofana knew that the plan to attack Bo Town included the commission of criminal acts, it is not the only reasonable inference that the logistics provided by Fofana were used to commit specific criminal acts in Bo Town or that such provision had a substantial effect on the perpetration of these specific criminal acts in Bo. Therefore, these actions by Fofana did not constitute aiding and abetting in the planning, preparation or execution of the criminal acts committed by Kamajors subsequently, in Bo."[85]

54. Regarding the above conclusion, the Defence avers that before it can be said that Fofana aided and abetted the planning, preparation or execution of the said criminal acts, the Prosecution must firstly, prove that it is exactly the same logistics that were supplied or provided by Fofana that the Kamajors used to commit the criminal acts in Bo and, by extension, Kebi Towns. This is so because if the logistics supplied or provided by Fofana were not actually used in the attack, then he cannot be said to have aided and abetted the commission of the criminal acts, as it is only through the provision or supply of the logistics that he can be said to have assisted in the planning, preparation or execution of the said criminal acts.

55. More significantly, as the evidence or factual findings of the Court show, it is possible that the said logistics were either used or not used. Similarly, it is possible that if they were used, they may not have been used in the particular attacks in which criminal acts were committed; whilst another inference could be that if the logistics were not used, they may have been kept for other attacks that never even materialized. This is not uncommon in military practice where arms and ammunitions are economized and kept in reserves either until old stocks are completed or when troops are on the defensive. Another probable inference could also be that Fofana's logistics provided or supplied may have been lost to enemy fighters in combat.

[85] Ibid, para. 813, pp.244-245. This quote is also reproduced in the Prosecution's Appeal Brief at para. 3.84.

56. For the reasons stated above, the Defence objects to the Prosecution's further argument that even if the logistics provided by Fofana were for some reason ultimately not used in the attacks, this would not affect the conclusion that Fofana is individually responsible for aiding and abetting those crimes, if the provision of logistics nevertheless had a substantial effect on the commission of the crimes.[86] All respect due to the Prosecution, this argument can at best be considered as a flat contradiction in terms. If the logistics provided or supplied by Fofana were ultimately not used, it will affect the conclusion that Fofana is individually responsible for aiding and abetting those crimes, because, as already noted, it is only through the use of the said logistics during the attacks can he be said to have aided and abetted the planning, preparation or commission of any criminal acts subsequently committed. In short, where no known 'Fofana logistics' are used or applied, there will be no assistance by Fofana; and if there is no assistance, the degree of involvement (substantial or less) becomes redundant.

57. Finally, the Defence notes that the Prosecution also took issue with the Trial Chamber's conclusion that "Fofana could only provide logistics "if and when directed to do so by Norman".[87] The Prosecution submitted that the Court's said conclusion is "immaterial" because under Article 6(4) of the Statute, the fact that an Accused acted under superior orders is no defence.[88] The Defence opines that the fact that Fofana could only provide logistics if and when directed to do so by Norman materially shows that the act of providing or supplying the logistics was not the act of Fofana but Norman. Norman being the directing mind with combat knowledge and education, makes illiterate Fofana a mere innocent agent of his; which act eventually makes Norman, not Fofana, liable for the supply of arms and ammunition, provided that they were used to commit criminal acts.

58. The Defence avers that as long as two different inferences can be drawn from the circumstantial evidence available to the Court, the evidence fails the test of been probative enough to prove beyond reasonable doubt that Fofana, in this case, aided and abetted in the planning, preparation or execution of criminal acts that were subsequently

[86] Prosecution's Appeal Brief, para. 3.87, p.55.
[87] Ibid, para. 3.86.
[88] Ibid.

committed in Bo and surrounding Towns. To be able to do so, only one inference or conclusion of guilt should be drawn from the circumstantial evidence. The Trial Chamber was therefore right in consequently holding that the evidence adduced has not established beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(1) for planning, instigating, ordering, committing or otherwise aiding and abetting in the planning, preparation or execution of any of the criminal acts which the Chamber found were committed in Bo District during the time frame charged in the Indictment.[89]

59. In similar vein, the Trial Chamber concluded that though Fofana received orders from Norman to provide logistics to commanders from Tongo following the December 1997 meeting, that action of Fofana "did not constitute further aiding and abetting in the planning, preparation or execution of the criminal acts committed by Kamajors in Tongo subsequently", as the commission of the specified crimes there is not the only reasonable inference to be drawn from the provision of the said logistics.[90]

C:

RESPONSE TO GROUND 5:
ACQUITTAL OF FOFANA OF ENLISTMENT OF CHILDREN INTO ARMED FORCES OR GROUPS OR THEIR ACTIVE USE IN HOSTILITIES:

60. The Prosecution submits that the Trial Chamber erred in law and/or fact in acquitting Fofana on Count 8, namely, enlistment of children into armed forces or groups or their active use in hostilities.[91] The Prosecution further submits that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana is individually responsible, under Article 6(1) of the Statute, for *aiding and abetting* the enlistment of under-aged children into armed forces or groups, and/or their use to participate actively in hostilities.[92] The Prosecution does not,

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[89] Judgment of Trial Chamber 1, para. 815, p.245.
[90] Ibid, para. 726, p.219
[91] Prosecution's Appeal Brief, para. 4.2, p.62.
[92] Ibid.

however, dispute the factual findings of the Trial Chamber. The Defence submits, in reply, that the Trial Chamber found that the evidence adduced has not proved beyond reasonable doubt that Fofana planned, ordered and/or committed the crime of enlisting child soldiers into an armed group, or using them to participate actively in hostilities.[93]

61. Firstly, the Defence notes that the Prosecution made a lengthy reproduction of the Trial Chamber's findings on the issue relating to the enlistment of children into armed forces or groups or their active use in hostilities,[94] and then consequently reiterated that on the findings of the Trial Chamber and the evidence it accepted, the only conclusion open to any reasonable trier of fact is that Fofana is individually criminally responsible under Article 6(1) of the Statute for aiding and abetting the crimes in question.[95]

62. Based upon the said findings, the Prosecution submitted that it defies the common sense of justice to suggest that Fofana's "heavy and central role in the organization stopped short only of the crime of enlistment of under-aged children, though evidence reveals that the organization committed that crime on a pervasive scale".[96] Whilst the Defence accepts that the trial record demonstrates that the CDF, as an organization, was involved in the recruitment of children under the age of 15 into an armed groups, it is our submission that this does not prove beyond reasonable doubt that Fofana was personally involved. Fofana's mere presence and position in the CDF did not demonstrate beyond reasonable doubt that he encouraged anyone to recruit and/use children as soldiers. It equally did not demonstrate beyond reasonable doubt that he aided and abetted in the planning, preparation or execution of either the enlistment of children into the CDF armed force, or used children as soldiers to participate actively in hostilities anywhere in the Republic of Sierra Leone within the time frame of the Indictment.[97]

63. The Prosecution submitted that Fofana's practical assistance to the CDF/Kamajors in the military enlistment of children and/or their active use in hostilities consisted of his

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[93] Trial Chamber Judgment 1, para. 959, p.284.
[94] Prosecution's Appeal Brief, paras. 4.5-4.10.
[95] Ibid, para. 4.8
[96] Ibid, para. 4.11
[97] See findings of the Trial Chamber in its Judgement at paras. 960-961, p.284.

logistical support to the CDF/Kamajors who were implicated in those crimes. Such assistance, the Prosecution averred, had a substantial effect on the commission of those crimes, as seen particularly in the fact that such logistical support in the shape of weapons, ammunitions etc did end up in the hands of the very children who were used actively in hostilities.[98] The Prosecution further submitted that Fofana encouraged the military enlistment of children and/or their active use in combat in ways that had substantial effect on the commission of those crimes, and that notable among instances of such encouragement was the occasion of the passing out parade in early January 1998, when Norman made his "all-out offensive" speech.[99] It argued that Norman's speech galvanized the Kamajors to attack the AFRC/RUF wherever they were and with all available weapons, and that Norman was addressing not only adult Kamajors, but also 'children who were involved in the operations'.[100]

64. The Defence submits in reply to the foregoing assertions of the Prosecution that Fofana's mere presence at Base Zero, where children were also present, is not sufficient to establish beyond reasonable doubt that he had any involvement in their recruitment and/or use as soldiers or Kamajor fighters. No evidence has been adduced by the Prosecution, direct or circumstantial, to prove beyond reasonable doubt that Fofana enlisted children into the CDF or supplied weapons to them to fight for the organization. The Prosecution also failed to adduce any evidence, oral or documentary, about the age of the individuals identified as "child soldiers". Even assuming, *arguendo*, that the said individuals were under the age of 15, there is no evidence that Fofana was, or should have been aware, of that information, or that he had anything to do with their conscription or enlistment; nor was there any information that he used them in any way. Accordingly, the Defence submits that the Prosecution has failed to prove its allegations that Fofana aided and abetted the conscription or enlistment of children into the CDF.

65. Furthermore, the Prosecution submitted in its Appeal Brief that Fofana should have been held liable because he was an authoritative figure within the CDF and was part of its

[98] Prosecution Appeal Brief., para. 4.13.
[99] Ibid, para. 4.15
[100] Ibid.

High Command.[101] To the contrary, the Defence submits that merely being Director of War is not enough to establish criminal responsibility for enlistment of child soldiers. Rather, the specific elements of the crime of enlisting children under the age of 15 years into armed forces or groups must be proved, and these include: ***i)*** that one or more persons were enlisted , either voluntarily or compulsorily, into an armed force or group by the accused; ***ii)*** that such person or persons were under the age of 15 years; ***iii)*** that the Accused knew or had reason to know that such person or persons were under the age of age of 15 years; and ***iv)*** that the Accused intended to enlist the said persons into the armed force or group.[102] Similarly, the specific elements of using children under the age of 15 years to actively participate in hostilities to be proved are as follows: ***i)*** that one or more persons were used by the accused to actively participate in hostilities; ***ii)*** that such person or persons were under the age of 15 years; ***iii)*** that the Accused knew or had reason to know that such person or persons were under the age of 15 years; and ***iv)*** that the Accused intended to use the said persons to actively participate in hostilities.[103]

66. The Defence submits that although Fofana acquired the title of "Director of War" at some point in the conflict, no real or clear-cut responsibilities were attached to his said position. Similarly, no evidence was called during the trial to explain exactly what the responsibilities and/or duties of the title were. Evidence subsisted in the trial to show that the title was apparently a CDF invention. The Prosecution's military expert, Col. Iron, for example, observed that there was no established rank system within the CDF force; he then went on to confirm that in the absence of a formal rank system, there was no written job description associated with the different offices within the CDF.[104] The Defence therefore avers that Fofana's title appeared in many ways to be nothing more than just a title, an illiterate man dressed in borrowed robes.[105] Many Kamajor fighters simply called Fofana as "Director", a nickname that implied respect but meant nothing to

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[101] Ibid, 4.17
[102] See the Trial Chamber's Judgement, paras. 195, p.59.
[103] Ibid, para. 196, p.59.
[104] Court Transcript, 14th June 2005, at 69:23
[105] See Court Transcript, 5th May 2006, at 36: 6-11

most combatants who were themselves illiterate and knew Fofana to be likewise[106]. In fact, the title: "Director", was used to address or refer to a number of other individuals in the CDF structure, including the various regional Directors of Operations.[107] Besides, the Trial Chamber found that even after the conflict, including the dissolution of Base Zero, Fofana retained his title as Director of War, until he later became Director of Peace.[108]

67. It is the additional contention of the Prosecution that Fofana's presence, as a superior member of the CDF, had an encouraging effect in the Commanders' Meeting in which Norman praised infant Kamajors for greater valour in the battlefield, and derided adult Kamajors for eating and looting.[109] The Defence reiterates that Fofana's mere presence at the above meeting did not demonstrate, beyond reasonable doubt, that he encouraged anyone to make use of child soldiers, nor did it demonstrate that he aided and abetted in the planning, preparation or execution of either the enlistment of child soldiers into the CDF force or the use of child soldiers to participate actively in hostilities. There is also no evidence portraying that Fofana's said presence had an encouraging effect on the commission of the criminal acts alleged by the Prosecution. As a matter of fact, a key Prosecution Witness testified that Fofana did not do anything to make the witness "personally feel he was director of war."[110] Fofana can, at best, be described as someone who held a degree of influence insufficient to give rise to Article 6(3) liability.

68. Besides the foregoing, in order to show that "Fofana knew or ought to have known that his conduct was giving practical assistance and encouragement to the military enlistment and use of children", the Prosecution stated the *mens rea* requirement for aiding and abetting as submitted by the Trial Chamber. In other words, that "the accused had knowledge that the acts performed by [him] assist the commission of the crime by the principal offender, or that one of a number of crimes that the accused is aware of will

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[106] It has already been established in this Response that the Trial Chamber found that Nallo was the only literate "Director" in the CDF. Himself and Norman were the only literate men in the top hierarchy. See also para. 321 of the Trial Chamber's Judgment that the Kamajors were 95% illiterate.
[107] See Exhibit 158, the Hoffman Expert Report, p. D.4.U.
[108] The Trial Chamber's Judgement, para. 809(x).
[109] Prosecution's Appeal Brief, para. 4.18.
[110] Court Transcript, 4th May 2005, pp 35-37 (Testimony of Arthur Koroma).

probably be committed by the principal offender.[111] The Defence, however, submits in reply that the Prosecution should first establish the *mens rea* for enlistment and use of child soldiers before ascertaining the *mens rea* for aiding and abetting such crime. As said repeatedly, the evidence as a whole did not establish that Fofana was aware of the situation regarding his subordinates, nor did it prove beyond reasonable doubt any criminal liability on his part.

69. Also, in answer to the Prosecution's submission that it is wholly unreasonable to suggest that Fofana's presence at Base Zero together with child soldiers was insufficient to establish beyond reasonable doubt that he *knew or was in a position to know* that the said children were part of the CDF military organization[112], the Defence submits that proof of knowledge alone is insufficient to establish the individual criminal responsibility of an Accused for the purposes of aiding and abetting. The Defence agrees with the Court when it rightly held that it is unable to conclude that Fofana's response alone at this or such other meetings had neither a condoning nor an encouraging effect upon the commission of any crimes by his subordinates regarding the enlistment or use of child soldiers;[113] not to mention the conspicuous absence of the *mens rea* to enlist children into armed forces or groups or use them actively in hostilities.

70. Moreover, the Prosecution submitted that given the close association between Kondewa and Fofana in the hierarchy and affairs of the CDF/Kamajors, it is unreasonable to conclude that Fofana was unaware that Kondewa had been initiating children into the CDF society/force in the manner that the Trial Chamber found to have constituted the first step in turning the boys into fighters.[114] To the contrary, the Defence submits that Fofana's position as Director of War did not make him an associate of Kondewa, and did not demonstrate beyond reasonable doubt that he aided and abetted in the planning, preparation or execution of the enlistment and use of boys into fighters. There is no evidence that Fofana ever expressed support and endorsed the use of child soldiers in

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[111] Prosecution's Appeal Brief, para. 4.20.
[112] Ibid, para. 4.23
[113] Judgement of the Trial Chamber, para. 966, p. 285-286.
[114] Prosecution's Appeal Brief, para. 4.25.

anywhere in Sierra Leone. This cannot be assumed, and even if it were to be assumed, the Prosecution bears the burden of proving it beyond reasonable doubt.

