817) SCSL-04-14-A (555-672) 555

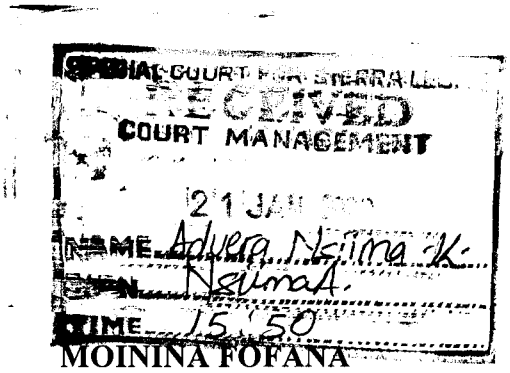
SPECIAL COURT FOR SIERRA LEONE

IN THE APPEALS CHAMBERS

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

Registrar: Mr. Herman Von Hebel

Date Filed: 21st January 2008



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

Case No. SCSL-04-14-A

Public

Kondewa Response to Prosecution Appeal Brief

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I. INTRODUCTION

1. Pursuant to Rule 112 of the Rules of Procedure and Evidence (the "Rules") and the Appeal Chamber Decision for Extension of Time,[1] the Defence for Allieu Kondewa (the "Defence") hereby submits its response to the Prosecution's Appeal Brief.[2]

2. The Prosecution filed ten Grounds of Appeal.[3] The Prosecution does not proceed on Ground 2 of its Grounds of Appeal. This Response addresses each of the remaining nine grounds of Appeal.

II. RESPONSE TO PROSECUTION'S GROUND 1

1.1 The Prosecution contends that the Trial Chamber erred in law and in fact in finding that the chapeau elements of crimes against humanity were not satisfied in this case.[4] Specifically the Prosecution argues that the Trial Chamber erred in concluding that the "evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack"[5] and as a result, the third of the chapeau elements of crimes against humanity was not satisfied.

1.2 The Defence submits that:

(a) The Trial Chamber applied the correct legal standard in concluding that the attack was not directed against any civilian population, as the civilian population was not the primary object of the attack. Therefore the third chapeau requirement for crimes against humanity was not satisfied;

(b) The evidence does not demonstrate a "pattern of victimization of civilians";

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[1] *Prosecutor v. Fofana and Kondewa,* SCSL-04-14-A-813, "Decision on Joint Urgent Renewed Joint Defence and Prosecution Motion for Extension of Time for the Filing of Response Brief," 13 December 2007.
[2] *Prosecutor v. Fofana and Kondewa,* SCSL-04-14-A-810, "Prosecution Appeal Brief", 11 December 2007.
[3] *Prosecutor v. Fofana and Kondewa,* SCSl-04-14-A-801, "Prosecution Notice of Appeal", 23 October 2007.
[4] Prosecution Appeal Brief, para. 2.5. The five chapeau elements to be satisfied for crimes against humanity are set out in Trial Chamber's Judgement, paras. 110 and 690.
[5] Trial Chamber Judgement, para. 693, relying on the *Kunarac* Appeal Judgement, para. 91.

(c) The Prosecution has misconstrued the legal concept of "crimes against humanity".

(a) Trial Chamber applied correct legal standard

1.3 The Trial Chamber concluded that the evidence did not prove beyond reasonable doubt that the civilian population was the primary object of the attack. The Trial Chamber further found that there was evidence that the attacks were directed against rebels or juntas.[6] Based on the Trial Chamber's finding, the Prosecution states that "[I]t is apparent ... that the Trial Chamber considered, as a matter of law, that an attack will not be one that is 'directed against' a civilian population if civilians are attacked in the course of attacks directed against opposing forces."[7] The Prosecution further states that the proposition that the civilian population must be "the primary object of the attack" was not "intended to mean that attacks against the civilian population committed in a widespread or systematic manner will not be crimes against humanity merely because the attacks against civilians occur during attacks on opposing forces, or in the course of an operation that had a military objective."[8]

1.4 In examining the reasoning of the *Kunarac* Appeal Judgement which the Trial Chamber relied on, the Prosecution states that the an attack will be "directed against the civilian population" if civilians are *directly* and *specifically* targeted in an attack, even if simultaneously military targets are also attacked.[9] The Prosecution also submits, as per the *Kunarac* Appeal Judgement, that the civilian population must be the *primary*, not the incidental target of an attack.[10] The Defence concurs that this is the correct legal standard for determining the third chapeau element and agrees with the Prosecution that "the question in not whether attacks against civilians coincided

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[6] Ibid.
[7] Prosecution Appeal Brief, para. 2.16.
[8] Prosecution Appeal Brief, para. 2.20.
[9] Prosecution Appeal Brief, para. 2.22.
[10] Ibid.

with attacks against military targets."[11] The question is whether the civilian population was the primary target of the attack.[12]

1.5 The basis of the Prosecution's first ground of appeal is that the "Trial Chamber proceeded on the erroneous assumption that attacks against the civilian population will not be "directed against" the civilian population if they occur in the course of the attack against military targets."[13] The Prosecution also submits that the Trial Chamber erred in failing to consider whether "there were additionally, simultaneously or subsequently, attacks directed against the civilian population."[14]

1.6 The Defence submits that the Trial Chamber did consider whether the attacks were directed against the civilian population and correctly concluded, "the evidence adduced does not prove beyond reasonable doubt that the civilian population was the primary object of the attack."[15] The further statement of the Trial Chamber, that "[B]y contrast, there is evidence that these attacks were directed against the rebels or juntas that controlled towns, villages, and communities throughout Sierra Leone" is not, as the Prosecution suggests, an error of reasoning by the Trial Chamber that since there were attacks directed against the rebels or juntas, there could not be an attack directed against the civilian population. The conclusion by the Trial Chamber was simply an evaluation of the evidence and the conclusion that the evidence did not prove beyond reasonable doubt that the civilian population was directly and specifically attacked as the primary target.

1.7 In reaching its finding the Trial Chamber then further stated that "the Chamber recalls the admission of the Prosecutor that 'the CDF and the Kamajors fought for the restoration of democracy."[16]

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[11] Prosecution Appeal Brief, para. 2.25.
[12] Prosecution Appeal Brief, para. 2.32 (emphasis added).
[13] Prosecution Appeal Brief, para. 2.234.
[14] Ibid.
[15] Trial Chamber Judgement, para. 693.
[16] Trial Chamber Judgement, para. 693. The Trial Chamber also refers to statements of Prosecution witnesses TF2-071 and TF2-008 and Defence witnesses to this same effect. The

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1.8 The Defence submits that the Prosecution is incorrect to suggest that the Trial Chamber erred in finding that the fact that the CDF "fought for the restoration of democracy" was a material consideration for the determination of the existence of crimes against humanity.[17] The Defence submits that the Trial Chamber correctly made reference to the objective or *raison d'etre* of the CDF in making its legal finding. The *ad hoc* tribunals have held that the existence of a plan or policy can be evidentially relevant in proving that an attack was directed against a civilian population though it is not a legal element for establishing crimes against humanity.[18] Equally, it should be evidentially relevant in proving that an attack was not directed against a civilian population. In this instance, the statement of the Prosecutor, a number of Prosecution witnesses and others that the aim and objective of the CDF and the Kamajors was the restoration of democracy are evidentially relevant to establishing that the civilian population was not the specific target of attacks. Further, not one Prosecution witness articulated or identified any CDF policy or objective of attacking the civilian population.[19] It is not clear how the Prosecution can reconcile its own evidence to the effect that the aim of the CDF was to restore democracy with the argument that the civilian population was the primary target of attack. Nor is it clear

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Defence also points out that in its Pre-Trial Brief the Prosecution notes that the CDF gained momentum in an attempt to defend the civilian population and restore the legitimate and democratic government, *Prosecutor v. Norman et al.*, SCSL-2004-14-PT-024, 'Prosecution's Pre-Trial Brief Pursuant to Order for Filing Pre-Trial Briefs' (Under Rules 54 and 73*bis*) of 13 February 2004, para. 18 ("Prosecution Pre-Trial Brief"). See also, testimony of Prosecution witness Colonel Iron: "All CDF operations as far as I can see appear to have been driven by the central strategic idea of the CDF, which was to defend their homelands." Trial Transcript, 14 June 2005, at page 34, line 5.

[17] Prosecution Appeal Brief, para. 2.51.

[18] *Blaškic* Appeal Judgement, para. 120; *Kunarac* Appeal Judgement, para. 98, *Limaj* Trial Judgement, para. 184.

[19] Rather, other Prosecution witnesses confirmed that the primary goal of the CDF was the defence of their homelands and the protection of civilians: Witness TF2-008 said that the objective of the Kamajors was to protect civilians and that this was told to Kamajors during training (Trial Transcript, 14 June 2005, at 34:5-18). Witness TF2-079 testified that he joined the Kamajors to "defend myself from RUF brutality and to prevent my community from being attacked by the RUF rebels." (Trial Transcript, 26 May 2005, at 7), He went on to confirm that the Kamajor movement was set up to protect the lives and properties of civilians (Trial Transcript, 27 May 2005, at 18). Prosecution Witness Colonel Iron stated that the CDF and ECOMOG had similar operational aims and objectives—to recover the country from the junta forces (Trial Transcript, 14 June 2005, at 50).

how the Prosecution can reconcile further evidence from its own witnesses of the CDF warning civilians of attacks, evidence that those warnings had been effective and evidence that Kamajors were often instructed specifically to "be careful of the civilians"[20] with their argument that "the only conclusion open to any reasonable trier of fact is that attacks committed by the CDF forces were specifically intended to target the civilian population."[21]

1.9 The Prosecution submits in its Appeal Brief that the "statement in the *Kunarac* Appeal Judgement, to the effect that the civilian population must be the 'primary object of the attack', and other similar statements in other judgments, must be read in context.[22] The Defence concurs. Indeed, the *ad hoc* tribunals have also acknowledged the need to contextualize their legal analysis in making a determination as to whether a civilian population was the target of an attack.

1.10 For example, the Trial Chamber in *Limaj* acknowledged and was "conscious" of the background and context in which the crimes of one side to a conflict are alleged to have taken place, with the considerable and widespread civilian suffering caused by the Serbian forces in Kosovo as the backdrop against which the actions of the KLA were examined.[23] The Defence submits that the comparisons with the *Limaj* case are striking. In *Limaj,* the Trial Chamber, in examining that particular context, considered that the KLA, a group resisting attempts at ethnic cleansing by the Serbian militias, had limited resources, that there were frequent transfers of territory, that localized pitched battles between the KLA and the Serbian forces were fought for one, two or

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[20] See, for example, paras. 387 and 389 of the Trial Chamber Judgement with evidence from Prosecution witness TF2-035 and TF2-048 of warnings to civilians of the attack on Tongo; para. 389 of the Trial Chamber Judgement with evidence from TF2-047 of a CDF commander repeating his order to "please be careful about the civilians."

[21] For example as stated at Prosecution Appeal Brief, para. 2.34.

[22] Prosecution Appeal Brief, para. 2.21.

[23] *Limaj* Trial Judgement, para. 193, noting that the *tu quoque* principle has no application in international law. Again the Defence notes that the Prosecution itself sets out this context, both in its own witnesses' testimony (see i.e. Footnote 16) and in its own filings. For example, the Prosecution Pre-Trial Brief acknowledges the systematic and prolonged repression and human rights abuse meted out by the combined RUF and AFRC forces against the innocent people of Sierra Leone, paras. 2-39.

three days throughout May, June and July 1998, and the fluidity of the situation at the time, made it difficult to determine with any certainty why particular individuals were murdered.[24] In reaching its conclusion that there was no KLA attack directed against a "civilian population", the Trial Chamber accepted that alleged KLA crimes, in the context of the population of Kosovo as a whole, did not amount to targeting of a civilian population.[25]

1.11 For the above reasons, the Defence submits that the Trial Chamber applied the correct legal reasoning in assessing the evidence. In concluding that the evidence did not demonstrate beyond reasonable doubt that the civilian population was the primary target of attack, the Trial Chamber did not, as the Prosecution argues, erroneously interpret the law as meaning that an attack targeting an opposing force negates the possibility of finding a concurrent or subsequent targeted attack against a civilian population.[26] The Trial Chamber simply found that the evidence did not demonstrate beyond reasonable doubt that the civilian population was the primary target of the attack.

(b) No "pattern of victimization" to demonstrate civilian population the primary target

1.12 The Prosecution proceeds to reiterate the evidence as set out by the Trial Chamber for the various crimes bases describing what it calls a "pattern of victimization of civilians"[27] and submits that on that evidence, the only conclusion open to a reasonable trier of fact is that attacks committed by CDF forces were specifically intended to target the civilian population.[28]

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[24] *Limaj* Trial Judgement, paras. 195-197.
[25] *Limaj* Trial Judgement, para. 210 (emphasis added).
[26] Prosecution Appeal Brief, para. 2.34.
[27] Prosecution Appeal Brief, para. 2.38.
[28] Prosecution Appeal Brief, para. 2.34.

1.13 The Defence submits that the evidence fails to establish that the civilian population was the primary target of an attack. The Defence submits that the Prosecution fails to distinguish between evidence that is demonstrative of an "attack" (the first chapeau requirement) and evidence that demonstrates that the attack was targeted at a civilian population. Through a selective recounting of the evidence, the Prosecution fails to take into account the evidence which the Trial Chamber used to reach its conclusion that the evidence did not demonstrate beyond reasonable doubt that the civilian population was targeted in the attack.

Evidence fails to establish civilian population was primary target

1.14 The Defence submits that the evidence as presented by the Prosecution and as accepted by the Trial Chamber demonstrates that the reason for each of the "attacks" as accepted by the Trial Chamber was the presence of rebels and junta. The Trial Chamber found the following events constituted part of a widespread attack:

(a) The attack by Kamajors on Tongo in late November / early December 1997; in early January 1998; and on 14 January 1998;
(b) The attack by Kamajors on Koribundo between 13 and 15 February 1998;
(c) The attack by Kamajors on Bo Town between 15 and 23 February 1998;
(d) The attack by Kamajors on Bonthe on 15 February 1998;
(e) The attack by Kamajors on Kenema between 15 and 18 of February 1998.

1.15 The Prosecution itself presented the evidence for each of these crime bases which demonstrated that the main reason why the CDF was even in those key towns in Sierra Leone was because they were held by the rebels and junta and suspected collaborators and the CDF wanted to flush them out – as a strategy to return the country to democracy would logically necessitate. This was accomplished in the attacks on Tongo and the one "all-out offensive" in four other towns which began on 13 February and which lasted between two and eight days. While accepting that it is possible for an attack targeted at a civilian population to occur at the same time as an

attack on a military target, the Prosecution did not present any evidence to suggest that the CDF was also in those five towns because the civilian population was also the object of attack.

1.16 With respect to Tongo, the Prosecution presented the evidence that the RUF and AFRC were forcing civilians to mine diamonds in Tongo and that if they refused they would be killed.[29] The strategic importance of Tongo to winning the war (and therefore restoring the democratic government) was stated by Prosecution witness TF2-222.[30]

1.17 With respect to the four towns included in the "all-out offensive" in February 1998, TF2-198 testified that the RUF and AFRC had a battalion stationed in Koribundo and for this reason the Kamajors wanted to capture Koribundo and flush out the AFRC and RUF.[31] TF2-017 described how the attack on Bo was motivated by the fact that Kebi Town in Bo District was of importance in the Bo campaign because it was the location of the Junta's brigade headquarters.[32] TF2-071 testified to the history of the SLA in Bonthe Town, how the Sierra Leone Navy was based there and how the relationship deteriorated after the overthrow of Kabbah with the SLA mistreating and beating civilians.[33] TF2-151 testified that prior to February 1998, Kenema was controlled by the AFRC who was working in conjunction with the rebels.[34]

1.18 The Defence submits that the evidence, as recounted by the Prosecution in paragraphs 2.37 – 2.41 of its Brief, represents neither a "course of conduct" nor a

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[29] Transcript of 22 February 2005, TF2-007, pp. 70-71, 77-78. Trial Chamber Judgement, para. 375 and footnotes 646-648 of Trial Chamber Judgement.
[30] Trial Chamber Judgement para. 381 and footnote 658. Further, as stated in Footnote 17, Prosecution witnesses TF2-035 and TF2-048 described how civilians were pre-warned of the attack on Tongo and most civilians had left.[30] The Prosecution fails to make clear why the CDF would warn civilians to leave an area if the civilians were themselves the primary target of the CDF attack.
[31] Trial Chamber Judgement, para. 416.
[32] Trial Chamber Judgement, para. 442.
[33] Trial Chamber Judgement, paras. 534-535.
[34] Trial Chamber Judgement, para. 566.

"pattern of victimization" to demonstrate that the attacks were directed at a civilian population. The Prosecution tautologically states that the evidence shows that "the manner of perpetration of these incidents makes it clear that the attacks against the civilians were specifically intended to make victims out of civilians."[35] Of course, evidence of civilians being killed or harmed is evidence of civilians being victims. Further, the Prosecution states that the Trial Chamber found the victims to be "disarrayed Sierra Leoneans including children". This information is irrelevant to the legal determination for the third chapeau requirement for crimes against humanity.[36] The Defence agrees that civilians were often victims, but such evidence does not logically translate into concluding that the civilian population was the primary target of an attack.

1.19 The Defence agrees that certain "civilians were deliberately and directly attacked" as the Prosecution suggests.[37] There was evidence of CDF targeting perceived RUF and junta collaborators and a number of killings that the Prosecution inflates into a "pattern of victimization" can be attributed to that. The Prosecution further notes in its Appeal Brief that the Trial Chamber expressly reaffirmed that "the crimes...were committed against unarmed...civilians, solely on the basis that they were unjustifiably perceived as and branded as rebel collaborators."[38] The Defence also agrees that perceived collaborators are accorded civilian status under international law. Where isolated crimes against these individuals are proved beyond reasonable doubt they may constitute war crimes, but in the absence of evidence to demonstrate that the civilian population was targeted these crimes cannot be elevated to crimes against humanity. Whether those perceived and suspected collaborators were correctly identified or not, they were targeted as individuals rather than as members of a larger targeted civilian population.[39]

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[35] Prosecution Appeal Brief, para. 2.42.
[36] Prosecution Appeal Brief, para. 2.49.
[37] Prosecution Appeal Brief, para. 2.42.
[38] Prosecution Appeal Brief, para. 3.13, referring to Sentencing Judgement, para. 47.
[39] *Limaj* Trial Judgement, para. 217.

1.20 The Defence further submits that although the Kamajors/CDF had a common aim to protect the civilian population and not commit crimes against them, this did not preclude individuals amongst them having less than noble aims and objectives of their own.[40] The Trial Chamber noted this when it stated, "there were some fighters who acts on their own without the knowledge of the central command because there area of operation was so wide."[41] Again, recounting of evidence of killings of suspected rebels or collaborators by unnamed Kamajors or by a very small number of identified Kamajors as is prevalent throughout the Prosecution's evidence does not translate into evidence that demonstrates beyond reasonable doubt that the civilian population was the primary target of CDF attacks.

1.21 In the Prosecution's view, the conclusion that the attacks were deliberately directed against the civilian population is "even clearer in view of the instructions, directions and incitement which the Kamajor leaders explicitly gave to the Kamajors prior to these attacks against civilians or as they happened."[42] Again, this evidence wholly points to, at most, evidence of instructions about particular suspected individual collaborators, rebels and juntas. This evidence reinforces the Defence's submission that at most, only rebels, juntas and collaborators were targeted, not the civilian population.

1.22 The Prosecution sets out this evidence of instructions at paragraphs 2.44 – 2.48. For example at Paragraph 2.44 of its Brief, the Prosecution recounts Norman stating "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators."[43] This evidence certainly does not support the rhetorical exaggeration

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[40] For example, a significant number of alleged killings were committed by a Kamajor named Kamabote. See Prosecution Appeal Brief, para. 2.37 and Trial Chamber judgement, paras. 388, 393 and 394. However, there was no evidence to demonstrate that Kamabote was acting in accordance with any order or direction or in furtherance of any CDF goal or plan to target the civilian population.

[41] Trial Chamber Judgement, para. 358.

[42] Prosecution Appeal Brief, para. 2.43.

[43] Prosecution Appeal Brief, para. 2.44.

of the Prosecution that there were orders to "exterminate the civilian population."[44] Again this is evidence which demonstrates at most the targeting of particular individuals but does not provide any evidential basis for concluding that a larger civilian population was the primary target of an attack.

1.23 The Defence further submits that the Prosecution, in suggesting that Norman gave instructions "that all civilians were to be killed in the attack"[45] irresponsibly and unacceptably misquotes the evidence as there is no evidence of such an order in any of the references made by the Prosecution to the Trial Chamber's Judgement (Trial Chamber's Judgement, paras. 320-321, 322, 328-329, 332-333, 334-336).[46]

1.24 Therefore, the Defence submits that this combined evidence of collaborators being targeted and of random Kamajors committing crimes does not provide either the type of evidence nor the scale of evidence required to demonstrate that the civilian population was indeed the primary target of CDF attacks.

(c) The Prosecution misconstrues the legal concept of "crimes against humanity"

1.25 The Defence submits that in attempting to argue that the alleged crimes of the CDF and the Accused fall within the parameters of crimes against humanity, the Prosecution has significantly misconstrued the legal conceptualization of "crimes against humanity".

1.26 The well-respected international criminal law academic, Cherif Bassiouni describes crimes against humanity as follows:

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[44] Prosecution Appeal Brief, para. 2.47. The Prosecution misstates the evidence. There is no evidence at all to suggest that the CDF, or any member of the CDF, suggested that the civilian population should be "exterminated".
[45] Prosecution Appeal Brief, para. 2.56.
[46] Prosecution Appeal Brief, footnote 68.

"...There are eleven different international texts defining crimes against humanity, but they all differ slightly as to their definition of that crime and its legal elements. However, what all of these definitions have in common is: (1) they refer to specific acts of violence against people irrespective of whether the person is a national or non-national and irrespective of whether these acts were committed in time or war or time of peace and (2) these acts must be the product of persecution against an identifiable group of persons irrespective of the make-up of that group or the purpose of that persecution..."[47]

1.27 The Defence submits that this definition bears itself out in the case law. A review of the case law from the ICTY and the ICTR is relevant to demonstrating that for a civilian population to be "targeted" to establish crimes against humanity, it must be shown that civilians are targeted because of some distinguishable characteristic of a civilian population. Given this requirement it is not surprising that a significant amount of the case law of the *ad hoc* tribunals establishing guilt for crimes against humanity is based on the offences of persecution and extermination, crimes which inherently require targeting of a civilian population.

1.28 The case law of the ICTY centers around conflicts that were essentially ethnic in nature and a civilian population that was targeted solely because of the distinguishing characteristic of ethnicity. For example, crimes committed in Kosovo were part of a deliberate and widespread campaign of violence directed at Kosovo Albanian civilians, and included the murder of hundreds of civilians, destruction and looting of property, and the forcible transfer and deportation of 800,000 Kosovo Albanians.[48] Crimes in Croatia relate to the objective of Serbia to remove the majority of the Croat and other non-Serb population from approximately one third of the territory of the Republic of Croatia. As part of the campaign against non-Serbs, hundreds were murdered, thousands imprisoned and tortured in detention centers, and homes and

[47] Cherif Bassiouni, *Crimes Against Humanity*, Crimes of War, November 2007, available at http://www.crimesofwar.org/thebook/book.html.

[48] See, for example, the description of events as set out in *Prosecutor v. Milosevic*, Case No. IT-99-37, Second Amended Indictment, October 29, 2001.

cultural monuments destroyed.[49] Crimes committed in Bosnia and Herzegovina relate to the forcible removal of Bosnian Muslims and Bosnian Croats from large areas of the territory.[50] This was accomplished through widespread killings, detentions, forcible deportation, plunder and destruction of property. For example, in the *Kunarac* Appeal Judgement referred to by the Prosecution[51], when the Serbians attacked civilians, they did so because of an individual characteristic of the civilian i.e. their ethnicity. Attacks were clearly directed at the civilian population – Muslim houses were burnt, all signs of Muslim culture systematically destroyed, Muslims were held in detention for months, and Muslim women were detained and subjected to systematic rape.[52] Clearly, in the context of that conflict individual civilians were targeted solely because they were Muslims. These were crimes against humanity. As a result of the nature of this conflict, a significant amount of the case law from each of these three conflict areas within the jurisdiction of the ICTY make findings of crimes against humanity for persecution and extermination.[53]

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[49] See description of events as set out in *Prosecutor v. Milosevic*, Case No. IT-02-54, Second Amended Indictment (Croatia), July 28, 2004, para. 6.

[50]See description of events as set out in *Prosecutor v. Milosevic*, Case No. IT-01-51, Initial Indictment (Bosnia), November 22, 2001.

[51] See, for example, Prosecution Appeal Brief, paras. 2.21, 2.27, 2.33.

[52] *Kunarac* Trial Judgement, paras. 573 – 575.

