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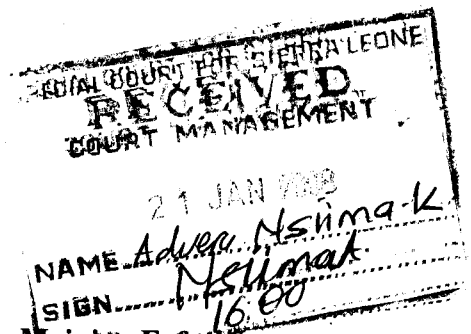
SPECIAL COURT FOR SIERRA LEONE
OFFICE OF THE PROSECUTOR
Freetown – Sierra Leone

IN THE APPEALS CHAMBER

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

Registrar: Mr. Herman Von Hebel

Date filed: 21 January 2008



THE PROSECUTOR **Against** **Moinina Fofana**
Allieu Kondewa

Case No. SCSL-04-14-A

PUBLIC
PROSECUTION RESPONSE BRIEF TO THE KONDEWA APPEAL BRIEF

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1. Introduction

A. General

1.1 Pursuant to Rule 112 of the Rules of Procedure and Evidence, and the Appeals Chamber's "Decision on Urgent Renewed Joint Defence and Prosecution Motion for Extension of Time for the Filing of Response Briefs" of 13 December 2007,[1] the Prosecution files this **Response Brief** containing the submissions of the Prosecution in response to the "Kondewa Appeal Brief", filed on behalf of Allieu Kondewa ("**Kondewa**") on 11 December 2007 (the "**Kondewa Appeal Brief**").[2]

1.2 It is noted that no appeal has been brought by Moinina Fofana against the Trial Chamber's Judgement.

1.3 Some authorities and documents are referred to in this Response Brief by abbreviated citations. The full references for these abbreviated citations are given in Appendix A to this Response Brief.

1.4 Unless otherwise indicated, references in this Response Brief to "the Defence" mean the Defence for Kondewa.

1.5 The submissions made in this Response Brief are without prejudice to the submissions made in the **Prosecution Appeal Brief**.[3] The submissions in this Response Brief merely respond to the arguments in the Kondewa Appeal Brief in the light of the Trial Chamber's Judgement, not taking into account the arguments raised by the Prosecution in its own appeal in this case.

1.6 It is noted that the numbering of Kondewa's various grounds of appeal in the Kondewa Appeal Brief differs from the numbering of those grounds of appeal in the Kondewa Notice of Appeal.[4] For convenience, this Response Brief refers to

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1 **Decision on Extension of Time for Filing Response Briefs,** Registry page nos. 446-449.

2 **Kondewa Appeal Brief,** Registry page nos. 322-441.

3 "Prosecution Appeal Brief", filed by the Prosecution on 11 December 2007, Registry page nos. 049-321 ("**Prosecution Appeal Brief**").

4 "Kondewa Notice of Appeal Against Judgement Pursuant to Rule 108", filed on behalf of Kondewa on 23 October 2007, Registry page nos. 001-004 ("**Kondewa Notice of Appeal**"). Ground 2 in the Kondewa Notice of Appeal is Ground 3 in the Kondewa Appeal Brief; Ground 3 in the Kondewa Notice of Appeal is Ground 2 in the Kondewa Appeal Brief; Ground 5 in the Kondewa Notice of Appeal is Ground 6 in the Kondewa Appeal Brief; and Ground 6 in the Kondewa Notice of Appeal is Ground 5 in the Kondewa Appeal Brief.

Kondewa's grounds of appeal in accordance with the numbering used in the Kondewa Appeal Brief.

B. Standards of review on appeal

1.7 Paragraphs 3 to 6 of the Kondewa Appeal Brief deal with the standards of review on appeal. The Prosecution agrees with the Defence that under the Statute and Rules of the Special Court, the standards of review on appeal are the same as those that apply in an appeal before the Appeals Chamber of the International Criminal Tribunal for the Former Yugoslavia ("**ICTY**") and in an appeal before the Appeals Chamber of the International Criminal Tribunal for Rwanda ("**ICTR**"). These standards of review on appeal are well-settled in the case law of the ICTY and ICTR.[5]