71. The Prosecution further submitted that the matter of flying the child soldiers by helicopter into Freetown is a matter of military logistics, which was within the administrative domain of Fofana, and that it is unreasonable not consider it at the very least as evidence tending to show that he knew or ought to have known of the crime.[115] The Defence submits that according to the Trial Chamber's findings,[116] a certain boy Witness (TF2-021) was, after receiving training, sent on his first mission to Masiaka where he shot a woman in the stomach and left her there on the ground. On subsequent missions, the witness fought with Kamajors at Kenema, SS Camp, Joru and Daru. In 1999, the said witness was flown by helicopter into Freetown with three other small boys and their commanders. The witness and the boys were given guns and sent to support ECOMOG, being the West African Economic Community Monitoring Group, which fought the rebels/Junta at Congo Cross and other parts of Sierra Leone.

72. On the basis of this finding, the Defence firstly submits that ECOMOG was in charge of logistics that were supplied to Kamajors; secondly, that the evidence adduced by the Prosecution did not demonstrate beyond reasonable doubt that Fofana knew or ought to have known that TF2-021 and other boys were flown by Helicopter to Freetown by ECOMOG; and thirdly, that there is also no evidence to prove beyond reasonable doubt that flying children from place to place was part of Fofana's job description or function. The Prosecution's suggestion that flying the children from place to place was a matter of military logistics was purely and merely speculative and served as an unjustified extension of the duties of Fofana.

73. Besides, the Prosecution concluded by submitting that given the clear finding that the CDF/Kamajors enlisted and used children in active combat, the superior position of Fofana within the CDF and the centrality of his role in the operations of the

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[115] Ibid, para. 4.25
[116] Judgement of the Trial Chamber, paras. 676-680, p. 204-205.

CDF/Kamajors as shown above, any reasonable trier of fact would come to the conclusion that Fofana was aware of the commission of the crime and that his actions constituted practical assistance or encouragement which had a substantial effect on the commission of that crime.[117] In response to this submission, the Defence submits that according to the findings of the court,[118] there is room for doubt and that the evidence does not establish that Fofana was aware of the situation regarding his subordinates.

74. The Trial Chamber was therefore right to have concluded that the evidence adduced by the Prosecution does not prove beyond reasonable doubt that Fofana is individually criminally responsible pursuant to Article 6(3), as a superior, for the enlistment or use of child soldiers to participate actively in hostilities anywhere in Sierra Leone during the period of the Indictment. Proof of knowledge alone is insufficient to establish the individual criminal responsibility of an accused.[119] Fofana's presence alone at meetings does not amount to a condonation of the commission of crimes by his subordinates relating to the enlistment or use of child soldiers.

75. Finally, the Prosecution submitted that the Dissenting Opinion of Justice Itoe, as stated below, did reflect a more reasonable appreciation of the evidence in the case and the correct application of the law to the evidence.[120] Justice Itoe, in his dissenting opinion, held that "[a]s far as the 2nd Accused is concerned, there is no direct evidence whatsoever linking him with any of the elements of the offences charged under count 8 of the indictment. The only evidence available is that he was the Director of War in charge of conducting the war whose execution (...) necessarily depends on the availability, first of all, and more importantly, of combat man power, and then, of the traditional military equipments and supplies for use in the conduct of the hostilities against the enemies".[121] The Defence submits that being Director is not enough to establish criminal liability and that there is no evidence that Fofana ever expressed support or endorsed the use of child soldiers. Notwithstanding Justice Itoe's said dissent, Article 18 of the Statute of the

[117] Prosecution's Appeal Brief, para. 4.27
[118] Trial Chamber Judgement, paras. 958 and 965.
[119] Trial Chamber Judgement, para. 966.
[120] Prosecution Appeal Brief, para. 4.28
[121] Dissenting Opinion of Judge Itoe as attached to the Judgment of Trial Chamber 1, para. 60

Special Court provides that a judgement shall be rendered by a majority of the Judges and that separate or dissenting opinions may be appended. Also, the Appeals Chamber has emphasized that the operative portion of a judgement or decision is the majority.[122]

76. Consequently, the Defence submits that the Prosecution has failed to prove how the Trial Chamber erred in acquitting Fofana of the enlistment or use of children into armed forces or groups or how they were actively used in hostilities. This ground of appeal ought, therefore, to be dismissed.

D:
RESPONSE TO GROUND 6:
THE RESPONDENT'S ACQUITTAL OF TERRORISM:

A. *Introduction and First Alleged Error of the Trial Chamber:*

77. Count 6 of the Indictment charges the Accused with acts of Terrorism as a serious violation of Common Article 3 and of Additional Protocol II pursuant to Article 3 (d) of the Statute. This Count relates to the Accused's alleged responsibility for the crimes charged in Counts 1 through to 5, including threats to kill, destroy property and to loot, as part of a campaign to terrorise the civilian population in those areas.

78. The prohibition against acts of terrorism is found in Article 3(d) of the Statute, and it is taken from Article 4(2) (d) of Additional Protocol II, which prohibits acts of terrorism as a violation of "the fundamental guarantees" of humane treatment under the Additional Protocol. This prohibition is in turn based on Article 33 of the Fourth Geneva Convention which prohibited "all measures of intimidation of terrorism" against protected persons. The *actus reus* and the *mens rea* of Terrorism were clearly laid down in the ICTY case of *The Prosecutor v. Galic*[123] and the *Galic Appeal Judgement*[124] as well.

79. The *actus reus* of terrorism consists of doing acts or threats of violence directed against persons or property, or that the accused acted in the reasonable knowledge that these acts

[122] SCSL-04-14-T-688, Hinga Norman et al, Decision Refusing to Subpoena the President of Sierra Leone.
[123] Galic Trial Judgement, paras. 87-90
[124] Galic Appeal Judgement, para. 102

would occur. The *mens rea* of terrorism is that such acts or threats of violence are committed with "the primary purpose or intent to spread terror" among persons. In the *Galic Appeal Judgement,* the Appeal Chamber of the ICTY held that "the acts or threats constitutive of the crime of terror shall not however be limited to direct attacks against civilians or threats thereof, but may include indiscriminate or disproportionate attacks or threats thereof. The nature of the acts or threats of violence directed against the civilian population can vary, the primary concern (...) is that those acts or threats of violence can be committed *with the specific intent to spread terror* among the civilian population".[125]

80. The Prosecution contended under Ground 6 that the Trial Chamber's reasoning that only those acts for which the Respondents have been found to bear criminal responsibility under another count of the Indictment, may form the basis of criminal responsibility for the purpose of assessment of the Respondent's individual responsibility for Terrorism, as a War Crime, charged in Count 6 of the Indictment.[126]

81. Firstly, the Defence submits that it is indeed true that all the other offences that Fofana was charged with were charged in the other counts respectively, save Count 6. Secondly, that it is by virtue of the alleged commission of the said other crimes that Fofana happens to be also charged with Terrorism. In other words, that by committing the other specified offences, he intended to terrorise the civilian population. Thirdly, if the Chamber has held that the Accused is not criminally responsible for any of the crimes[127] respectively specified in the other counts, then it is not possible for the Accused to be guilty of terrorism, or to be said to have intended to spread terror, through the commission of the other crimes that he is accused of committing, which he did not commit. In short, the Accused cannot commit terrorism by virtue of criminal offences that he did not commit. It is therefore only right for the Chamber to hold that it would only consider the acts or offences for which the Accused was found to be criminally responsible, when considering his liability for terrorism as charged in Count 6. Basically, a person cannot be

[125] Ibid, para. 102 (emphasis added)
[126] Prosecution's Appeal Brief, para. 5.6
[127] Trial Chamber Judgement, paras. 49 & 843

said to terrorise the civilian population by or through the commission of an offence that he has not committed.

82. The Prosecution further contended that in Tongo, the Trial Chamber erred in law and in fact, in holding that while spreading terror may have been Norman's primary purpose in issuing the order (in December 1997 and January 1998) to kill, capture enemy combatants and "collaborators"[128], inflict physical suffering or injury upon them, and destroy their houses, this is not the only reasonable inference that could be drawn from the evidence available to the Trial Chamber.

83. The Defence avers that it is indeed not the only inference that can be drawn from the said evidence, but that another inference, which is the more probable one, could be that the perpetration of the said acts was primarily meant to recapture and regain control of the areas under rebel and junta control, by eliminating any form of opposition or resistance to this objective. Put simply, the said prohibited acts may have been perpetrated to enable the Kamajors to regain complete control of the areas under the enemy's control, notwithstanding that the Defence concedes that the Kamajors' means of doing so may have been regrettably unlawful. The fact, however, remains that spreading of terror amongst the civilian population is not the only inference that can be drawn from the evidence adduced by the Prosecution.

84. The Prosecution further contended that as regards Koribondo, the Chamber erred in law and in fact in holding that it is not the only reasonable inference that Fofana knew or had reason to know that his subordinates would commit criminal acts in Koribondo, with the primary purpose of spreading terror[129], because the commission of such acts was not explicitly included in Norman's order, and that the evidence adduced has not established, beyond reasonable doubt, that Fofana knew or had reason to know that criminal acts had been subsequently committed by his subordinates.

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[128] Prosecution's Appeal Brief, para, 5.16
[129] Ibid, para. 5.38

85. The Defence submits that before Fofana can be held to be criminally responsible for the acts committed in Koribondo, he must know or have reason to know that other criminal acts, apart from the ones given in Norman's order, would be committed by the Kamajors in Koribondo. The Court found that Fofana only had knowledge of the criminal acts that were included in Norman's order, because they were the ones he heard of from the said order. He therefore could not have known that other offences like looting, as charged in the Indictment, would be committed. Besides, there is absolutely no evidence adduced by the Prosecution to prove beyond reasonable doubt that Fofana actually knew or had reason to know that the said other criminal acts not found in Norman's order were going to be committed by his subordinates. Such knowledge cannot be merely assumed or imputed without discharging the criminal burden of proving it beyond reasonable doubt.

86. Furthermore, to say that the commission of criminal acts in Koribondo was done with the primary purpose of spreading terror is also not the only reasonable inference that can be drawn from the evidence, because another inference which can also be drawn, is that the said criminal acts were committed by Kamajors to regain areas under rebel and junta control as well as to restore democracy in Sierra Leone.[130]

87. The Prosecution additionally contends in its Appeal Brief that the Trial Chamber failed to examine whether acts of burning of property, which were charged in Count 5 of the Indictment (as Pillage), satisfied the elements of acts of terrorism under Count 6, on the ground that the Accused had not been convicted of pillage under Count 5.[131] In answer to this contention, the Defence submits that the Trial Chamber did not and could not have examined whether acts of burning of property, which were charged as Pillage in Count 5 of the Indictment, satisfied the elements of acts of terrorism under Count 6. This is because it was not found by the Chamber that Fofana committed acts of burning as pillage, and he was therefore acquitted on that charge. The Accused cannot be said to commit acts of terrorism through acts that he has not been held to have committed; hence, the reason why the Trial Chamber failed to consider acts of burning under a failed charge

[130] Trial Chamber Judgement, para. 693
[131] Prosecution's Appeal, para. 5.12

for purposes of terrorism. Any other evidence relating to acts of burning could also not have been taken into consideration because it would be irrelevant, and this Brief shall later argue under Ground 7 of the Prosecution's Appeal that there is no separate charge for burning, and that burning does not form part of the Count of Pillage.

B. *Second Alleged Error of the Trial Chamber:*

88. In addition to the above, the Prosecution submitted that the Trial Chamber erred in law and fact in finding that Fofana and Kondewa were not individually responsible under Article 6(1) of the Statute for aiding and abetting in the planning, preparation and execution of acts of terrorism in the towns of Tongo, though it found Fofana and Kondewa individually responsible for aiding and abetting Murder (Count 2), Cruel treatment (Count 4) and Collective punishment (Count 7) in the second and third attacks on Tongo[132]. It submitted that the Trial Chamber erred by holding, with respect to Count 6, that "while spreading terror may have been Norman's primary purpose in issuing the order to kill captured enemy combatants and 'collaborators', to inflict physical suffering or injury upon them and destroy their houses, this was not the only reasonable inference that can be drawn from the evidence."[133] The Trial Chamber concluded that it had not been "proved beyond reasonable doubt that Fofana had the requisite knowledge for aiding and abetting acts of terrorism".[134]

The Kamajors Specific Intent to Terrorise the Civilian Population:

89. The Prosecution then proceeded to enumerate a catalogue of some of the grim atrocities, unfortunate and pathetic, committed by the Kamajors[135] and consequently submitted that the said incidents considered together, in particular, the brutality of the crimes and the fact that the crimes or their consequences were displayed before other members of the civilian population, it could not be open to any reasonable trier of fact to conclude that these acts did not have the primary purpose of spreading terror.

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[132] Ibid, para. 5.15.
[133] Ibid, para. 5.16.
[134] Trial Chamber Judgement, para. 731
[135] Prosecution Appeal Brief, paras 5.19 to 5.22

90. With the greatest respect to the Prosecution's summation, the goal of the Kamajors in regaining territories under rebel/Junta control, which was also the primary purpose of the attacks, could be argued as well to be the more reasonable and probable inference that can be drawn from the aforementioned circumstantial evidence catalogued in the Appeal Brief. The said criminal acts were thus ancillary to the main object of the Kamajors. The Defence avers that as long as this other inference, apart from the inference to merely spread terror among the civilian population, can be drawn, then the offence as charged against the Accused has not been proven beyond reasonable doubt. This is so because, as earlier noted in this Brief, to infer criminal responsibility from circumstantial evidence, the criminal conduct inferred must be *the only inference* that can be drawn from the said circumstantial evidence. Where any other inference or inferences can also be drawn from the circumstantial evidence, such a conclusion is nothing more than a doubtful possibility or probability, which cannot discharge the onerous criminal burden of proof beyond reasonable doubt. The Trial Chamber was therefore right in holding that the intention to spread terror among the civilian population is not the only inference that can be drawn from the evidence. Therefore, the Prosecution failed to prove that the Kamajors had the specific intent to terrorise the civilian population of Tongo.

Fofana's Alleged Knowledge of the Specific Intent to Terrorise as an Aider and Abettor:

91. The Prosecution submits that the Trial Chamber erred in finding that Fofana, as an aider and abettor, did not have sufficient *knowledge* of the specific intent of the perpetrators to spread terror in the towns of Tongo[136], because such knowledge could be inferred from the relevant circumstances. The Defence avers that to prove acts of terrorism, the Prosecutor should prove that Fofana had *knowledge of the specific intent of the perpetrator to spread terror*, in other words, that the Accused did acts or made threats of violence directed against persons or property or acted in the reasonable knowledge that those acts would occur, and that the perpetrators of the criminal acts committed such acts with intent to spread terror among persons.[137] The Defence submits that, for the reasons

[136] Prosecution Appeal Brief, para. 5.24
[137] Trial Chamber Judgement, para. 175

proffered below, the Prosecution's attempt to show that Fofana had knowledge of the specific intent of the perpetrator to commit acts of terror failed.