[53] See, for example, *Babic* Trial Judgement: Crimes against humanity (persecution); Blagojević (*Blagojević and J*okić Trial Judgement): Crimes against humanity (murder, persecution, and other inhumane acts – specifically forcible transfer); Jokić *(Blagojević and* Jokić Trial Judgement): Aiding and abetting crimes against humanity (murder, extermination and persecution); *Brdjanin* Trial Judgement: Crimes Against humanity (persecution, torture, deportation, and inhumane acts); *Deronjic* Trial Judgement: Crimes against humanity (persecution); *Dosen* Trial Judgement: Crimes against humanity (persecution); Kordić, *Kordić and Cerkez* Trial Judgment: Crimes against humanity (persecution); *Kos* Trial Judgement: Crimes against humanity (persecution); *Krstić:* Crimes against humanity (extermination and persecution); *Kovac* Appeal Judgement: crimes against humanity (enslavement and rape as part of systematic attack against civilian population targeting Muslim women); *Krstić* Appeal Judgement: crimes against humanity (persecution); *Kunarac* Appeal Judgement: Crimes against humanity (rape and torture targeting Muslim women; *Kvočka* Appeal Judgement: crime against humanity (persecution); *Prcac* Appeal Judgement: crime against humanity (persecution); *Radić* Trial Judgement: crime against humanity (persecution); *Santic* Appeal Judgement: Crimes against humanity (persecution, murder and inhumane acts. Other case law in which there have been findings of crimes against humanity not based on persecution or extermination include the cases on the siege of Sarajevo which lasted some 15 months where the SRK, carried out a deliberate "campaign of shelling and sniping" of civilians, civilian areas and the civilian population of Sarajevo. The SRK employed highly skilled and trained snipers to kill civilians. The SRK targeted the city with indiscriminate shelling for 15 months and deprived its citizens of water, electricity and food for that time period. Various ICTY

1.29 In the ICTR, the factual base is entirely based on the extermination and genocide of one group of civilians; the Tutsi and the majority of those civilians killed were killed because they were Tutsi. Clearly a civilian population distinguishable because they were Tutsi was targeted.[54]

1.30 In the particular circumstances of this case under review by the Appeal Chamber, attacks on individual civilians by Kamajors were done because of their affiliation or suspected affiliation with a fighting force, not because of a freestanding characteristic of the individual. They were attacked because they were - rightly or wrongly - suspected of being rebels, juntas or collaborators.[55] Therefore the attacks were directed at destroying military groups and individuals associated with those military groups, not because they were a part of the civilian population.

1.31 The Defence submits that the Prosecution, in attempting to argue that the attacks by the CDF were targeted at the civilian population, has mischaracterized the entire essence of crimes against humanity. The Prosecution suggests that the only conclusion a reasonable trier of fact could have reached in this circumstance using the factors as set out in the *Kunarac* Appeal is that there was a widespread attack against a civilian population.[56] Perhaps through its erroneous use of the word "extermination" the Prosecution is attempting to elevate the evidence to fit within the

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and Trial and Appeal Chambers have determined that the siege of Sarajevo was an attack directed at a civilian population (i.e. *Galić* Trial Judgement: Crimes against humanity (murder and inhumane acts for the 15-month siege of Sarajevo).

[54] See, for example, *Akayesu* Appeal Judgement: Crimes against humanity (extermination, murder, rape, torture and other inhumane acts); Barayagwiza *(Nahimana et al.* Trial Judgement*)*: Crimes against humanity (extermination and persecution); *Kambanda* Appeal Judgement: crimes against humanity (extermination and murder); *Musema* Appeal Judgement: crimes against humanity (extermination), *Nahimana et al.* Trial Judgement: crimes against humanity (extermination and persecution); Ngeze *(Nahimana et al* Trial Judgement): Crimes against humanity (extermination and persecution); *Ruggiu* Trial Judgement: Crimes against humanity (persecution); *Rutaganda* Appeal Judgement: Crimes against humanity (extermination); *Serushago* Trial Judgement: Crimes against humanity (extermination, murder and torture); *Semanza* Appeal Judgement: Aiding and abetting crimes against humanity (extermination, torture and murder); *Niyitegeka* Appeal Judgement: crimes against humanity (extermination, murder and other inhumane acts).

[55] Prosecution Appeal Brief, para. 3.13 referring to Sentencing Judgement, para. 47.

[56] Prosecution Appeal Brief, paras. 2.33 – 2.34.

legal parameters of crimes against humanity.[57] Though, of course, there was no "extermination" of a civilian population by the CDF, nor a targeting of a civilian population. For the Prosecution to suggest that crimes perpetrated over no more than a period of 10 days[58] (with one attack – Koribindo- lasting 45 minutes[59]) coupled with a significant amount of evidence demonstrating the targeting of collaborators, rebels and juntas,[60] evidence of civilians being warned to leave particular areas,[61] evidence of warning given to not harm civilians[62] and the Prosecution's own evidence that the aim of the CDF was the restoration of democracy,[63],meets the standard of crimes against humanity in light of the established case law is factually and legally wrong and does nothing more than pervert the legal conceptualization of crimes against humanity.

[57] Prosecution Appeal Brief, para. 2.47.
[58] Prosecution Appeal Brief, para. 2.35.
[59] Trial Chamber Judgement, para. 420 ("The attack lasted 45 minutes").
[60] See, for example, Trial Chamber Judgement, paras. 425, 426, 431, 440, 446, 469, 470, 493, 495, 497, 504, 518, 541, 548, 549, 551 and 552.
[61] For example, Trial Chamber Judgement, para. 387.
[62] Trial Chamber Judgement, para. 392 and para. 525 ("The Kamajors were told to stop harassing civilians.")
[63] See footnotes 13 and 16 above.

III. RESPONSE TO PROSECUTION'S GROUNDS 3 AND 4

2.1 In its third and fourth grounds of appeal, the Prosecution requests that the Appeal Chamber revise the Trial Chamber's findings and find: 1) Kondewa is individually responsible, under Article 6(1) of the Statute, for instigating all of the crimes which the Trial Chamber found were committed during the second and third attack on Tongo; and 2) Kondewa is individually responsible, under Article 6(1) of the Statute, for aiding and abetting in the planning, preparation or execution of all the crimes which the Trial Chamber found were committed during the attacks on Koribundo, Bo and Kenema.

1) Instigation of crimes in Tongo

2.2 The Defence submits that the evidence fails to establish beyond reasonable doubt that Kondewa is individually responsible under Article 6(1) of the Statute for instigating all of the crimes committed in Tongo. This is because:

(a) A causal relationship between the alleged instigation and the physical perpetration of the crimes (i.e. that the contribution of the accused in fact had an effect on the commission of the crime as is required for instigation) as is required to satisfy the *actus reus* element has not been established;

(b) Kondewa's actions do not meet the standard of having "*direct and substantial*" contribution to satisfy the *actus reus* element required for individual responsibility for instigating.

(a) No causal connection demonstrated

2.3 The Prosecution sets out the elements of instigating as found by the Trial Chamber at paragraph 3.50 of its Brief. The Defence concurs that these are the correct elements. However, the Prosecution further states that the main difference between instigating and aiding and abetting is the *mens rea* requirement; noting that it is sufficient that the aider and abettor has knowledge that his acts assist in the commission of the principle

perpetrator's crime whereas for instigating it is necessary to show that the accused had the intent to provoke or induce the commission of a crime.

2.4 The Defence submits that the Prosecution is incorrect in stating that the main difference between instigating and aiding and abetting is in the *mens rea* requirement. The *actus reus* elements for each of these crimes are also significantly different; for aiding and abetting, proof of a cause-effect relationship is not necessary whereas for instigating a key element of proof is demonstrating a causal relationship between the instigation and the perpetration of the crime. The Prosecution is therefore incorrect in stating that *"[I]n finding Kondewa responsible for aiding and abetting these crimes, the Trial Chamber found effectively that the elements of the actus reus of instigating were satisfied in this case"*.[64] To find an individual responsible for instigating there must be proof of a causal relationship.

2.5 "Instigating" means prompting another person to commit an offence.[65] Both positive acts and omissions may constitute instigation.[66] The Defence emphasizes that instigation therefore requires that the Accused actually does something or fails to do something. Further, as stated by the *Blaškić* Trial Chamber, the commission of an act by someone corroborates that a causal relationship between the instigation and the physical perpetration of the crime is an element requiring proof.[67]

2.6 In this regard, the Defence submits that there is no evidentiary proof of a causal connection between the actions of Kondewa and the crimes perpetrated in the last two attacks on Tongo and therefore, there can be no liability under Article 6(1) of the Statute for instigating.

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[64] Prosecution Appeal Brief, para. 3.92.
[65] *Akayesu* Trial Judgement, para. 482; *Blaškić* Trial Judgement, para. 280; *Kordić* Trial Judgement, para. 387.
[66] *Blaškić* Trial Judgement, para. 280.
[67] Ibid.

2.7 The Prosecution reiterates the Trial Chamber's finding that at the passing out parade in December 1997 Kondewa made a statement which was:

> *"Then all the fighters looked at Kondewa, admiring him as a man with mystic power, and he gave the last comment saying "a rebel is a rebel: surrendered, not surrendered, they're all rebels...[t]he time for their surrender has long since been exhausted so we don't need any surrendered rebel." He then said, "I give you my blessings, go boys go."*[68]

2.8 The Prosecution further states that as the Trial Chamber found that this statement encouraged the commission of crimes during the second and third attack on Tongo for which Kondewa was found guilty for aiding and abetting (and which the Defence has appealed[69]), that also "amounted to instigating those crimes".[70] This is the extent of the Prosecution's argument that the evidence satisfies the *actus reus* for instigation.

2.9 The Defence submits that the *actus reus* for instigation requires a clear contribution by the accused to the act of the other person.[71] This evidence far from satisfies this element. There is no evidence of there being any causal relationship between this one statement by Kondewa and the perpetration of any crime in Tongo. There is no evidence to show that any of the kamajors who were present at the passing out parade were the same Kamajors who were subsequently in Tongo or the same Kamajors that committed any crime. There is no evidence that any Kamajor was prompted to commit any crime on the basis of these ambiguously phrased 28 words out of Kondewa's mouth six weeks beforehand.

2.10 In the *Brdjanin* Trial Chamber decision, the Trial Chamber evaluated several statements of the Accused to determine if the accused was guilty of instigating extermination and/or willful killing. The Trial Chamber found that the statements

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[68] Prosecution Appeal Brief, para. 3.19 quoting Trial Chamber Judgement, para. 321. Also referred to at para. 3.93 of the Prosecution Appeal Brief.
[69] Kondewa Appeal Brief, paras. 122-159.
[70] Prosecution Appeal Brief, para. 3.93.
[71] *Natetilic and Martinovic* Trial Judgement, para. 60.

were not specific enough to constitute instructions of any sort and that the nexus between the statements and the actual killings was not established. The Trial Chamber stated:

> *"The Trial Chamber is not satisfied that the public utterances of the Accused, in particular his statements with respect to mixed marriages and those suggesting a campaign of retaliatory ethnicity-based murder prompted the physical perpetrators to commit any of the acts charged under Counts 4 and 5 of the Indictment, because the nexus between the public utterances of the Accused and the commission of the killings in question by the physical perpetrators has not been established. Moreover, neither the public utterances of the Accused nor the decisions of the ARK Crisis Staff are specific enough to constitute instructions by the Accused to the physical perpetrators to commit any of the killings charged".*[72]

2.11 In this case, the statement by Kondewa does not contain any instructions, directions or orders. The statement is so ambiguous that it is only through inference that it is possible to make the connection between that statement and any Kamajors interpreting it as instructions to commit any of the killings or crimes charged.

2.12 In *Brdjanin* however, the Trial Chamber found that causality was established between the acts of instigation by the Accused and the acts committed by the physical perpetrators with respect to other evidence. The Trial Chamber held:

> *"The Trial Chamber has found that decisions of the ARK Crisis Staff [for which the Accused bears responsibility] regarding the disarmament, dismissal and resettlement of non-Serbs were systematically implemented by the municipal Crisis Staffs, the local police, and the military. Moreover, it has been abundantly proved that the Accused made several inflammatory and discriminatory statements, inter alia, advocating the dismissal of non-Serbs from employment, and stating that only a few non-Serbs would be permitted to stay on the territory*

[72] *Brdjanin* Trial Judgement, para. 468 (emphasis added).

of the ARK. In light of the various positions of authority held by the Accused throughout the relevant time, these statements could only be understood by the physical perpetrators as a direct invitation and a prompting to commit crimes. Against this background, the Trial Chamber is satisfied that the Accused instigated the commission of some crimes charged in the Indictment."[73]

2.13 The Defence submits that in failing to establish any causal relationship between the words spoken by Kondewa and commission of any crimes in Tongo, the Prosecution has failed to fulfill the first part of the *actus reus* requirement of that form of individual responsibility.

(b) No direction and substantial contribution

2.14 Further, the Defence submits that Kondewa's actions do not meet the standard of having "direct and substantial" contribution to satisfy the *actus reus* element required for individual responsibility for instigating.

2.15 In relation to the involvement of an accused in a crime other than through direct participation, the Trial Chamber in *Tadic,* upon a review of Second World War case-law, concluded that to hold an individual criminally responsible for his participation in the commission of a crime other than through direct commission, it should be demonstrated that he intended to participate in the commission of the crime and that his deliberate acts contributed **directly and substantially** to the commission of the crime. The Trial Chamber stated:

"In sum, the accused will be found criminally culpable for any conduct where it is determined that he knowingly participated in the commission of an offence that violates international humanitarian law and his participation directly and substantially affected the commission of that offence through supporting the actual commission before, during, or after the incident. He will also be

[73] *Brdjanin* Trial Judgement, para. 360 (emphasis added).

responsible for all that naturally results from the commission of the act in question."[74]

2.16 It is now firmly established that for the accused to be criminally culpable his conduct must have been proved, beyond a reasonable doubt, to have contributed to, or have had an effect on, the commission of the crime.[75] What constitutes the *actus reus* and the requisite contribution inevitably varies with each mode of participation set out in Article 6(1).[76] What is clear is that the contribution to the undertaking must be a substantial one.[77]

2.17 The Defence submits that no reasonable trier of fact could reach the conclusion that the ambiguously phrased words of Kondewa at the passing out parade meet the evidential standard of a substantial contribution. The evidence also fails to establish that these words had any direct contribution on the commission of a crime. The evidence is only that Kondewa said these words. It is only through broad stretches of inference and implication that the Prosecution can suggest that the only reasonable conclusion is that this resulted in the instigation of crimes. Clearly, without further evidence demonstrating both the causal connection and the substantial contribution this is not the case.

2) Aiding and abetting crimes in Koribundo, Bo and Kenema

2.18 The Prosecution submits that on the evidence accepted by the Trial Chamber, the only conclusion for a reasonable trier of fact was that Kondewa gave encouragement and moral support to the planners of the attacks and the crimes and that therefore he

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[74] *Tadić* Trial Judgement, para. 692. See also *Kordić* Appeals Judgement, para 27 "The *actus reus* is satisfied if it is shown that the conduct of the accused was a factor substantially contributing to the perpetrator's conduct."
[75] *Tadić* Trial Judgement, para. 673-674; Čelebići *Trial* Judgement, para. 326; *Akayesu Trial* Judgement, para. 473-475; *Furundzija* Judgement, para. 235;
[76] *Akayesu* Trial Judgement, paras. 480-485.
[77] See for example, *Kayeshima et al.* Trial Judgement, para. 199.

aided and abetted in the planning of those crimes in Koribundo, Bo and Kenema.[78] This is based on the following evidence set out at para. 3.95 of the Prosecution's Appeal Brief:

- Kondewa was present at the December 1997 Commanders Meeting where the attack on Tongo was discussed;
- Kondewa was present at two meetings in January 1998 where the attacks on Bo and Koribundo were discussed.
- On the basis of his status as High Priest, as a member of the "Holy Trinity", that Kondewa gave encouragement and moral support to the planners of the attacks and the crimes and therefore aided and abetted in those crimes.[79]

2.19 The Defence submits that to prove aiding and abetting beyond reasonable doubt, the evidence - as with instigation as argued above - must demonstrate that the acts of the accused had a "substantial effect" upon the perpetration of a crime. The Defence submits that the evidence accepted by the Trial Chamber and relied upon by the Prosecution in its Appeal falls well below this standard.

2.20 The Defence relies on its arguments as set out in its Appeal Brief at Paragraphs 141 – 154 in appealing the Trial Chamber's finding that Kondewa aided and abetted the perpetration of crimes in Tongo. Similarly, the Defence submits that on the evidence no reasonable trier of fact could conclude that attending two meetings at which the attacks on Bo and Koribundo were discussed, where the only evidence of Kondewa actually saying anything was to give his blessing and medicine to Kamajors, satisfied the "substantial effect" test that is well established in the *ad hoc* tribunals' jurisprudence.[80]

2.21 While the Defence does not dispute that the Kamajors had great respect for Kondewa and that they looked up to him, his mere presence at meetings in the

[78] Prosecution Appeal Brief para. 3.98.
[79] Prosecution Appeal Brief, para. 3.98.
[80] See Appendices C and D of the Kondewa Defence Appeal Brief.

absence of evidence that Kondewa actually did anything other than fulfill his role as High Priest in giving the Kamajors a blessing does not meet the evidential standard required to demonstrate aiding and abetting beyond reasonable doubt. The seniority of Kondewa, the reverence shown towards him, that he is analogized to the "Holy Ghost" are irrelevant without evidence that shows that Kondewa actually did something that had a "substantial effect" to aid and abet in planning. The Defence subtmits that there is no such evidence and that no reasonable trier of fact could conclude beyond reasonable doubt that Kondewa aided and abetted in planning.

IV. RESPONSE TO PROSECUTION'S GROUND 5

3-4.1 The Prosecution's fifth ground of appeal is that the Trial Chamber failed to clearly describe the full extent of Kondewa's responsibility for the crime of enlisting children under the age of 15 into armed forces or groups. Trial Chamber convicted Kondewa under Article 6(1) for committed this crime, finding that Kondewa was individually responsible for committing the crime of enlistment of a child under 15 into an armed force or group.[81] However the Prosecution requests the Appeal Chamber to find that Kondewa bears individual responsibility on Count 8 of the Indictment of enlistment of an unknown number of children into armed forces or groups and/or using them to participate actively in hostilities.[82]

3-4.2 The Prosecution states that significantly the Trial Chamber made the finding, based on the evidence of TF2-021, that in the circumstances of a particular initiation described by the witness, "it is beyond reasonable doubt that Kondewa...was also performing an act analogous to enlisting them for active military service."[83] The Prosecution further submits that Kondewa is also liable of the offence of aiding and abetting the enlistment of more than one child soldier.[84] In particular, the Prosecution refers to the 20 children of the same age group initiated with TF2-021.

3-4.3 The Defence submits that:

(a) the evidence on which Kondewa was found individually responsible for enlisting of one child into an armed force or group was so flawed that it is impossible from that evidence to reach the further conclusion that Kondewa enlisted more than one child or that he aided and abetted the enlistment of more than one child;

(b) initiation does not equate to enlistment.

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[81] Prosecution Appeal Brief, para. 4.29. The Defence has appealed this finding.
[82] Prosecution Appeal Brief, para. 4.4.
[83] Prosecution Appeal Brief, para. 4.36.
[84] Prosecution Appeal Brief, para. 4.38.

3-4.4 The Defence reiterates its arguments in relation to the testimony of TF2-021 and the Trial Chamber's finding that through the initiation of TF2-021 (and twenty other children) Kondewa effectively committed the crime of enlistment. The Defence also reiterates its arguments that the Trial Chamber erred in conflating initiation with enlistment. These arguments are set out at paragraphs 186- 215 of the Defence Appeal Brief. The Defence submits that the Prosecution's argument that Kondewa is liable for aiding and abetting in the enlistment of the twenty other child soldiers fails primarily on the ambiguity of the testimony of TF2-021 and the Trial Chamber's own confusion as to its interpretation.

3-4.5 At para. 4.41 of its Appeal Brief, the Prosecution states *"[T]he initiation process conducted by Kondewa in Base Zero was a substantial contribution to the crime of enlistment and/or use of under-aged children to participate in combat hostilities."* The Defence is unclear as to the meaning of this statement as it is a legal conclusion as to the satisfaction of an element of the *actus reus* for aiding and abetting, which is the Appeal Chamber's role. Further, merely stating that initiations were a substantial contribution to enlistment does not mean anything in the absence of any evidence that actually demonstrates that they were. The Prosecution refers to evidence given by their Expert Witness who expressed her belief that initiation was a stepping stone to recruitment, and the evidence of TF2-014 who stated that Kamajors would go to war early if they had been initiated. It is unclear how this evidence demonstrates that initiations were a substantial contribution to the crime of enlistment. The relevance of paras. 4.42 and 4.43 is also unclear.

3-4.6 The Prosecution has failed to show that Kondewa made a substantial contribution to the crime of enlistment, specifically in the case of the 20 other boys initiated with TF2-021 as the Prosecution has argued. The evidence with respect to TF2-021 is deeply flawed and the Prosecution fails to establish how initiation

"substantially" contributed to enlistment. On this basis the Appeal Chamber should reject this ground of appeal.

V. RESPONSE TO PROSECUTION'S GROUND SIX

1. MR. KONDEWA'S ACQUITTAL FOR TERRORISM

5.1 Under Ground Six of the Prosecution's Appeal Brief, the Prosecution takes issue with three determinations made by the Trial Chamber specifically relevant to Mr. Kondewa. Each section below will address the Prosecution's submissions.

A. Alleged error in law regarding interpretation of the Indictment

5.2 The Prosecution takes issue with an aspect of the Trial Chamber's holding regarding Count 6. Paragraph 28 in the Indictment states that "at all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 to 27 and charged in counts 1 to 5, including threats to kill, destroy and loot, as part of a campaign to terrorize the civilian populations of those areas and did terrorize those populations".[85]

5.3 The Trial Chamber decided that it would "consider under [Count 6], only those crimes which are charged *and* are found to have been committed under Counts 1-5 in the Indictment".[86] Thus, while the Indictment only refers to conduct "charged", the Judgement referred to conduct "charged" and "committed", meaning that the Trial Chamber would only consider acts for which Mr. Kondewa was found guilty under Counts 1-5 for Count 6. The Trial Chamber *"[would] not consider other killings which may have occurred elsewhere in relation to [Count 6]"*.[87]

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[85] Indictment, para. 28.
[86] Prosecution Appeal Brief, para. 5.6 (quoting Trial Chamber Judgement, para. 879) (emphasis added).
[87] Trial Chamber Judgement, para. 49.

5.4 The Prosecution suggests that this interpretation is invalid. The Trial Chamber erred by including the phrase "and are found to have been committed", which was not originally stated in paragraph 28 of the Indictment. This phrase created an additional prerequisite that was unjustifiably added to the terms of the Indictment, and thus the conclusion was unwarranted.

5.5 The Prosecution suggests that the Trial Chamber should rather have considered all crimes "*set forth in paragraphs 22 through 27 and charged in counts 1 through 5*".[88] Mr. Kondewa only needed to have been charged with the crime. Even if he was not convicted of a certain crime, independent consideration under Count 6 should have been made.

5.6 The Defence submits that the Trial Chamber was correct and that its interpretation should be upheld.

1. The Trial Chamber did not alter the prerequisites of Count 6 and correctly held that only crimes charged and convicted be considered

5.7 The Prosecution compares the language of the Judgement with the language of the Indictment. Paragraph 28 of the Indictment states "*only those crimes which are charged*".[89] The Judgement states "only those crimes which are charged and are found to have been committed".[90] Because the language on its face differs, the Prosecution suggests that the Trial Chamber changed the intended meaning and prerequisites. As a result, the altered language changed the fundamental intent and requirements of the Indictment. Had the Trial Chamber intended to take the exact language of paragraph 28 and alter it to

[88] Trial Chamber Judgement, para. 28.
[89] Indictment.
[90] Trial Chamber Judgement, para. 49.

add a prerequisite, then the interpretation of paragraph 28 with the additional phrase might have been unwarranted. However, this was not the case.

5.8 The Trial Chamber in its Judgment was *interpreting* paragraph 28 within its general interpretation of Count 6 as a whole. This was expressly stated when it started by stating it had "adopted a limited interpretation of Count [6]."[91] Thus, the language in the Judgement expresses its conclusion, not the language of the Indictment. As such, the Trial Chamber did not add a prerequisite. The fact that the Trial Chamber used certain language from paragraph 28 within its own finding does not mean the Trial Chamber added a requirement *per se* as the Prosecution suggests.[92]

5.9 The Trial Chamber has broad discretion to interpret the Indictment, and "*appellate intervention is warranted only in limited circumstances*".[93] This is true especially when a vague Indictment necessitated the Trial Chamber to fairly and proportionately interpret it. If the Trial Chamber has properly exercised its discretion, the Appeals Chamber may not intervene solely because it may have exercised the discretion differently.[94] Proportionality invokes the "*balancing of potentially conflicting rights of an accused, the restriction of one right to the advantage of another right is contingent on three factors [within public international law]: it must be suitable, it must be necessary, and the degree and scope of the restriction must remain in a reasonable relationship to the preference given to the other right*".[95] Thus, procedural measures should never be capricious or excessive, and if it is

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[91] *Ibid.*, para. 49.
[92] Prosecution Appeal Brief, para. 5.6.
[93] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-AR50, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber II Decision of 6 October 2004 Denying Leave to File Amended Indictment, para. 11 (2004) (***Bizimungu* Decision**); *Prosecutor v. Karamera et al.*, ICTR-98-44-AR73, Decision on Prosecutor's Interlocutory Appeal Against Trial Chamber III Decision of 8 October 2004 Denying Leave to File an Amended Indictment, para. 11, (2003) (***Karamera* Decision**).
[94] *Karamera* Decision, para. 11.
[95] *Prosecutor v. Krajišnik*, IT-00-39-A, Decision on Momcilo Krajišnik's Request to Self-Represent, On Counsel's Motions in Relation to Appointment of Amicus Curiae, and On the Prosecution Motion of 16 February 2007, para. 69, (2007).

sufficient to use a more lenient measure, it must be applied.[96] To adhere to the Prosecution's suggested interpretation of Counts 6-7 would go beyond procedural measures capricious or excessive in nature.