1.8 In this respect, it is emphasized in particular that where an appellant alleges an **error of fact**, the Appeals Chamber will not conduct an independent assessment of the evidence admitted at trial, or undertake a *de novo* review of the evidence.[6] The standard of review on appeal for an error of fact of this type has been articulated by the Appeals Chamber of the ICTY as follows:

> Pursuant to the jurisprudence of the Tribunal, the task of hearing, assessing and weighing the evidence presented at trial is left primarily to the Trial Chamber. Thus, the Appeals Chamber must give a margin of deference to a finding of fact reached by a Trial Chamber. Only where the evidence relied on by the Trial Chamber could not have been accepted by any reasonable tribunal of fact or where the evaluation of the evidence is 'wholly erroneous' may the Appeals Chamber substitute its own finding for that of the Trial Chamber. It must be borne in mind that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.
>
> ... it is initially the Trial Chamber's task to assess and weigh the evidence presented at trial. In that exercise, it has the discretion to 'admit any relevant evidence which it deems to have probative value', as well as to exclude evidence 'if its probative value is substantially outweighed by the need to ensure a fair trial.' As the primary trier of fact, it is the Trial Chamber that has the main responsibility to resolve any inconsistencies that may arise within and/or amongst witnesses'

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5 See for instance the references in paragraph 1.5 of the Prosecution Appeal Brief.

6 See, for instance, ***Čelebići* Appeal Judgement**, paras 203–204.

> testimonies. It is certainly within the discretion of the Trial Chamber to evaluate any inconsistencies, to consider whether the evidence taken as a whole is reliable and credible and to accept or reject the 'fundamental features' of the evidence. The presence of inconsistencies in the evidence does not, per se, require a reasonable Trial Chamber to reject it as being unreliable. Similarly, factors such as the passage of time between the events and the testimony of the witness, the possible influence of third persons, discrepancies, or the existence of stressful conditions at the time the events took place do not automatically exclude the Trial Chamber from relying on the evidence. However, the Trial Chamber should consider such factors as it assesses and weighs the evidence.
>
> ... The reason that the Appeals Chamber will not lightly disturb findings of fact by a Trial Chamber is well known. The Trial Chamber has the advantage of observing witnesses in person and so is better positioned than the Appeals Chamber to assess the reliability and credibility of the evidence. Accordingly, it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points. This discretion is, however, tempered by the Trial Chamber's duty to provide a reasoned opinion, following from Article 23(2) of the Statute[7].

1.9 In other words, in an appeal against conviction, the Appeals Chamber does not determine whether it is *itself* satisfied beyond a reasonable doubt of the guilt of the accused. Rather, it applies a "deferential standard" of review, under which it must decide whether a reasonable Trial Chamber, based on all of the evidence in the case, *could* have been satisfied beyond reasonable doubt as to the finding in question.[8] An appellant can only establish an error of fact where the appellant can establish that the finding of fact reached by the Trial Chamber is one which could not have been made on the evidence by ***any*** reasonable tribunal of fact.

1.10 It has further been held that in making this determination:

> The Appeals Chamber does not review the entire trial record *de novo*; in principle, it only takes into account evidence referred to by the Trial

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[7] ***Kupreškić*** **Appeal Judgement**, paras 30–32 (footnotes omitted). See also ***Tadić*** **Appeal Judgement**, para. 64; ***Aleksovski*** **Appeal Jugement**, para. 63; ***Kunarac*** **Appeal Judgement**, paras 39–42; ***Čelebići*** **Sentencing Appeal Judgement**, paras 54–60; ***Bagilishema*** **Appeal Judgement**, paras 11–14; ***Rutaganda*** **Appeal Judgement**, paras 22–23; ***Krnojelac*** **Appeal Judgement**, paras 11–12; ***Vasiljević*** **Appeal Judgement**, para. 7.

[8] ***Blaškić*** **Appeal Judgement**, para. 22.