92. Firstly, the Defence notes that the Prosecution restated some of the findings of the Court in its Appeal Brief about Norman's order to the Kamajors during the Passing Out Parade in December 1997. Norman had ordered Kamajors to kill all war prisoners and all civilians deemed to be collaborators, to destroy the houses of alleged collaborators, to spare no one working for the Juntas or mining for them, and to chop off the left hand of any captured "junta" to "give an indelible mark".[138] The Prosecution contends that the only conclusion open to any reasonable trier of fact from these findings is that Norman's order as issued included a purpose of terrorising the civilian population, in order to "give a signal" to anyone who might contemplate sympathising with or supporting the rebels, and that Fofana knew or was aware of Norman's said intent.[139]

93. The Defence submits that Norman's order as issued did not include a purpose to terrorise the 'civilian population'. The purpose of the said order or instructions, as found by the Trial Chamber, was not merely to kill war prisoners and their collaborators and to destroy their houses, but that "Norman said in the open that "the attack on Tongo will determine who the winner or looser [*sic*] of the war would be" and that, *inter alia*, the chopping of the left hand of any captured junta would be "a signal to any group that will want to seize power through the barrels [*sic*] of the gun and not the ballot paper; (...) that we in Africa, we want to practice democracy".[140] The Defence avers that the odious acts outlined by the Prosecution as directed by Norman against the juntas and their collaborators were meant to eliminate oppositions or resistance to the CDF's ultimate legitimate goal of eliminating the rebels/juntas and restoring democracy in concert with ECOMOG, as already argued.

94. From the evidence as it stands regarding the contents of Norman's order, the Defence submits that it cannot be inferred that Fofana had any knowledge that due to the

[138] Prosecution Appeal Brief, para. 5.27
[139] Ibid, para. 5.29.
[140] Trial Chamber Judgement, para. 321.

execution of the said order, the perpetrators would have or had the specific intent to terrorise the civilian population, when the express purpose of the order was to teach the civilians and collaborators a lesson to practice democracy and to eliminate every resistance or opposition to regaining the towns of Tongo. Knowledge of such a specific intention to terrorise cannot therefore be imputed on Fofana as an inference from the order given by Norman. At most, the order may contain intent to commit criminal acts, but cannot be interpreted or extended in its meaning to transfer knowledge on Fofana of a specific intent of the Kamajors to spread terror among the civilian population. There is no circumstantial evidence to prove such intent beyond reasonable doubt, because it is not the only inference that can be drawn from that evidence.

95. Secondly, the Prosecution also contended that because Fofana was aware "*that the Kamajors who had earlier on operated in the towns of Tongo Field had previously engaged in criminal conduct*, which had been reported to Base Zero", and that Fofana was certainly aware of the acts perpetrated by the Death Squad as well as the many atrocities that had been committed by the Kamajors in the period preceding the attack on Tongo,[141] the only conclusion open to any trier of fact from the said findings is that Fofana had knowledge of the specific criminal acts, with the specific intent to spread terror among the civilian population by the principal offenders.[142] With respect, the most that anyone can infer from the said circumstances is that it is possible or probable that Fofana could have some knowledge that criminal acts will be committed by the Kamajors in the next or future attack(s) on Tongo, but definitely not the conclusion that Fofana had knowledge that the Kamajors who were going to attack Tongo certainly had *the specific intent to spread terror* through their criminal conduct.

96. The Defence is aware that much of the evidence in this case direct or infer that the knowledge which Fofana had was to the effect that whatever acts that were committed by the Kamajors, were committed with the sole purpose or aim of conquering areas and regaining territories from the rebels and Juntas. This is clear even from Norman's speech

[141] Ibid, para. 5.28.
[142] Ibid, para. 5.30.

at the Passing out Parade in December 1997, before he gave the order to commit criminal acts; where Norman, as stated above, said that "*the attack on Tongo* will determine who is the winner or looser (*sic*) of the war..."[143] This shows that the main purpose of the attack was to capture Tongo, and not to terrorise the civilian population. Fofana's speech too on this occasion emphasised the importance of capturing Tongo, and not 'to lose ground.'[144] The Defence re-submits that there is nothing to infer that Fofana had knowledge that criminal acts would be committed in Tongo, with the intent to spread terror. At best Fofana's knowledge was to the extent that combat activities will take place in Tongo and its environs, which may lead to ousting the rebels/junta from such strategic combat area identified by the Kamajors/CDF.

97. The Trial Chamber was therefore right in finding that "while spreading terror may have been Norman's primary purpose in order to kill, capture enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to burn their houses, this is not the only reasonable inference that can be drawn from the evidence".[145] Another inference that can be drawn, which is even more probable, is the gaining or regaining of territories under rebel or Junta control. Consequently, the Defence avers that the Trial Chamber was right in finding that the Prosecution did not prove beyond reasonable doubt that Fofana had the requisite knowledge that the Kamajors had the specific intent to commit crimes with the primary purpose of spreading terror among the civilian population[146], which is an essential element of the crime of Acts of Terrorism.

C. Third Alleged Error of the Trial Chamber:

98. The Prosecution contends under this rubric that the Trial Chamber erred when it found that Fofana could not be held criminally responsible under Article 6(3) for acts of terrorism under Count 6 in Koribondo, because according to the Trial Chamber, "it is not the only reasonable inference that Fofana knew or had reason to know that his

[143] Trial Chamber Judgement, para. 321.
[144] Ibid.
[145] Ibid, para. 731
[146] Ibid.

subordinates *would commit criminal acts in Koribondo* with the *primary purpose of spreading terror*", and that "the evidence adduced has not established beyond reasonable doubt that Fofana knew or had reason to know that such acts had been committed by his subordinates subsequently"[147].

99. The Prosecution states that the Trial Chamber erred in reaching its said conclusion because it only took into consideration direct evidence only, without looking into the possible existence of circumstantial evidence to establish necessary knowledge.[148] The first argument of the Prosecution is that the Trial Chamber appeared to accept that crimes were committed by the Kamajors with the intent of terrorising the civilian population because there is a section of the judgement which is entitled as "Unlawful Killings, Terrorising Civilian Population and Collective punishment". The Defence contends that a mere title or heading is no indication that the Chamber accepts the heading as correct and true. The heading merely highlights what would be discussed and analysed thereunder. It is not an acceptance of the allegation that there were unlawful killings, terrorising of the population and collective punishment. In fact, under this heading of the judgement, the Trial Chamber proceeded to discuss and analyse the said crimes, and consequently ended up with its findings. It is therefore incorrect that the only reasonable inference that can be drawn from the said heading/title and its contents is that Fofana knew, or had reason to know that his subordinates would commit criminal acts in Koribondo, with the primary purpose of spreading terror.

100. The second argument of the Prosecution is that the fact that the brutal crimes or their consequences were displayed before other members of the civilian population, the only conclusion that can be drawn by a trier of fact is that these acts had the primary purpose of spreading terror.[149] This inference cannot be drawn in the face of the express goal of the Kamajors that their primary purpose of the attacks was not to spread terror, but to capture or take towns that were under rebel or Junta control.

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[147] Prosecution Appeal Brief, para. 5.38
[148] Ibid, para. 5.41
[149] Prosecution Appeal Brief, para. 5.39.

101. Regarding the attack on Koribondo, it is obvious from Norman's statement that the primary purpose of the attack was not to spread terror, but to take or capture the town for military or combat advantage, and that the Kamajors were desperate to do so because they had failed to capture it four times and had lost lots of money on previous attacks on Koribondo. It is a finding of fact that at the Commanders' Meeting held in early January 1998 for the attack on Koribondo, "Norman said that they should take Koribondo "at all costs" because they had already spent a lot on Koribondo. He said that they had attacked three or four times before without the CDF taking it."[150] He said this before ordering the commission of the criminal acts identified by the Trial Chamber[151]. The Defence avers that the terror that was spread among the civilian population was incidental to the primary purpose of capturing Koribondo, it may have been a strategic, though unlaful, means to a necessary end.

102. Moreover, the Prosecution argued jurisprudencially that the fact that crimes were, for instance, committed frequently or notoriously by subordinates of the Accused indicates that the superior had knowledge of the crimes; and that 'a military commander operating as part of an organised structure with reporting and monitoring systems facilitates the showing of actual knowledge'.[152]

103. To the contrary, however, the Defence notes that the said jurisprudence, which was applied in the ICTY *Celebici case*[153], is distinguishable from this case, in the sense that the geographical area where the crimes were committed was limited to the confines of a prison camp. Whereas, in the present case, the crimes that were found to have been committed occurred nationwide at far-away places often removed from the central command at Base Zero. Fofana hardly knew of what was happening elsewhere outside Base Zero, save for the few instances of criminal conduct reported to him. The reporting system within the CDF, as found in the Trial Chamber's judgment, was also very poor,

[150] Trial Chamber Judgement, paras. 328-329.
[151] Ibid, para. 329.
[152] Prosecution Appeal Brief, para. 5.42.
[153] ICTY *Celebici Trial Judgment*, para. 770.

often done "verbally" and "generally conveyed by foot".[154] This is totally different from the "Celebici case" in which the reporting system was very efficient and far more technologically advanced. Fofana could not therefore know of the criminal acts frequently or notoriously committed by his subordinates through such a defective reporting system.

104. Also, the commanders in the CDF were not, strictly speaking, part of an organised structure. This was borne out in the factual finding of the Trial Chamber as follows: "Although the CDF was regarded as a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of the central command, because their area of operation was so wide. Commandants' authority to discipline their men on the ground was entirely their own. The CDF did not keep records of its members as a conventional army would."[155] In short, the CDF was far from being an organised structure; it was akin to a guerrilla group set-up, which was loose and disorganized.

105. The above was further confirmed when the Trial Chamber found that "there was no administrative structure in Bo to effectively control the Kamajors. They ignored their chain of command and did not follow orders."[156] Also, in November 1997, the Kamajors who occupied Gumahun and its surrounding areas were described as "disorganised and uncontrolled".[157] It is therefore reasonably established that the CDF, unlike the armed forces in the "Celebici case", was not an organised structure. Also, unlike this case, the CDF, as already noted, lacked an effective monitoring system. The Court found that although Norman had a satellite phone at Base Zero, he would use the phone to keep President Kabbah informed and to request assistance from him when necessary.[158] The CDF therefore was neither an organised structure, nor did it have an effective reporting and monitoring system. These factors could not therefore foist or impute "actual

[154] Trial Chamber's Judgment, paras. 309-310.
[155] Ibid, para. 358
[156] Ibid, para. 507.
[157] Ibid, para. 514
[158] Trial Chamber Judgement, para. 310

knowledge" on Fofana of any criminal act committed by his subordinates, with the specific intent to spread terror among the civilian population.

106. Additionally, the Prosecution highlighted certain circumstantial evidence, from which it believes, knowledge of the commission of alleged crimes with the specific intent to spread terror on the civilian population, could be imputed on Fofana. These circumstances included the following:

a) The orders given by Norman;
b) Previous instances of acts of violence that happened, notably during the attack on Tongo;
c) That Fofana received reports on any military operation, in particular when Nallo was involved;
d) Fofana's direct superior-surbordinate relationship with Nallo, Joe Tamiday and Bobor Tucker, who were the principal/key commanders in Koribondo;
e) The meeting that took place after the attack at Koribondo with Tamiday, during which Fofana asked him questions regarding the attack on Koribondo.[159]

Norman's Orders:

107. The Prosecution submits that a reasonable reading of Norman's order for the attack on Koribondo can only be understood as containing an order to commit international crimes, including acts of terrorism, when Norman said, in early January 1998, that the commanders and their fighters should not leave in the Koribondo location "any house or any living thing there, except mosque, church, the *barri* and the school"[160]; hence, concluding that Norman's primary purpose was to terrorise the civilian population.

108. Again, what the Prosecution omitted or lost sight of in Norman's order, is that the primary object of the attack was first mentioned in the order as a matter of priority and great importance, before the order for the commission of unlawful acts, the latter of

[159] Prosecution Appeal Brief, para. 5.55
[160] Ibid, para. 5.46

which is of more interest to the Prosecution than the former. According to the order, "Norman said that they should take Koribondo at all costs, because they had already spent a lot on Koribondo. He said that Koribondo had been attacked three or four times without the CDF taking it up".[161] This statement preceded the order for crimes to be committed. To suggest that the primary object of the attack was to terrorise the civilian population is thus both monofocal and inconceivable.

109. The order for the unlawful acts complained of could be described as part of Norman's personal excesses, and not of the goal of the CDF, because the CDF had an objective not only to desist from harassing civilians, but to actually protect them. From the very day that the Kamajors are initiated into the CDF, at the very cradle of their membership, they are given instructions not to harass civilians. The Court found that: "During the initiation, Kamajors were given certain rules and prohibitions that they were bound to follow. Some of the prohibitions precluded, *inter alia*, the killing of civilians not participating in the conflict, the killing of women, looting, and the killing of surrendered enemy. The consequence of violating one of these rules was that a Kamajor would lose his immunisation to bullets, and would be killed."[162] Besides, Allieu Kondewa told the Kamajors that they were supposed to assist civilians, and that they must stop harassing civilians and stealing their property.[163]

110. The Defence also notes that there were certain criminal acts committed by Kamajors acting on a frolic of their own, short of a command to undertake such acts. Such unlawful acts may have been a secondary object of the attack that was totally unknown to Fofana, or they may have been a means of attaining the primary object of taking or capturing Koribondo as a military advantage. What is, however, clear is that to spread terror was never, and could never have been, the primary object of the attacks. Since the primary object of the attack was to take Koribondo, it is incorrect to say that the only conclusion that can be drawn from the evidence is that the attack was primarily aimed at terrorising

[161] Trial Chamber Judgement, para. 329
[162] Ibid, para. 314
[163] Ibid, para. 620

civilians. Therefore, this knowledge cannot be imputed on Fofana, in order to make him criminally responsible for acts of terrorism in Koribondo.

Previous Instances of Violent Acts by the Kamajors:

111. The Prosecution submits that because Fofana had knowledge of previous violent acts commited by the Kamajors, notably in Tongo, and because he received reports on military operations, particularly from Nallo, it could be inferred from these circumstances that he had reason to know that acts of terrorism would be committed at Koribondo.[164] The Defence submits knowledge that previous instances of violence cannot amount to proof of knowledge beyond reasonable doubt that acts of terrorism would be committed in the future. Also, such knowledge is insufficient to satisfy the *mens rea* requirement of terrorism, which is the knowledge that the subordinates of Fofana had the primary objective or purpose to spread terror among the civilian population, or to terrorise the civilian population by virtue of such unlawful acts.

112. Regarding the reports sent or submitted to Fofana, the Defence has already submitted that the reporting system was of a very poor quality; in fact, too poor to enable Fofana to have full knowledge of what his subordinates were doing in the field of operation. As regards the operational reports from Nallo, the Defence states that there is no evidence adduced in this case showing the exact nature and content of such reports. Besides, the factual finding that the strategies for war operations, which Fofana and Nallo planned together, did not include the killing of innocent civilians, looting of property or raping of women, has not been controverted beyond reasonable doubt. This circumstantial evidence cannot impute knowledge of the commission of acts of terrorism by subordinates on Fofana.