5.10 Moreover, it is evident that concerns of prejudice to the accused were guiding the Trial Chamber's interpretation. The concern for fairness and prejudice to Mr. Kondewa was expressed in paragraph 48 when the Trial Chamber dismissed evidence because "*it would be prejudicial to the Accused to allow such evidence to be admitted....*"[97] The Trial Chamber's concern in a proportional and just interpretation of the Indictment can also be inferred to have existed when interpreting Counts 6-7 in paragraph 49 of the Judgement. The Prosecution suggests that the Trial Chamber had no basis in the applicable law for its finding.[98] However, failure to limit Counts 6-7 would have unjustly and unlawfully prejudiced Mr. Kondewa, and thus the Trial Chamber did not abuse its discretion.

2. The Trial Chamber's limiting interpretation was needed due to Count 6's overly broad and disproportionate scope

5.11 The Defence submits that the Trial Chamber correctly limited Count 6 by limiting and clarifying its overly broad scope.

5.12 An examination of paragraph 28 discloses a multiplicity of allegations in the particulars of the alleged offences of terrorizing the civilian population and collective punishments. Paragraph 28 appears to charge Mr. Kondewa with two offences: terrorizing the population and collective punishments respectively. However, the Indictment charged Mr. Kondewa with five

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[96] *Prosecutor v. Martić,* IT-95-11-PT, Decision on Second Motion for Provisional Relief, para. 13 (quoting *Prosecutor v. Dragan Jokić*, IT-02-53-PT, Decision on Request for Provisional Release of Accused *Jokić*, 28 March 2002, para. 18).
[97] Trial Chamber Judgement, para. 48.
[98] Prosecution Appeal Brief, para. 5.9.

additional charges by reference of Counts 1-5.[99] Count 6 does not charge Mr. Kondewa with one crime but, rather, with six crimes.

5.13 The Prosecution suggests that the Trial Chamber should have considered all acts charged under Counts 1-5 to again be considered under Counts 6-7. The drawback lies with the *means* by which the crimes and offences should have been considered. Paragraph 28 in effect incorporates offences already outlined and detailed in Counts 1 through 5. The Indictment as vague, general, and uncertain prejudiced Mr. Kondewa by laying multiple charges therein. The indirect and vague manner through which the paragraph lays charges within the Indictment by its vagueness and duplicity violates the rule of multiplicity and uncertainty.

5.14 Count 6 proliferates "*the issues for trial ... [a clear] example of an infringement of the rule governing the form of an Indictment technically known as the rule against duplicity*".[100] Allowing for the reconsideration of every act under Counts 1-5 through Counts 6, given the means and vagueness of the language, undermines the principles of fairness and proportionality by permitting an overly broad, disproportionate, and unwarranted interpretation of the Indictment.

5.15 In *Lansana and Eleven Others v. Regina*, a decision of the Sierra Leone Court of Appeal, the court applied English case law authorities regarding duplicity, multiplicity, and uncertainty as defects in the form of an indictment.[101] The court stated that: "*The general rule is that for each separate count there should be only one act set out which constitutes the*

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[99] The five are: (1) murder, a Crime Against Humanity; (2) violence to life, health and physical or mental well-being of persons, in particular murder, as a War Crime; (3) inhumane acts as a Crime against Humanity; (4) Violence to life, health and physical or well-being of persons, in particular cruel treatment, as a War Crime; and (5) pillage, as a War Crime. These five and distinct offences exist as additional offences to the separate two offences embodied in Counts 6-7.

[100] Trial Chamber Judgement, para. 15.

[101] *Lansana and Eleven Others v. Regina,* ALRS SL 186 (1970-1971).

offence. If two or three offences are set out in the same count, separated by the disjunctive 'or' and the conviction should be quashed".[102]

5.16 The court in *Prosecutor v. Bradjanin* stated that "[*t*]*he old pleading rule was that a count which contained more than one offence was bad for duplicity, because it did not permit an accused to plead guilty to one or more offences and not guilty to the other or other offences included within the one count*".[103] *Although the court stated that this rule would be "completely impracticable ... given the massive scale of the offences which it has to deal with," this was in reference to laying separate charges for each murder*".[104]

5.17 In *Prosecutor v. Bizimungu et al.*, the court similarly stated that *"[t]he rule against duplicity generally forbids the charging of two separate offences in a single count, although a single count may charge different means of committing the same offence*".[105] In *Bizimungu*, the Appeals Chamber upheld the Trial Chamber's decision not to grant the Prosecution's request to charge genocide and complicity in genocide alternatively but in one single count.[106] The lower court in *Bizimungu* stated that even *"[w]ith regard to the Prosecution intention to combine and charge alternatively the Counts of Genocide and Complicity in Genocide, the Chamber finds this procedure irregular and would render the count bad for duplicity and will pose problems particularly when it has to pronounce judgment and sentence on one or the other of the charges*".[107] The request in *Bizimungu* to combine the offence with the *means* of committing the offence in the same count was denied. Paragraph 28 in effect goes beyond *Bizimungu* by incorporating completely

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[102] *Ibid.*
[103] *Prosecutor v. Brdjanin et al.*, IT-99-36, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, para. 61 (2001).
[104] *Ibid.*
[105] *Bizimungu Decision,* para. 23 (emphasis added).
[106] *Ibid.*, paras. 22-23.
[107] *Prosecutor v. Bizimungu et al.*, ICTR-99-50-I, Decision on the Prosecutor's Request for Leave to File an Amended Indictment, para. 31 (2003).

different and distinct offenses in one single count, a method the Prosecution would suggest is correct.

3. The Trial Chamber was correct in not considering acts of burning as pillage under Count 5, which thus precludes consideration under Count 6

5.18 The Prosecution submits that the Trial Chamber *"failed to examine whether acts of burning of property, which were charged in Count 5 of the Indictment (pillage), satisfied the elements of terrorism under Count 6, on the ground that the Accused had not been convicted of that conduct as pillage under Count 5."*[108]

5.19 The Defence, however, submits that the Trial Chamber was correct in holding that burning did not constitute acts of pillage.[109] Definitions and the usage of the term pillage traditionally focused on the unlawful appropriation of property, which support the Trial Chamber's holding that pillage is the unlawful appropriation of property.[110] Thus, given the Trial Chamber's limited interpretation, such acts are precluded from being considered under Count 6.

5.20 Thus, the Defence submits that the Trial Chamber's finding was correct regarding Count 6. In *Prosecutor v. Čermak et al.*, the court stated that *"[w]hen reviewing a Trial Chamber's discretionary decision, the question before the Appeals Chamber is not whether it agrees with that decision, but whether the Trial Chamber has correctly exercised its discretion in reaching that decision"*.[111] The Defence submits that the Trial Chamber did not commit any discernible legal error nor abuse its discretion and, in fact, was careful not to abuse it.

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[108] Prosecution Appeal Brief, para. 5.12.
[109] *See infra* [Part 2].
[110] *Ibid.*
[111] *Prosecutor v. Čermak et al.*, IT-03-73-AR73.1, Decision on Interlocutory Appeals Against the Trial Chamber's Decision to Amend the Indictment and for Joinder, para. 6 (2006).

B. Alleged individual responsibility in towns of Tongo

5.21 The second factor the Prosecution takes issue with regarding Mr. Kondewa is that the Trial Chamber erred in law and in fact in finding that Mr. Kondewa was not individually responsible under Article 6(1) of the Statute for aiding and abetting in the planning, preparation or execution of acts of terrorism in the towns of Tongo.[112]

5.22 The three elements of terrorism, in addition to the chapeau requirements of Article 3 of the Statute are:

(i) Acts or threats of violence directed against persons or property;

(ii) The Accused intended to make persons or property the object of those acts and threats of violence or acted in the reasonable knowledge that this would likely occur; and

(iii) The acts or threats of violence were committed with the primary purpose of spreading terror among those persons.[113]

5.23 The Prosecution disputes the Trial Chamber's exclusive reliance upon the instruction given by Norman at the December 1997 Passing Out Parade to determine whether the *perpetrators* of the proven acts of violence had the specific intent to terrorise the civilian population.[114] The Prosecution suggests that the Trial Chamber "should therefore have considered all of the circumstances of the Tongo crimes as a whole with a view to determining whether the specific intent to spread terror had been established, rather than focusing simply on the instruction given by Norman at the December 1997 Passing Out Parade".[115]

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[112] Prosecution Appeal Brief, para. 5.15.
[113] Trial Chamber Judgement, para. 170.
[114] Prosecution Appeal Brief, para. 5.17.
[115] *Ibid.*

5.24 The Prosecution included evidence in its Appeal Brief that should have been considered in addition to Norman's instruction at the Passing Out Parade.[116] The "*intent to spread terror can be inferred from the circumstances of the acts in question, in particular their nature, manner, timing, and duration*".[117] The Prosecution thus asserts that Mr. Kondewa had the required awareness to be liable for terrorism by virtue of aiding and abetting and would have been found guilty if other evidence had been considered.[118]

5.25 The Trial Chamber held 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 to destroy their houses, this is not the only reasonable inference that can be drawn from the evidence*".[119] The Defence submits that the Trial Chamber was correct and that its finding should be upheld.

1. Terrorism as a Specific Intent Crime

5.26 For specific intent crimes, the aider and abettor must have knowledge of the *specific intent* (dolus specialis) of the perpetrator to commit the act of terrorism.[120] The "defining element of the offence of acts of terrorism is the intent to spread terror among the protected population",[121] which is prohibited under Article 51(2) of Additional Protocol I and Article 13(2) of Additional Protocol II to the Geneva Conventions. The fact that a general act of violence, for example, known to be committed or that has been committed cannot suffice to establish guilt of terrorism beyond a reasonable doubt. The civilian

[116] *Ibid.*, para. 5.21.
[117] *Ibid.*, para. 5.17 (referencing Galić Appeal Judgement, para. 104) (emphasis added).
[118] *Ibid.*,, para. 5.32.
[119] Trial Chamber Judgement, para. 731.
[120] *Ibid.*, para. 743.
[121] *Ibid.*, para. 175.

population may be terrorised and frightened by war. Legitimate military actions may have a consequence in terrorising civilian populations. However, the offence of terrorism "is meant to criminalise acts or threats that are undertaken for the primary purpose of spreading terror in the protected population".[122]

5.27 To establish guilt, the specific intent of the *mens rea* to spread terror must be proven as an element of the offence. While the Prosecution suggests that the intent to spread terror can be inferred from the circumstances, nothing in the evidence from the Trial Chamber's Judgement satisfies both elements beyond a reasonable doubt to establish that Mr. Kondewa is guilty of acts of terrorism. For such a conclusion to be inferred, Mr. Kondewa must have had knowledge of the specific intent. There is insufficient evidence to suggest that such knowledge exists to convict Mr. Kondewa for two reasons: 1) the evidence could not sufficiently infer a conclusion to convict Mr. Kondewa for terrorism, a specific intent crime; and 2) an inference from which other reasonable inferences may be drawn cannot establish guilt beyond a reasonable doubt under a *prima facie* case.

2. Guilt Not Established Beyond a Reasonable Doubt

5.28 Even if the Trial Chamber had relied on the evidence in paragraph 5.21, the two-part test would not have established Mr. Kondewa guilt beyond a reasonable doubt. For a doubt to be reasonable, it must arise from the evidence or from the want of it. The doubt cannot be an imaginary doubt or conjecture unrelated to the evidence. Reasonable doubt "is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case, which, after the entire

[122] *Ibid.*

comparison and consideration of all the evidence ... [where] they cannot say they *feel an abiding conviction of the truth of the charge*".[123]

5.29 In *Prosecutor v. Delalić et al.*, the Trial Chamber stated that proof of beyond a reasonable doubt need not reach certainty, but it must carry a high degree of probability. "*Proof beyond a reasonable doubt does not mean proof beyond the shadow of a doubt. The law would fail to protect the community if it admitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour, which can be dismissed with the sentence, 'of course it is possible, but not in the least probable', the case is proved beyond reasonable doubt, but nothing short of that will suffice.*[124]

5.30 Under this standard, the acts provided in paragraph 5.21 of the Prosecution Appeal Brief do not establish beyond a reasonable doubt any specific intent that the ***primary*** purpose of the CDF was spreading terror among the civilian population. Moreover, the fact that AFRC and RUF rebels collectively attacked Tongo on 11 August 1997 and occupied it until January 1998 cannot and should not be ignored.[125] RUF and AFRC rebels were known to have collectively attacked and occupied Tongo until January 1998, the timeframe during which Mr. Kondewa was found guilty. A prevalent preoccupation of the CDF and Kamajors was to restore President Kabbah's government, to prevent the State of Sierra Leone from further destabilization and collapse, and to restore the democratically elected Government of Sierra Leone to power thereby gaining constitutional legitimacy.[126] Within that background

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[123] West Pub. 2002 (emphasis added).
[124] *Prosecutor v. Delalić et al.*, IT-96-21-T, Judgement, para. (1998) (quoting Lord Denning in *Miller v. Minister of Pensions* [1947] 1 All ER 372, 373-74) (***Delalić* Judgement**).
[125] Trial Chamber Judgement, para. 375 (citing Transcript of 1 March 2005, TF2-027, pp. 70-71, Transcript of 22 February 2005, TF2-027, p. 10 Transcript of 18 February 2005, TF2-027, pp. 78-79).
[126] The collective defensive efforts of the Kamajors and CDF were supported by President Kabbah, the *de jure* sovereign, vested with the supreme executive authority of the Republic of Sierra Leone. The need to defend oneself from threat to life is not only justifiable but reasonable during an armed conflict. As Justice Bankole Thompson stated, "[The defence of necessity] must be grounded either in excuse or justification. The act of the accused must have been done in the interest of self-preservation, charcterised not by

and context, the nature of the specific intent to terrorize cannot be founded to establish Mr. Kondewa's guilt beyond a reasonable doubt.

5.31 The Prosecution suggests, however, that all attacks were made with the specific intent to terrorize the civilian population and that all such attacks were conclusively perpetrated by the Kamajors. However, nothing exists to suggest that this was established beyond a reasonable doubt, and the Prosecution's suggestion does not merit reversal of the Trial Chamber's holding.

5.32 Even if the specific intent of the perpetrator to spread terror was established, which the Defence does not accept except for the sake of argument, the evidence does not prove beyond a reasonable doubt that Mr. Kondewa had knowledge of such intent. The Trial Chamber found that "it has *not* been proved beyond a reasonable doubt that Kondewa had the requisite knowledge, an essential element of the crime of acts of terrorism".[127] Nothing suggests that Mr. Kondewa have knowledge of the specific *intent* of the perpetrator to commit such crimes.[128] Thus, a *prima facie* case does not exist against Mr. Konewa to establish any guilt beyond a reasonable doubt.

5.33 Moreover, the Defence submits that the decision to rely on the instruction at the Passing Out Parade was within the discretion of the Trial Chamber. The selection of various evidence to rely upon and use by the Trial Chamber was done throughout the Judgement and was not only done for this specific instance.

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reference to its voluntariness but by its unpunishable nature...[T]he situation must be so imminent and the peril so pressing that normal human instincts cry out for action and make counsel of patience unreasonable." Judgement, Annex C – Separate Concurring and Partially Dissenting Opinion of Hon. Justice Bankole Filed Pursuant to Article 18 of the Statute, para. 79.

[127] Trial Chamber Judgement, para. 743 (emphasis added).

[128] *Ibid.*

5.34 Thus, the Defence submits that the Trial Chamber did not commit reversible error. The Trial Chamber's holding not to convict Mr. Kondewa of terrorism in the towns of Tongo should be upheld.

C. Alleged responsibility in Bonthe District

5.35 The third factor the Prosecution takes issue with is the Trial Chamber's finding that Mr. Kondewa could not be held liable under Count 6 for the offences committed in the Bonthe District.[129] The Trial Chamber held that Mr. Kondewa could not be held liable under Count 6 for the Bonthe District, as "it has not been established beyond reasonable doubt that Kondewa knew or had reason to know that such acts [alleged as terrorism] had been committed by his subordinates for the primary purpose of spreading terror".[130]

5.36 The applicable law under Article 6(3) requires that the superior either(i) knew or (ii) had reason to know that his subordinates were about to commit criminal acts or had already done so. The Trial Chamber held that with respect to Count 6 that:

> *"while some of the criminal acts which were committed by the Kamajors in the Bonthe Town might have been committed with the primary purpose of spreading terror among the civilian population, the Chamber finds on the totality of the evidence that it has not been established beyond a reasonable doubt that Kondewa knew or had reason to know that such acts had been committed by his subordinates for the primary purpose of spreading terror".*[131]

1. Terrorism as a Specific Intent Crime

[129] Prosecution Appeal Brief, para. 5.59.
[130] Trial Chamber Judgement, para. 879.
[131] *Ibid.*

5.37 The Defence adopts paragraphs 5.26 and 5.27. The Defence submits similarly that insufficient evidence exists to prove beyond a reasonable doubt that Mr. Kondewa had the requisite knowledge to satisfy the elements of the offence of terrorism. The link between the acts of the subordinates and his knowledge regarding the *specific* act of terrorism is unfounded.

5.38 In the *Čelebici* case, the Appeals Chamber upheld the interpretation given by the Trial Chamber of the standard "had reason to know" and found that a superior would be criminally responsible as a superior only if information was available to him which would have put him on notice of offences committed by subordinates.[132]

5.39 In *Prosecutor v. Galić*, for example, the Trial Chamber found that *Galić* was guilty as a superior of terrorism because he had failed to prevent the commission of the crimes and to punish the perpetrators *even though he had knowledge* of the crimes and had control over the SRK forces.[133] The court also found that *Galić* had furthered the campaign of terror through orders relayed down the SRK chain of command.[134]

5.40 Contrary to the Prosecution's submissions, the Trial Chamber did not find sufficient proof that the events in paragraphs 564 and 565 were within the knowledge of Mr. Kondewa or happened during the indictment period. Moreover, material in consistencies existed in TF2-116's statements, a witness for which the Trial Chamber relied upon substantially to make its findings in the Bonthe District. Upon cross-examination, the witness admitted not to have been a direct witness to the killings.[135] These material inconsistencies and statements undermine the witness's credibility, which include the fact that

[132] *Čelebici* Appeal Judgement, para. 241.
[133] *Prosecutor v.* Galić, IT-98-29-T, Judgement and Opinion, para. 749 (2003).
[134] *Ibid.*
[135] Transcript of TF2-116, 9 November 2004, p. 43.

TF2-116 was not familiar with the structure of the Kamajors,[136] that the witness did not inform anyone including Mr. Kondewa of the alleged incidents,[137] and that the late Hinga Norma was seen in Bonthe much later than the time of the incidents reported by the witness.[138]

2. Guilt Not Established Beyond a Reasonable Doubt

5.41 The evidence cannot link terrorism with the specific intent necessary to establish Mr. Kondewa's guilt beyond a reasonable doubt and adopts paragraph 5.26 to emphasize that terrorism is a specific intent crime. A stronger causal link must be established for the specific and requisite *mens rea* to exist to find Mr. Kondewa guilty beyond a reasonable doubt.

5.42 The evidence relied upon by the Trial Chamber, in addition to the evidence the Prosecution suggests the Trial Chamber should have used, do not conclude beyond a reasonable doubt that Mr. Kondewa knew or should have known that his subordinates were about to commit or had committed *per se* the specific acts of terrorism.

5.43 The Defence submits that this does not merit reversal, and that the Trial Chamber's holding not to convict Mr. Kondewa of terrorism in the Bonthe District should be upheld.

D. CONCLUSION

5.44 For the reasons stated above, the Defence respectfully requests the Appeals Chamber to uphold the findings of the Trial Chamber as stated in this section.

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[136] Transcript of TF2-116, 9 November 2004, p. 50.
[137] *Ibid.*, p. 49.
[138] *Ibid.*, p. 41.

VI. RESPONSE TO PROSECUTION'S GROUND 7: BURNING AS PILLAGE

6.1 Under Ground 7 of the Prosecution's Appeal Brief, the Prosecution takes issue with the Trial Chamber's decision in paragraph 166 to define pillage without including the "destruction of property by burning".[139]

6.2 The Trial Chamber specifically and clearly outlined the elements of pillage in paragraph 165as:

(i) The Accused unlawfully appropriated the property;
(ii) The appropriation was without the consent of the owner; and
(iii) The Accused intended to unlawfully appropriate the property.

6.3 Even though count 5 of the Indictment was entitled "Looting and burning," the Trial Chamber stated that "the *offence charged* under this count 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".[140] The Trial Chamber explained that "*while both looting and burning deprive[d] the owner of their property, the two actions [were] distinct since the latter crime may be committed without appropriation per se*".[141] Thus, the focus was to remain on the unlawful appropriation of property as defined in paragraph 165.

6.4 The Prosecution disputes the Trial Chamber's finding "*that 'an essential element of pillage is the unlawful appropriation of property', and that 'the destruction by burning of property does not constitute pillage*'".[142] The Defence agrees with the

[139] Prosecution Appeal Brief, para. 6.2.
[140] Judgement, para. 166 (emphasis added).
[141] *Ibid.*
[142] Prosecution Appeal Brief, para. 6.2, quoting Trial Chamber's Judgement para. 166.

Prosecution that the problem, in part, is the definitional lacuna surrounding the terminology. However, the Defence also submits that prior case law and customary international illustrate that pillage does not comprise or include acts of burning.

6.5 The Prosecution focuses in its Appeal Brief on the distinction between the destruction and appropriation of property. The sources used offer definitions taken from the *Oxford English Dictionary*,[143] *Le Nouveau Petit Robert*,[144] the UK *Manual of the Law of Armed Conflict*,[145] and the *Pohl Case*[146] focus on pillage as encompassing acts of destruction, devastation, and damage.

6.6 These sources refer to general acts of destruction and damage as constituting pillage. Thus, the Prosecution suggests that *destruction* or the act of *destroying* is pillage. However, the Prosecution never specifically illustrates how the specific reference in paragraph 166 – "destruction *by burning of property*" – should constitute acts of pillage. Thus, that burning should be included in the definition of pillage is only implied.

6.7 In addition, the Prosecution does not address the fact that destruction could also occur pursuant to the unlawful appropriation of property. The mere "destruction" of property does not specifically lend itself either way to mean that a property has been burned or appropriated. Thus, the Prosecution never specifically asserted why the burning of property should be included in the definition of pillage by means of defining "destruction". In addition, the Trial Chamber already eliminated destruction as a part of the definition of pillage when it stated that pillage would not constitute the "*destruction* of property by burning".

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[143] *Ibid.*. para. 6.5.
[144] *Ibid.*, para. 6.6.
[145] *Ibid.*, para. 6.7.
[146] *Ibid.*, para. 6.8.

6.8 Moreover, while the Prosecution suggested that burning should be included as acts of pillage, it did not rule out that the unlawful appropriation of property should not be included within the definition of pillage. Definitions and the usage of the term pillage support the Trial Chamber's holding that pillage is the unlawful appropriation of property and that burning, although perhaps related, does not constitute pillage.

6.9 The definition used by the Trial Chamber reflects the elements of pillage that the drafters of the Rome Statute used. The drafters of the Rome Statute for the International Criminal Court agreed to define pillaging as "*(1) the appropriation of property; (2) for private or personal use; and (3) without the consent of the owner*".[147] As the Prosecution points out, the *Black's Law Dictionary* might not necessarily be a dictionary for the purposes of international humanitarian law *per se*. However, the definition ultimately used by the Trial Chamber reflects the same elements utilized by the drafters of the Rome Statute.

6.10 Pillaging is "a classic war crime defined in the Rome Statute as 'pillaging a town or place" where looting occurs on a more widespread level".[148] Looting "*is viewed as a species of the genus of theft, which is typically characterized by unauthorized entry, misappropriation of property, and, often, collective action. What distinguishes looting from other forms of theft is a lack of normal security brought on by emergency circumstances, resulting in the unusual vulnerability of its victims and a general loss of social order*".[149] Looting has been treated as a war crime and has been condemned, unless absolutely necessary, by the Hague Convention of 1907 and the Geneva Convention of 1954.

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[147] Hans Boddens Hosang, in his comment on Article 8(2)(b)(xvi) on Pillaging, in THE INTERNATIONAL CRIMINAL COURT, ELEMENTS OF CRIMES AND RULES OF PROCEDURES AND EVIDENCE 177 (Roy S. Lee ed., 2001)

[148] George P. Fletcher, On the Crimes Subject to Prosecution in Military Commissions, 5 J. Int'l Crim. Just. 39, 41 (2007).

[149] Stuart P. Green, Looting, Law, and Lawlessness, 81 Tul. L. Rev. 1129, 1134 (2007).