> Chamber in the body of the judgement or in a related footnote, evidence contained in the trial record and referred to by the parties, and additional evidence admitted on appeal, if any.[9]

1.11 Furthermore, as the Kondewa Appeal Brief acknowledges,[10] not every error of fact leads to a reversal or revision of a decision of a Trial Chamber. Article 20(1)(c) of the Statute requires that the error of fact be one which has "occasioned a miscarriage of justice". The Appeals Chamber of the ICTY has for instance held that the appellant must establish that the error was critical to the verdict reached by the Trial Chamber, thereby resulting in a "grossly unfair outcome", or a "flagrant injustice", such as where an accused is convicted despite a lack of evidence on an essential element of the crime.[11]

1.12 Where the appellant alleges an **error of law**, the Appeals Chamber, as the final arbiter of the law of the Court, must determine whether such an error of substantive or procedural law was in fact made.[12] The Appeals Chamber of the ICTY has said that:

> Errors of law do not raise a question as to the standard of review as directly as errors of fact. Where a party contends that a Trial Chamber made an error of law, the Appeals Chamber, as the final arbiter of the law of the Tribunal, must determine whether there was such a mistake. A party alleging that there was an error of law must be prepared to advance arguments in support of the contention; but, if the arguments do not support the contention, that party has not failed to discharge a burden in the sense that a person who fails to discharge a burden automatically loses his point. The Appeals Chamber may step in and, for other reasons, find in favour of the contention that there is an error of law"[13].

1.13 In other words, the Appeals Chamber accords no particular deference to the findings of law made by the Trial Chamber, since the Appeals Chamber is as capable as the Trial Chamber of determining what is the law. However, in

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9 ***Brđanin* Appeal Judgement**, para. 15.

10 **Kondewa Appeal Brief**, para. 6.

11 See, *e.g.*, ***Kupreškić* Appeal Judgement**, para. 29. See also ***Furundžija* Appeal Judgement**, para. 37; ***Kunarac* Appeal Judgement**, para. 39; ***Krnojelac* Appeal Judgement**, para. 13; ***Vasiljević* Appeal Judgement**, para. 8; ***Kvočka* Appeal Judgement**, para. 18.

12 ***Kunarac* Appeal Judgement**, para. 38.

13 ***Furundžija* Appeal Judgement**, para. 35. See also, *e.g.*, ***Kajelijeli* Appeal Judgement**, para. 5; ***Vasiljević* Appeal Judgement**, para. 6.

accordance with the general principle that it is for a party asserting a right or seeking relief to establish the existence of that right or the entitlement to that relief, an appellant may be said to bear a burden of persuasion[14]. Thus, it has been said that:

> [A] party who submits that the Trial Chamber erred in law must at least identify the alleged error and advance some arguments in support of its contention. An appeal cannot be allowed to deteriorate into a guessing game for the Appeals Chamber. Without guidance from the appellant, the Appeals Chamber will only address legal errors where the Trial Chamber has made a glaring mistake. If the party is unable to at least identify the alleged legal error, he or she should not raise the argument on appeal. It is not sufficient to simply duplicate the submissions already raised before the Trial Chamber without seeking to clarify how these arguments support a legal error allegedly committed by the Trial Chamber.[15]

1.14 As to the remedy to be granted in cases where an error of law has been established, it has been held that:

> Where the Appeals Chamber finds that there is an error of law in the Trial Judgement arising from the application of the wrong legal standard by the Trial Chamber, it is open to the Appeals Chamber to articulate the correct legal standard and review the relevant factual findings of the Trial Chamber accordingly. In doing so, the Appeals Chamber not only corrects a legal error, but applies the correct legal standard to the evidence contained in the trial record in the absence of additional evidence, and it must determine whether it is itself convinced beyond reasonable doubt as to the factual finding challenged by the Defence before that finding is confirmed on appeal.[16]

1.15 Thus, not every error of law leads to a reversal or revision of a decision of a Trial Chamber. Pursuant to Article 20(1)(b) of the Statute, the Appeals Chamber is empowered to reverse or revise a Trial Chamber's decision only when the error of law is one "invalidating the decision".[17] The party alleging an error of law must identify the alleged error and explain how the error invalidates the decision, and

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14 See, *e.g.*, ***Tadić* Additional Evidence Appeal Decision**, para. 52.

15 ***Kupreškić* Appeal Judgement**, para. 27. See also ***Kunarac* Appeal Judgement**, paras 43-48; ***Krnojelac* Appeal Judgement**, para. 10.

16 ***Kvočka* Appeal Judgement**, para. 17; see also ***Blaškić* Appeal Judgement**, para. 15; ***Kordić* Appeal Judgement**, para. 17; ***Stakić* Appeal Judgement**, paras 9, 312 (but see the Partly Dissenting Opinion of Judge Shahabuddeen, paras 2-7); ***Brđanin* Appeal Judgement**, para. 10.