Fofana's Direct Superior- Surbordinate Relationship with Nallo and Others:

113. The Defence submits that Fofana's relationship with Nallo and other subordinates failed to impute knowledge upon Fofana of the commission of criminal acts by Kamajor perpetrators, save for the offences for which Fofana was convicted. The said relationship

[164] Prosecution Appeal Brief, para. 5.50-5.51

cannot also be stretched to impute knowledge on Fofana for unlawful acts committed with the primary purpose of spreading terror, which allegation, as argued, has not been established beyond reasonable doubt by the Prosecution.

114. This is because the other probable inference that could be reasonably drawn from the circumstantial evidence put together by the Prosecution is that the said criminal acts were committed as well with the primary purpose to capture or secure territories under rebel or Junta control. In this regard, for the purposes of Count 7 (Collective Punishment), the Defence submits that the only knowledge that can be imputed upon Fofana from the circumstantial evidence available to the Trial Chamber is knowledge of the commission of acts found under that Count, but that that knowledge cannot be extended to satisfy the *mens rea* of terrorism, since it is equally found by the Court that the primary purpose of the attacks by the Kamjors/CDF was not to spread terror, but to regain territory from the rebels/junta and to restore democracy.[165]

The Meeting after the Attack at Koribondo:

115. The Defence submits that it is clear from the foregoing submissions that the circumstantial evidence considered by the Prosecution cannot suffice to impute knowledge on Fofana for various acts of terrorism that were subsequently committed by his subordinates. The Chamber recognised that there were other criminal acts alleged in the Indictment, such as looting, which were in fact committed in Koribondo, but that they were not included in Norman's order.[166] Fofana could not therefore have possibly known that they would be committed in Koribondo. Therefore, the Chamber found that it had not been established beyond reasonable doubt that Fofana knew or had reasons to know that these other criminal acts would be committed by the Kamajors in Koribondo.[167]

D. *Fourth Alleged Error of the Trial Chamber:*

116. This submission does not affect Fofana, it only concerns Kondewa: the 2nd Respondent.

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[165] Trial Chamber Judgement, para. 693, pp. 209-210
[166] Ibid, para. 781.
[167] Ibid.

E:
RESPONSE TO GROUND 7:
THE OFFENCE OF PILLAGE:

117. The Prosecution contends under this ground that the Trial Chamber erred in law in refusing to consider acts of "destruction by burning of property" for purposes of the war crime of Pillage, as charged under Count 5 of the Indictment.[168] This error, it alleges, resulted from the Trial Chamber's narrow view of limiting pillage to "the unlawful appropriation of property"[169], in the sense that it does not encompass malicious acts of destruction of property, such as arson, in the context of an armed conflict. Essentially, though Count 5 of the Indictment is entitled "Looting and Burning," the offence charged is Pillage, a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II punishable under Article 3(f) of the Statute. "Destruction by burning of civilian owned property" as charged under Count 5 of the Indictment, otherwise known as 'acts of burning', was not considered by the Trial Chamber for the offence of Pillage charged under Count 5, because the Court held that Pillage is limited to appropriation of property and cannot be extended to include malicious acts of destruction.[170]

118. In order to better understand the issues that the Prosecution strenuously grappled with under this ground, the question that must be answered is whether Pillage includes malicious acts of destruction. In the ICTY *Celebici Trial Judgement*[171] and the *Blaskic Appeal Judgement*[172] respectively, the terms, "pillage", "plunder" and "spoilation" were used to describe the unlawful appropriation of private or public property during an armed conflict. Similarly, in the ICTY *Kordic and Cerkez Appeal Judgement*,[173] the Court held that the *mens rea* for Pillage is satisfied where it is established that the Accused intended to appropriate the property by depriving the owner of it. Also, according to Black's Law Dictionary 'appropriation' involves "the exercise of control over property; a taking of

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[168] The Prosecution's Appeal Brief, para. 6.1, pp.102-3.
[169] Ibid.
[170] Judgment of Trial Chamber 1, para. 166, p.50.
[171] Para. 591
[172] Paras. 147-148
[173] Para. 84; see also the *Celebici Trial Judgment*, para. 590.

possession"[174], whilst it defines "pillage" as "the forcible seizure of another's property, especially in war; especially the wartime plundering of a city or territory".[175]

119. The *Kordic and Cerkez Appeal Judgement*[176] stipulated the elements of pillage as follows: i) that the Accused unlawfully appropriated property, ii) the appropriation was without the consent of the owner, and iii) that *the Accused intended to unlawfully appropriate* the property. The Defence submits that if the meaning of pillage was extended to include the destruction of property, as the Prosecution firmly suggests, then "the intention to destroy" would have been part of its *mens rea*. Since the definition, however, merely limits the *mens rea* to "the intention to appropriate", it follows that the crime of Pillage is limited to appropriation, because if it included unlawful or malicious destruction as well, the *mens rea* requirement would have been both the "intention to appropriate" and the " intention to maliciously destroy", which is not the case.

120. The Defence submits that the destruction of property may not involve any unlawful appropriation, as one can destroy without unlawfully appropriating; and one can similarly unlawfully appropriate property without destroying it. Put simply, the offence of "Pillage" firstly, anticipates and includes the 'appropriation of private or public property'; secondly, it connotes the *mens rea* of 'deprivation of the owner' of the use of his property as well as 'appropriation by the taker' of the same; and finally, the offence assumes lack of 'consent by the owner' of the 'appropriation by the taker'. In this regard, "Burning", or legally speaking, "Arson" or "Malicious Damage", does not form an element of "pillage", as pillage is more akin to "looting".

121. The Defence further contends that in its efforts to broaden the meaning of "Pillage" to include arson/malicious destruction, the Prosecution proceeded to give a plethora of non-legal definitions available in the *Oxford English Dictionary* and the *Oxford Thesaurus*.[177] It also attempted at reconstructing the offence in French via the definition of the verb

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[174] 7th Edition, p.98
[175] Ibid.
[176] Paras. 79 and 84.
[177] The Prosecution's Appeal Brief, para. 6.5, pp.104-5.

"*piller*" found in the "*Le Nouveau Petit Robert*" Dictionary.[178] The Defence avers that the said attempts at defining "Pillage" are non-legal definitions that serve no useful purpose in the present case. Such non-judicial and non-statutory definitions ought to be rejected. Similar attempts at using or applying Australian, American, Canadian and/or British Military Manuals to situate pillage as inclusive of the destruction of "enemy" property from a military viewpoint,[179] should be dismissed for having little or no legal value.

122. The Defence finds it even more objectionable that the Prosecution could take issue with the definition of "appropriation" in Black's Law Dictionary, which the Chamber relied upon for its judgment. With all respect due to the Prosecution, the Defence submits that its argument that the said Dictionary "is not concerned with legal definitions for the purposes of international humanitarian law",[180] is untenable. It is trite law that definitions in "law dictionaries", unlike the common dictionaries and manuals relied upon by the Prosecution, are not laymen's definition of words or terms, but are generally based on reliable legal, judicial and statutory authorities in the relevant fields of law. It is thus evident from Black's Law Dictionary that its definition of "Pillage", as noted herein, is clearly referable to an acceptable *legal* definition of the offence as used in both non-international and international armed conflicts.

123. The Prosecution also argues that since Article 4(2)(g) of Additional Protocol II to the Geneva Conventions prohibits "pillage" but contains no other provision expressly prohibiting the destruction of civilian property, if the term "pillage" in the said Article is not interpreted to include unlawful destruction of property, there will be a lacuna in the law, as there will be no obvious prohibition of such acts in non-international armed conflicts.[181] The Defence submits that this argument is equally untenable because the presence of a lacuna in the law for non-international conflicts is no justification for the limitless expansion of the meaning of "pillage" to include the unlawful destruction of

[178] Ibid., para. 6.6.
[179] Ibid., paras. 6.7-6.8.
[180] Ibid., para. 6.9.
[181] Ibid., paras. 6.10-6.11.

property during such armed conflicts. Only an express Statute or customary international law can decree the specifics of an offence internationally or locally.

124. Besides, it is the view of the Defence that where such a lacuna subsists, the legal practice is to seek recourse to other recognized provisions of law to fill it. It is for this reason that Article 5 of the Statute of the Special Court empowered the Prosecutor to prosecute as well, persons who committed certain enumerated offences under Sierra Leonean law. In particular, the Statute envisaged and provided for situations in which the Prosecution may wish to apply his discretion and strategy in charging and prosecuting persons who bear greatest responsibility for allegedly "burning" property, public or private. Article 5.b of the Statute provides for "wanton destruction of property under the Malicious Damage Act, 1861", a "crime under Sierra Leonean law", and then outlines the said crime to include: i) Setting fire to dwelling houses, any person being therein, contrary to section 2 of the Act; ii) Setting fire to public buildings, contrary to sections 5 and 6 of the Act; and iii) Setting fire to other buildings, contrary to section 6. Since the Prosecutor chose not to try the 1st Respondent for offences under Sierra Leonean law as expressly stated in the Statute,[182] he cannot subsequently be seen to contend that such omission could be filled by inferences from surrounding events and circumstances, even to the point of including non-legal references therein.

125. The Defence submits that where a Statute or legislation is fully and unambiguously expressed, it will defeat an essential rule of statutory interpretation to read differently into the statute that which is so clearly and fully expressed. Relying on the *expressio unius est exclusio alterius* rule of construction, the Trial Chamber in the ICTY case of *Prosecutor v. Kupreskic et al*, held that "the explicit inclusion of particular fundamental rights could be interpreted as the implicit exclusion of other rights"[183]. The Defence therefore avers that Arson or Malicious Damage under Sierra Leonean is a specific offence created by the Statute of the Special Court, whilst Pillage as generalized by the Prosecution to include 'Burning' is not so specified in the said Statute.

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[182] Even where the conflict is a non-international and is Sierra Leonean in nature.
[183] *Kupreskic* Trial Chamber Judgment, para. 623, 14 January 2000.

126. Finally, the Defence notes that the Prosecution additionally proceeded to give a purposive interpretation to the offence of "Pillage", by arguing that since the mischief of wanton destruction of property during international and non-international or internal armed conflicts is rife, it would be unreasonable to suppose that drafters of Additional Protocol II to the Geneva Convention had in 1977 intended to omit it from what is to be prohibited during internal armed conflicts. The Prosecution argued that if the said drafters had not intended to omit wanton destruction of property, then it would be reasonable to capture such conducts through the construction of any provision that would bear it, such as subsuming it under Pillage by virtue of Article 4(2)(g) of Additional Protocol II. It thus urged the Appeal Chamber to develop international humanitarian law accordingly.[184]

127. In response to the above, the Defence submits that it is misleading to conclude that the drafters of Additional Protocol II omitted the prohibition of unlawful destruction in internal armed conflicts; this is because such prohibition is glaringly implicit in Article 13(1) of Additional Protocol II which provides that: "The civilian population and individual civilians shall enjoy *general protection* against the *dangers arising from military operations*." (Emphasis added) A similar message is also carried in Article 13 (2) of the said of Additional Protocol. The Defence therefore avers that there is no need to extend or expand the definition of Pillage to include unlawful destruction during an armed internal conflict. Any attempt by the Appeal Chamber to so do will not develop international humanitarian law as has been suggested by the Prosecution, but will lead to the dangerous precedent of creating offences that were not intended by the drafters, and thus making international humanitarian law more uncertain than ever before.

[184] The Prosecution's Appeal Brief, para. 6.13, p.108.

F:

RESPONSE TO GROUND 8:

DENIAL OF LEAVE TO THE PROSECUTION TO AMEND THE INDICTMENT IN ORDER TO CHARGESEXUAL OFFENCES:

128. The contention of the Prosecution in this ground is that the Trial Chamber erred in law, fact and/or procedure in dismissing the Prosecution's Motion of 9th February 2004, for leave to amend the Indictment in order to add four new counts of sexual violation, including: *(a)* rape (a crime against humanity punishable under Article 2(g) of the Statute); *(b)* sexual slavery and any form of sexual violence (a crime against humanity punishable under Article 2(g) of the Statute); *(c)* other inhumane acts (a crime against humanity punishable under Article 2(i) of the Statute); and *(d)* outrages upon personal dignity (a violation of Article 3 common to the Geneva Conventions and of Additional Protocol II, punishable under Article 3(e) of the Statute).[185]

129. On 20th May 2004, the Chamber dismissed the said Motion of the Prosecution of 9th February 2004, *inter alia*, on the following grounds:

1. That the application was tardy, due regard being had to the temporal jurisdiction of the Special Court for Sierra Leone (SCSL), to wit, that the Prosecution sought to bring fresh charges 2 years after investigations had commenced, and that the trial date was imminent. Granting the Application would have been prejudicial to the rights and interests of the Accused;

2. That granting the application at that stage would also have amounted to an abuse of process that would bring the administration of justice into disrepute. The cases of *Canom Enterprises Inc. v. Coolessor* and *The House of Spring Garden Ltd. v. Waite*[186] were cited by the Chamber to that effect;

[185] Prosecution Appeal Brief, para. 7.1
[186] [1990] 2 All ER 990 (CA).

3. That the Prosecution should have exercised the same diligence it applied in prosecuting the other offences; and

4. That granting the Prosecution's Application for amendment at that stage would also prejudice the rights guaranteed to the Accused under the provision of Articles 17(4)(a), 17(4)(b) and 17(4)(c) of the Statute of the SCSL.

130. The Defence agrees with the decision of the Chamber on the basis that the said reasons outweighed any advantage that could be achieved by amending the Indictment at that stage of the trial to include four new sexual offences. That process would have prolonged the trial period, not to mention the possibility of bringing preliminary motions on the new charges, and the fact that the Prosecution may have thereby gained an undue advantage for violating the principle of "equality of arms". The Defence therefore submit that the said decision was the only way that the Chamber could have exercised its discretion judiciously, and in the overall interest of justice.

131. The Prosecution contends that the Trial Chamber erred in law and in procedure in finding that the Prosecution acted without due diligence in the conduct of its investigations of gender crimes[187], without making any findings of fact on the evidence to confirm it. It argued that the Trial Chamber merely imagined that if the Prosecution had exercised due diligence, the gender crimes committed would have been included in the original indictment. But contrary to the assertion of the Prosecution, the Trial Chamber did make a finding of fact to the effect that the Prosecution did not only act without due diligence in the conduct of its investigations of gender crimes, but was also not diligent in filing an application for amendment to the Indictment to include the four new crimes of sexual violence[188].

[187] Prosecution Appeal Brief, para. 7.10
[188] SCSL-04-14-T- Decision on Request for Leave to Amend, para. 58

132. In the said Decision on the Prosecution's request for leave to amend the Indictment,[189] the Trial Chamber held that "if any gender offence or offences exist at all against those Accused persons who are the subject matter of this motion, that *should have been uncovered through the exercise of the ordinary and normally expected professional diligence on the part of the Prosecution and the investigations*, and the Accused brought to justice, after having , as was the case with the other offences for which they now stand, been indicted, and informed in detail of the nature and cause of the charges against them as mandatorily stipulated in Article 17 (4)(a) of the Statute."