6.11 Pillage has synonymously been used with plundering and looting, although specific definitions have not been clearly established in international humanitarian law. In *Prosecutor v. Simić et al.*, the court stated that "*the acts of plundering infringe upon a number of norms of international humanitarian law and constitute a violation of the laws and customs of war under Article 3 (e) of the Statute*".[150] The court continued to state that "*[u]nlike plunder, the acts of looting, also alleged in the Amended Indictment, are not specifically defined by the Statute, or other sources of international humanitarian law*".[151]

6.12 Regardless of the terminology, the terms "pillage," "plunder," and "spoliation" varyingly all have been used to describe the unlawful appropriation of public and private property during armed conflicts and that "plunder" should be understood as encompassing acts traditionally described as "pillage".[152] The court in *Simić* stated that the question of whether the acts of looting constitute the specific offence of plunder was largely a terminological one and that linguistic and comparative legal sources generally used the two terms synonymously.[153]

6.13 The court in *Prosecutor v. Delalić et al.* similarly stated while both the terms "pillage" and "plunder" might be similar, it was "*not necessary to determine whether, under current international law, these terms are entirely synonymous*".[154] The Court stated that the offence of the unlawful appropriation of public and private property in armed conflict had been varyingly termed "pillage", "plunder" and "spoliation".[155] The court concluded that plunder "*should be understood to embrace all forms of unlawful appropriation of property*

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[150] *Prosecutor v. Simić et al*, ICTY-95-9, Judgment, paras. 98 and 99 (2003) (***Simić* Judgement**).
[151] *Ibid.*, para. 98.
[152] *Ibid.*
[153] *Ibid.* (referencing *The Oxford English Dictionary*, which defines the term "to loot" as synonymous to "to plunder," "to sack," and refers to recorded usage of the term in this context since 1845 (W.H. Smith in Colburn's United Service Magazine of II. 10), The Oxford English Dictionary, Volume IX, Clarendon Press, Oxford, 1998. The US Uniform Code for Military Justice (UCMJ) also uses the term "looting" as synonymous to "plundering." Article 103 of the Uniform Code for Military Justice provides for a punishment of persons engaged in "looting or pillaging." (10 USCS §§ 801)).
[154] *Delalić* Judgement, para. 591.
[155] *Ibid.*

in armed conflict for which individual criminal responsibility attaches under international law, including those acts traditionally described as 'pillage'".[156]

6.14 In *Prosecutor v. Kunarac et al.,* the Trial Chamber also held the world plunder and pillage were synonymous, with both words being defined together in the International Committee of the Red Cross Dictionary.[157] The Trial Chamber stated that:

> *"the use of the word "plunder " in Article 3(e) of the Statute refers to its ordinary meaning of involving unjustified appropriations of property either from more than a small group of persons or from persons over an identifiable area such as already described. This interpretation is more consistent with plunder being a violation of the laws or customs of war".*[158] The trial chamber relied in part on *Prosecutor v. Blaskić*, which focused on the intent to destroy, thieve, and take property.[159] *Kunarac* held that *"[t]he word 'plunder' in its ordinary meaning suggests that more than the theft of property from one person or even from a few persons in the one building is required".*[160]

6.15 The *Čelebici* Judgment held that *"plunder included unjustified appropriations, both by individual soldiers for their private gain and by the organized seizures within the framework of a systematic exploitation of enemy property".*[161] *Simić* used the definition used in *Čelebici*, which held that plunder within the meaning of the Statute encompasses *"all forms of unlawful appropriation of property in armed conflicts for which individual criminal responsibility attaches under international law"* and extends to both cases of "organised" and "systematic" seizure of property from protected persons in occupied territories, as well as to "acts of looting committed by individual soldiers

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[156] *Ibid.*
[157] *Prosecutor v. Kunarac et al.,* IT-96-23&23/1, Judgement, para. 15 (2002).
[158] *Ibid.*, para. 16.
[159] *Prosecutor v. Blaškić,* IT-95-14, Judgement, para. 15 (2003) (***Blaškić* Judgement**).
[160] *Prosecutor v. Kunarac*, Case No. IT-96-23&23/1-T, Decision on Motion for Acquittal, para. 15 (July 3, 2000) (***Kunarac* Decision**).
[161] *Ibid.*, para 15. (quoting *Celebici* Judgement, paras 590-591).

for their private gain".[162] This definition was endorsed as stated above in *Blaskić*[163] and also *Prosecutor v. Jelisić.*[164]

6.16 These definitions illustrate that the act of pillage is distinguished and limited by acts for which both the *actus reus* and *mens rea* could specifically be attributed for with regards to the ultimate *causation* of the destruction. The unlawful appropriation of property illustrates an intent to exert control, whether it be through taking or using the property.[165] While destruction of property by burning may occur during acts of pillage, the two are not synonymous.

6.17 Counsel agrees with the Prosecution that "..... if the term 'pillage' in Article 4(2)(g) is not interpreted to include unlawful destruction of property, there would be no obvious prohibition on such acts in non-international armed conflicts under the Geneva Conventions or Additional Protocols".[166] This lacuna was spotted by the drafters of the Special Court Statute that was why Article 5 of the Statute provided for the prosecution of offences under the *Malicious Damage Act 1861.* The offences covered under Article 5 include setting fire to a dwelling house, public buildings and other buildings.

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[162] *Simić* Judgement, para. 99 (quoting *Čelebici* Judgement, para. 590).
[163] *Blaškić* Judgement, para. 184.
[164] *Prosecutor v. Jelisić,* IT-95-10 –T, Judgement, para. 48 (1999) (*Jelisić* Judgement).
[165] The main dispute over pillage in international humanitarian law has been over whether looting must be widespread or can occur with one act. *See Kunarac* Decision; *Blaškić* Judgement; George P. Fletcher, On the Crimes Subject to Prosecution in Military Commissions, 5 J. Int'l Crim. Just. 39, 41-42 (2007) (stating that pillaging occurs when troops engage in widespread looting). References of pillaging with regards to the unlawful appropriation of cultural artifacts also uphold the Trial Chamber's finding in paragraph 166. *See* Patty Gerstenblith, From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century, 37 Geo. J. Int'l L. 245 (2006); Joshua M. Zelig, Recovering Iraq's Cultural Property: What Can Be Done to Prevent Illicit Trafficking, 31 Brook. J. Int'l L. 289 (2005); and Anthi Helleni Poulos, The 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict: An Historic Anaylsis, 28 Int'l J. Legal Info. 1 (2000). Article 9 of the 1970 UNESCO Convention provides a way for nations to deal with cases of pillage of archaeological and ethnological materials, which upholds the definition that pillage is the unlawful appropriation of property. *See* Patty Gerstenblith, From Bamiyan to Baghdad: Warfare and the Preservation of Cultural Heritage at the Beginning of the 21st Century, 37 Geo. J. Int'l L. 245, 320-21 (2006) (quoting Article 9 of the UNESCO Convention, which states: "Any State Party to this Convention whose cultural patrimony is in jeopardy from pillage of archaeological or ethnological materials may call upon other States Parties who are affected." Nov. 17, 1970, 823 U.N.T.S. 231, 10 I.L.M. 289, 328 art. 9 (1971)).
[166] Prosecution Appeal Brief, para. 6.11.

6.18 Counsel submits that the incorporation of the *Malicious Damage Act 1861* and the offences emanating there from were intended to take care of the lacuna under international law. The Prosecution has failed to explain why it chose not to charge under Article 5 of the Statute which, quite clearly and unequivocally, provides for the offences of burning/arson.

6.19 The Prosecution is contending that "..... *prosecuting persons pursuant to the Malicious Damage Act 1861 of Sierra Leone (pursuant to the powers conferred in article 5 of the Statute) does not resolve the broader question as to whether wanton destruction of property is a conduct reasonably coming within the general prohibitory province of common article 3 to the Geneva Conventions or of Additional Protocol II which regulate non-international armed conflicts*"[167]. Whilst this might be correct, Counsel submits it is not the function of this Chamber to change or amend statute law but that of the drafters of the relevant conventions and protocols. This is especially correct as the Statute of the Special Court does not have any lacuna as far as providing for the offences of burning and arson are concerned. The Secretary-General of the United Nations as early as October 2000 spotted the deficiency of international law as far as these offences were concerned and enacted Article 5 of the Statute to take care of same.[168]

Conclusion

6.20 The Trial Court's view that the destruction by burning of property does not constitute pillage should be upheld and the finding that Mr. Kondewa should not be convicted on Count 5 regarding burnings in reference to paragraph 166 should be upheld.

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[167] Ibid. para. 6.12.

[168] The Report of the Secretary-General on the Establishment of a Special Court for Sierra Leone, 4th October 2000, UN Doc S/2000/915, 4th October 2000, para 19 (The rationale behind adopting the Malicious Damage Act 1861 as Article 5 of the Statute of the Special Court was to take care of "cases where a specific situation or an aspect of it was considered to be either unregulated or inadequately regulated under international law".

VII. RESPONSE TO PROSECUTION'S GROUND 8: DENIAL OF LEAVE TO AMEND THE INDICTMENT IN ORDER TO CHARGE SEXUAL CRIMES:

7.1 Ground 8 of the Notice of Appeal and the Prosecution's Appeal Brief deal with an application that was taken to the Trial Chamber pursuant to Rule 73(A0. The Prosecution is now seeking belatedly and unusually a "…. *challenge to the Indictment Amendment Decision as part of its post –judgement appeal*…."[169]

PROCEDURAL HISTORY

7.2 On the 9th February 2004, the Prosecution filed a request before the Trial Chamber to amend the Indictment in the case against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa[170]. The Prosecution sought to add new charges to the indictment, to add new locations to the indictment and to extend the time frame of the indictment by two years and four months.

7.3 On the 1st June 2004 the Trial Chamber issued its Decision on Prosecution Request for Leave to Amend the Indictment, refusing the prosecution request to add counts of sexual violence by a majority with the Hon. Justice Pierre Boutet dissenting holding that granting the amendments sought would prejudice the rights of the Accused to a fair and expeditious trial and would amount to an abuse of process.

7.4 On the 4th of June 2004, the Prosecution applied to the Trial Chamber pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") for leave to file an interlocutory appeal against the Trial Chamber Amendment Decision[171].

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[169] Prosecution Appeal Brief para. 7.6.
[170] Request for Leave to amend the Indictment Against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa, filed by the Prosecution on the 9th February 2004.
[171] Prosecution's Application for leave to file an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa.

7.5 On the 2nd August 2004, this application was refused by the Trial Chamber in its "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa". Judge Pierre Boutet Dissenting Opinion was filed on the 5th August 2004.

7.5 On the 30th August 2004, the Prosecution filed an appeal against the Trial Chamber's Decision of 2nd August 2004 refusing leave to file an Interlocutory Appeal[172]. The Prosecution filing consists of both an argument on the Court's jurisdiction to entertain the appeal and its submissions on the merits of the appeal.

7.6 On the 10th September 2004 the Defence filed a Consolidated Statement concerning the jurisdiction of the Appeals Chamber to hear the Prosecution's "Application" for leave to appeal against the Decision on request for leave to amend the Indictment and the Prosecution filed a Reply on the 15th September 2004.

7.7 On the 17th January 2005 this Chamber rendered its "Decision on Prosecution Appeal against the Trial Chamber's Decision of the 2 August 2004 Refusing Leave to File an Interlocutory Appeal" inter alia striking out the said application and declaring that "..... *the Appeals Chamber has no jurisdiction to grant leave to the Appellants to appeal from the interlocutory decision of the trial Chamber and also has no jurisdiction to entertain the appellant's appeal brought without leave of the Trial Chamber*"[173].

7.8 The Prosecution argues that "..... *the Trial Chamber erred in law, fact and/procedure in dismissing the Indictment Amendment Motion. In so far as the Trial Chamber erred in law and/or fact, the error(s) invalidated the Trial Chambers Judgement and/or*

[172] Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 Refusing Leave to File an Interlocutory Appeal.
[173] Decision on the Prosecution Appeal Against the Trial Chamber's Decision of the 2 August 2004 Refusing leave to File an Interlocutory Appeal dated 17th January para. 44.

occasioned a miscarriage of justice, within the meaning of Article 21(1)(b) and/or (c) of the Statute, in that it led to the result that the Trial Chamber's Judgement gave no consideration to the individual responsibility of the Accused for the serious crimes with which the Accused would have been charged had the Trial Chamber not so erred'[174].

7.9 The Prosecution relies on Article 21(1)(b) and/or (c) to raise this ground of Appeal. The Defence notes that Article 21(1) does not have sub-paragraphs and therefore concludes that the Prosecution must be relying on Article 20(1)(b) and/or (c) of the Statute which are ipsissima verba Rule 106(A)(a), (b) & (c). Article 20(1) provides:

> *The Appeals Chamber shall hear appeals from persons convicted by the Trial Chamber or from the Prosecutor on the following grounds:*
>
> *a. A procedural error;*
> *b. An error on a question of law invalidating the decision;*
> *c. An error of fact which has occasioned a miscarriage of justice.*

7.10 The Defence submits firstly, that the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings. Secondly, that the Appeals Chamber does not have jurisdiction to hear Ground 8 based on the principles of res judicata and issue estoppel.

7.11 Therefore, the Prosecution is precluded from questioning the Trial Chamber's "Majority Decision on the Prosecution's Application for Leave to File an Interlocutory Appeal against the Decision on the Prosecution's Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa" at this stage of the proceedings.

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[174] Prosecution Appeal Brief para. 7.6.

LACK OF JURISDICTION

7.12 Counsel submits that the Motion filed by the Prosecution before the Trial Chamber requesting an amendment of the Indictment in the case against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa on the 9th February 2004 was filed pursuant to Rule 73(a) of the Rules of Procedure and Evidence of the Special Court and further submits that appeals governing such Motions are exclusively governed by Rules 73 (A) and (B) of the Rules.

Rules 73 provides:

> *(a) Subject to rule 72, either party may move the Designated Judge or a Trial Chamber for appropriate ruling or relief after the initial appearance of the accused. The Designated Judge or the Trial Chamber, or a judge designated by the Trial Chamber from among its members, shall rule on such motions based solely on the written submissions of the parties, unless it is decided to hear the parties in open Court.*
>
> *(b)* ***Decisions rendered on such motions are without interlocutory appeal. However, in exceptional circumstances and to avoid irreparable prejudice to a party, the Trial Chamber may give leave to appeal. Such Leave should be sought within 3 days of the*** **decision and shall not operate as a stay of proceedings unless the Trial Chamber so orders.**
>
> *(c) Whenever the Trial Chamber and the Appeals Chamber of the Court are seized of the same Motion raising the same or similar issue, the Trial Chamber shall stay proceedings on the said Motion before it until a final determination of the said Motion by the Appeals Chambers.*

7.13 Rules 73(B) originally did not allow for any interlocutory appeals. This was subsequently amended in a Plenary Committee meeting and the Trial Chamber alone was granted jurisdiction to rule on whether such appeals were warranted.

7.14 Counsel submits that the Prosecution is precluded from questioning the Trail Chamber's "Majority Decision on the prosecution's Application for Leave to File an Interlocutory Appeal Against the Decision on the Prosecution's Request for Leave to amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa". In 2004, the Prosecution sought relief in its "Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal" dated the 30th August 2004 was that the Appeal Chamber finds *"that it has the power to entertain an appeal against the Impugned Decision and to exercise that power"*[175].

7.15 The Prosecution Appeal Brief quite clearly summarised the decision of the Prosecution Appeal Against the Trial Chamber's Decision of the 2 August 2004 refusing leave to file an Interlocutory Appeal as follows:

> *"On the 17 January 2005, the Appeals Chamber issued a decision (The "Appeal Chamber Decision") finding that it had no jurisdiction to grant leave to the Prosecution to appeal from the Indictment Amendment Decision and no jurisdiction to entertain the appeal without the leave of the Trial Chamber"*[176].

7.16 Thus this Chamber unequivocally adjudged that it lacked jurisdiction to deal with appeals from decisions of the Trial Chamber emanating from motions brought pursuant to Rule 73(A) without first obtaining leave of the Trial Chamber as provided under Rule 73(B). The Appeals Chamber said:

> *"But for the need to deal with the issue raised in these proceedings once and for all in order to clear any doubt as to the limits of the Courts inherent jurisdiction, it would have been in order to refuse to entertain the proceedings on the ground that there is no procedural foundation for*

[175] Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal - para 23.
[176] Prosecution Appeal Brief para 7.5.

approaching the Appeals Chamber in matters such as this, touching on a decision of the trial Chamber rendered in a motion under Rule 73(A), without prior leave of the Trial Chamber. While it is undisputed that the Court has an inherent jurisdiction which it exercises as and when such is appropriate, it is an assumption of the extent of the inherent powers of the Court that goes too far, to assume that the Court also has an inherent jurisdiction to fashion a procedure for originating proceedings before it outside the express provisions of the Rules"[177].

7.17 The Prosecution in raising Ground 8 at this stage of the proceedings is ingeniously seeking to bestow jurisdiction on the this Chamber by relying on Article 20(1)(b) and/or (c) of the Statute the Special Court.

7.18 Counsel observes that the Article 20(1) was in existence on the 30th August 2004 when the Prosecution filed an appeal against the Impugned Decision. The Prosecution nevertheless conceded that "*There is no provision in the Rules which expressly permits a party to appeal to the Appeals Chamber against a decision of the Trial Chamber under Rule 73(B) refusing leave to file an interlocutory appeal*"[178]. The Prosecution further conceded that the Appeals Chamber does not have " ..... *a general power to hear any appeal from any decision of a Trial Chamber at any time and in any circumstances, regardless of whether or not the Statute or Rules provide for it*"[179].

7.19 Counsel submits that the Appeals Chamber does not have an inherent jurisdiction to hear appeals and applications where the Statute and the Rules specifically exclude such jurisdiction. The Appeal Chamber had this to say on the issue:

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[177] Decision on Prosecution Appeal against the Trial Chamber's Decision of the 2 August 2004 Refusing Leave to File an Interlocutory Appeal para 24.
[178] Prosecution Appeal Against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal – 6.
[179] Ibid para 8.

"The Prosecution argues that notwithstanding the absence of express grant of jurisdiction to the Appeals Chamber to grant leave to appeal or to entertain appeals from a refusal by the Trial Chamber of leave to appeal, the Appeals Chamber has an inherent jurisdiction to grant leave to appeal and to entertain this appeal. It is undoubted that the courts have inherent powers to do that which is necessary to the fair administration of justice. A court also has the inherent power to control its proceedings to ensure that justice is done"[180].

7.20 Counsel further submits that the Rules and Statute make provisions for only one way that the Appeals Chamber can be seised of jurisdiction from interlocutory applications determined by the Trial Chamber, i.e. through a successful application for leave made to the Trial Chamber. This was eruditely articulated by the Appeals Chamber when it opined:

"Rule 73(B) has made express provision for one and only one approach to the Appeals Chamber, namely by way of a successful application for leave made to the Trial Chamber. It would subvert that provision for us to permit applications to this Chamber to be made without leave and it would usurp the exclusive jurisdiction of the Trial Chamber to determine which – if any – of its interlocutory decisions should be reviewed on appeal in the course of the trial"[181].

SCOPE OF ARTICLE 20(1) OF THE STATUTE:

7.22 The Prosecution in seeking to give a different flavour and complexion to its case by now alleging that the *"In so far as the Trial Chamber's erred in law and/or fact, the errors) invalidated the Trial Chamber's Judgement and/or occasioned a miscarriage*

[180] Ibid para 31.
[181] Ibid para 42.

of justice, within the meaning of Article 21(1)(b) and/or (c) of the Statute, ……."[182].

7.23 Article 20 (1) of the Statute sets out the parameters of an appeal of a Judgement. The three grounds for an appeal are:

A procedural error;

An error on a question of law invalidating the decision;

An error of fact which has occasioned a miscarriage of justice.

7.24 Firstly the Prosecution identifies no procedural error. The Prosecution states at paragraph 7.10 of its Appeal Brief that the "*Trial Chamber erred in law and/or procedure in finding that the Prosecution had acted without due diligence in the conduct of its investigations of gender crimes…*"[183] A finding by the Trial Chamber that the Prosecution did not act with due diligence is not a procedural error. The Prosecution identifies no procedural errors in its Brief nor in its appended "Appeal Against Refusal of Leave to Appeal" on the part of the Trial Chamber in its Indictment Decision that affected the Trial Judgement in any form. Therefore this ground of appeal is not valid.

7.25 In addition to the statement it makes in paragraph 7.10 regarding an alleged error of law, the Prosecution also states that the Trial Chamber further erred in law when it stated, "*it is the traditional role and practice for the Prosecution to bring as many counts in an indictment as possible and to amend them where it becomes necessary.*"[184] The Prosecution also identifies a number of other alleged errors by

[182] Prosecution Appeal Brief para. 7.6.
[183] Prosecution Appeal Brief, para. 7.10 (emphasis added).
[184] Prosecution Appeal Brief, para. 7.11.

the Trial Chamber in its application of Rule 73(B) in its "Appeal Against Refusal of Leave to Appeal".[185]

7.26 To bring a ground of appeal within the purview of Article 20 (1) (b) there must be an error of law *which renders the decision invalid*, i.e. that is there are errors on a point of law which, if proven, affect the guilty verdict.[186] This is not the case in this instance. The Prosecution has not demonstrated that the Indictment Decision affected the eventual verdict in this case, or rendered any part of the Trial Judgement invalid, and therefore this ground of appeal does not fall within Rule 20(b).

7.27 Under the third ground for appeal pursuant to Article 20 (1)(c) a party alleging an error of fact must show that the alleged error invalidates the decision in the Judgement or occasions a miscarriage of justice.[187] Again the Prosecution, while identifying a number of alleged errors of fact made by the Trial Chamber (i.e. concluding that the Prosecution had acted without due diligence[188]) has not demonstrated how this invalidates the Trial Chamber findings in its Judgement.

7.28 Therefore there is no basis under Article 20 (1) of the Statute for the Prosecution to bring this ground of appeal. In a footnote in its Brief requesting that the Appeal Chamber find the Trial Chamber erred in dismissing the Indictment Amendment Motion, the Prosecution notes that the ICTY *"has indicated that where it is in the interests of justice to do so, it can find that the Trial Chamber erred in acquitting the accused ...without either substituting a conviction or ordering a new trial."*[189] And as a result, the Prosecution states *"it is similarly open to the Appeals Chamber to find that the Trial Chamber erred in refusing to allow the Prosecution to amend the indictment to add further counts..."*[190]

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[185] Prosecution Appeal Against Refusal of Leave to Appeal, paras. 10-22.
[186] *Krnojelac* Appeal Judgement, para. 6.
[187] *Rutaganda,* Appeal Judgement, para. 18.
[188] Prosecution Appeal Brief, para. 7.10.
[189] Prosecution Appeal Brief, Footnote 506.
[190] Ibid.

7.29 The Defence notes that the "case-law of the *ad hoc* tribunals accepts that there are situations where the Appeals Chamber may raise questions *proprio motu* or agree to examine alleged errors which will not affect the verdict but which do, however, raise an issue of general importance for the case-law or functioning of the Tribunal."[191] The Defence agrees that "It is appropriate [for an Appeal Chamber] to consider an issue of general importance where its resolution is deemed important for the development of the Tribunal's case-law and it involves an important point of law that merits examination."[192]

7.30 The Prosecution has failed to identify an issue of law of general importance[193] that requires the discretionary attention of the Appeal Chamber. Nor has the Prosecution made any detailed submissions identifying the issue of significance to the jurisprudence. The Prosecution instead merely reiterates all the errors it believes that the Trial Chamber made[194] in its Indictment Amendment Decision.

7.31 An Appeal is not an opportunity for the Prosecution to seek rectification for a decision that did not go in its favour. In seeking no remedy other than an affirmation from this Appeal Chamber that the Trial Chamber erred in dismissing the Indictment Amendment Motion, it seems that the Prosecution does not seek clarity on an important point of law that will aid in the functioning of the Special Court or of general importance to the case law.

7.32 Counsel submits that the Prosecution's allegation of a miscarriage of justice without more does not arrogate jurisdiction to this Chamber[195].

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[191] *Krnojelac* Appeal Judgement, para. 6.
[192] Ibid. para. 7.
[193] See *Tadić Appeal Judgement*, para. 315: "But the point of law which is involved is one of importance and worthy of an expression of opinion by the Appeals Chamber."
[194] Prosecution Appeal Brief, paras. 7.8 – 7.15 and Appendix A.
[195] *"On the other hand, an allegation of miscarriage of justice or the fact of being dissatisfied with a decision of the Trial Chamber does not, on its own, confer the right to appeal". Para 31* of Decision on the Prosecution Appeal against the Trial Chamber's Decision of the 2nd August 2004 Refusing leave to File an Interlocutory Appeal dated 17th January 2005.

ISSUE ESTOPPEL/RES JUDICATA

7.33 On the 30th August 2004, the Prosecution filed an appeal against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal. The Prosecution's filing consists of argument on the Court's jurisdiction to entertain the appeal and its submissions on the merits of the appeal. The Prosecution inter alia prayed this Chamber "*To find that it has the power to entertain an appeal against the Impugned Decision, and to exercise that power*"[196].

7.34 The Defence on the 10th September 2004 filed a consolidated/joint "Defence Statement Concerning the Jurisdiction of the Appeals Chamber to Hear the Prosecution's "Application" for leave to appeal against the Decision on Request for Leave to Amend the Indictment". The Defence argued:

> *"The Defence submits that the Appeals Chamber does not have jurisdiction over this appeal. The Prosecution admits that the Rules do not allow for such an appeal. This in itself should be sufficient cause to dispose of the appeal"*[197].

7.35 This Chamber on the 17th January 2005 ruled:

> *"An application made to the Appeals Chamber for leave to appeal an interlocutory decision of the trial Chamber rendered pursuant to Rule 73(A) is incompetent. An appeal brought to this Chamber without the requisite leave of the Trial Chamber pursuant to Rule 73(B) is also incompetent"*[198].