17 Compare ***Kunarac* Appeal Judgement**, para. 38.

an allegation of an error of law which has no chance of resulting in an impugned decision being quashed or revised may be rejected on that ground.[18]

1.16 In the case of an alleged **procedural error**, it is necessary to distinguish between cases where it is alleged that there has been a non-compliance with a *mandatory procedural requirement* of the Statute and the Rules, and cases where it is alleged that the Trial Chamber has erroneously exercised a *discretionary power*. Errors of the former type will not necessarily invalidate the Trial Chamber's decision, if there has been no prejudice to the Defence.[19]

1.17 In cases where it is alleged that the Trial Chamber has erroneously exercised its discretion, the issue on appeal is not whether the decision is correct, but rather whether the Trial Chamber has correctly exercised its discretion in reaching that decision. Provided that the Trial Chamber has properly exercised its discretion, its decision will not be disturbed on appeal, even though the Appeals Chamber itself may have exercised the discretion differently.[20]

1.18 The test for determining whether the Trial Chamber has erred in the exercise of a discretion is whether the Trial Chamber "has misdirected itself either as to the principle to be applied, or as to the law which is relevant to the exercise of the discretion, or that it has given weight to extraneous or irrelevant considerations, or that it has failed to give weight or sufficient weight to relevant considerations, or that it has made an error as to the facts upon which it has exercised its discretion".[21]

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[18] See, for instance, ***Krnojelac*** **Appeal Judgement**, para. 10; ***Kvočka*** **Appeal Judgement**, para. 16; **CDF Subpoena Appeal Decision**, para. 7 "To show that the discretion was based on an error of law, an appellant must give details of the alleged error, and must state precisely how the legal error invalidates the decision." However, even if an appellant's arguments are insufficient to support the contention of an error, the Appeals Chamber may conclude for other reasons that there has been an error of law; *Stakić* Appeal Judgement, para. 8.

[19] See, e.g., ***Čelebići*** **Appeal Judgement**, paras 630–639. See also ***Krstić*** **Appeal Judgement**, paras 187–188 (holding that the prosecution's failure to comply with its disclosure obligations did not warrant a retrial where no prejudice to the accused was established).

[20] See, e.g., **CDF Subpoena Appeal Decision**, para. 5; ***Milošević*** **Reasons for Decision**, para. 14; ***Bagosora*** **Interlocutory Appeal Decision**, para. 10.

[21] **CDF Subpoeana Appeal Decision**, para. 6; ***Milošević*** **Reasons for Decision**, para. 5. See also ***Milošević*** **Interlocutory Appeal Decision**, para. 7; ***Bizimungu*** **Interlocutory Appeal Indictment Decision**, para. 11; ***Karemera*** **Interlocutory Appeal Indictment Decision**, para. 9.

1.19 In simple terms, the question is whether the exercise of the discretion was "reasonably open" to the Trial Chamber,[22] or whether, conversely, the Trial Chamber "abused its discretion",[23] or has "erred and exceeded its discretion",[24] or whether the Trial Chamber has committed a "discernible error" in the exercise of its discretion,[25] or whether the Trial Chamber's decision was so unreasonable and plainly unjust that the Appeals Chamber is able to infer that the Trial Chamber must have failed to exercise its discretion properly.[26]

2. Prosecution Response to Kondewa's Appeal Ground One: Superior responsibility of Kondewa for crimes committed in Bonthe District

A. Introduction

2.1 This section of this Response Brief responds to paragraphs 7 to 69 of the Kondewa Appeal Brief.

2.2 The Trial Chamber found that Kondewa was individually responsible as a superior, under Article 6(3) of the Statute, for crimes committed in Bonthe District by Kamajors under the command of Morie Jusu Kamara ("**Kamara**"), District Battalion commander of Bonthe District, Julius Squire ("**Squire**"), Kamara's second in command, and Kamajor Baigeh ("**Baigeh**"), Battalion commander of the Kassilla battalion.[27] Kamara, Squire, Baigeh and the troops

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22 ***Čelebići* Appeal Judgement**, paras 274–275 (see also para. 292, finding that the decision of the Trial Chamber not to exercise its discretion to grant an application was "open" to the Trial Chamber).