133. The above finding was based on the observation by the Trial Chamber that, contrary to the assertion of the Prosecution in answer to questions put by the Court to the Prosecution as part of the Status Conference, the Prosecution *admitted* that it was in possession of evidence on gender related offences against these accused persons, *since June 2003*, and only sought an amendment to charge the Accused for these offences eight months later. This clearly showed that the said evidence had not "just recently" come to the knowledge and possession of the Prosecution, as they alleged.[190]

134. The Chamber also made another observation that after two years of investigations, it was neither credible nor convincing that the Prosecution, operating with experienced Prosecutors and Investigators in gender-related crimes, could easily come by evidence of rape, sexual slavery and other gender offence in respect of the RUF/AFRC group of indictees, but failed to do so for those of the CDF indictees, even though all of the indictees before the Special Court were operating within the same territory, and did so virtually contemporaneously.[191] The said findings and observations of the Court thus made the Prosecution's explanation untenable to say the least, because they did not act with due diligence and would consequently prejudice the rights of the Accused persons to a fair and expeditious trial.

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[189] Ibid, para. 58 (emphasis added)
[190] Ibid, para. 55 (emphasis added)
[191] SCSL-04-14-T-113, Decision on Request for Leave to Amend, para. 57

135. The Prosecution also took issue with the Chamber's findings that one of the Prosecution's explanation for the delay, which was that it was awaiting the decision on the joinder motion to consolidate the three indictments, was unacceptable and untenable, because it would require the Accused to "wait indefinitely and for as long as the Prosecution is engaged in the protractedly indefinite expedition, which result may either be uncertain or not forthcoming at all."[192] The Prosecution argued that no such delay would have occurred because it had not suggested that the proceedings in the case were to be stayed until such time that the Prosecution considered that all of its potential investigations in the case were complete and all potential charges added to the Indictment[193].

136. Although no application for stay of proceedings was suggested by the Prosecution, the proceedings would inevitably have been stayed by the Trial Chamber *ex abundanti cautela*, in order to avoid prejudicing the effect of the new amendments and/or motions on possible preliminary objections to be made. It is equally possible that some motions touching on jurisdiction may have been filed, as is the case with amended charges which may be objected to because they are duplicitous or the like. When faced with a motion that touches on jurisdiction, the proceedings would inevitably have to be stayed, until the motion has been heard and determined, because such motions go to the root of the proceedings. The proceedings would also have to be stayed so as not to render certain decisions in the said motions nugatory. It is for these reasons that the Trial Chamber, in its wisdom and experience, would have stayed the proceedings out of caution.

137. The Prosecution further argued that they can move to amend the Indictment at any time, even during the course of trial, when the Prosecution so moved to amend the Indictment[194]. But the Trial Chamber must consider the reasons why the amendment of the Indictment was being sought at that time, and in particular whether the Prosecution has acted with due diligence, and whether there would be prejudice to the Accused in amending the Indictment at that time. Whilst it is true that, under the Rules of Evidence of the Special Court, the Prosecution can move to amend the Indictment at any time, even

[192] Prosecution Appeal Brief, para. 7.14.
[193] Ibid, para. 7.14
[194] Prosecution Appeal Brief, para.

during the course of the trial, it is equally true that the Trial Chamber has the jurisdiction to refuse the application if any of the following occurs:

a) The Indictment is not brought timeously;

b) Where the Prosecution has not acted diligently;

c) Where the process would delay the trial unduly;

d) Where the process would prejudice the statutory rights of the Accused person guaranteed by Article 17(4) of the Statute;

e) Where the process would prejudice or pervert the course of the justice;

f) Where the process would not enhance the fairness and integrity of the proceedings; and

g) Where the process would amount to a delay of proceeding and bring the administration of justice into disrepute.[195]

138. The Trial Chamber found that all the disadvantages of granting the application, as outlined in above, were evident from the facts and circumstances of the present case. Against the backdrop of the limited time mandate of the Special Court (3 years), the Court exercised its discretion judiciously and refused the application for an amendment.

139. The Prosecution then went on to argue that the Trial Chamber appeared to have taken the view that there is a certain "cut-off point" after which any amendment to the Indictment would violate the rights of the Accused to an expeditious trial, and to that extent, the Trial Chamber misdirected itself in law[196]. The Defence notes that the Chamber never took any such view or observation of a "cut-off" point. The view of the Trial Chamber was that the stage at which the application was made was questionable, to wit, that it was made when the trial was imminent and that it would be prejudicial to the rights of the Accused persons, as it would take time and would occasion a disruption and postponement of the Chamber's schedule to commence the trials. The Chamber found that this situation could have been avoided if the Prosecution had acted diligently and brought the application for

[195] See SCSL-04-14-T-113 Decision on Prosecution Request for Leave to Amend the Indictment, paras. 44 to 86

[196] Prosecution Appeal Brief, para. 7.15

an amendment as early as June 2003, or soon thereafter, when it accepted and conceded, that evidence for gender offences against the Accused, was already available to it[197].

140. The Prosecution then proceeded to argue that the Chamber gave no basis for the suggestion that the Defence might require up to 2 years to investigate the additional charges.[198] The Defence replies that the Chamber gave the basis for suggesting this when it stated that the Defence might not need a *"shorter time than the 2 years it took the Prosecution"* to prefer the 8 Count Indictment against the Accused persons, particularly so because the new locations involved in the Indictments would require verifications, which will certainly take some length of time for the Defence to accomplish. The processes involved therein, including legitimate investigations, would inevitably occasion "undue delay" in proceeding with the trial, and in ensuring that it is fair and expeditious.[199]

141. Finally, the Prosecution argued under this ground that Rule 72*bis* of the Rules of Procedure and Evidence, does not require a stay of proceedings where preliminary motions are brought in relation to new charges. In answer to this argument, the Defence adopts all its previous arguments under this ground vis-a-vis the need to stay proceedings for investigation and related purposes.

G:
RESPONSE TO GROUND 9:
PRECLUSION OF EVIDENCE OF UNLAWFUL CONDUCT OF A SEXUAL NATURE:

142. Under this ground, the Prosecution contended that the Trial Chamber erred in law, fact and/or procedure in forbidding the Prosecution from leading, eliciting and adducing evidence of sexual violence, even though such evidence was relevant to material issues in the case, including evidence in support of other charges of criminal conduct against the mind and body, which concerns Count 3 (of Inhumane Acts of Crimes against Humanity)

[197] Ibid, Trial Chamber Decision on Prosecution Request for Leave to Amend the Indictment, para. 75.
[198] Prosecution Appeal Brief, para.715
[199] Trial Chamber Judgement, para. 63

and Count 4 (violence to life, health and physical or mental well-being of persons, as a war crime, in particular cruel treatment)[200].

143. The Defence avers that evidence is only admissible at law if it is relevant. It becomes relevant if it seeks to prove an offence charged or if it is so directly connected to the facts in issue that it does not require the straining of the imagination to determine whether the piece of evidence sought to be adduced or admitted, is indeed relevant to the issues at stake, or not.

144. The Prosecution accepted that the evidence they were seeking to introduce was the very evidence they were to adduce in order to prove the four new counts of sexual offences,[201] if they had succeeded in adding them to the Indictment by leave of the Court. With the greatest deference to the Prosecution, the Defence submits that it goes against the doctrine of fundamental fairness for the Prosecution to now seek to bring in through the back door, evidence that was rejected by the Chamber in refusing to grant leave to amend the Indictment for the four new sexual offences to be added.

145. In any case, if any such evidence of sexual offences, having been rejected by the Trial Chamber, are to be admitted by the Appeals Chamber without a charge to that effect, which it seeks to prove, then such evidence will go to absolutely no issue and will remain an extraneous and irrelevant piece of material that will be inadmissible. The Prosecution contends that as a matter of law, the war crime of violence to life, health and physical and mental wellbeing of persons, in particular cruel treatment (punishable under Article 3(a) of the Statute) can include crimes of a sexual nature,[202] thus suggesting that the four new sexual offences suggested by the Prosecution are encapsulated in these globally defined offences. If this is so, then the Prosecution should not have sought to amend the Indictment to include the four new sexual offences, because, by parity of reasoning, they would already have been charged under the globally defined offence of "Inhumane Acts

[200] Prosecution Appeal Brief, para. 8.8
[201] SCSL-04-14-T-434 Concurring Opinion of Justice Itoe on the Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, para. 77.
[202] Prosecution Appeal Brief, para. 8.10

or Crimes against Humanity" in Counts 3 and 4. These charges do not specifically allege or even mention the said sexual offences or acts as constituting Inhumane Act or Crimes against Humanity.

146. Also, the failure of the Prosecution to plead gender acts or offences in Counts 3 and 4 or anywhere else in the Indictment is fatal to the admissibility of the evidence, because a mere allegation of Inhumane Acts or offences against humanity is too vague to comply with Rule 47(c) of the Rules, and to help the Accused prepare his defence as well. The charge as it stands leaves the defence asking the following questions: What types of sexual offences are involved? Who committed it? Where was it committed? When was it committed?, and so forth. Without these details being given in the Indictment to satisfy the requirements of a statement and particulars of offence, the defence can neither carry out investigations nor even begin to prepare a defence to answer the charges. It is for this reason that such a vague charge without particulars is considered to be fatal.

147. Furthermore, the rights of the Accused to a fair trial which are guaranteed by Article 17(2) requires that the evidence to be adduced at the trial must be directly relevant to the facts in issue, including the Counts and offences alleged in the Indictment, and not evidence extraneous or irrelevant to proving the charges. Another reason why the Chamber rightfully refused the application to adduce gender evidence is because of the imminent closure of the Prosecution's case. The Prosecution had already indicated that it was at the verge of closing its case. If it was allowed at that stage to adduce the sexual evidence it was seeking to adduce, that would have inevitably necessitated a reasonably lengthy adjournment for the defence to carry out investigations on the proposed evidence of the witnesses in question. This will effectively aid the conduct of the cross examination of such witnesses. This process will obviously delay the trial of the Accused persons, who have been in custody for quite some time, thus violating their rights under Article 17 (4) (c) of the Statute.

148. The admission of the proposed gender evidence after the Chamber had denied the Prosecution's motion to amend the Indictment, which seeks to include the said gender

offences, is not only contrary to the doctrine of Fundamental Fairness and the respect for Judicial Decision by all parties, but that if this application is granted, it would mean that the Trial Chamber had indirectly overturned its own Decision of the 20th day of May, 2004, without any justification whatsoever.

149. Finally, the other reason why the Chamber refused this application and the Defence believes, rightly so, was because the evidence sought to be adduced would be prejudicial to the interest of the Accused persons. Such evidence would cast a cloak of doubt on the image of innocence that the Accused enjoys under the law, until the contrary is proved.[203] Such situation will, incidentally, violate the Accused's right to a fair hearing as well.

150. Apart from the foregoing, the crux of the Prosecution's contention under this ground is that the Chamber erred in finding that evidence in support of offences that have not been specifically pleaded is not admissible; and that evidence cannot properly be adduced to support Counts 3 and 4 of the Consolidated Indictment without the underlying factual allegations having been specifically pleaded. The Prosecution argued that the Chamber so erred because it is allegedly settled law that a deficiently pleaded indictment can be deemed to be cured, and that no prejudice exists where there has been timely, clear and consistent information provided to the Accused detailing the factual basis of the charges against him[204]. The Prosecution argued that in this case, the pre-trial brief and opening statements, among other things, did clearly and specifically inform the Defence that Counts 3 and 4 encompassed allegations of sexual violence.

151. The Prosecution then proceeded to give examples of information from Pre-Trial Briefs filed on the 2nd March 2004 and on 22nd April 2004, which will be shall set out herein for ease of reference. In the Prosecution's Pre-Trial Brief filed on the 2nd March 2004, sexual violence was *"specifically averred"* in the following way: that "(t)he evidence will show that the civilians in Talia village and surrounding villages were subjected to a comprehensive and systematic pattern of violence consequent to the arrival of thousands

[203] Ibid, Concurring Opinion of Justice Itoe on the Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence, para. 78
[204] Prosecution Appeal Brief, paras 8.7 to 8.8 (Emphasis added)

of Kamajors, who effectively occupied the area for a period up to nine months. The evidence will demonstrate that *their daughters and wives were systematically raped and held in sexual slavery.*[205]

152. Also, in the Prosecution's supplemental Pre-Trial Brief filed on the 22nd April 2004, sexual violence was "specifically averred" in the following way: "As regards Bonthe District, the evidence will demonstrate, *inter alia* that *....women and girls subjected to by the CDF to sexual assaults, harassment, and non-consensual sex,* which resulted in the widespread proliferation of sexual transmitted diseases, unwanted pregnancies and severe mental suffering"[206].

153. In the first place, the Defence avers that the authorities for the proposition that a deficiently pleaded indictment can be deemed to be cured and that no prejudice will subsist where there has been timely, clear and consistent information provided to the Accused *detailing the factual basis of the charges against him* are: the *Ntagerura Appeal Judgement*[207] and *Ntakirutimana Appeal Judgement*,[208] (ICTR cases) and the *Kupreskic Appeal Judgement*,[209] and *Kvocka Appeal Judgement*[210] (ICTY cases).

154. Rule 47 of both the ICTY and ICTR Rules of Evidence and Procedure requires an indictment to contain a "concise statement of facts", whereas such a provision is conspicuously absent in the SCSL Statute. "Such a concise statement of facts" is capable of giving detailed factual information to the Accused to prepare his defence, in that it would give the name and address of the offender, his or her address, the place where the crime was committed, the time and the particulars of the crime. A concise statement of fact is sufficient to give enough information to the Accused to prepare his defence, and it is therefore not surprising that such a statement can indirectly cure a defective indictment.

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[205] Prosecution Appeal Brief, 8.12
[206] Ibid, 8.13
[207] Ntagerura Appeal Judgement, para 28
[208] Ntakirutimana Appeal Judgement, para 27
[209] Kupreskic Appeal Judgement, para 114
[210] Kvocka Appeal Judgement, para. 43

155. The said authorities do not apply to the SCSL, because there is no requirement for a concise statement of facts to be are filed here, which would contain enough detailed information to enable the Accused to prepare his defence. Therefore, a defective Indictment in the SCSL cannot be cured by the information given in a Pre-Trial Brief, however detailed it is. The Prosecution alleges that the Pre-Trial Brief filed on the 22nd day of March 2004 as well as its Supplemental Pre-Trial Brief filed thereafter are capable of curing a defective Indictment. The Defence disagrees.