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[196] Prosecution appeal against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal. Para. 23(1) Dated 30th August 2004.
[197] "Defence Statement Concerning the Jurisdiction of the Appeals Chamber to Hear the Prosecution's "Application" for leave to appeal against the Decision on Request for Leave to Amend the Indictment" para 9.
[198] Decision on the Prosecution Appeal against the Trial Chamber's Decision of the 2nd August 2004 Refusing leave to File an Interlocutory Appeal dated 17th January 2005 para 43.

7.36 The Appeals Chamber further stated:

> *"For the reasons given, we find that the Appeals Chamber has no jurisdiction to grant leave to the Appellants to appeal from the interlocutory decision of the Trial Chamber and also has no jurisdiction to entertain the appellant's appeal brought without the leave of the Trial Chamber".*

7.37 Counsel submits that the Prosecution is precluded by law through the principles of *res judicata* and *issue estoppel* from mounting a *".... challenge to the Indictment Amendment Decision ....."* This Chamber has ruled that it does not have jurisdiction to entertain an appeal brought to this Chamber without leave of the Trial Chamber when the Prosecution specifically prayed this Chamber *"To find that it has the power to entertain an appeal against the Impugned Decision, and to exercise that power"* in the "Prosecution Appeal against the Trial Chamber's Decision of 2 August 2004 refusing leave to file an Interlocutory Appeal".

7.38 Counsel submits that the position of the law governing *"issue estoppel"* are firstly, that issues that were actually and necessarily litigated in one action cannot be relitigated in a subsequent action. Secondly, a party intending to successfully invoke the doctrine of *"issue estoppel"* must show that the same or identical issue is presented in the second action that was decided in the first and that the issue was actually and necessarily decided in the first action. Thirdly, the doctrine assures that preclusion will result only after a party has had full opportunity to litigate the particular issue.

7.39 Counsel refers the Chamber to the dictum of Lord Maughan L. C. in NEW BRUNSWICK RAIL. CO Vs. BRITISH & FRENCH TRUST CORPORATION LTD. Where he stated:

> *"....the doctrine of estoppel (per rem judicatam) is one founded on considerations of justice and good sense. If an issue has been distinctly*

raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them[199]".

7.40 Counsel refers the Chamber to the book titled *THE DOCTRINE OF RES JUDICATA* by Spencer Bower and Turner under the rubric "*The necessary constituents of estoppel per rem judicatem*" where the Learned Authors had this to say:

"*Any party who is desirous of setting up res judicata by way of estoppel, whether he is relying on such res judicata as a bar to his opponent's claim, or as the foundation of his own, and who has taken the preliminary steps required in order to qualify for that purpose, must establish all the constituent elements of an estoppel of this description, ... That is to say, the burden is on him of establishing (except as to any of them which may be expressly or impliedly admitted) each and every of the following:*

i. **that the alleged judicial decision was what in law is deemed such;**

ii. **that the particular decision relied upon was in fact pronounced as alleged;**

iii. **that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;**

iv. **that the judicial decision was final;**

v. **that the judicial decision was, or involved a determination of the same question as sought to be controverted in the litigation in which the estoppel is raised;**

vi. **that the parties to the judicial decision, or their privies were the same persons the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive in rem"**[200].

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199 *[1939] A. C. 1, H. L. 19 – 20*

[200] The Doctrine of *Res Judicata*, 2nd Edition at pages 18 to 19.

7.41 Counsel also refers the Chambers to Halsbury's Laws of England volume 15, 3rd ed. para. 355 at page 181 and extensively quoted in the Sierra Leonean cases of *ENGLAND, ENGLAND, SMART and COSIER v. OFFICIAL ADMINISTRATOR, PRATT and BECKLEY*[201] and GBOYA v. KAMARA[202]which states as follows:

> *In order to support that defence it was necessary to show that the subject matter in dispute was the same (that is to say, that everything that was in controversy in the second suit as the foundation of the claim for relief was also in controversy in the first suit), that it came in question before a court of competent jurisdiction, and that the result was conclusive so as to bind every other court"*[203].

7.42 These principles have been upheld in international courts. In *Kajelijeli,* the Appeals Chamber for the International Criminal Tribunal for Rwanda stated:

> *[T]he Appeals Chamber ordinarily treats its prior interlocutory decisions as binding in continued proceedings in the same case as to all issues definitively decided by those decisions. This principle prevents parties from endlessly relitigating the same issues, and is necessary to fulfil the very purpose of permitting interlocutory appeals: to allow certain issues to be finally resolved before proceedings continue on other issues.*[204]

7.43 In *Prosecutor v. Karemera et al.,* the Trial Chamber refused to reconsider an issue previously litigated and settled in order to prevent undue justice, unnecessary repetition in the proceedings, and waste in judicial resources. The court stated that "The Chamber is of the view that repeated reconsideration would be inconsistent with the interests of justice and the principle of *res judicata*".[205]

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[201] [1964 – 66] African Law Reports (Sierra Leone Series) 315 at 324 – 325.
[202] [1974 – 82] Sierra Leone Bar Association Law Reports 252.
[203] Ibid 256
[204] *Kajelijeli v. Prosecutor*, ICTR-98-44A-A, Appeals Judgement, para. (2005).
[205] *Prosecutor v. Karamera et al.*, ICTR-98-44-PT, Decision on Motion to Vacate Sanctions Rules 73(F) and 120 of the Rules of Procedure and Evidence, para. 10 (2005).

7.44 The principles of *res judicata* and *issue estoppel* have similarly been upheld in numerous cases and decisions in the International Criminal Tribunal for the former Yugoslavia. In *Prosecutor v. Simić et al.*, for example, the court explicitly stated that "[t]he principle of *res judicata* would prevent the prosecution from raising that specific issue again in any interlocutory proceedings between it and the ICRC unless the Trial Chamber itself were prepared to reconsider its decision"[206]

CONCLUSION

7.45 The Defence for Mr. Kondewa prays that the Appeals Chamber strikes out Ground 8 of the Prosecution's Appeal based on the arguments put forward above. The conduct of the Prosecution is quite clearly an abuse of the process of the Court.

7.46 The Appeals Chamber has by its judgement of the 17th January 2005 decided that it lacks jurisdiction to hear or entertain what the Prosecution has now couched and described as a *"....challenge to the Indictment Amendment Decision as part of its post –judgement appeal...."*.

7.47 Thus Counsel submits that the Appeals Chamber is *functus officio* as far as the Amendment Decision is concerned. The rationale behind the doctrine of *estoppel* per *rem judicatam* was succinctly stated by Spencer Bower and Turner in their work *THE DOCTRINE OF RES JUDICATA* in the following words:

> *"There are two theories (which, however, on analysis, may perhaps be regarded as merely two aspects or sides of one and the same theory) whereon the doctrine of estoppel per rem judicatam is commonly justified; viz. first, the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and secondly, the*

[206] *Prosecutor v. Simić et al.*, IT-95-9, Decision on (1) Application by Steven *Todorović* to Re-Open Decision of 27 July 1999, (2) Motion by ICRC to Re-Open Scheduling Order of 18 November 1999, and (3) Conditions for Access to Material, para 9. (2000).

right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may, unless curbed by the estoppel, weigh down judicially declared rights and innocence"[207].

7.48 Counsel also refers the Chambers to the dictum of Lord Shaw in the case of HOYSTED Vs. TAXATION COMMISSIONER where he stated:

"Parties are nor permitted to begin fresh litigation because of new views they may entertain of the law of the case or new versions which they present as to what should be a proper apprehension by the Court of the legal construction of the document or the weight of certain circumstances. If this were permitted, litigation would have no end except when legal ingenuity is exhausted"[208].

7.49 Unless any substantive legal changes or new facts are presented, the principles of *issue estoppel* and *res judicata* preclude the Prosecution from requesting the Appeal Chamber to re consider a matter that has already been decided upon prior. These principles are not uncommon in most domestic courts and all international courts. They exist to preserve the fairness and the integrity of the proceedings, decisions of the court, and also to prevent judicial resources from unnecessarily being wasted.

7.50 For these reasons Counsel respectfully requests the Chamber to dismiss this Ground of the Prosecution's appeal.

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[207] The Doctrine of *Res Judicata*, 2nd Edition at page 10.
208 [1926] A. C. 155 P. C.

VIII. RESPONSE TO PROSECUTION'S GROUND 9: PRECLUSION OF EVIDENCE OF UNLAWFUL CONDUCT OF A SEXUAL NATURE:

PROCEDURAL HISTORY

8.1 On the 15th February 2005, the Prosecution filed a Motion seeking a ruling from the Trial Chamber as to the admissibility of evidence of sexual violence under Counts 3 and 4 of the Consolidated Indictment during the trial of the Accused Persons[209].

8.2 The Trial Chamber by a majority (Justice Pierre Boutet dissenting) on 24th May 2005 ruled that evidence of a sexual nature could not be admitted under Counts 3 and 4 of the Consolidated Indictment[210].

8.3 On the 27th of June 2005, the Prosecution applied to the Trial Chamber pursuant to Rule 73(B) of the Rules of Procedure and Evidence ("Rules") for leave to appeal Trial Chamber's "Reasoned Majority Decision on Prosecution Motion for a Ruing on the Admissibility of Evidence"[211].

8.4 On the 7th July 2005 the Defence teams for Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa filed a "Joint Defence Response to the Prosecution Request for Leave to Appeal Decision on Prosecution Motion for a Ruing on the Admissibility of Evidence" arguing that the Prosecution's application for leave lacked merit and should be denied.

8.5 On the 9th December 2005, this application was refused by the Trial Chamber in its "Majority Decision on Request for Leave to appeal Decision on Prosecution Motion for a Ruing on the Admissibility of Evidence". Judge Pierre Boutet's Dissenting Opinion was also filed on the 9th December 2005.

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[209] Urgent Prosecution Motion for a Ruling on the Admissibility of Evidence.
[210] Decision on the Urgent Prosecution Motion filed on the 15th of February 2005 for a Ruling on the Admissibility of Evidence.
[211] Request for Leave to Appeal Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence

8.6 The Trial Chamber in dismissing the prosecution's application concluded "..... *that the Prosecution has failed to satisfy the first of the conjunctive criteria laid down by Rule 73(B). We are unable, therefore to exercise our discretion pursuant to the aforesaid Rule73(B) to grant leave to appeal. Having so ruled, it is not necessary to examine the merits of the application in the light of the "irreparable prejudice" requirement of the Rule*"[212].

8.7 Counsel submits that the "Urgent Prosecution Motion for a Ruing on the Admissibility of Evidence" filed before the Trial Chamber on the 15th February 2005 was filed pursuant to Rule 73(A) of the Rules of Procedure and Evidence of the Special Court and that appeals governing such Motions are exclusively governed by Rules 73 (A) and (B) of the said Rules.

8.8 Counsel repeats mutatis mutandis paragraphs 7.10 through 7.14 and paragraphs 7.17 through 7.32 proffered in support of Ground 8 in support of this ground.

8.9 The Defence submits that the Rules do not allow for interlocutory appeals to be brought at this stage of the proceedings and that the Appeals Chamber does not have jurisdiction to hear Ground 9. The Prosecution is therefore precluded from bringing the said Ground 9 and/or raising it at this stage of the proceedings.

[212] Majority Decision on Request for Leave to appeal Decision on Prosecution Motion for a Ruing on the Admissibility of Evidence dated 9th December 2005 para. 11.

CONCLUSION

8.10 The Defence for Mr. Kondewa prays that this Chamber strikes out Ground 9 of the Prosecution's Appeal based on the arguments canvassed in paragraphs 7.10 through 7.14 and paragraphs 7.17 through 7.21 proffered in support of Ground 8.

IX. RESPONSE TO PROSECUTION'S GROUND 10

FIRST ERROR OF THE TRIAL CHAMBER: REFUSAL TO CONSIDER SENTENCING PRACTICES OF SIERRA LEONEAN COURTS:

9.1 Counsel submits that the Trial Chamber was correct in holding that because "…. the Accused were neither indicted nor convicted for any of the offences enumerated under Article 5 of the Statute …….. 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 …. 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 on Kondewa"[213].

9.2 Rule 101 of the Rules of Procedure and Evidence sets forth a guideline for sentencing. Rule 101 states:

(A) *A person convicted by the Special Court, other than a juvenile offender, may be sentenced to imprisonment for a specific number of years.*

(B) In determining the sentence, the Trial Chamber shall take into account the factors mentioned in Article 19(2) of the Statute, as well as such factors as:

(i) Any aggravating circumstances;

(ii) Any mitigating circumstances including the substantial cooperation with the Prosecution by the convicted person before or after the conviction;

(iii) . . .

[213] Sentencing Judgement, para. 43

(C) *The Trial Chamber shall indicate whether multiple sentences shall be served consecutively or concurrently.*

(D) Any period during which the convicted person was detained in custody pending his transfer to the Special Court or pending trial or appeal, shall be taken into consideration on sentencing.

9.3 Article 19(1) of the Statute states that *"[i]n determining the terms of imprisonment, the Trial Chamber shall, as appropriate, have recourse to the practice regarding prison sentences in the International Criminal Tribunal for Rwanda and the national courts of Sierra Leone."* Counsel submits that it is thus left to the discretion of the Trial Chamber as deemed appropriate to apply either or both the sentencing practices of the International Criminal Tribunal for Rwanda and national courts of Sierra Leone and that the Trial Chamber's finding was correct and not an abuse of its discretion.

9.4 Additionally, Article 19(1) of the Statute of the Special Court is distinct from the ICTR and ICTY where the Statutes of these Courts provide that the Trial Chambers in the case of the ICTR *"shall have recourse to the general practice regarding prison sentences in the courts of Rwanda"*[214] and in the case of the ICTY *"shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia"*[215].

9.5 As stated in *CRAIES ON STATUTE LAW* by S. G. G. Edgar where the Learned Author stated:

> *"Statutes passed for the purpose of enabling something to be done are usually expressed in permissive language, that is to say, it is enacted that 'it shall be lawful,' etc., or that 'such and such a thing may be done.' 'Prima facie, these words import a discretion, and they must be construed as discretionary unless*

[214] ICTR Statute, Article 23(1).
[215] ICTY Statute, Article 24(1).

there be anything in the subject-matter to which they are applied, or in any other part of the statute, to show that they are applied, or in any other part of the statute, to show that they are meant to be imperative"[216].

9.6 The crimes for which Mr. Kondewa was convicted are crimes against humanity and war crimes – crimes international in nature. Article 19 of the Statute of the Special Court establishes, "In imposing the sentences, the Trial Chamber should take into account such factors as the gravity of the offence and the individual circumstances of the convicted person." Thus, Counsel submits that the Trial Chamber was accurate to have held that international law should guide because the elements and gravity of the offence are an international crime.

9.7 International criminal courts and tribunals have consistently taken into account the international nature and elements of different international crimes against humanity and war crimes.[217] The Trial Chamber was therefore justified and correct in holding that the sentencing practices within Sierra Leone should not be followed. In Sierra Leone, maximum sentences (death penalty and life imprisonment) have been issued for crimes such as murder, attempted murder, manslaughter, rape, and robbery. Sentencing practices in Sierra Leone have followed the sentencing guidelines that have been established in sources such as *Archbold.*[218]

9.8 It would have inappropriate for the Trial Chamber to adopt the domestic practice of the national courts of Sierra Leone in the present case since Mr. Kondewa was not indicted for, nor convicted of, the domestic offences under Article 5 of the Statute. It is submitted that the Trial Chamber was therefore correct to hold that "Article 19(1)

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[216] Craies on Statute Law, S. G. G. Edgar, 6th edition at page 284 under the rubric 'Obligatory and Permissive Acts'.
[217] *See* Dr. David L. Nersessian, *Comparative Approaches to Punishing Hate: The Intersection of Genocide and Crimes Against Humanity*, 43 STAN J. INT'L L. 221 (2007).
[218] Archbold, "Criminal Pleading Evidence and Practice," (Sweet and Maxwell 35th ed. 1962), at pp. 4301-32.

authorizes the Trial Chamber to consider, where appropriate, the sentencing practices of Sierra Leonean domestic courts"[219].

9.9 Counsel further submits that the Trial Chamber correctly applied the sentencing practices of the International Criminal Tribunal for the former Yugoslavia and the International Criminal Tribunal for Rwanda. Both the ICTR and ICTY try individuals for international crimes, similar to the Special Court. Although Article 19(1) of the Statute does not specifically state that the Trial Chamber shall have recourse to the ICTY, Counsel submits that the Trial Chamber was correct in applying the jurisprudence of the ICTY as the statutory provisions of the Special Court are analogous to those of the ICTY. The Trial Chamber correctly applied the sentencing practices of the international courts and disregarded the sentencing practices of the Sierra Leonean domestic courts as been inappropriate in the circumstances.

9.10 Counsel therefore requests the Chamber to dismiss Ground 9 of the Prosecution's Appeal Brief. The Trial Chamber did not abuse its discretion nor commit any error of law, and thus its decision should be upheld.

SECOND ERROR OF THE TRIAL CHAMBER: TREATING STATEMENTS OF THE ACCUSED AT THE SENTENCING HEARING AS MITIGATING FACTORS

9.11 In response to this limb of the Prosecution's Appeal Brief, Counsel submits that the Trial Chamber's reliance on the *Orić* Trial Chamber Judgment is correct in every respect[220]. Counsel for Kondewa submits that the *Orić* case constitutes persuasive authority and the fact that that decision was a decision of a Trial Chamber does not deprive it of its persuasiveness in guiding the Trial Chamber in exercising its discretion.

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[219] Sentencing Judgement, para. 42.
[220] Ibid Jelisić para 100

9.12 Counsel submits that contrary to the Prosecution's submission[221], the Trial Chamber did not solely rely on the *Orić* case, but the Trial Chamber referred to other authorities[222] in support of its decision.

9.13 Counsel refers the Chamber to the decision of the Appeals Chamber in the case of *Vasiljević:*

> *"Previous case-law from the Trial Chambers of the Tribunals states that in order for remorse to be considered as a mitigating factor it has to be sincere. The Appeals Chamber is 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. The Trial Chamber considered a number of factors put forward by the Appellant as mitigating circumstances, including his repentance or remorse."*[223]

9.14 Expression of remorse – as unequivocally demonstrated above in *Vasiljević* – has been accepted as a mitigating circumstance in international criminal law where it is real and sincere[224]. The jurisprudence of the ICTR and the ICTY shows that an Accused can express sincere regret without admitting his participation in a crime and this is a factor which may be taken into account in its consideration of mitigating circumstances.[225]

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[221] para 9.19 prosecution's Appeal Brief

[222] such as the decision of the Appeals Chamber on the *Vasiljević* Appeal Judgment para177

[223] Ibid *Vasiljević* para 177

[224] Momir Nikolić *Appeal Sentencing Judgment para 117:* "The Appeals Chamber notes that the expression of remorse has been recognised as a mitigating factor if the remorse is real and sincere. The Trial Chamber expressed no reservations with respect to the sincerity of the Appellant's remorse. In fact, the Trial Chamber found the Appellant's expression of remorse to be a mitigating factor. This finding is in itself a confirmation that the Trial Chamber considered the Appellant's remorse to be sincere, as only a "real and sincere" expression of remorse constitutes a mitigating circumstance"

[225] *Vasiljević* Appeal Judgment para177; *Sikirica* Sentencing Judgment para 152, 194, 230; *Todorović* Sentencing Judgment paras 89-92: Sincerity might be gleaned from the statement and conduct of the Accused as well as any medical or expert report- para 89 *Todorović* Sentencing Judgment; *Orić* Trial

9.15 In the *Orić* case, the Trial Chamber took into consideration[226] the fact that during the course of the Trial Counsel for the Accused had shown compassion on behalf of the Accused towards the witnesses for their loss and suffering. The Trial Chamber held that it "does not doubt the sincerity of the Accused in expressing empathy with the victims for their loss and suffering".

9.16 Kondewa, in his case, went further than merely expressing how he felt through his Counsel[227] but also in his *allocutus* expressed remorse and empathized with the victims and their relatives for their loss and suffering:

> *"Sierra Leoneans, those of you who lost your relations within the war, I plead for mercy today, and remorse, and even for yourselves"*[228]

9.17 It follows that Kondewa unreservedly expressed remorse for the crimes that were committed within the territory of Sierra Leone and empathized with the victims of such crimes. Counsel submits that the Prosecution's contention that the words spoken by Mr. Kondewa's in his *allocutus* cannot be regarded as "genuine expressions of empathy for victims, let alone expressions of genuine remorse"[229] is unfounded.

As the Trial Chamber noted;

> *"although Kondewa did not expressly recognize his own participation in the crimes for which he has been found guilty, the empathy he has shown is real and sincere"*[230].

Judgment para 752. See also Jokić Sentencing Judgment para 89; *Blaškić* Appeals Judgment para 705; *Simić* Trial Judgment para 1066.

[226] Ibid Orić Trial Judgment para 752
[227] **Sentencing Judgment paras 89-90**
[228] *Transcript* of 19 September 2007 p. 64
[229] Prosecution Appeal Brief, para. 9.21.
[230] Sentencing judgment para 65

9.18 Counsel for Kondewa submits that the Trial Chamber in the circumstances properly exercised its discretion in concluding that Kondewa had shown remorse and '*real and sincere*' empathy towards the victims of crimes committed in violation of international criminal law[231]. As such, the Trial Chamber was correct, and its decision should be upheld.

THIRD ERROR OF THE TRIAL CHAMBER: TREATING LACK OF ADEQUATE TRAINING AS A MITIGAITNG FACTOR

9.19 Counsel for Kondewa successfully proved on a balance of probability that Kondewa lacked military training and experience.[232] Throughout the course of the trial no evidence was lead to suggest that Kondewa had any military training, experience or formal education to guide him in making tough decisions during those difficult times. In the *Bisengimana* case, the ICTR Trial Chamber held that the fact that the Accused person was educated amounted to an aggravating circumstance[233]. By parity of reasoning, Counsel submits that the lack of military training and formal education is a mitigating circumstance.

9.20 Counsel refers the Chamber to the *Orić* Trial Chamber Judgment[234] and to that of the *Hadžihasanović* Trial Judgment[235]. In the *Orić* case,[236] the Trial Chamber took into consideration the "*enormous burden that was cast upon {the Accused} at the age of 25 while the situation in Srebrenica was desperate*". He had cast upon him

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[231] In Prosecutor v. Kambanda, Judgment and Sentence, September 4, 1998, paras 56-57, the Trial Chamber held that the finding of mitigating circumstances "relate to assessment of sentence and in no way derogates from the gravity of the crime. It mitigates the punishment, not the crime". See also Prosecution v. Erdemović, Sentencing Judgment, November 29, 1996, para 46- 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".
[232] Kondewa Defence Sentencing Brief paras. 89 – 95.
[233] Bisengimana Judgment and Sentence, para 182
[234] para 757
[235] para 2018.
[236] Noted by the Prosecution's Appeal Brief para 9.24

"enormous responsibilities and problems that are usually carried by seasoned military commanders"[237].

9.21 In *Hadžihasanović*, the Accused was made the commander of a military unit only 9 days after it had been established, and at the very time that it was forced to engaged in an unforeseen battle with the opposing armed forces, and his difficulties in exercising command were compounded by a mass arrival of refugees and by a problem of foreign combatants.

9.22 In *pari materia* the *Orić* and *Hadžihasanović* cases, and as the Trial Chamber in its sentencing judgment noted:

"both men 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 training for the roles which they were to play"[238].

9.23 Counsel submits Kondewa was forced without choice assist in the defence of his people and to ensure that constitutional order and the rule of law return to Sierra Leone. The Trial Chamber it is submitted properly exercised its discretion in considering this fact as a mitigating circumstance.

9.24 The Prosecution itself suggested that the Trial Chamber is entitled to take into account the lack of military training as a mitigating factor[239]. It would seem that the Prosecution's query is based on the fact that this issue was not proved by the Defence Kondewa to the requisite standard and that the Trial Chamber did not highlight the facts on which the Trial Chamber based its decision. That being the case,[240] Counsel for Kondewa submits that contrary to the Prosecution's assertion, evidence of the lack

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[237] Ibid para 757
[238] *Sentencing Judgment para 66 –*
[239] Para 9.25 of the Prosecution's Appeal Brief
[240] Which it is submitted is the case gleaned from paragraph 9.25 of the Prosecution's Appeal Brief.

of military training was adduced in the Kondewa Sentencing Brief[241] and considered by the Trial Chamber in its Sentencing Judgement[242]. Counsel therefore submits that the lack of military training by Kondewa was proved by the Defence for Kondewa on a balance of probabilities.

9.25 Counsel for Kondewa submits that the Trial Chamber correctly considered his lack of military training and did not abuse its discretion when sentencing Kondewa. Counsel urges this Chamber to dismiss this part of the Prosecution's appeal and to uphold the Trial Chamber's decision.

FOURTH ERROR OF THE TRIAL CHAMBER: TREATING SUBSEQUENT CONDUCT OF THE ACCUSED AS A MITIGATING FACTOR

9.26 Counsel disagrees with the Prosecution's contention that "..... *the Trial Chamber did not refer to any evidence of subsequent conduct of* ***Kondewa***". It is submitted that the Sentencing Brief filed on behalf of Kondewa proved conclusively that, Kondewa was a farmer and an herbalist[243] prior to the war and that after the war he returned to that task and to his people who were very much appreciative of his contributions to the community.

9.27 Counsel submits that substantial evidence of the subsequent conduct of Kondewa was provided in the submissions contained in the Sentencing Brief filed on behalf of Kondewa and the *allocutus* made by Mr. Kondewa at the sentencing hearing. Counsel refers this Chamber to paragraph 23 of the Sentencing Judgment where the Trial Chamber said of Mr. Kondewa:

> "*He presented regrets and asked for pardon for the deaths and suffering. He also reiterated that his motivation for participating in the conflict was to reinstate democracy and restore President Kabbah to power*".

[241] Para 89-95 of the Kondewa Sentencing Brief.
[242] Ibid. 22 and 66.
[243] Ibid para. 110 & 111.

9.28 The Trial Chamber specifically footnoted pages 90-94 of the transcript of Mr. Kondewa. Mr. Kondewa referred to his conduct subsequent to the war in the following words:

"I entered into this war because they were killing the civilians, they were punishing them, so that democracy would be restored back to Sierra Leone. I did it so that I can go back to my bush and work. Even the Prosecutor who went to arrest me, met me going to harvest palm nuts. ..... All the good things I was doing, that was the reason they gave me wives"[244].

9.29 The Prosecution failed to adduce any evidence which points to a different life which Mr. Kondewa led after the war. The part of Mr. Kondewa's *allocutus* dealing with his life led subsequent to the war, which went unchallenged by the Prosecution, it is submitted, was therefore proved on a balance of probability. Counsel submits that the Trial Chamber was therefore correct in holding that the subsequent conduct of Mr. Kondewa amounted to a mitigating factor.

FIFTH ERROR OF THE TRIAL CHAMBER: TREATING LACK OF PRIOR CONVICTIONS AS A MITIGATING FACTOR

9.30 Counsel submits that the Trial Chamber was correct in finding that since *"... neither Fofana nor Kondewa has any previous convictions ..... For purposes of sentencing, a clean slate in terms of their criminal records, can be considered as a mitigating circumstance"*. The Appeals Chamber of the ICTY has held that the absence of any criminal record and the Accused's family and social situation constitute a mitigating circumstance[245]. In the jurisprudence of the ICTR also it has been decided that:

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[244] CDF Sentencing Hearing Transcript, 19th September 2007 page 94 lines 7 – 14.

[245] (*Kunarac* et al Appeal Judgment para 408; See also *Erdemović* Sentencing Judgment para 16; *Simić* Trial Judgment para 108; *Nikolić* Trial Chamber Judgment para 265. *Kupreškić Appeal Judgment* para 459 (Good character with no prior criminal conviction can serve as a mitigating circumstance).

"The accused has no previous criminal record until he committed the acts for which he is now pleading guilty. The accused had always conducted himself as an honest and respectable citizen.

The above facts constitute mitigating circumstances to be considered by the Chamber"[246].

9.31 It is submitted that a lack of any criminal record reflects the absence of any tendency, inclination, or any predisposition to break any laws. A lack of any criminal record displays in fact one's respect for the laws and the choice to follow the laws. It reflects the moral character of the individual in choosing to follow and do what is fair and what is just. Such considerations are crucial to consider when assessing the *mens rea* of a crime and the individual's potential capability or lack thereof to commit a crime.

9.32 The Trial Chamber correctly decided and held, in following international criminal case law and jurisprudence, that a lack of a criminal record is a relevant and crucial mitigating circumstance. Thus, the decision of the Trial Chamber should be upheld.

SIXTH ERROR OF THE TRIAL CHAMBER: TREATING THE "JUST CAUSE" OF THE ACCUSED AS A MITIGATING FACTOR & SEVENTH ERROR OF THE TRIAL CHAMBER: TREATING THE MOTIVE OF "CIVIC DUTY" AS A MITIGATING FACTOR

9.33 The Kondewa Defence in response to this part of the Prosecution's Appeal brief submits that the Trial Chamber noted the vagueness of the defence of Necessity and rejected its use both in national as well as in international criminal law.[247]

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[246] *Ruggiu* para 59-60; *Rutaganira Judgment & Sentence* para 130.

[247] Para 69-81 of the Sentencing Judgment.

9.34 Contrary to the Prosecution's Appeal Brief[248] what the Trial Chamber did in its Sentencing Judgement was to consider the particular circumstances of the case[249] as well as the form and degree of participation by the Accused in the crimes[250] and then impose a sentence fitting the crime. The Trial Chamber said:

> *"Further to our finding that Necessity is not and cannot be a sustainable defence nor is it a mitigating factor in this case, it is equally the Chamber's view, suffice to say for our purposes here, that it cannot be accepted either, as a defence in cases where the Accused Persons are indicted for serious violations of International Humanitarian Law as is the case with the two Accused Persons who we have convicted"*[251].

9.35 The Defence submits that the consideration of the purpose and side on which the CDF/Kamajor were fighting has no bearing on the defence of Necessity. What the Trial Chamber did was basically to take into consideration the circumstances of the conflict in Sierra Leone and treat them as mitigating circumstances. It has been held in the jurisprudence of the ICTR that:

> *"With respect to individualizing sentences, this chamber has unfettered discretion in its assessment of the facts and the attendant circumstances. Such discretion allows the chamber to decide whether to take into account certain factor in the determination of the sentence"*[252].

9.36 While the Trial Chamber acknowledged the fact that Kondewa as a member of the Kamajors was fighting to restore constitutional order and the rule of law and that the said fact amounted to a mitigating circumstance, it also stated that that fact does not

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[248] Para 9.34 - 9.41.
[249] Para 82 - 91 of the Sentencing Judgment
[250] *Aleksovski* Appeal Judgment para 152

[251] Sentencing Judgment, para. 77
[252] *Ruggiu* Judgment & Sentence para 52; a principle unequivocally confirmed by the Appeals Chamber in the case of *Serushago*. See also footnote 5.

exculpate him from criminal liability. The Trial Chamber stressed the fact that pro-democracy militias should not use the fact that they are fighting for a just cause to harm innocent civilians.[253] The Chamber went on to say:

"The Chamber hopes 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 institutions of war"[254].

9.37 The Defence submits that the Trial Chamber correctly exercised its sentencing discretion in holding that the motive of civic duty is a mitigating circumstance based on the preponderance of evidence before it of the nature of Kondewa's involvement in the war in Sierra Leone. The Trial Chamber in considering the motives that prompted the CDF/Kamajor to join the war also addressed the issue of the way in which the international community contributed and supported the activities of the CDF Troops. The Trial Chamber said:

"It should be recognised however, 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 forces of the Accused Persons, backed and legitimised by the Internationally deployed force, the ECOMOG, defeated and prevailed over the rebellion of the AFRC that ousted the legitimate Government. This achievement, the Chamber notes, 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 (2000), had become the order of the day"[255].

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[253] Para 96 of the Trial Chamber's Sentencing Judgment

[254] Sentencing Judgement, para. 96.
[255] Ibid para.87.

9.38 It has been held in the jurisprudence of the ICTY that where an accused person commits an offence for which the Tribunal has jurisdiction with an evil motive that in itself is considered as an aggravating circumstance[256]. The Chamber held:

"The motive of the crime may also constitute an aggravating circumstance when it is particularly flagrant. Case-law has borne in mind the following motives: ethnic and religious persecution desire for revenge and sadism. Resultantly, the Trial Chamber considers that it is essential to review the motives of the crimes violating international humanitarian law imputed to the accused. Here, the Trial Chamber takes note of the ethnic and religious discrimination which the victims suffered. In consequence, the violations are to be analyzed as persecution which, in itself, justifies a more severe penalty"[257].

9.39 By parity of reasoning with the ratio of the Blaškić case, Counsel submits that if an evil motive could be treated as an aggravating circumstance, then acting for a noble cause can properly be counted as a mitigating circumstance even though the motive behind the conduct is not a defence in itself.[258]Kondewa fought selflessly to ensure that the rule of law and constitutional order would reign. The Trial Chamber found that violations of International Humanitarian Law occurred but Kondewa and Fofana as the Trial Chamber in its sentencing Judgment correctly held.

"...were among those who stepped forward in the effort to restore democracy to Sierra Leone..."[259]

9.40 It is submitted that the Trial Chamber properly exercised its sentencing discretion in holding that the motive of civic duty is a mitigating circumstance having regard to the nature of Kondewa's involvement in the war in Sierra Leone and ".... *the*

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[256] *Blaškić Judgment*, March 3, 2000 para 785; See also *Tadić Sentencing Judgement*, para. 45. 1708;- ***Čelebici*** *Judgement*, para. 1235.
[257] *Blaškić* Trial Judgment para 785
[258] As demonstrated as regard the defence of necessity
[259] Sentencing Judgment para 94

contribution of the two Accused Persons to the establishment of the much desired and awaited peace in Sierra Leone and the difficult, risky, selfless and for a very sizeable number of their CDF/Kamajors, the supreme sacrifices that they made to achieve this through a bloody conflict"[260] the existing jurisprudence on sentencing.

EIGHTH ERROR OF THE TRIAL CHAMBER: TREATING THE PURPOSES OF RECONCILIATION AS A MITIGATING FACTOR

9.41 In response to this part of Ground 10, Counsel for Kondewa submits that the purpose of sentencing include deterrence, reprobation and reconciliation. Sentencing practices in international criminal law has focused largely on deterrence and retribution[261]. The purpose of reconciliation has however started to gain prominence in international criminal law. The purpose of reconciliation Counsel submits is in consonance with the Security Council's aim of restoring and maintaining peace and security[262].

9.42 Counsel refers the Chamber to the decision of the ICTY Trial Chamber in the *Erdemović* Sentencing Judgment; the Chamber noted that:

> "*The International Tribunal, in addition to its mandate to investigate, prosecute and punish serious violations of international humanitarian law, has a duty, through its judicial functions, to contribute to the settlement of the wider issues of accountability, reconciliation and establishing the truth behind the evils perpetrated in the former Yugoslavia. Discovering the truth is a cornerstone of the rule of law and a fundamental step on the way to reconciliation: for it is the truth that cleanses the ethnic and religious hatreds and begins the healing process*".[263]

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[260] Sentencing Judgement, para. 91.
[261] Trial Chamber Sentencing Judgement, para 26
[262] See *Prosecution v Tadić*, Sentencing Judgment, November 11 1999, para 7 and *Prosecutor v. Kambanda*, Judgment and Sentence, September 4 1998, para 26.
[263] Ibid *Erdemović* Sentencing Judgment para 21

9.43 It is submitted that the Trial Chamber correctly held that a repressive sentence against Kondewa would be counter productive. As has been submitted by Counsel for Kondewa,[264] there is no criminal propensity to be deterred. Retribution would also not serve its desired objective as Kondewa has unreservedly expressed remorse and real and sincere empathy with the victims for the crimes committed in the territory of Sierra Leone[265]

9.44 Counsel further submits that neither the calls for justice by the persons directly and indirectly affected by the crimes for which the Kondewa has been convicted nor the call of the international community as a whole to end impunity could have been answered by a harsh sentence.[266]

9.45 The views of the ICTR in this regard is particularly instructive:

> *"The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1999 so as to end impunity. It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed. The Chamber considers that a fair trial and in the event of a conviction, a just sentence, contribute towards these goals"*[267].

9.46 Counsel agrees with the Prosecution's proposition of law that "*Other case law of the international tribunals indicates that to the extent to which considerations of reconciliation and restoration of peace may be relevant to sentencing, these objectives are to be served by imposing sentences which "dissuade for good those*

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[264] Sentencing Brief filed on behalf of Kondewa, para 21.
[265] Sentencing Judgment, para 65.
[266] If the Sentence is to fit the circumstances of the case and the gravity of the offence then the Trail Chamber rightly exercise its Sentencing discretion.
[267] *Nzabirinda, Judgment & Sentence, para 49. See also Serugendo*, Judgement (TC), para. 31 citing *Rutaganda*, Judgement (TC), para. 455.
Serugendo, Judgement (TC), para. 33; *Aleksovski*, Judgement (AC), para. 185; *Mucić et al*, Judgement (AC), para. 806.

who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations on international humanitarian and human rights"[268]. The same proposition was stated in the *Kayishema* Trial Judgement when it was held that "*As to deterrence, this Chamber seeks to dissuade for good those who will be tempted in the future to perpetrate such atrocities by showing them that the international community is no longer willing to tolerate serious violations of international humanitarian law and human rights*".[269]

9.47 Counsel however submits that unlike the situation in Rwanda and the former Yugoslavia, the war that was fought in Sierra Leone by the CDF/Kamajor troops was done with the active support and collaboration of the international community.

9.48 The Trial Chamber in its Judgement found as a fact the following:

"Whilst in Conakry, there were some differences between President Kabbah and Norman, especially after Norman had granted a BBC interview condemning the coup and soliciting the assistance of hunters in reinstating the government[270]*. To resolve these disagreements, the Ambassadors of the USA, Great Britain and Nigeria to Sierra Leone and the UNDP representative arranged a meeting with Norman and the President in Conakry. At the meeting, these Ambassadors offered assistance from their countries only if both the President and Norman would agree to work together in the interests of Sierra Leone*[271]*. Upon President Ahmad Tejan Kabbah's arrival in Conakry, the OAU designated ECOWAS to restore Kabbah's government. ECOWAS in turn designated ECOMOG. In furtherance of the ECOWAS policy, the British Government assisted by providing equipment to ECOMOG"*[272].

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[268] Prosecution Appeal Brief, para 9.51.
[269] *Kayishema* Trial Judgement, paras. 1 – 2.
[270] Judgement, 2nd August 2007, para. 76.
[271] Ibid para 77.
[272] Ibid 82.

9.49 The views of the ICTR in this regard is particularly instructive

> *"The Tribunal was established to prosecute and punish the perpetrators of the atrocities in Rwanda in 1999 so as to end impunity. It was also created to contribute to the process of national reconciliation, the restoration and maintenance of peace and to ensure that the violations of international humanitarian law in Rwanda are halted and effectively redressed. The Chamber considers that a fair trial and in the event of a conviction, a just sentence, contribute towards these goals"*[273].

9.50 Counsel submits the Trial Chamber correctly exercised its discretion in imposing the sentences on Kondewa taking into consideration the overall circumstances of the case[274]. The Trial Chamber did not simply rely on the issue of reconciliation but had recourse to the totality of the gravity of the offences, the circumstances of the Kondewa, the aggravating and mitigating circumstances[275] before pronouncing its judgment.

NINTH ERROR OF THE TRIAL CHAMBER: DECIDING THAT ALL SENTENCES WOULD BE CONCURRENT WITHOUT ADEQUATE CONSIDERATION

9.51 Rule 101(C) of the Rules of Procedure and Evidence states *"[t]he Trial Chamber shall indicate whether multiple sentences shall be served consecutively or*

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[273] *Nzabirinda, Judgment & Sentence, para 49. See also Serugendo*, Judgement (TC), para. 31 citing *Rutaganda*, Judgement (TC), para. 455.
Serugendo, Judgement (TC), para. 33; *Aleksovski*, Judgement (AC), para. 185; *Mucić et al*, Judgement (AC), para. 806.

[274] Ibid footnote 5

[275] Which the Prosecution has failed to prove beyond reasonable doubt and the mitigating circumstances which the Kondewa Defence proved on a balance of probabilities: *Delalić* et al., Judgment, Appeals Chamber, February 20, 2001, para. 590; Prosecutor v. Kunarac et al., Judgment, ICTY Trial Chamber, February 22, 2001 para.847; *Prosecutor v. Sikirica* et al., Judgment, ICTY Trial Chamber, November 13, 2001, para 110. *Ntakirutimana*, Judgment, TC, para. 893; *Vasiljević*, Judgement, TC, para. 272; *Simić*, Sentencing Judgment, TC, para. 40.

concurrently." When multiple sentences have existed, judges have issued concurrent sentences so that they may be served simultaneously.[276]

9.52 The Rules and Statute of the Court provide that in imposing a sentence the Trial Chamber has to take into consideration the gravity of the offence, the circumstances of the accused and any aggravating and mitigating factors[277]. The Defence concurs with the Prosecution's proposition that the Trial Chamber "*had the discretion to impose a single, global sentence on an accused convicted of more than one crime*"[278] and also has the discretion "*to impose separate sentences in respect of each of the counts for which each of the Accused was convicted*"[279].

9.53 The Defence submits that the Trial Chamber correctly exercised its discretion in imposing separate sentence for each of the crimes for which Kondewa was convicted and holding that the sentences imposed were to run concurrently after considering the aggravating and mitigating factors as well as the personal circumstances of Kondewa. The Trial Chamber concluded that "*it has chosen to impose separate sentences for each of the crimes for which Fofana and Kondewa have been convicted because it is our view that this better reflects the culpability of the Accused for each offence for which they were convicted, given that distinct crimes were committed by each Accused in discrete geographical areas*"[280]. The Prosecution's argument "*that the Trial Chamber in the Sentencing Judgement, simply ordered all sentences to be served concurrently, without giving any reasons for this decision, and without making reference anywhere in the Sentencing Judgement to the principle that the overall sentence to be served by an accused must reflect the totality of the accused's criminal conduct*" is therefore wrong and misleading. The Trial Chamber in the concluding paragraph of its Sentencing Judgement also said:

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[276] *See e.g., Prosecutor v. Imanishimwe,* ICTR-99-24-T, Judgement and Sentence, 25 February 2004, para. 827.
[277] Article 19 (2) of the Statute and Rule 101 (B)
[278] Sentencing Judgement para. 9.53.
[279] Ibid para. 9.53.
[280] Para 97 - page 34 of the Sentencing Judgment

"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 taking into consideration by the Chamber in arriving at an appropriate sentence"[281].

9.54 Thus, the Kondewa Defence submits that contrary to the arguments put forward by the Prosecution[282], the Trial Chamber imposed multiple sentences that it ordered were to be served concurrently after analysing all the aggravating and mitigating circumstances put forward by the Prosecution and the Kondewa Defence and after reviewing the general circumstances of the case vis a vis the gravity of the offences for which Kondewa was found guilty.

TENTH (AND OVERALL) ERROR OF THE TRIAL CHAMBER: MANIFEST INADEQUACY OF THE SENTENCE

9.55 In the exercise of its sentencing discretion, the Trial Chamber has to take into consideration several factors:

"In determining the appropriate sentence to be imposed on an Accused person, the Trial Chamber is obliged to take into account any aggravating and mitigating circumstances but the weight to be given to the aggravating and mitigating circumstances is within the discretion of the Trial Chamber".[283]

9.56 The burden of proof for aggravating circumstances is on the Prosecution. *"[O]nly those matters which are proved beyond a reasonable doubt against an accused may be the subject of an Accused's sentence or take into account in aggravation of that*

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[281] *Para 95 of the Trial Chamber's Sentencing Judgment.*

[282] Prosecution's Brief para. 9.61.

[283] *Čelebići* Appeal Judgment para 777. Note also the footnotes of *Kupreskić* and *Aleksovki* judgments

sentence."[284] The Defence has a duty to prove mitigating circumstances on a balance of probabilities[285]. While the gravity of the offence has been accepted as the starting point[286], the Trial Chamber has to look beyond the abstract gravity[287] and take into consideration any aggravating circumstances[288], the individual and mitigating circumstances of Accused[289].

9.57 In the process of this consideration, issues such as the age of Kondewa, his character prior to the date of the preferment of the indictment, his family situation, his lack of military training, his lack of any previously known criminal record, his excellent record of behavior during detention and during the course of the trial, his assistance to victims during the war, his being illiterate, the fact that he was among a few who stood firm in the defence of democracy and the rule of law, etc were considered by the Trial Chamber. Counsel submits that these factors were proven on behalf of Kondewa to the required standard of proof both in the Sentencing Brief filed on behalf of Kondewa and in the oral submissions made at the sentencing hearing[290]. It is submitted that it was only on completion of this exercise that the Trial Chamber imposed a sentence on Kondewa.[291]

9.58 Counsel wish to reiterate that the jurisdiction conferred by the Statute on the Trial Chamber takes away the imposition of the death penalty and that of life imprisonment[292]. Kondewa at the date of his sentencing was over 50 years old[293]. The

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[284] *Prosecutor v. Mucič et al.*, IT-96-21-A, 20 February 2001, para. 763 **("Čelebići Case").**
[285] *Ntakirutimana*, Judgment, TC, para. 893; Vasiljević, Judgement, TC, para. 272; *Sikirica*, Sentencing Judgement, TC, para. 110; Simić, Sentencing Judgment, TC, para. 40; *Kunarac*, Judgment, TC, para. 857.
[286] Ibid Čelebići Appeal Judgment para. 777
[287] Semanza Judgment and Sentence para 555
[288] A particular circumstances shall not be retained as an aggravating factor if it is included in the consideration of the elements of the crime; Ntakirutimana Trial Chamber Judgment and Sentence para 893. See also *Todorovic* Sentencing Judgment para 57
[289] *Semanza* Judgment para 555. See also *Aleksovski* Appeal Judgment para 152
[290] Čelebići Judgement (AC), para 719. "While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results".
[291] Sentencing Judgment para 32-94Sentencing Judgment para 32-94
[292] Article 19 (1) and Rule 101 (A)
[293] para 142 of the Kondewa Defence Sentencing Brief

life expectancy of Sierra Leoneans is estimated at 41 years[294]. Thus, Kondewa's age exceeds the life expectancy in Sierra Leone. It is submitted that the imposition of any higher sentence other than that imposed on Kondewa[295] would have meant imposing a sentence of life imprisonment.

9.59 The Prosecution in its Appeal Brief[296] relied on the cases of *Imanishinwe* and *Semaza*[297], Sentencing Judgments of the ICTR to illustrate how the Trial Chamber could have exercised its discretion. Counsel submits that the Prosecution failed to note in its submissions that in those cases, the personal circumstances of the accused, the gravity of the offence and the mitigating factors were completely different to this case[298] and the offences committed in those cases relate principally to the crime of genocide[299].

9.60 The *Imanishimwe* sentence is distinguishable from that of Kondewa in the sense that the Trial Chamber in that case did not accept the circumstances put forward by the Defence for *Imanshimwe* as mitigating circumstances. The Trial Chamber in that case held:

"The Imanishimwe Defence made no sentencing submissions. However, it presented a detailed description of Imanishimwe's professional background prior to the conflict in Rwanda in 1994. The Chamber notes that Imanishimwe's background prior to the 1994 conflict in Rwanda, as submitted by the Defence, includes work with several religious and benevolent associations, as well as a university degree in social sciences and military studies, followed by five years of military command experience. The Chamber does not consider Imanishimwe's

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[294] UNDP Human Development Report 2006, Human Development Indicators, Country Fact Sheets, Sierra Leone, *a http://hdr.undp.org/hdr2006/statistics/countries/country_fact_sheets/cty_fs_SLE.html.*
[295] Para 97 of the Sentencing Judgment
[296] Paras 9.56–9.57 and the footnotes attached thereto
[297] Accused charged with genocide and complicity to commit genocide under counts 1-3 of the Semanza indictment. See also paras 574-582 of the Trial Chamber's Judgment and Sentence
[298] See paras 817- 820 of the *Imanishimwe* Judgment and Sentence but note more particularly para 820.
[299] Count 7 and 10 of the *Imanishemwe* Indictment

background, as submitted by the Defence, to be a factor to mitigate his sentence. The Chamber notes that the Imanishimwe Defence made no submissions concerning any significant personal, medical, or other relevant circumstances that could influence sentencing considerations".[300]

9.61 Counsel submits that the quantum of sentences imposed in the cases referred to by the Prosecution are significantly higher than those in the present case for good reasons i. e. the differences in the crimes charged and convicted, the aggravating and mitigating circumstances relied on and proven etc. It is submitted that even two accused persons charged with the same offences might, for good reasons, receive significantly different sentences. Approval of this practice was given in the *Čelebići* Judgement in the following words:

"While it does not disagree with a contention that it is to be expected that two accused convicted of similar crimes in similar circumstances should not in practice receive very different sentences, often the differences are more significant than the similarities, and the mitigating and aggravating factors dictate different results".[301]

9.62 As the Trial Chamber noted in its Sentencing Judgment in this case:

"The Chamber has taken note of some significant and enlightening precedents on sentencing principles that have been cited by the Parties. However, even though the statutorily oriented sentencing principles in those cases remain relevant in guiding and assisting us to arrive at a decision in this case, 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 we consider relevant and pertinent to scaling the sentences that we are about to hand

[300] Ibid para 820 of the Imanishimwe Judgment and Sentence
[301] Čelebići, Judgement (AC), para 719.

down on the Accused Persons in relation to the counts for which we have found them guilty".[302]

9.63 There are authorities from the ICTR and ICTY with circumstances similar to that of Kondewa where persons convicted of murder have received sentences of two to seven years imprisonment.

9.64 In the case of *Orić*, the Trial Chamber considered the following factors to be relevant to the issue of mitigation: 1. the Bosnian Muslims faced an "*escalating offensive by militarily superior Serb armed forces*"; 2. "*the unpreparedness of the Bosnian Muslim forces*"; 3. "*an unmanageable influx of refugees*"; 4. "*increasing isolation of the town and area resulting in critical shortages of food and other essentials*"; 5. "*general chaos*" and 6 "*the flight from Srebrenica of all the authorities, civilian and otherwise, soon after the outbreak of hostilities and the take-over of the town by the Serb forces*". The Trial Chamber found that these combined factors "*resulted in a total breakdown of society in Srebrenica including a collapse of law and order*".[303] The Trial Chamber further considered that, in the midst of this chaos, *Orić* was appointed to his position as chief of police in a small town near Srebrenica that soon became "*a focal point in the Serb offensive*"[304]. He quickly earned "*public esteem as a local hero*" for his contribution to the successful Bosnian effort to recapture Srebrenica.[305]

9.65 In describing the Bosnian Muslim's efforts to "*re-constitute the basics of authority and government*" in Srebrenica, the Trial Chamber noted:

"The evidence demonstrates that the difficulties were enormous, especially since the persons who would have filled in the various positions had fled the town and the general situation was worsening. There was also the predicament of resisting the

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[302] Sentencing Judgment, para 82.
[303] *Orić* Trial Judgement, para 768.
[304] Ibid para 768.
[305] Ibid para 768.

on-going siege on Srebrenica by the Serb forces without a proper army, without any effective link with the ABiH and the BiH government and in addition, having to defend on a number of voluntary and poorly armed groups of fighters gathered around local leaders, some of whom were reluctant to accept any superior command structure".[306]

9.66 The situation described in the *Orić* case is significantly similar to that faced by the CDF during the war. Following the Coup, "*President Ahmed Tejan Kabbah and other members of his Government were forced to leave Sierra Leone and many of them proceeded to Conakry, Guinea*".[307] The Trial Chamber also found as follows in relation to Kondewa and Fofana: "..... *that both men 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 training for the roles which they were to play*".[308]

9.67 *Orić* received a two-year sentence for failure to prevent murder pursuant to Article 7.3 and Article 3 of the ICTY Statute.