156. A close look at the paragraph where the Prosecution claims that it gave information about sexual offences in its two Pre-Trial Briefs reveal that that the pre-trial information did not name the offenders or give their address; also the particulars of the offence committed by the offender is not given, and the facts and circumstances in which the offence was committed are also conspicuously absent. The sexual offences were merely named in these two Briefs, and such scanty and vague information, the Defence submits, cannot give sufficient information to an Accused person to enable him to prepare his defence, and to carry out effective cross-examination of Prosecution Witnesses. The Defence also submits that such vague and scanty information, unlike a concise statement of facts, is grossly insufficient and incapable of curing a defective indictment. The information given by the Prosecution discloses no evidentiary material to enable the Accused person to prepare his defence, and the Trial Chamber was right to so hold.

H.

GROUND 10:

RESPONSE TO THE PROSECUTION'S GROUND ON SENTENCING:

i. *Refusal to Consider Sentencing Practices of Sierra Leonean Courts:*

157. In the Prosecution's sentencing brief, the Prosecution submits that the Trial Chamber erred in law when the Trial Chamber found that it would be inappropriate to rely on sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed, on the grounds (1) that the accused were not indicted or convicted for any of the

offences under Article 5 of the Statute (which confers jurisdiction on the Special Court over certain crimes under Sierra Leonean law); and (2) that the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract.[211]

158. The Defence submits that Article 19(1) authorizes the Trial Chamber to consider *as appropriate*, the sentencing practices of Sierra Leonean domestic courts. In this regard, the Respondent submits that the Trial Chamber is right to have noted that the Accused were neither indicted of the offences enumerated under Article 5 of the Statute. The Trial Chamber carried out a detailed analysis of the Sierra Leone sentencing practice and gave its reasons why it would be inappropriate to rely on the sentencing practices in Sierra Leone in determining the punishment to be impose on either Fofana or on Kondewa.[212] In fact the Prosecution did not make any submission to show that it was appropriate for the Trial Chamber to rely on the sentencing practice of Sierra Leone. As the Trial Chamber rightly held, the Statute of the Special Court does not provide for either capital punishment or imposition of a "life sentence", which are the punishments that the most serious crimes under Sierra Leonean law attract. For these reasons, the Trial Chamber found that it would be inappropriate to rely on the sentencing practices of Sierra Leonean Courts in determining the punishment to be imposed on either Fofana or Kondewa.[213]

159. The Defence submits that Article 19(1), authorizes the Trial Chamber to consider the Sentencing practice of Sierra Leone as an aid in determining the appropriate sentence; however, they are not bound to follow it. Thus the Trial Chamber is entitled to impose a sentence it deems appropriate in the circumstances. The Defence submits that because very important underlying differences exist between the Sierra Leonean sentencing practice and prosecutions in the Special Court, the nature, scope and the scale of the offences tried before the Special Court do not allow for an automatic application of the sentencing practices in Sierra Leone.

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[211] Prosecution Appeal Brief, para. 9.8
[212] Sentencing Judgement, para. 43
[213] Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa.

160. The Defence submits that the Statute of the ICTY provides that the Trial Chamber "shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia", even though the ICTY has no jurisdiction at all over crimes under the law of the former Yugoslavia. The Statute of the *ICTR* provides that ICTR Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of Rwanda", even though the ICTR has no jurisdiction at all over crimes under the law of Rwanda.[214] The Respondent submits that in *Blaskic*, the *ICTY* Appeals Chamber held that in as much as the Trial Chamber must consider the sentencing practices in the former Yugoslavia as an aid in determining the appropriate sentence; however, they are not bound by them.[215] In *Celebici,* the Appeals Chamber further held that, although a Trial Chamber should "have recourse to" and should "take into account" this general practice regarding prison sentences in the courts of the former Yugoslavia, this "does not oblige the Trial Chambers to conform to that practice; it only obliges the Trial Chambers to take account of that practice".[216] The Defence hereby submit that what is important is that the Trial Chamber should give due consideration to the sentencing practice of Sierra Leone but it is neither obliged to follow it or be bound by it. The Court indeed gave due consideration to it.

161. In *Akayesu*, the Appeals Chamber confirmed the Trial Chambers are duty bound to "resort" to the general practice regarding prison sentences in the Courts of Rwanda and to "take account" thereof. Neither the Rules nor the Statute specify to what extent the Trial Chamber must resort to the said practice, although there is consistent authority at ICTR that the said provisions "do not oblige the Trial Chamber to conform to that practice; they only oblige the Trial Chamber to take account of that practice.[217] The Trial Chamber is not limited by the practice of the courts of Sierra Leone and it may draw upon other legal sources in order to determine the appropriate sentence.

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[214] Prosecution Appeal Brief, para. 9.10
[215] Blaskic Appeal Judgement, para. 681
[216] Celebici Appeal Judgement, para. 813
[217] Akayesu Appeal Judgement, para. 420, see Serushago, Judgement on Appeal, para. 30, see also the Celebici Appeal Judgement, para. 813

162. In the *Akayesu* case, the Appeals Chamber found that the Trial Chamber considered whether it could rely on the practice in the courts of Rwanda. It found rightly, that the said practice "is but one of the factors that it has to take into account in determining sentences," and that, it should be used for guidance but not binding. The Trial Chamber held that although trials relating to the 1994 events had been conducted in Rwanda resulting in death sentences and prison terms on several occasions, it had "not been able to have information on the contents of these decisions, particularly their underlying reasons." Finally, the Trial Chamber recalled that "Rwanda, like all States which have incorporated genocide or crimes against humanity in their domestic legislation, has envisaged the most severe penalties in its criminal legislation.[218] Sierra Leone has not even incorporated war crimes or crimes against humanity in its legislation, but yet has the most severe penalties in its criminal legislation.

163. The Prosecution submits that an international criminal court should not impose a sentence that is grossly out of touch with the idea of justice in the domestic jurisdiction concerned.[219] The sentences imposed are not in any way out of touch with the idea of justice in the domestic jurisdiction concerned because the domestic courts could have imposed the very same sentences passed by the Trial Chamber, due regard being had in all the facts and circumstances of the case. In fact, the Prosecution cannot and has not shown how the said sentences are out of touch with the domestic idea of justice. The Defence therefore submit that the sentences are indeed in touch with the domestic idea of justice.

164. While the Prosecution acknowledged that the Trial Chamber could not, by reference to national sentencing practices, impose a death sentence or life sentences, it can and must, have regard to the severity of the sentences that would be imposed by a national court for similar crimes.[220] The Trial Chamber took into consideration the sentences that would be imposed by a national court for similar offences, and it used its discretion to impose the most appropriate sentences in the circumstances. The Defence reiterates that the Trial

[218] Akayesu Appeal Judgement, para. 420
[219] Prosecution Appeal Brief, para. 9.12
[220] Prosecution Appeal Brief, para. 9.14

Chamber is not bound by the sentencing practices of the national courts and they are not obliged to conform to the practices in the national courts of Sierra Leone. The *ratione materiae* jurisdiction of International Tribunals differs fundamentally from that of a national court which punishes all sorts of offences, usually ordinary crimes.

165. The Defence submits that Appeals Chamber ought to dismiss this sub ground of appeal for the Prosecution failed to show any error in the Trial Chamber's analysis of those provisions and in exercise of its discretion imposed the most appropriate sentences after considering the domestic sentencing practice, and all the peculiar facts and circumstances of this case in general, and those of Fofana in particular.

ii. *Treating Statements of the Accused at the sentencing hearing as Mitigating Factors:*

166. The Prosecution submits that in order to be a factor in mitigation, the remorse expressed by an accused must be real and sincere[221]. The Defence submits that neither the Statute nor the Rules exhaustively define the factors which may be defined as mitigating factors[222]. Consequently, under the jurisprudence of ICTR and ICTY, "what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion."[223] The burden of proof which must be met by an accused with regard to mitigating circumstance is not, as with aggravating circumstance, proof beyond reasonable doubt, but proof on the balance of probabilities – the circumstance in question must exist or have existed "more probably than not."[224] Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing.[225]

167. The Prosecution submits that the Trial Chamber did not suggest that the Defence statement was an expression of remorse, let alone a genuine expression of remorse, but

[221] Ibid, para. 9.16
[222] Statute of Special Court, para 19(1) check it and Rule 110
[223] Musema Appeal Judgement, para. 395
[224] Delalic et al, Appeal Judgement, para. 590
[225] Niyetgeka Appeal Judgement, para 266, referring to Musema Appeal Judgement, 396.

said that "Although Fofana by his statement does not expressly acknowledge his personal participation in the crimes for which the Chamber has convicted him, the Chamber finds that he has clearly expressed empathy with the victims of those crimes."[226] The Prosecution further submits that case law of international criminal tribunals has not generally regarded expressions of "empathy" with victims, especially where made by Defence counsel rather than by accused, as mitigating factors in sentencing.[227] As long as the Trial Chamber which saw and listened to the Accused person, observed his demeanor, has found as a fact that Fofana was emphatic which description by far stronger than merely being sympathetic or remorseful because he actually put himself in the shoes of the victim, such a finding ought not to be disturbed, and the discretion of the Trial Chamber to decide what it considers what is a mitigating factor should also not be fettered. Empathy is a deeper form of remorse.

168. The Defence submits that the Prosecution has failed to substantiate with any authority or case law that empathy with victims, especially where made by Defence counsel rather than by accused as mitigating circumstance is not an expression of remorse. It is the discretion of the Trial Chamber to decide whether that the words used by counsel show real remorse and could therefore be considered as mitigating circumstance. The Prosecution has not shown that the Trial Chamber committed any error in the exercise of its discretion. The Chamber found the elements of remorse to be sincere and genuine.

169. The Defence submits that the Trial Chamber was right to have held that "although Fofana by this statement does not expressly acknowledge his personal participation in the crimes for which the Chamber has convicted him, the Chamber finds that he has clearly expressed empathy with the victims of those crimes.[228] The Prosecution submits that the Trial Chamber quoted the *Oric* judgement which was only a Trial Judgement and is presently on appeal before the ICTY.[229] The Defence submits that an accused can express real and sincere remorse without having to give evidence or being cross-examined by the

[226] Prosecution Appeal Brief, para. 9.17
[227] Prosecution Appeal Brief, para. 9.19
[228] Sentencing Judgement, para. 64
[229] Prosecution Appeal Brief, para. 9.19

Prosecution. It is correct to state that previous case-law from the ICTY states that in order for remorse to be considered as a mitigating factor it has to be sincere.[230]

170. In *Vasiljelic*, the Appeals Chamber was of the view that an accused can express sincere regrets without admitting his participation in a crime, and that that is a factor which may be taken into account.[231] Contrary to the Prosecution's assertion that the principle cited by the Trial Chamber in *Oric,* is yet to be tested on appeal, the Appeals Chamber has already made a pronouncement in *Vasiljelic*. The Trial Chamber considered a number of factors put forward by the Respondent as mitigating circumstances, including his repentance and remorse and found that he has clearly expressed empathy with the victims of those crimes.[232]

171. The Trial Chambers of the ICTY and ICTR have consistently taken evidence as to character into account in imposing sentence. The Appeals Chamber in *Mucic et al*, notes that factors such as conduct during trial proceedings, as ascertained primarily through the Trial Judges' perception of an accused, have also been considered in both mitigation and aggravation of sentence. The behaviour is relevant to a Trial Chamber's determination of, for example, remorse for the acts committed or, on the contrary total lack of compassion.[233]

172. The Prosecution further submits that a Trial Chamber, exercising it discretion properly, cannot give any significant mitigating weight to expressions of empathy for victims made at sentencing hearing, in the case of crimes of gravity. The Respondent submits that the Trial Chamber indeed and actually took into consideration the gravity of the offence[234]before considering his remorse as a mitigating circumstance. The Prosecution has not identified any specific error in the Trial Chamber's findings and did not establish that its finding was unreasonable. It is not enough for the Prosecution to cite passages in the Judgement without substantiating the errors alleged. As a general rule, the Appeals

[230] Todorovic Sentencing Judgement, para. 89
[231] Vasiljelic Appeal Judgement, para. 177
[232] Sentencing Judgement, para. 64
[233] Mucic et al, Appeals Chamber Judgement, para. 788
[234] Sentencing Judgement, para. 64

Chamber will not revise a sentence unless the Trial Chamber has committed a "discernible error" in exercising or has failed to follow the applicable law.[235] It is for the Appellant to demonstrate how the Trial Chamber ventured outside its discretionary framework in imposing its sentence.

173. To show that the Trial Chamber committed a discernible error in exercising its discretion, "the Appellant has to demonstrate that the Trial Chamber gave weight to extraneous or irrelevant considerations, failed to give weight or sufficient weight to relevant considerations, made a clear error as to the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[236] The Trial Chamber of the ICTY has held that the Chamber shall take into account the individual circumstances of the convicted person as well as aggravating and mitigating factors. The Appeals Chamber has stated that since the factors to be taken into account for aggravation or mitigation of a sentence have not been defined exhaustively by the Statute and the Rules, a Trial Chamber has a considerable amount of discretion in deciding these factors. The Chamber is obliged to take into account mitigating circumstances when determining the sentence, but the weight to be attached thereto is discretionary[237] and the Trial Chamber has exercised this discretion judicially and judiciously.

174. The Respondent submits that this sub-ground of appeal ought to be dismissed because the Prosecution has failed to show any error in the Trial Chamber's discretion.

iii. Treating lack of Adequate Training as a Mitigating Factor:

175. The Prosecution submits that the Trial Chamber took into account, as a mitigating factor, that the accused "were propelled in a relatively short period of time, from civilian life to an effective position of authority in a very brutal and bloody conflict, with no adequate

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[235] Jokic Judgement on Sentencing Appeal, para. 8
[236] Babic Judgement on Sentencing Appeal para. 44, cited in Galic Judgement on Sentencing Appeal, para. 394
[237] Naletilic and Martinovic, Trial Chamber, para. 742

training for the roles which they were to play" and that the Trial Chamber referred to no evidence to support this finding.[238] The Defence submits that the Trial Chamber stated that it *is aware* that both men were propelled in a relatively short period of time, which is an indication of the fact that the Trial Chamber took into consideration the evidence adduced during the trial to arrive at this conclusion. It is clear from the evidence in this case that combatants were trained for only two weeks and others who were not fighting were trained for only four days to learn "cock and fire" technique[239]. There is a factual finding that Fofana was not a combatant, and was never seen on the battle field or even held a weapon. This shows that Fofana had no proper training.

176. The Defence submits that Base Zero was established by Norman in September 1997 and very shortly afterwards Fofana was appointed Director of war which shows that he was propelled from civilian life to effective position of authority within a very short time[240]. it is for this reason that the Trial Chamber stated that it was aware of these facts because cogent evidence to this effect has been adduced in this case. As the Trial Chamber rightly held, whilst this in no way reduces the gravity of the crimes which were committed, the Chamber recognizes it as a factor in mitigation of sentence. The Prosecution has not demonstrated that the Trial Chamber erroneously considered in mitigation that the Fofana was propelled in a relatively short period of time.

177. In general, Trial Chambers are "endowed with a considerable degree of discretion in deciding on the factors which may be taken into account" in mitigation of sentence.[241] It is for the Prosecution to show that the Trial Chamber erred in exercising its discretion; a mere recital of mitigating factors, without more, does not discharge this burden[242].

178. The Prosecution submits that the Trial Chamber cited no authorities in this part of the Sentencing Judgement.[243] The Defence submits that the Prosecution also failed to cite the

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[238] Prosecution Appeal Brief, para, 9.22
[239] Trial Chamber Judgement, para. 319
[240] Ibid para, 302
[241] Celebici Appeal Judgement, para. 780 cited in Galic Appeal Judgement, para. 414
[242] Kvocka et al Appeal Judgement, para. 675
[243] Prosecution Appeal Brief, para. 9.24

authorities or case-law compelling the Trial Chamber to cite authorities when deciding what factors to be considered as mitigating factors and the weight to be attached to them. The Trial Chamber is not bound to cite authorities each and every time that it exercises its discretion, because the exercise of such a discretion also includes a consideration of the facts and circumstances of the case.

179. The Defence submits that the difficult circumstances in which a convicted person had to operate had been used as a mitigating factor and this has been held to be a pivotal consideration for the purpose of establishing the sentence that should be meted out to an accused.[244] Throughout the Judgement, the Trial Chamber endeavoured to describe the abysmal conditions prevailing in Sierra Leone during the relevant time in 1996 to 1999 within which the Fofana operated. The Defence submits that the Prosecution's submission is based on a misreading of the Trial and Sentencing Judgements.

180. The Prosecution submits that the Trial Chamber established no factual basis at all to justify taking lack of training into account as a mitigating factor for either Accused (...) [and] to be a mitigating factor, there must in each individual case be established facts which show that the lack of training affected the ability of the accused to comply with the requirements of international law, and therefore somewhat mitigated the moral culpability of the accused.[245] The Defence submits that the fact that the Chamber stated that it is "aware that both men were propelled in relatively short period of time" and that they had inadequate training shows that the Trial Chamber took factual basis into consideration before arriving at its conclusion.

181. The Defence submits that what constitutes a mitigating circumstance is a matter for the Trial Chamber to determine in the exercise of its discretion[246]. The burden of proof which must be met by an accused with regard to mitigating circumstances is not , as with aggravating circumstances, proof beyond reasonable doubt, but proof on the balance of probabilities – the circumstance in question must exist or have existed "more probably

[244] Celibici Trial Judgement, para 1248
[245] Prosecution Appeal Brief, para. 9.25
[246] Musema Appeal Judgement, para. 395.

than not."[247] Once a Trial Chamber determines that certain evidence constitutes a mitigating circumstance, the decision as to weight to be accorded to that mitigating circumstance also lies within the wide discretion afforded to the Trial Chamber at sentencing.[248]

182. This sub-ground of appeal ought to be dismissed for the Prosecution has failed to show the Trial Chamber misapplied its discretion.

iv. *Treating Subsequent Conduct of the Accused as a Mitigating Factor:*

183. The Defence submits that this sub-ground of appeal ought to be disregarded by the Appeals Chamber since its does not feature in the Prosecution's notice of appeal. In *Simba,* the ICTR Appeals Chamber precluded the Prosecution from adducing evidence on a ground of appeal which was not included in the Prosecution's Notice of Appeal.[249] Should the Appeals Chamber deem it otherwise to consider this sub-ground of appeal, the Defence submits as follows:

184. The Prosecution submits that the Trial Chamber took into consideration subsequent conduct of Fofana, which consisted of five witness statements annexed to the Fofana Sentencing Submissions.[250] The Prosecution further submits that the information contained in these statements is largely of a general nature, and does not give specific details of the precise conduct of Fofana that would enable an objective assessment to be made of his actual contribution or efforts to peace and reconciliation.[251] The Defence submits that contrary to the Prosecution's submission that these statements are largely of a general nature, the statements are very specific, for example one of the statements reads as follows: "whenever, CDF/Community problems were reported at the meeting Fofana always went to resolve them. Within the first few weeks, he visited a number of schools in Bo District to resolve the CDF related problems, and he conducted similar visits

[247] Delalic et al, Appeal Judgement, para. 590
[248] Niyitegeka Appeal Judgement, para. 266
[249] Aloys Simba, Appeal Judgement, para, 326
[250] Prosecution Appeal Brief, para. 9.29
[251] Ibid, para. 9.29

together with the Chairman of the Drivers Union to sort out problems at checkpoints. In addition, he personally called a meeting for all CDF commanders in the South to educate them on the outcomes and commitment of the workshop, and to make it clear that that they should ensure these were all followed by both themselves and the Kamajors."[252] A careful perusal of the Statements of Frances Fortune shows specific situations where the Respondent is organizing reconciliation workshops in every regional headquarter and selected district headquarters after the Lomé Peace Accord.[253] Even the statements of the other witnesses are very specific.[254]

185. The Prosecution agrees that the Fofana did involve himself to a degree in activities aimed at peace and reconciliation, but submits that in the absence of more detail and specific evidence, only limited weight could be given to this evidence by a reasonable Trial Chamber.[255] The Defence submits that the issue as to weight is at the discretion of the Trial Chamber. In cases where it is alleged that the Trial Chamber has erroneously exercised its discretion, the issue on Appeal is not whether the decision is correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has exercised its discretion judiciously and, its decision ought not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently.[256]

186. In *Plavsic,* the Trial Chamber took into consideration that Mrs. Plavsic was instrumental in ensuring that the Dayton Agreement was accepted and implemented in Republika Srpska. As such, she made a considerable contribution to peace in the region and is entitled to pray it in aid in mitigation of sentence. The Trial Chamber gave it significant weight. The Defence submits that the Trial Chamber was right to have taken his subsequent conduct and equally attaching significant weight to it. The Prosecution has failed to show how the Trial Chamber erred in exercising its discretion in this particular case.

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[252] Statement of Simon Arthy
[253] Statement of Frances Fortune.
[254] Statements of Rashid Abdul Sandi, Foday Seisay and Shekou Tejan-Sankoh
[255] Prosecution Appeal Brief, para. 9.29
[256] Milsosevic Reasons for Decision, para. 14

187. The Defence further submits that the test is whether the exercise of discretion was "reasonably open" to the Trial Chamber, or whether, conversely, the Trial Chamber "abused its discretion," or has "erred and exceeded its discretion", or whether the Trial Chamber has committed a "discernable error" in the exercise of its discretion,[257] or whether the Trial Chamber's decision ***was so unreasonably and plainly unjust*** that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[258]

v. *Treating Lack of Prior Convictions as a Mitigating Factor:*

188. The Defence submits this sub-ground of appeal should be disregarded since its not part of the Prosecution ground of appeal but should the Appeals Chamber deem it necessary to still consider this sub-ground of appeal the Respondent submits as follows:

189. The Prosecution submits that the Trial Chamber erred in law, or exceeded its sentencing discretion, in treating prior conviction as a mitigating factor. The Prosecution further submits that the case law of international criminal tribunals indicates that lack of prior convictions should not be considered as a significant mitigating factor.[259] The Prosecution cites the ICTY appeal Judgement of *Galic* to buttress its point but the paragraph referred to by the Prosecution does not say anything about previous convictions. The Prosecution has therefore failed to substantiate the point that it is only in exceptional circumstances that previous good character can be considered as a factor in mitigation. In *Nikolic*, the Trial Chamber took into account in mitigation, the fact that the Accused had no previous criminal record.[260] No authority has therefore been cited by the Prosecution to the effect that lack of prior conviction is not a mitigating factor. In fact, even in domestic jurisdictions, lack of prior conviction is always a mitigating factor. In *Ruggiu,* the Trial Chamber considered that the fact that the accused had no previous

[257] *Naletilic and Martinovic Appeal Judgement, paras.* 257-259
[258] Compare Mejakic Rule 11bis Appeal Decision, para. 10 (emphasis added)
[259] Prosecution Appeal Brief, para. 9.31
[260] Dragan Nikolic, Trial Judgement, para. 265

criminal record constituted mitigating circumstances to be considered in the determination of an appropriate penalty.[261]

190. Absence of criminal record has always been treated as a mitigating factor. In *Ruggiu*, the ICTR Trial Chamber held that "the accused has no previous criminal record. Until he committed the acts to which he is now pleading guilty, the accused had always conducted himself as an honest and respectable citizen." The weight to be attached to mitigating circumstances is a matter of discretion for the Trial Chamber and unless the Prosecution succeeds in showing that the Trial Chamber abused its discretion, resulting in a sentence outside the discretionary framework provided by the Statute and the Rules, the Appeals Chamber cannot intervene within the wide discretion of the Trial Chamber.

191. The Appeals Chamber of the ICTY has said that: Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake.[262] A party alleging an error of law must prove the same, failing which the findings stand as correct. The Prosecution has woefully failed to prove that any such error of law has been committed.

vi. *Treating the Just Cause of the Accused as a Mitigating Factor:*

192. The Prosecution submits that the Trial Chamber erred in law in holding that the CDF/Kamajors was a fighting force that was mobilized and was implicated in the conflict in Sierra Leone to support a legitimate cause which...was to restore the democratically elected Government of President Kabbah.[263]

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[261] *Ruggiu,* Judgement and Sentence, 1 June 2000, paras. 59-60
[262] Furundzija Appeals Judgement, para. 35
[263] Prosecution Appeal Brief, para. 9.34

193. The Defence submits that the Prosecution has not demonstrated how the Trial Chamber erroneously considered in mitigation that "although the commission of these crimes transcends acceptable limits, such as acting in defence of constitutionality by engaging in a struggle or a fight that was geared towards the restoration of the ousted democratically elected Government of President Kabbah, it certainly, in such circumstances, constitutes a mitigating circumstance in favour of the two Accused Persons." [264]

194. It is clear from paragraph 82 that the Trial Chamber gave the prevailing circumstance and statutorily oriented principles in sister International Criminal Tribunals which remain relevant in guiding and assisting the Trial Chamber to arrive at a decision in this case. As the Trial Chamber observed, it is pertinent to note that there is an important factual and contextual difference and distinction that the Chamber would like to draw between those cases as against this one which they "consider relevant and pertinent in scaling the sentences that we are about to hand down on the Accused Persons in relation to the Counts for which we have found them guilty."[265]

195. The Prosecution further submits that this section of the Sentencing Judgement is to hold that it is a mitigating factor in sentencing that the convicted person was fighting on the "right" side in the conflict. The Prosecution further submits that this holding is inconsistent with the most fundamental tenets of international humanitarian law, and inconsistent with the Trial Chamber's conclusion, based on the same fundamental tenets, that "necessity", and the alleged principle of "Salus Civis Suprema Lex Est", are neither defences nor matters to be taken into account in mitigation.[266] The Prosecution allegation at issue is based on a misreading of the Sentencing Judgement. The Trial Chamber held "that the argument of fighting the enemy, the AFRC, as the two accused Persons indisputably did, in order to restore the ousted democratically elected Government of President Kabbah which we hold is rather a mitigating circumstance, but on which the defence of Necessity has been grounded by the Honourable Justice Thompson in his Dissenting Opinion, we conclude were carefully planned and premeditated killings of

[264] Sentencing Judgement, para. 86
[265] Sentencing Judgement, para. 82
[266] Prosecution Appeal Brief, para. 9.36

innocent and unarmed civilians for which we have found the two Accused Persons guilty. In these circumstances, the Chamber cannot but conclude that such an argument is meretricious and without foundation.[267] The motive of the Fofana in that he had a good motive is indisputably a mitigating factor because a good whittles down the criminal intent of the crime committed, before judgement and mitigates punishment after judgement.

196. The Respondent submits that the Prosecution's submission that it is a mitigating factor in sentencing that the convicted person was fighting on the "right" side in the conflict is misconstrued. For as the Trial Chamber observed "that this Judgement will send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness of their cause, they must observe the laws of war in pursuing or defending the legitimate causes..."[268] Contrary to the Prosecution's assertion, the Trial Chamber never considered the issue of the "right" side of the conflict in arriving at its reasoning.

197. The Defence submits that in *Erdemovic,* the Trial Chamber pointed out that, any reduction of the penalty stemming from the application of mitigating circumstances in no way diminishes the gravity of the crime and adopted the *obiter dictum* of the United States Military Tribunal when it delivered its sentence in the *Hostage case* in the following words: "Throughout the course of this opinion, we have had the occasion to refer to matters to be considered in mitigation of punishment. The degree of mitigation depends upon many factors including the nature of the crime, the age and experience of the person whom it applies, the motives for the criminal act, the circumstances under which the crime was committed and the provocation if any that contributed to its commission. *It must be observed that mitigation of punishment does not in any sense of the word reduce the degree of the crime.* It is more a matter of grace than of defence. In other words, the punishment assessed is not a proper criterion to be considered in evaluating the findings with the degree of magnitude of the crime."[269]

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[267] Sentencing Judgement, para. 80
[268] Sentencing Judgement, para. 96
[269] Erdemovic Sentencing Judgement, para. 46, citing USA v Wilhem List (Hostage case) (italics added)

198. The Respondent submits that the Prosecution has failed to explain how the Trial Chamber erred in law treating by treating just cause as a mitigating factor.

vii. *Treating the Motive of "Civic Duty" as a Mitigating Factor:*

199. The Prosecution submits that the Trial Chamber held that "there is nothing in the evidence which demonstrates that either Fofana or Kondewa joined the conflict in Sierra Leone for selfish reasons" and that "they acted from a sense of civic duty rather than for personal aggrandizement or gain".[270] The Prosecution further submits that this finding of the Trial Chamber is based on the consideration that Fofana and Kondewa were fighting on the "right" side of the conflict and that the Trial Chamber erred in law and in the exercise of its sentencing discretion, in taking into account as a mitigating factor, for the same reasons as those given in Section H[271] of the Prosecution's submission. The Defence submits that the Prosecution is being speculative in stating that the Trial Chamber's finding is based on the consideration that Fofana and Kondewa were fighting on the "right" side of the conflict. The Defence adopts its submissions in Paragraph H.

200. It is clear that the Trial Chamber took into account the Respondent's service to his country and it not based on whether the Respondent fought on the "right" side of the conflict as the Prosecution has submitted. The Trial Chamber held that "this judgement will send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war in pursuing or defending legitimate causes, and that they must not recruit or use children as agents or instruments of war. It will in addition, remind them of their obligation to protect civilians who are unarmed and not participating in hostilities, and whose aspiration is only for protection, regardless their perceived affiliation."[272] In *Krstic*, the Trial Chamber held that motive 'to some extent [is] a necessary factor in the determination of the sentence after guilt has been established. In determining the appropriate sentence, a distinction is to be made between the individuals who allowed

[270] Prosecution Appeal Brief, para. 9.42
[271] Prosecution Appeal Brief, para. 9.43
[272] Sentencing Judgement, para. 96

themselves to be drawn into a maelstrom of violence, even reluctantly, and those who initiated or aggravated it and thereby more substantially contributed to the overall harm.[273]

201. The Defence submits that the Prosecution has failed to show how the Trial Chamber erred in law in the exercise of its discretion in treating this as a mitigating factor.

viii. *Treating the Purposes of Reconciliation as a Mitigating Factor:*

202. The Defence submits that this sub-ground of appeal should be disregarded since the Prosecution failed to include it in its Notice of appeal. Should the Appeals Chamber deem it necessary to consider the arguments raised by the Prosecution, the Respondent submits as follows:

203. The Prosecution submits that the Trial Chamber held that: "it is our view that a manifestly repressive sentence, rather than providing the deterrence objective which it is meant to achieve to the Sierra Leonean society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this Court is mandated by UN Security Council Resolution 1315, to achieve."[274] The Prosecution further submits that the said Resolution did not suggest that reconciliation could be promoted by passing of sentence more lenient than would otherwise be appropriate, as a gesture of "reconciliation" and that the passing of lenient sentences by those found to have committed the gravest crimes, if anything, undermine reconciliation.[275]

204. The Defence submits that a sentence is unduly lenient where it falls outside the range of sentences which the Judge, applying his mind to all the relevant factors, could reasonably consider appropriate. An appellate court will only interfere if it is demonstrated that the

[273] Krstic Trial Judgement, para. 711
[274] Prosecution Appeal Brief, para. 9.46
[275] Prosecution Appeal Brief, para. 9.47

sentencing judge fell into material error of fact or law.[276] In *Tadic*, the Appeals Chamber held that it should not intervene in the exercise of the Trial Chamber's discretion with regard to sentence unless there is a "discernible error".[277] The sentence passed by the Trial Chamber is not lenient, but it is appropriate in that it struck a balance between deterrence and reconciliation.