9.68 In the case of *Joseph Nzabirinda*[309] the Accused was sentenced to a term of seven years' imprisonment for the offence of murder as a crime against humanity pursuant to Article 3(a) of the Statute of the ICTR.

9.69 Counsel submits that the important factual and contextual differences between the cases cited by the Prosecution and the instant case necessitated the Trial Chamber to undertake a proper individualization of the sentence using its unfettered discretion.[310]

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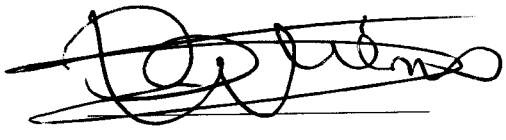
[306] Ibid para 769.
[307] Trial Judgement, para. 72.
[308] Sentencing Jundgement of Moinina Fofana & Allieu Kondewa, para 66.
[309] Sentencing Judgement dated 23rd February 2007, para 116.
[310] The individual circumstances of Kondewa- his age, his illiteracy, his family and social situation and the mitigating circumstances-lack of any prior criminal record, lack of military training, the remorse he showed etc Ibid paras 82 & 95 of the Sentencing Judgment

9.70 Counsel further submits that no discernable error was committed[311] by the Trial Chamber in the sentences imposed on Kondewa and if the maxim that punishment must fit the crime is to hold good, then the Trial Chamber rightly exercised it discretion. Counsel submits that this Chamber should not interfere with the sentences imposed by the Trial Chamber in this case as the prosecution has failed to show or establish any error in the Trial Chamber's discretion. An authority for this proposition is the *Vasiljević* Appeal Judgement where it was said:

> *"Similar to an appeal against conviction, an appeal from sentencing is a procedure of a corrective nature rather than a de novo sentencing proceeding. A trial Chamber has considerable though not unlimited discretion when determining a sentence. 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 follow applicable law.' The test that has to be applied for appeals from sentencing is whether there has been a discernible error in the exercise of the Trial Chamber's discretion. As long as the Trial Chamber keeps within the proper limits, the Appeals Chamber will not intervene".*[312]

9.71 For the several submissions put forward above, the Kondewa Defence requests the Appeals Chamber to dismiss Ground 10 of the Prosecution Appeal.

Filed in Freetown,



Yada Williams

21st January, 2008

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[311] Article 20 of the Statute

[312] Vasiljević Appeal Judgement para 9

APPENDIX A

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necessary constituents of estoppel per rem judicatem"

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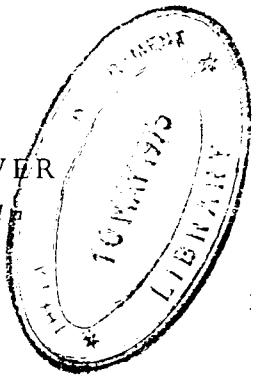
APPENDIX B

SPENCER BOWER AND TURNER

LAW OFFICERS'

The Doctrine of Res Judicata



The Original Text by

GEORGE SPENCER BOWER

Sometime one of His Majesty's Counsel and a Master of the Bench of the Inner Temple

The Second Edition by

THE RIGHT HONOURABLE

SIR ALEXANDER KINGCOME TURNER,

M.A., LL.B. (N.Z.), HON. LL.D. (AUCKLAND)

A Judge of the Court of Appeal of New Zealand

"οὐκ ἄν ποτε
κατάστασις γένοιτ' ἄν οὐδενὸς νόμου,
εἰ τοὺς δίκῃ νικῶντας ἐξωθήσομεν
καὶ τοὺς ὄπισθεν εἰς τὸ πρόσθεν ἄξομεν."

Sophocles, *Ajax*, 1246–49

LONDON
BUTTERWORTHS
1969

Introduction

Introductory

1 In English jurisprudence a *res judicata*, that is to say a final judicial decision pronounced by a judicial tribunal having competent jurisdiction over the cause or matter in litigation, and over the parties thereto, disposes once and for all of the matters decided, so that they cannot afterwards be raised for re-litigation between the same parties or their privies. The effect of such a decision is two-fold.

Parties estopped from averring to the contrary

2 In the first place, the judicial decision estops or precludes any party to the litigation from disputing, against any other party thereto, in any later litigation, the correctness of the earlier decision in law and fact.[1] The same issue cannot be raised again between them, and this principle extends to all matters of law and fact which the judgment, decree, or order necessarily established as the legal foundation or justification of the conclusion reached by the Court.[2]

Transit in rem judicatam

3 In the second place, by virtue of the decision the right or cause of action set up in the suit is extinguished, merging in the judgment which is pronounced. *Transit in rem judicatam.* The result is that no further claim may be made upon the same cause of action in any subsequent proceedings between the same parties or their privies.[3]

4 Every judicial decision such as is described in paragraph 1 above operates, in a word, both as an estoppel and as a merger. It is conclusive in both capacities because on the one hand, as Coke would put it, it is of such "uncontrollable credit and verity" that no party may presume to

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1 See para. 9, *post*, for a more detailed statement of the rule.

2 Per DIXON J. in *Blair* v. *Curran* (1939), 62 C.L.R. 464 (H. Ct. of Aus.) at p. 531. This dictum crystallises the essence of the doctrine of issue estoppel.

3 "The very right or cause of action claimed or put in suit has in the first proceedings passed into judgment, so that it merged and has no longer an independent existence"—per DIXON J. in *Blair* v. *Curran* (1939), 62 C.L.R. 464 (H. Ct. of Aus.) at p. 532.

impeach it,[1] and, on the other, it is of such an exalted nature that it extinguishes the original cause of action, and consequently bars the successful party from afterwards attempting to resuscitate what has been so extinguished, and stir the dust which has received such honourable sepulture; or, in modern phraseology, because in both cases alike it is against public policy, and oppressive to the individual, to re-agitate disputes which have been litigated once for all to a finish.

5 It is of the utmost importance, in every case in which considerations of *res judicata* arise, to distinguish clearly between the two consequences of a judicial decision to which we have already adverted. Much confusion of thought has been engendered by the failure of text-writers, counsel,[2] and judges,[3] to keep clearly in mind which of the two consequences of *res judicata* arise, or are invoked, in particular matters before the Court. It is hoped that in the present work the terminology to be adopted in this edition may assist towards the clarity of thought always essential to a study of this subject.

Terminology

6 The terms "*res judicata*" and "estoppel by record" have at times been indiscriminately used to signify either, or both, of the two doctrines which we have mentioned. It is proposed in this edition to use the term *res judicata* as a phrase of general application applicable to both the doctrines. The first of the two consequences of a *res judicata*, by virtue of which a party to litigation is precluded thereafter, as against the other or

[1] 2 Coke on Litt. 260A.

[2] In the judgment of SOMERVELL L.J. in *Greenhalgh* v. *Mallard*, [1947] 2 All E.R. 255 a considerable passage is occupied (at p. 258) in dealing with an argument in which the two doctrines had obviously been hopelessly confused, Counsel having put forward *Brunsden* v. *Humphrey*, *infra*, (in which the question of merger, not of issue estoppel, was the sole matter for argument) in support of a plea of what amounted to issue estoppel. So, too, in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.* (*No.* 2), [1966] 2 All E.R. 536, H.L. Lord HODSON refers at p. 561 to "another argument put forward by the appellant, which I do not find it possible to accept", the argument being obviously based on a confusion between the two quite separate consequences which follow upon a judgment.

[3] See, for instance, *Ord* v. *Ord*, [1923] 2 K.B. 432, a case of issue estoppel pure and simple, where at p. 443 LUSH J. reinforced his judgment by a reference to *Brunsden* v. *Humphrey* (1884), 14 Q.B.D. 141, C.A., a case in which merger was essentially the question in dispute. Another typical example is the judgment of LEWIS J. at first instance in *Marginson* v. *Blackburn Borough Council*, [1938] 2 All E.R. 539; this was reversed on appeal in [1939] 1 All E.R. 273; [1939] 2 K.B. 426. Cf. *in New Zealand* the judgments of OSTLER J. in *Priest* v. *Mouat*, [1937] N.Z.L.R. 431 and of SMITH J. in *National Insurance Co. of New Zealand Ltd.* v. *Geddes*, [1936] N.Z.L.R. 1004, and the criticism of these in *Wilson* v. *Matheson*, [1955] N.Z.L.R. 927, at p. 930, adopted by SHORLAND J. in *Clyne* v. *Yardley*, [1959] N.Z.L.R. 617, at p. 628. Even in the Lords, Lord GUEST is to be found in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*, (*No.* 2), [1966] 2 All E.R. 536, H.L. at p. 567 speaking in the same sentence of merger and of issue estoppel as if the two were instances of the operation of the same doctrine. *Cf.*, however, the less receptive attitude of Lord HODSON to this part of appellant's argument at p. 561.

others, from denying in subsequent litigation the correctness of a decision on a matter of law or fact given in the earlier litigation between them, will in this treatise be called "estoppel *per rem judicatam*". The second consequence—*viz.* the merger of the original cause of action in the judgment concluding the litigation—will be referred to hereafter in this work as "merger in judgment".

The term "estoppel by record", though it has been widely accepted as applicable to one or both of the consequences of a *res judicata* which have been referred to above,[1] must be acknowledged, on any careful examination of the doctrines supporting those consequences in their present form, to be both misleading and inconvenient. If the first of these two consequences—estoppel *per rem judicatam*—be the topic to be considered, it is at once to be observed that it is the *res judicata*, not the record, which creates the estoppel. As will be seen hereafter, it is immaterial whether the judicial decision is pronounced by a tribunal which is required by law, or authorised by custom, to keep written memorials of its decisions, or by a tribunal which is not so required or authorised.[2] As regards this result of a *res judicata*, then, though it is correctly described as an estoppel, its description as "estoppel by matter of record" or (more shortly) "estoppel by record" is a misnomer. The term, as applied by Coke and the other Elizabethan jurists, did undoubtedly reflect the views in their day obtaining as to the characteristics and limits of this class of estoppel. At a time when it was considered a sacrilege to question the inviolable "credit and verity" of a judicial *record*, rather than an injustice and scandal to impeach and re-agitate a judicial *decision*, the phrase was natural and appropriate enough. But, now that the latter aspect of the doctrine has superseded the former, the retention of the expression "estoppel by record" has become little more than an archaic survival.[3]

[1] The term is used generically by *Halsbury's Laws* (3rd Edn. Vol. 15); *cf. Everest and Strode* 3rd Edn. (1923), *Phipson on Evidence* 10th Edn. 845–846.

[2] See (e.g.) per Lord GUEST in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*, (*No.* 2), [1966] 2 All E.R. 536, H.L. at p. 564: "As it is now quite immaterial whether the judicial decision was pronounced by a tribunal which is required to keep a written record of its decisions, this nomenclature has disappeared, and it may be convenient to describe *res judicata* in its true and original form as 'cause of action estoppel'."

[3] "Estoppel by matter of record" is the first of the three classes of estoppel mentioned in 2 Coke on Littl. 352a. Coke there describes "matter of record" as including "letters patent, fine, recovery, pleading, taking of continuance, confession, imparlance, warrant of attorney, admittances", without mentioning judgments at all,—a curious omission,—but, in an earlier part of the same treatise (2 Coke on Littl. 260a), after defining "recordum" as a memorial or remembrance in rolls of parchment of the "proceedings and acts"—which would include judgments—"of courts of record", he proceeds to state, as a fundamental rule of evidence, that "the rolls being the records or memoranda of the judges of the courts of record, import in them such uncontrollable credit and verity as they admit no averment, plea, or proof to the contrary" —which is as much as to say, though the word itself is not used, that there is an estoppel against contradicting or impeaching the records of judicial "proceedings and acts". Now, if this rule

As regards the other of the consequences of *res judicata*—merger in judgment—the term "estoppel by record", though it is used in this connection by some high authorities, must be regarded as even more inept and open to objection, since this consequence of a *res judicata* is seen, when examined, not to be attributable to estoppel at all.

The use of the terms "estoppel by matter of record" or "estoppel by record" is accordingly sedulously avoided in this work, as is also that of their horrible companion "estoppel quasi of record".[1]

Treatment of the subject

7 The two doctrines which we have now been at pains to separate one from the other will be dealt with in completely different parts of this treatise, of which Part I will deal with the principles governing estoppel *per rem judicatam*. Under this general heading the subjects of cause of action estoppel and of issue estoppel[2] must logically be dealt with. After an exposition in the earlier chapters of this Part of the principles underlying the doctrine of estoppel *per rem judicatam*, a number of applications of

had been expressed so as to embrace all judicial decisions, and no more, it would, in substance, correspond to the rule of estoppel *per rem judicatam*; but it is not so expressed, for, in the first place, it is limited to the record of the decision, not the decision itself; secondly, the records referred to include, in addition to those of judgments, many of which are deemed in modern times to create either no estoppel at all, or only an estoppel by representation; whilst, lastly, it is only the decisions of courts of record which are stated to be subjects of estoppel. It is accordingly submitted, for reasons which will be elaborated in Chapter I, *post*, that the term "estoppel by record" ought now to be discarded altogether, in the interests of scientific nomenclature.

Dealing with the term "estoppel by record", and contrasting with it the more modern use of "issue estoppel", FULLAGAR J. wrote (of "issue estoppel") in *Jackson* v. *Goldsmith* (1950), 81 C.L.R. 446 (H. Ct. of Aus.) at p. 466: "It has the great advantage of being quite unambiguous. The term 'estoppel by record' is an alternative to 'issue estoppel', and it is a term which has been in use for a very long time. But while it is not open to any *prima facie* objection, it has become *ancipitis usus*, being used sometimes as equivalent to issue estoppel, sometimes as equivalent to *res judicata*, and sometimes as describing a supposed common principle from which both the rule as to *res judicata* and the rule as to issue estoppel are derived." In this work "estoppel *per rem judicatam*" is used to include all cases of estoppel precluding the contradiction of matters previously determined between the parties. These include (a) cases where it is sought to challenge the decision itself, and this is precluded by estoppel ("cause of action estoppel"), and (b) cases where, though the decision in the previous proceedings is not challenged, some issue forming an essential constituent of it is. The principle which precludes the latter type of challenge is in this work called "issue estoppel".

[1] 15 *Halsbury's Laws*, 3rd Edn., pp. 168–169, 212 *et seq*; *cf.* the notes to *The Duchess of Kingston*'s *Case* in 2 Smith's Leading Cases 13th Edn. 689.

[2] For the place of these terms in the systematic classification of estoppels *per rem judicatam*, see the judgment of DIPLOCK L.J. in *Thoday* v. *Thoday*, [1964] P. 181, at p. 197. He appears to have been the first to use the term "cause of action estoppel". "Issue estoppel" is a term perhaps first suggested in Australia by HIGGINS J. in *Hoysted* v. *Federal Taxation Commissioner* (1921), 29 C.L.R. 537 (H. Ct. of Aus.) at p. 561. It was taken up by DIXON J. in *Blair* v. *Curran* (1939), 62 C.L.R. 464 (H. Ct. of Aus.) at p. 531 and by FULLAGAR J. in *Jackson* v. *Goldsmith* (1950), 81 C.L.R. 446 (H. Ct. of Aus.) at p. 466. It has been adopted in English courts by DIPLOCK L.J. in *Thoday* v. *Thoday*, [1964] P. 181, at p. 198 and by Lord DENNING, M.R. in *Fidelitas Shipping Co., Ltd.* v. *V/O Exportchleb*, [1965] 2 All E.R. 4, at p. 8.

these principles will be examined, and it will be seen in successive chapters how these principles are applied to such special subjects as running-down cases, taxation and rating cases, and matrimonial proceedings. The plea of *autrefois acquit* (the plea by which this doctrine is applied to criminal matters) is dealt with in a separate chapter in this section of Part I, and this Part concludes with a chapter dealing with affirmative answers to a plea of estoppel.

Part II will deal with merger in judgment—the doctrine whereby recovery of judgment by one party operates as a bar to further proceedings by him in respect of the same cause of action. After an exposition of the principles underlying this doctrine, the plea of *autrefois convict* in criminal matters will receive consideration in a separate chapter.

Each Part will conclude with a chapter dealing with the rules as to pleading and procedure applicable to that part of the subject. Four Appendices are added to the text; in the first two of these will be found short excursus dealing with (a), the inherent jurisdiction of the Court enabling the dismissal of proceedings in cases where *res judicata* cannot be strictly established, and (b), the doctrine of *Res Judicata* in Roman Law, while the last two are devoted to the legislative repeal of the rule in *Hollington* v. *F. Hewthorn & Co., Ltd.*[1]

[1] [1943] K.B. 587.

PART I

Estoppel Per Rem Judicatam

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CHAPTER

Preliminary

8 In this introductory chapter it is proposed to deal successively with, first, the principle sustaining estoppel *per rem judicatam*, secondly, the theory on which the doctrine is based, thirdly, the terminology of this part of the subject, and lastly, the constituent elements of *res judicata* in its operation as estoppel.

Statement of the principle of estoppel per rem judicatam

9 The rule of estoppel by *res judicata*, which, like that of estoppel by representation, is a rule of evidence,[1] may thus be stated: where a final judicial decision has been pronounced by either an English, or (with certain exceptions) a foreign,[2] judicial tribunal of competent jurisdiction over the parties to, and the subject-matter of, the litigation, any party or privy to such litigation, as against any other party or privy thereto, and, in the case of a decision *in rem*, any person whatsoever, as against any other person, is estopped in any subsequent litigation from disputing or questioning such decision on the merits,[3] whether it be used as the foundation of an action,[4] or relied upon as a bar to any claim, indictment or complaint,[5] or to any affirmative defence, case, or allegation, if, but not unless, the party

[1] *Humphries* v. *Humphries*, [1910] 2 K.B. 531, C.A. per FARWELL J. delivering the judgment of the court, at p. 536; *Marginson* v. *Blackburn Borough Council*, [1939] 2 K.B. 426, per SLESSER L.J. at p. 437. ("the broader rule of evidence which prohibits the reassertion of a cause of action"); *Morrison, Rose & Partners* v. *Hillman*, [1961] 2 Q.B. 266, per PEARSON L.J. at p. 277 ("To my mind the correct line of approach to this question is to regard the previous decision as conclusive evidence").

[2] See Chapter II, para. 69, *post*, as to foreign *res judicatae*.

[3] This passage of the text, reprinted from the first edition, was expressly approved by Lord GUEST in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd., (No. 2)*, [1966] 2 All E.R. 536, H.L. at p. 564.

[4] See para. 18, *infra*, as to the principle, in cases where an action is brought on the *res judicata*, being precisely the same as in cases where the decision is set up as a bar, though not usually denominated "estoppel" in the former type of case. As to the cases in which an action will not lie at all on a judgment, see Chapter II, paras. 77 *et seq.*, *post*.

[5] The plea of *autrefois acquit*, which is in its nature a plea of estoppel *per rem judicatam* in criminal cases, is dealt with in Chapter XI.

interested raises the point of estoppel at the proper time and in the proper manner.[1]

This rule is sometimes expressed in the concise Latin maxim *res judicata pro veritate accipitur*.[2]

Theories on which the doctrine is based

10 There are two theories (which, however, on analysis, may perhaps be regarded as merely two aspects or sides of one and the same theory) whereon the doctrine of estoppel *per rem judicatam* is commonly justified;[3] *viz.* first, the general interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions; and, secondly, the right of the individual to be protected from vexatious multiplication of suits and prosecutions at the instance of an opponent whose superior wealth, resources and power may, unless curbed by the estoppel, weigh down judicially declared right and innocence.[4] The former is

[1] See Chapter XIV, *post*.

[2] By (for instance) Lord MACDERMOTT, delivering the report of the Judicial Committee, in *Sambasivam* v. *Public Prosecutor, Federation of Malaya*, [1950] A.C. 458, P.C. at p. 479.

[3] One may disregard here certain archaic and metaphysical theories, originating mainly with Coke, such as that of the inviolable sanctity of "the record", as such (2 Coke on Littl. 260a), which is of "so high and conclusive a nature as to admit of no contradiction thereof" (2 Coke on Littl. 352a), or the fanciful view, quite in the Baconian spirit, that, as nature abhors a vacuum, so "the common law . . . abhors infiniteness" (*Ferrer* v. *Arden* (1599), 6 Co. Rep. 7a), and *infinitum in jure reprobatur* (*Randal* v. *Higgens* (1605), 6 Co. Rep. 44b), or the still more curious and scholastic suggestion that it would be a monstrous inversion of the natural order of things that, men being mortal, litigation should be immortal (*ne lites immortales essent dum litigantes mortales sunt*) cited by the Court of Common Pleas at p. 239 of *Ellis* v. *M'Henry* (1871), L.R. 6 C.P. 228), or, lastly, the idea that, on the principle of *cuilibet in sua arte perito est credendum*, a sort of intercurial comity ought to prevail, in obedience to which the judgment of a court of exclusive jurisdiction ought not to be questioned by any other court, though deemed by the latter erroneous (*Bunting* v. *Lepingwell* (1585), 4 Co. Rep. 29a).

[4] In 2 Coke on Littl. 260a, the doctrine is made to rest upon public convenience only: "for otherwise (as our old authors say, and that truly) there should never be an end of controversies, which should be inconvenient". *Cf.* BRETT M.R., at p. 518 of *Re May* (1885), 28 Ch.D. 516, C.A.: "it is one of the most fundamental doctrines of all courts, that there must be an end to all litigation". This was also the view of the Roman jurists: see App. B., *post*. On the other hand, both of the theories referred to in the text are expressly relied upon in *Ferrer* v. *Arden* (1599), 6 Co. Rep. 7a, where *expedit reipublicae ut sit finis litium* is first given summarily as the foundation of the rule (p. 7a), and, later (at p. 9a) there follows an expansion of the formula in these terms: "*interest reipublicae ut sit finis litium*; otherwise great oppression might be done under colour and pretence of law; for if there should not be an end of suits, then a rich and malicious man would infinitely vex him that had right by suits and actions; and in the end (because he cannot come to an end) compel him (to redeem his charge and vexation) to relinquish his right". The court then enlarges on the scandal of an infinity of verdicts, recoveries, and judgments in one and the same cause, with possibly "contrariety" between some of them, and the protraction of litigation thence resulting, and concludes with the quaint expression cited in the last note—"all this tends to the dishonour of the common law, which abhors infiniteness". *Cf.* CASSELS J. in *Johnson* v. *Cartledge and Matthews*, [1939] 3 All E.R. 654, at p. 657: "it seems lamentable that it should be possible for so many Courts to be engaged at different times in different places considering the unfortunate results of the negligent driving of a motor car". Lord BLACKBURN, at p. 530 of *Lockyer* v. *Ferryman* (1877), 2 App. Cas. 519, H.L., preached the two theories as separate and distinct from one another, and as the two recognised foundations of the doctrine: "The object of the rule of *res judicata* is always put upon two grounds—the one *public policy*, that it is in the

public policy, and is succinctly expressed in the maxim, *interest (or expedit) reipublicae ut sit finis litium*: the latter is private justice, and is reflected in the maxims, *nemo debet bis vexari pro una et eadem causa*, and, in connection with criminal litigation, to which the theory is equally applicable,[1] *nemo debet bis vexari pro uno et eodem delicto*. "The utility and equity of estoppel by *res judicata*, from either of the above points of view", (said Mr Spencer Bower in the first edition of this work) "is so obvious that, with scarcely any exception,[2] both professional and popular criticism has refrained from fastening on this class of estoppel the odium which, with equal injustice, but far more superficial plausibility, has in times past gathered round the doctrine of estoppel by representation".[3] This opinion was fully supported by the decisions at the time when it was written, and indeed it has been said even in recent years in the House of Lords that:

> "the doctrine of estoppel (*per rem judicatam*) is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which the parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them".[4]

interest of the State that there should be an end of litigation, and the other, the *hardship on the individual* that he should be vexed twice for the same cause". This dictum is recalled with approval by HOLROYD PEARCE L.J. in *Morrison, Rose and Partners* v. *Hillman*, [1961] 2 Q.B. 266, at p. 276, and again by Lord REID in his judgment in the Lords in *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd., (No. 2)*, [1966] 2 All E.R. 536, H.L. at p. 549. Reference may also be made to the judgment of Lord GUEST at p. 564 in the same case. See further *Green* v. *Weatherill*, [1929] 2 Ch. 213, at p. 221, "The plea of *res judicata* is not a technical doctrine, but a fundamental doctrine based on the view that there must be an end to litigation" (MAUGHAM J.). (It is to be noted, however, that this was a merger case.) *Cf.* the cases cited in note 2, *infra*.