205. The Prosecution further submits that the Special Court's purpose of providing "a credible system of justice and accountability" with a view to contributing "to the process of national reconciliation and to the restoration and maintenance of peace" cannot be achieved if the sentences imposed by the Special Court are not consistent with what the community would accept as a punishment fitting the crimes in question. The Prosecution seems to be misinterpreting what a credible system of justice and accountability are all about. The Defence submits that reconciliation cannot only be achieved by imposing a hasher sentence, but by striking a balance between deterrence and reconciliation. Further as the Trial Chamber held: One of the main purposes of a sentence imposed by an international Tribunal is to influence the legal awareness of the accused, the surviving victims, their relatives, the witnesses and the general public in order to reassure them that the legal system is implemented and enforced. Additionally, the process of sentencing is intended to convey the message that globally accepted laws and rules have to be accepted by everyone.[278]

206. The Defence accepts the general importance of deterrence as a consideration in sentencing in international crimes, but agrees with the statement in *Tadic* that, this factor must not be accorded undue prominence in the overall assessment of the sentences to be imposed on persons convicted by the International Tribunal.[279] One of the purposes of the Tribunal, in "bringing to justice' individuals responsible for serious violations of international humanitarian law, is to deter future violations. With regard to the impact of deterrence on punishment, the Appeals Chamber of ICTY has already accepted 'the

[276] Aleksovski Appeal Judgement, para. 186
[277] Tadic Appeal Judgement, para. 22
[278] Sentencing Judgement, para. 30, citing Nikolic Sentencing Judgement, para. 139.
[279] Tadic Sentencing Appeal, para. 48

general importance of deterrence as a consideration in sentencing for international crimes.' Equally, the Appeals Chamber accepts that this factor must not be accorded undue prominence in the overall assessment of sentences to be impose on persons convicted by the International Tribunal."[280]

207. The Trial Chamber rightly concluded that a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leone society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this court is mandated by the UN Security Council Resolution 1315, to achieve.[281] The Respondent submits that the crimes for which the Chamber has convicted them are grave and very serious, but what, in a sense, atones for this vice is the fact that the CDF/Kamajor fighting force of the Accused persons, backed and legtimised by the Internationally deployed force, the Ecomog, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government.[282] This achievement as the Chamber rightly noted, contributed immensely to re-establishing the rule of law in this Country where criminality, anarchy and lawlessness, which the United Nations sought to end and was determined to achieve in adopting Security Council Resolution 1315.[283]

208. The Defence submits that this sub-ground of appeal ought to be dismissed for the Prosecution has failed to explain how the Trial Chamber erred in law, and/or erred in the exercise of its sentencing discretion.

ix. *Deciding that Sentences would be Concurrent without Adequate Consideration:*

209. In this sub ground of appeal, the Prosecution has made a recital of cases of the ICTR and ICTY on concurrent and consecutive sentencing and finally questioning the Trial Chamber's discretion in holding "that this better reflects the culpability of the Accused

[280] Mucic et al., Appeals Chamber Judgement, para. 801, see also Aleksovski, Appeal Judgement, para. 185
[281] Sentencing Judgement, para. 95
[282] Ibid, para. 87
[283] Ibid, para. 87

for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas." The Prosecution further submits that notwithstanding this express decision of the Trial Chamber, the Court then simply ordered all of the sentences to be served concurrently, leading to the result that Fofana received the same overall sentence that he would have received if he had been convicted on Count 4 only, and had not also been convicted on Counts 5 and 7.[284]

210. The Defence submits that the Statute and the Rules are sufficiently liberally worded to permit the Trial Chamber to impose a concurrent or global sentence. Whether or not the Trial Chamber adopts either is within the discretion of the Chamber. In support of the view that a Chamber has such discretion, past practice of both the ICTR and the ICTY may be examined. In *Akayesu*, while pronouncing multiple sentences, Trial Chamber I clearly interpreted the Rules to allow the Tribunal to impose either a single sentence for all the counts or multiple sentences, with the understanding that in the case of the latter, the Tribunal shall decide whether such sentences should be served consecutively or concurrently.[285] It is thus apparent that it is within the discretion of the Trial Chamber to impose either a single sentence or multiple sentences for convictions on multiple counts. However, the question which arises is, in what circumstances is it appropriate for a Chamber to exercise its discretion to impose a single sentence. The Trial Chamber is of the view that the sentencing practice of both international tribunals is instructive, and has considered these practices where appropriate. However, it is also aware of the limitations of the use that can be made of the sentencing practices of these tribunals. In particular, it notes that the practice of imposing global sentences at both tribunals makes it difficult to ascertain the sentence imposed for each individual crime.[286]

211. The Defence further submits that it is within a Trial Chamber's discretion to impose sentences which are either global, concurrent or consecutive, or a mixture of concurrent and consecutive. The overarching goal in sentencing must be to ensure that the final or aggregate sentence reflects the totality of the criminal conduct and overall culpability of

[284] Prosecution Appeal Brief, para. 9.59
[285] Akayesu Trial Judgement, para. 41
[286] Sentencing Judgement, para. 41

the offender. This can be achieved through either the imposition of one sentence in respect of all offences, or several offences ordered to run concurrently, consecutively or both. The decision as to how this should be achieved lies within the discretion of the Trial Chamber.[287]

212. The Defence submits that the Prosecution has failed to show how the Trial Chamber erred in this regard and we therefore urge the Appeals Chamber to dismiss this sub-ground of appeal.

x. ***Manifest Inadequacy of the Sentence:***

213. The Prosecution does not challenge the Trial Chamber's findings of fact but rather attempts to demonstrate, in view of those facts[288], that the sentence rendered by the Trial Chamber was manifestly inadequate.

214. The Prosecution submits that the primary, and overall, error in the sentencing Judgement is that it imposes sentences which are, in the circumstances, so unreasonable or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[289] The Defendant submits that a harsher punishment does not necessarily contribute to more reconciliation. The Trial Chamber exercises a considerable amount of discretion (although not unlimited) in determining an appropriate sentencing. This is largely because of the overriding obligation to individualize a penalty to fit the individual circumstances of the accused and the gravity of the crime. To achieve this goal, Trial Chambers are obliged to consider both aggravating and mitigating circumstances relating to an individual accused[290]. This, the Respondent submits, was rightly considered by the Trial Chamber.[291]

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[287] Mucic et al., Appeals Chamber Judgement, para. 428-430
[288] Prosecution Appeal Brief, para. 9.63, 9.64
[289] Prosecution Appeal Brief, para. 9.62
[290] Celibici Appeal Judgement, para. 717
[291] Sentencing Judgement, para. 40

215. The Prosecution submits that, in the case of Fofana, the Trial Chamber found that the crimes of his subordinates of which he was convicted under Article 6(3) "were of a very serious nature, and were committed against innocent civilians", and referred to the brutality of the offences committed by Fofana's subordinates, including mutilations and killings.[292] As the Prosecution rightly submitted the Trial Chamber took into consideration that Fofana's convictions under Article 6(1) of the Statute for aiding and abetting, and that aiding and abetting as a mode of liability generally warrant a lesser sentence than that to be imposed for more direct forms of participation. The Prosecution further submits that the Trial Chamber took into account as an aggravating factor in relation to all convictions that "given his role as a former chiefdom speaker, a community elder and the CDF National Director of War, Fofana breached a position of trust in committing the offences.[293]

216. The Defence submits that the Trial Chamber's discretion is governed by the Statute and the Rules which contain the general guidelines for a Trial Chamber to take into account in sentencing. These amount into an obligation on the Trial Chamber to take into account aggravating and mitigating circumstances which it did and while passing sentences took into account the circumstances of the case and the standing of the accused persons. The Trial Chamber took into account the applicable law, the circumstances of the case, and the conduct of the accused persons and when all the relevant considerations are taken into account as in the present case, the Trial Chamber notes that Article 19 and Rule 101(B) stipulate that certain factors have to be considered in determining an appropriate sentence. These include the gravity of the offence, the individual circumstances of the Accused, any aggravating factors, and where appropriate, the general sentencing practices of the ICTR and of the national courts of Sierra Leone.[294]

217. The issue is, did the Trial Chamber consider the relevant factors and took due account thereof? The Trial Chamber's summary in paragraph 32 was prima facie correct. The Trial Chamber duly considered and took into account the relevant factors. In its Sentence,

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[292] Prosecution Appeal Brief, para. 9.64
[293] Prosecution Appeal Brief, para. 9.65
[294] Sentencing Judgement, para. 32

the Trial Chamber discussed firstly how to interpret the relevant provisions of the Statute and the Rules. The Trial Chamber held, in particular, that "[i]n considering the gravity of the offence, the Chamber has taken into account such factors as the scale and brutality of the offences committed, the role played by the Accused in their commission, the degree of suffering or impact of the crime on the immediate victim, as well as its effect on relatives of the victim, and the vulnerability and the number of the victims."[295]

218. This principle was applied in *Celebici* whereby the Appeals Chamber held that the "the litmus test for the appropriate sentence is the gravity of the offence."[296] It requires "a consideration of the particular circumstances of the case, as well as the form and degree of the participation of the accused in the crime.[297] The Prosecution has not shown that the Trial Chamber failed in its duty to make the appropriate consideration.

219. The Defence submits that after defining the principles on which it was to rely, the Trial Chamber set out its findings on the merits of the arguments put forward by the Fofana and the Prosecution. The Trial Chamber considered factors in mitigation and aggravation and held: that the crimes for which the Accused were tried and convicted remain very serious, and both Fofana and Kondewa will bear the stigma of a conviction after we have pronounced their sentences. The Chamber hopes this judgement will send a message to future pro-democracy armed forces or militia groups that notwithstanding the justness or propriety of their cause, they must observe the laws of war in pursuing or defending legitimate cause, and that they must not recruit or use children as agents or instruments of war. It will, in addition, remind them of their obligation to protect civilians who are unarmed and not participate in hostilities, and whose aspiration is only to protection, regardless of their perceived affiliation.[298]

220. The Respondent submits that the right to take into account other pertinent factors goes hand in hand with the overriding obligation to individualize a penalty to fit the individual

[295] Sentencing Judgement, para. 33
[296] Celebici Appeal Judgement, para. 731, endorsing the findings in Kupreskic Judgement, para. 852
[297] Kupreskic Judgement, para. 852, cited in Aleksovski Appeal Judgement, para. 152
[298] Sentencing Judgement, para. 96.

circumstances of the accused, the overall scope of his guilt and the gravity of the crime, the overriding consideration being that the sentence imposed must reflect the totality of the accused's criminal conduct. The Trial Chamber then concluded that: "it is our view that a manifestly repressive sentence, rather than providing the deterrent objective which it is meant to achieve, will be counterproductive to the Sierra Leone society in that it will neither be consonant with nor will it be in the overall interests and ultimate aims and objectives of justice, peace, and reconciliation that this Court is mandated by the UN Security Council Resolution 1315, to achieve. The motivation of the Accused in this case, where they fought to reinstate democracy, and the prevailing circumstances in which their crimes were committed, has therefore been taken into consideration by the Chamber in arriving at an appropriate sentence.[299]

221. Given the considerable amount of discretion vested in the Trial Chamber, the question arises as to what role the Appeals Chamber should play in the consideration of an appeal against sentence. In *Celebici,* the Appeals Chamber stated its position as follows: "the appeal process of the International Tribunal is not designed for the purpose of allowing parties to remedy their own failings or oversights during trial or sentencing." Appeals proceedings are rather of a corrective nature, [...] they do not amount to a trial de novo [...]. The test to be applied in relation to the issue as to whether a sentence should be revised is that most recently confirmed in *Furundzija* Appeal Judgement. Accordingly, as a general rule, the Appeals Chamber will not substitute its sentence for that of a Trial Chamber unless it believes that the Trial Chamber has committed an error in exercising its discretion or has failed to apply the applicable law". The Appeals Chamber will only intervene if it finds that the error was "discernible". As long as the Trial Chamber does not venture outside its "discretionary framework" in imposing a sentence, the Appeals Chamber will not intervene.[300]

222. The Prosecution submits that to the extent that the Trial Chamber was entitled to treat any of those matters as mitigating factors, the Prosecution submits that no reasonable tier of

[299] Sentencing Judgement, para. 95
[300] Celebici Appeal Judgement, paras 724 and 725

fact, properly applying the relevant sentencing principles, could have given such matters such weight as to reduce sentences of such gravity to such low terms of six and eight years.[301] The Respondent has sufficiently dealt with this point in paragraph H but reiterates that the Prosecution has not demonstrated that the Trial Chamber gave weight to extraneous or irrelevant consideration or made a clear error as the facts upon which it exercised its discretion, or that the Trial Chamber's decision was so unreasonably or plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.

223. It is for the Prosecution to show that the Trial Chamber erred in exercising its discretion, a mere recital, without more, does not discharge that burden. The Defence reiterates that the Trial Chamber has considerable discretion in determining an appropriate sentence, which includes the weight given to mitigating and aggravating circumstances. The Defence further submits that it is difficult and unhelpful to lay down a hard and fast rule on the point; there are a number of variable factors to be considered in each case.[302] Considering all the above-mentioned mitigating circumstances together and giving particular importance to such factors as found by the Trial Chamber, the Defence submits, the Trial Chamber was right to have concluded that a substantial reduction of the sentence was warranted, not only in line with the peculiar facts and circumstances of this case but also to meet the ends of justice, which we submit have been properly met.

224. The Defence therefore submits that the Prosecution has failed to demonstrate an error of the Trial Chamber in this regard. This sub-ground of appeal therefore ought to be dismissed and with it the entire appeal.

Submitted this 21st Day of January 2008.

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Wilfred Davidson Bola Carrol -

Counsel for the 1st Respondent (Moinina Fofana).

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[301] Prosecution Appeal Brief, para. 9.71

[302] Jelisic Appeal Judgement, para. 96

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