[1] For a full exposition of the doctrine of *autrefois acquit* and of the application of the doctrine of issue estoppel to criminal cases, see Chapter XI, *post*.

[2] There appear to be few, if indeed any, instances of express judicial characterisation of estoppel *per rem judicatam* as "odious", though in one case, a very sound and accurate judge permitted himself the rather loose expression that "in one sense" (he did not say what sense, and it is not easy to conceive any) it may be said to exclude the truth (HOLMES L.J., at p. 584 of *Irish Land Commission* v. *Fyan*, [1900] 2 I.R. 565: "it would be contrary to public policy to allow the same parties to re-agitate the same matter in subsequent proceedings. Estoppel by matter of record rests on this principle, and though it may be said in one sense to exclude the truth, it is essentially just and righteous"). In *Cox* v. *Dublin City Distillery Co., Ltd. (No. 3)*, [1917] 1 I.R. 203, Sir IGNATIUS O'BRIEN L.C. (Ir.), said, at p. 230, that "the principle" of estoppel "has often been made the subject of disapproval from the time of Coke to that of L.J. FITZGIBBON. For myself, I fail to see why this should be so, because it appears to me a convenient means, and sometimes the only means, of defending a position which may be just and fair as between man and man." In *Hayward* v. *Hayward*, [1961] 1 All E.R. 236; [1961] P. 152 PHILLIMORE J. permitted himself some critical observations as to the possible effects of the application of estoppels in the divorce jurisdiction; but it must be remembered that divorce is a very special field, and, moreover, in that case he was provided with a legitimate answer to the plea of estoppel—*viz.* the illegality of the marriage which was to be set up by the plea.

[3] See the authors' *Law of Estoppel by Representation* 2nd Edn. (1965) paras. 14 *et seq.*

[4] *New Brunswick Rail. Co.* v. *British and French Trust Corporation, Ltd.*, [1939] A.C. 1, H.L. per Lord MAUGHAM L.C. at pp. 19–20. *Cf.* LAWTON J.'s pleasant reconciliation of justice and equity with the "curious and excellent kinde of learning" of the doctrine of estoppel in *Randolph* v. *Tuck*, [1962] 1 Q.B. 175, at p. 184.

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Criticisms of the doctrine

11 But notwithstanding the opinions, above expressed, of Mr Spencer Bower in the first edition of this book in 1924, and of Lord MAUGHAM L.C. in the House of Lords in 1939,[1] doubts have been expressed more and more frequently in more recent years as to how far the application of the doctrine can be pushed before it breaks down as a matter of practical common sense. As yet legal philosophy has been spared the shock of any vigorous attack from a high quarter upon the doctrine as a whole; but some cracks have appeared in a structure which half a century ago was considered impregnable. As is often the case when a legal doctrine comes under fire, matters of detail, particular aspects, rather than the doctrine as a whole, have first become the subject of criticism. In the case of estoppel *per rem judicatam*, the questions which have been raised have not been concerned with the doctrine as generally enunciated, but with particular applications of it. It has been questioned, for instance, whether judgments by default ought always to have the same authority, binding the parties by estoppel *per rem judicatam*, as judgments in which the issues have been decided after contest;[2] and, again, whether judgments in foreign courts should not be more carefully examined, before being held to be binding by estoppel, than domestic judgments.[3] After much exploratory litigation it has ultimately been found impracticable to bind revenue and rating authorities from year to year by estoppel *per rem judicatam*, and so a gloss has been placed upon the doctrine, resulting in each year's assessment being considered as a different question from the assessment of the year before;[1] in running-down cases it has been seriously doubted whether a decision as between A and B (for instance) as to their respective contributions, in respect of the injuries suffered by one passenger in the car of one of them ought always to estop them when their contributions to another passenger's damages are under consideration;[2] and in divorce the courts have firmly declined to allow "the Court to be estopped" from making full and fresh inquiry into allegations of matrimonial misconduct, even though the same point has been the subject of a previous decision between the same parties.[3] All these separate instances taken together must be taken to indicate some substantial degree of resistance on the part of the courts against extending the application of the doctrine any further; and indeed may demonstrate a definite tendency towards positively restricting its future operation, in the face of the increasing complexity of many of the problems of modern litigation.

12 The theoretical foundation of estoppel *per rem judicatam* is as stated in para. 10, *supra*, not only where the *res judicata* is set up as a bar to a cause of action, claim, or affirmative case which contradicts the former decision, but also where an action is brought on the *res judicata*, for the purpose of preventing the opposite party from disputing such former decision on the merits. Though the word "estoppel" is hardly ever used in the latter class of case, the rule of evidence applied is in substance precisely the same, and its object and effect is the same, *viz.* to preclude any party to the *res judicata* from ever afterwards, as against any other party thereto, impeaching its correctness.[4]

13 The applicability of the rule both to civil and to criminal proceedings, both to decisions of courts of record and to those of other judicial tribunals, and both to English and to foreign *res judicatae*, is justified by, and rests upon, the same theoretical basis of public policy and private justice.

The doctrine is the product of the adversary system of litigation

14 The doctrine of estoppel *per rem judicatam* is the product of the adversary system of litigation practised in English Courts. Its essence is that *as between opposed parties* an issue, once litigated, should be regarded as

[1] *New Brunswick Rail. Co.* v. *British and French Trust Corporation*, [1939] A.C. 1, H.L. per Lord MAUGHAM L.C. at pp. 19–20.

[2] *New Brunswick Rail. Co.* v. *British and French Trust Corporation*, [1939] A.C. 1, H.L. per Lord WRIGHT at p. 37 and Lord ROMER at p. 41; *Kok Hoong* v. *Leong Cheong Kweng Mines, Ltd.*, [1964] A.C. 993, J.C. per Lord RADCLIFFE at p. 1010. (". . . while from one point of view a default judgment can be looked upon as only another form of a judgment by consent (see *Re South American and Mexican Co., Ex parte Bank of England*, [1895] 1 Ch. 37, at p. 45 and, as such, capable of giving rise to all the consequences of a judgment obtained in a contested action or with the consent or acquiescence of the parties, from another a judgment by default speaks for nothing but the fact that a defendant for unascertained reasons, negligence, ignorance or indifference, has suffered judgment to go against him in the particular suit in question. There is obvious and, indeed, grave danger in permitting such a judgment to preclude the parties from ever reopening before the court on another occasion, perhaps of different significance, whatever issues can be discerned as having been involved in the judgment so obtained by default."). See, too, *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd., (No. 2)*, [1966] 2 All E.R. 536, H.L. per Lord REID at p. 554, dealing with a judgment by default in a foreign court, the effect of which is referred to in note 3, *infra*. And see, generally, under the heading "Judgments by Default" paragraphs 46 *et seq. post*.

[3] *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd., (No. 2)*, [1966] 2 All E.R. 536, H.L. per Lord REID at p. 554. Dealing with estoppels which were contended for on the foundation of a foreign default judgment, Lord REID said: "The difficulty which I see about issue estoppel is a practical one. Suppose the first case is one of trifling importance, but it involves for one party proof of facts which would be expensive and troublesome; and that party can see the possibility that the same point may arise if his opponent later raises a much more important claim. What is he to do? The second case may never be brought. Must he go to great trouble and expense to forestall a possible plea of issue estoppel if the second case is brought? This does not arise in cause of action estoppel: if the cause of action is important, he will incur the expense; if it is not, he will take the chance of winning on some other point. It seems to me that there is room for a good deal more thought before we settle the limits of issue estoppel . . ."

[1] For a discussion of the development of the exception to the general principle, applicable to taxation and rating cases, see Chapter X, *post*.

[2] For a separate discussion of the doctrine as applied to running-down cases see Chapter IX, *post*.

[3] The doctrine as applied in matrimonial proceedings is discussed in Chapter XII, *post*.

[4] See para. 17, *infra*.

for ever decided. In a different system of jurisprudence where the court exercised an inquisitorial function, it might be thought unjust or inexpedient that it should be impeded in its search for truth by the principle *res judicata inter partes pro veritate accipitur*. But this is not the system under which English courts administer justice, except possibly for the divorce jurisdiction, in which it has become clear that considerations of estoppel *inter partes* will not be allowed to stifle full inquiry into the facts founding allegations of matrimonial offences. DIPLOCK L.J. has commented interestingly on the philosophical background of the matter as follows:

> "Estoppel merely means that, under the rules of the adversary system of procedure upon which the common law of England is based, a party is not allowed, in certain circumstances, to prove in litigation particular facts or matters which, if proved, would assist him to succeed as plaintiff or defendant in an action. If the court is required to exercise an inquisitorial function and may inquire into facts which the parties do not choose to prove, or would under the rules of the adversary system be prevented from proving, this is a function to which the common law concept of estoppel is alien. It may well be a rational rule to apply in the exercise of such an inquisitorial function to say that if a court having jurisdiction to do so has once inquired into the truth of a particular allegation of fact and reached a decision thereon, another court of co-ordinate jurisdiction in the exercise of its own discretion should not re-embark upon the same inquiry, but should accept the decision of the first court. But this is a different concept from estoppel as hitherto known in English law. It will be interesting to watch its development in future cases, but fortunately it is not, in my view, necessary to develop it in the present appeal. For, whatever this new concept may involve, it would appear from those cases in which it has been adumbrated that it only becomes relevant in cases where, under the old common law concept of estoppel, a party to matrimonial proceedings would be prevented from proving facts or matters which the court, in the exercise of its inquisitorial functions, might regard as relevant to its decision in those proceedings."[1]

The doctrine that the decision of the Court is binding thereafter on those only who were parties to the suit is subject to an exception in the case of judgments *in rem*, which will receive consideration in a later chapter.[2]

Correctness of the decision not a relevant consideration

15 It is not essential, or even relevant, to prove that the decision relied upon to found an estoppel is itself correct, or well founded in law or fact; if it is pronounced as a final judicial decision, by a tribunal having jurisdiction, as to the same question, and between the same parties, it will be conclusively deemed correct, as between these parties, unless and until upset on appeal. This proposition rests on the well-known fact that a

[1] *Thoday* v. *Thoday*, [1964] P. 181, C.A. at p. 197. [2] See Chapter VIII, *post*.

competent tribunal has jurisdiction to give a wrong judgment. It has jurisdiction to decide wrongly, as well as rightly,[1] and if it makes a mistake that mistake is conclusive between the parties unless and until corrected by an appeal duly constituted.[2]

Res judicata *and judicial precedent contrasted*

16 There is an essential difference between the doctrine of estoppel *per rem judicatam* and the doctrine of judicial precedent. By virtue of the former a final decision of a concrete issue between parties, by any court having jurisdiction to determine that issue, will for ever thereafter preclude either party from raising the same issue against the other party to the decision, whether before the same court, or before any court exercising a higher or lower jurisdiction.[3] The doctrine of judicial precedent, on the other hand, is not concerned with concrete issues as between parties. Its effect is to declare the law, not the facts, and to declare it so as to be binding upon all persons, whether parties to the proceedings or not, in all courts of inferior, and in some cases of the same, jurisdiction; but not so as to be binding on courts of higher jurisdiction, in which the *ratio decidendi* of the former decision becomes re-arguable. The doctrine of precedent does not depend upon the maxims *interest reipublicae sit finis litium* or *res judicata pro veritate accipitur*, but depends simply upon the desirability of certainty and uniformity in the law. The difference between the doctrines of *res judicata* and judicial precedent is interestingly illustrated in the twin cases of *Re Waring*, *Westminster Bank, Ltd.* v. *Awdry*[4] decided in 1942 and 1948 respectively. In the first of these, on an originating summons issued by trustees, FARWELL J. held that section 25 of the Finance Act 1941 was not applicable to a certain annuity fund set up by the trust; on appeal, the Court of Appeal reversed this decision, and held the provisions of the section applicable to the fund.[5] At this stage the effect of the decision of the Court of Appeal was two-fold; it decided as a matter of *res judicata* for ever, as between the parties to the appeal, that section 25 applied to the particular fund. It also declared to all the world that courts up to and including the Court of Appeal would thereafter interpret the law as laid

[1] See for instance per Lord HOLT C.J. in *Philips* v. *Bury* (1694), Skin. 447—"his sentence must have some effect to make a vacancy, be it never so wrong" (p. 485).

[2] Per ISAACS J. in *Meyers* v. *Casey* (1913), 17 C.L.R. 90 (H. Ct. of Aus.) at pp. 114–115.

[3] See, for instance, *Marginson* v. *Blackburn Borough Council*, [1939] 2 K.B. 426, C.A. at p. 438—"This seems to us to be a clear discussion on the same issue, between the same persons litigating in the present case, and establishes conclusively, *albeit in the county court*, in a claim by the defendants against the present plaintiff, that both were equally to blame."

[4] FARWELL J.'s decision on the first application in the *Waring* litigation is reported in [1942] Ch. 309. The decision was reversed in the Court of Appeal—[1942] Ch. 426. The second application is reported in [1948] Ch. 221.

[5] *In Re Waring*, *Westminster Bank, Ltd.* v. *Awdry*, [1942] 2 All E.R. 250; [1942] 1 Ch. 426, C.A.

down in that case, in disputes as between any parties whomsoever. In 1946 *Berkeley* v. *Berkeley*[1] came before the House of Lords; the decision of the House in that case (in which none of the parties in *Re Waring* was concerned) was to the opposite effect. The result of *Berkeley* v. *Berkeley* was that the law was thereby stated, as a matter of judicial precedent, to all the world to the opposite effect from what had previously been stated in *Re Waring*. But although such was the effect of *Berkeley* v. *Berkeley* as a matter of judicial precedent, it had no effect at all, as regards the persons concerned in the Waring Trust, as *res judicata*. Although the law was, as to all the rest of the world, now as decided in *Berkeley* v. *Berkeley*, the parties to the 1942 decision in *Re Waring* continued to be bound by the result of that case. In 1948 the trustees in the Waring estate made a further application to the court,[2] seeking directions as between themselves and another beneficiary who had not been joined in the first proceedings. The result—it is submitted in accordance with principle—was that, following the application of the principle of *res judicata*, all those who had been parties to the first proceedings in 1942 remained bound *inter partes* by the decision, from which there had been no appeal; but, as between the trustees and beneficiaries who had not been parties to the 1942 proceedings, the application of the doctrine of judicial precedent brought about a different position—*viz.* that laid down in *Berkeley* v. *Berkeley*.[3]

Use of the term "estoppe" land its equivalents, where the res judicata *is relied upon as a bar*

17 Where a judicial decision is pleaded or relied upon as a bar to any claim, counter-claim, affirmative defence, or allegation which purports to impeach the correctness of such decision, the *res judicata* clearly operates as an "estoppel" in the strictest sense of the word, as has been recognised at various stages in the history of the doctrine by such eminent authorities, to take a few examples out of the many, as BULLER J.,[4] Lord ELLENBOROUGH C.J.,[5] Lord TENTERDEN, then ABBOTT C.J.,[6] Lord SELBORNE

[1] *Countess of Berkeley* v. *Berkeley*, [1946] 2 All E.R. 154; [1946] A.C. 555, H.L.

[2] *In Re Waring, Westminster Bank, Ltd.* v. *Burton-Butler*, [1948] 1 All E.R. 257; [1948] Ch. 221 (JENKINS J.).

[3] *In New Zealand* the difference between the two doctrines was referred to by Sir HAROLD BARROWCLOUGH C.J. in *Gisborne Sheepfarmers' Mercantile Co., Ltd.* v. *Inland Revenue Commissioner*, [1962] N.Z.L.R. 810, S.C. at p. 814.

[4] At p. 377 of *Duffield* v. *Scott* (1789), 3 Term Rep. 374.

[5] At pp. 353, 358 of *Outram* v. *Morewood* (1803), 3 East 346. In the same year, Lord ELLENBOROUGH C.J. is reported, at p. 59 of *Strutt* v. *Bovingdon* (1803), 5 Esp. 56 as having directed a jury that "the record of the first cause should not be deemed a legal estoppel, so as to conclude the rights of the parties by its production, but it was binding so far that he should consider himself bound to tell the jury to consider it as conclusive of the rights of the parties". (Then why should it "not be deemed a legal estoppel"?)

[6] At p. 155 of *Hannaford* v. *Hunn* (1825), 2 C. & P. 148.

L.C.,[1] Lord PARKER, then PARKER J.,[2] and, to come to more recent times, Lord MAUGHAM L.C., Lord RUSSELL OF KILLOWEN, and Lord WRIGHT,[3] whether the *res judicata* be a judgment, or a judicial decision which is not technically so denominated, such as the sentence of a court martial,[4] or an award.[5] In Australia, the decision of the committee of a racing club disqualifying a race horse owner has been held *res judicata* between the parties thereto.[6] Accordingly, the use of the word "estoppel" in connection with the class of case under discussion has now become quite common,[7] though in earlier times it was more sparingly and hestitatingly employed. There is no magic, however, in this or any other particular name, and in nearly all the cases in which the word "estoppel" is absent from the judgment,[8] it will be found that exact variants or equivalents such as "conclusive" or "cannot be questioned",[9] "preclude", "bar",[10] "obstacle",[11] and the like have been used in its place, and that, under this substituted nomenclature, the principle, that every *res judicata* bars or precludes a party from setting up a case the object or effect of which is to dispute the correctness of that *res judicata*, is as efficiently stated as if the actual expression "estoppel" were a thousand times repeated.[12]

[1] At p. 304 of *R.* v. *Hutchings* (1881), 6 Q.B.D. 300, C.A.—"estoppel *per rem judicatam*".

[2] At p. 583 of *Re Surfleet's Estate, Rawlings* v. *Smith* (1911), 105 L.T. 582 ("estoppel by *res judicata*").

[3] In *New Brunswick Rail. Co.* v. *British and French Trust Corporation*, [1938] 4 All E.R. 747; [1939] A.C. 1.

[4] *Hannaford* v. *Hunn* (1825), 2 C. & P. 148. See Chapter II, *post*, for other illustrations of decisions which are not judgments.

[5] In *Commings* v. *Heard* (1869), L.R. 4 Q.B. 669 an award was described in the argument for the defendant as having the effect of an "estoppel quasi of record", adopting the phraseology of *Smith's Leading Cases*. In the judgments the court hesitated to apply the term "estoppel", preferring phrases (which are really equivalent) such as "concluded", "precluded", "prohibited", "bar", etc. etc. (*per* LUSH J. at pp. 672, 673 and 674): but on p. 231 of *Duke of Buccleuch* v. *Metropolitan Board of Works* (1870), L.R. 5 Exch. 221, BLACKBURN J. spoke of an award as an estoppel in unqualified terms. *Cf. Hopkins* v. *Hopkins*, [1914] P. 282, where a withdrawal of a charge was described as an "estoppel" by BARGRAVE DEANE J. at p. 286. A more modern instance of the use of the term "estoppel" where the decision was one of an umpire on an arbitration is *Fidelitas Shipping Co., Ltd.* v. *V/O Exportchleb*, [1965] 2 All E.R. 4; [1966] 1 Q.B. 630.

[6] *Meyers* v. *Casey* (1913), 17 C.L.R. 90 (H. Ct. of Aus.) per ISAACS J. at p. 114 ("the objections . . . are, by reasons of the Committee's decision, *res judicatae* as much as if, instead of the Committee, it had been the Supreme Court unappealed from that had so held".

[7] For modern instances see for instance *Marginson* v. *Blackburn Borough Council*, [1939] 1 All E.R. 273; [1939] 2 K.B. 426, C.A.; *Morrison, Rose & Partners* v. *Hillman*, [1961] 2 All E.R. 891; [1961] 2 Q.B. 266, C.A.

[8] In some cases, though absent from the judgment, it was used in the argument—*e.g.* in *A.-G.* v. *King* (1817), 5 Price 195 and *The Challenge and Duc D'Aumale*, [1904] P. 41.

[9] As in *London County Council* v. *Galsworthy*, [1917] 1 K.B. 85, D.C.

[10] As in *Commings* v. *Heard* (1869), L.R. 4 Q.B. 669 where also the terms "concluded", "precluded", and "prohibited" appear in the judgment of LUSH J. at pp. 673, 674.

[11] "Obstacle to the recovery" is the phrase used by Lord DENMAN, C.J., delivering the judgment of the Queen's Bench at p. 521 of *Palmer* v. *Temple* (1839), 9 Ad. & El. 508.

[12] "Conclusive evidence" is treated as a synonym of "estoppel" by KNIGHT BRUCE V.C. at p. 171 of *Holland* v. *Clark* (1842), 1 Y. & C. Ch. Cas. 151; *cf.* the judgment of PEARSON L.J. in

Terminology employed where the res judicata is the foundation of an action

18 Where an action, or counterclaim, is founded on a judgment or other judicial decision, assuming it to lie at all, as is the case with all foreign, but only some English, *res judicatae*, the judicial decision is precisely to the same extent, and precisely for the same reasons, and under precisely the same conditions, conclusive and binding upon the parties and their privies, so as to preclude any of them from impeaching its correctness, as it is when set up as a bar or obstacle to a claim or case which involves such an impeachment. There is, therefore, no logical justification for applying the term "estoppel" to the one class of case, and withholding it from the other, since in substance and principle both are equally the subject of the doctrine. But there has been a reluctance to use the term in such proceedings, and in both pleadings and judgments there has appeared a preference—not to be explained upon logical grounds—for such phraseology as that the decision is not "examinable" or "impeachable" on the merits, or is "not to be inquired into", or that the defendant is not "suffered", or "permitted", or "allowed", to contradict it.

The necessary constituents of estoppel per rem judicatam

19 Any party who is desirous of setting up *res judicata* by way of estoppel, whether he is relying on such *res judicata* as a bar to his opponent's claim, or as the foundation of his own, and who has taken the preliminary steps required in order to qualify him for that purpose, must establish all the constituent elements of an estoppel of this description, as already indicated in the general proposition enunciated at the commencement of this chapter.[1] That is to say, the burden is on him of establishing (except as to any of them which may be expressly or impliedly admitted) each and every of the following:

(i) that the alleged judicial decision was what in law is deemed such;
(ii) that the particular judicial decision relied upon was in fact pronounced, as alleged;

Morrison, Rose & Partners v. *Hillman*, [1961] 2 Q.B. 266, at p. 277—"to my mind the easiest line of approach to this question is to regard the previous decision as conclusive evidence". "Estoppel or bar" is the expression used by JAMES L.J. at p. 751 of *Massam* v. *Thorley's Cattle Food Co.* (1880), 14 Ch.D. 748, C.A., he evidently regarding the two terms as convertible. In *Stokes* v. *Stokes*, [1911] P. 195 the doctrine in question is spoken of by EVANS P., delivering the judgment of himself and BARGRAVE DEANE J. at p. 198, as "the doctrine of *res judicata*, or of estoppel".

[1] SLESSER L.J. thus put the essentials in *Marginson* v. *Blackburn Borough Council*, [1939] 2 K.B. 426, C.A. at p. 438: "This seems to us a clear decision on the same issue between the same persons litigating in the present case, and establishes conclusively, albeit in the county court, in a claim by the defendants against the present plaintiff that both were equally to blame. We think, therefore, on this head, that the appeal succeeds . . . and that the plaintiff is estopped from bringing his first cause of action".

(iii) that the judicial tribunal pronouncing the decision had competent jurisdiction in that behalf;
(iv) that the judicial decision was final;
(v) that the judicial decision was, or involved, a determination of the same question as that sought to be controverted in the litigation in which the estoppel is raised;
(vi) that the parties to the judicial decision, or their privies, were the same persons as the parties to the proceeding in which the estoppel is raised, or their privies, or that the decision was conclusive *in rem*.

20 The above six *probanda* form the subjects of the next seven chapters of this Part,[1] the treatment of the sixth of them being divided between Chapters VII and VIII. Then follow four chapters dealing with particular applications of the principles which have up to this point been enunciated.[2] Part I then concludes with a chapter on affirmative answers which are in law deemed sufficient to defeat a *prima facie* case of estoppel *per rem judicatam*; and by a final chapter[3] on the procedure which must be followed by a party entitled to raise a plea of estoppel.[4]

[1] Chapter II, *post*, first examines the question of what constitutes a judicial decision, which (since such a decision must have been pronounced by a judicial tribunal) involves a discussion of two questions, viz: what constitutes a judicial tribunal, and what is in law deemed a decision; it then deals with English criminal *res judicatae*, and foreign *res judicatae*, both of which, with certain qualifications, are shown to come within the doctrine of *res judicata*; and, finally, it discusses and distinguishes the classes of judicial decision on which an action will lie, and those on which it will not: Chapter III, *post*, deals with the mode of proving that the particular judicial decision relied upon as the foundation of the estoppel was in fact pronounced: Chapter IV, *post*, is occupied with an investigation of what is required to establish that the judicial tribunal had a competent jurisdiction over the subject of the litigation, and the parties: Chapter V, *post*, is devoted to the question of the finality of the decision, and what is involved in that expresssion: Chapter VI, *post*, treats of the identity of the subject-matter of the *res judicata* with that of the proceedings in which the estoppel is raised. The subject of issue estoppel is dealt with at length at this point of the text. Chapter VII, *post*, deals with the topic of parties in actions *in personam*; proceedings *in rem* are considered in Chapter VIII.

[2] These are: Chapter IX (Running-down Cases); Chapter X (Taxation and Rating Cases); Chapter XI (The Plea of *Autrefois Acquit*); and Chapter XII (Matrimonial Proceedings).

[3] Chapter XIII.

[4] Chapter XIV.