23 *Ibid.*, para. 533 ("[T]he Appeals Chamber recalls that it also has the authority to intervene to exclude evidence, in circumstances where it finds that the Trial Chamber abused its discretion in admitting it"), and see also at para. 564 (finding that there was no abuse of discretion by the Trial Chamber in refusing to admit certain evidence, and in refusing to issue a subpoena that had been requested by a party at trial).

24 *Ibid.*, para. 533.

25 ***Naletilić and Martinović* Appeal Judgement**, paras 257-259; ***Mejakić* Rule 11*bis* Decision**, para. 10.

26 Compare ***Mejakić* Rule 11*bis* Appeal Decision**, para. 10.

27 **Trial Chamber's Judgement**, paras 867-903.

under their command are referred to below collectively as "**Kondewa's alleged subordinates**".

2.3 In this ground of appeal, Kondewa contends that the Trial Chamber erred in finding the existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates.

2.4 In this ground of appeal, Kondewa does not take issue with the Trial Chamber's findings that the criminal acts in question were committed by Kondewa's alleged subordinates, or the Trial Chamber's findings that Kondewa knew or had reason to know that criminal acts were about to be or had been committed by Kondewa's alleged subordinates,[28] or the Trial Chamber's findings that Kondewa failed to take the necessary and reasonable measures to prevent the criminal acts or punish the offenders thereof.[29] As Kondewa does not challenge the Trial Chamber's findings of law or fact with respect to these issues,[30] the Prosecution makes no submissions on the Trial Chamber's findings in respect of these issues, and the Appeals Chamber is not called upon to consider the Trial Chamber's findings in respect of these issues. This ground of appeal is confined solely to the issue of whether the Trial Chamber erred in finding the existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates.

B. The applicable law

2.5 The Trial Chamber's legal findings in respect of the requirements for the existence of a superior-subordinate relationship for the purposes of Article 6(3) of the Statute are set out in paragraphs 236-241 of the Trial Chamber's Judgement. The Kondewa Appeal Brief takes no issue with the Trial Chamber's findings of law in respect of this issue.

2.6 In particular, the Trial Chamber found as a matter of law, correctly it is submitted, as follows.

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28 **Trial Chamber's Judgement**, paras 874-879.
29 *Ibid.*, para. 880.
30 See, in particular, **Kondewa Appeal Brief**, paras 8 and 12.

2.7 First, for the purposes of Article 6(3) of the Statute, a superior "is someone who possesses the power or authority to prevent the commission of a crime by a subordinate or to punish the offender of the crime after the crime has been committed".[31] In assessing the degree of control to be exercised by the superior over the subordinate, the "effective control" test should be applied (a proposition with which the Kondewa Appeal Brief expressly agrees[32]), according to which the superior must possess the "material ability to prevent or punish criminal conduct"[33] (as opposed to mere substantial influence that does not meet the threshold of effective control[34]).

2.8 Secondly, the power or authority of the superior to prevent or to punish need not arise from a *de jure* status of a superior conferred upon him by official appointment, but may be merely *de facto* powers or control (such *de facto* superior-subordinate relationships being a common situation in contemporary conflicts "where only *de facto* armies and paramilitary groups subordinated to self-proclaimed governments may exist").[35] Indeed, *de jure* power in and of itself is not conclusive of whether a superior-subordinate relationship exists, although it may be evidentially relevant to such a determination. What must be established is that the superior had the "material ability to prevent or punish criminal conduct" by the subordinate.[36] Where the material ability to prevent or punish criminal conduct is *de facto* rather than *de jure*, there is no requirement that the *de facto* superior exercised the trappings of *de jure* authority generally: all that is required is that the *de facto* superior possessed the requisite *degree* of effective control.[37]

2.9 Thirdly, hierarchy, subordination and chains of command need not be established in the sense of a formal organisational structure as long as the test of effective control is met.[38] While it is necessary to prove that the perpetrator was the

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31 **Trial Chamber's Judgement**, para. 236, and the authorities there cited.
32 **Kondewa Appeal Brief**, para. 9.
33 **Trial Chamber's Judgement**, para. 238, and the authorities there cited.
34 *Ibid.*,. See also ***Kajelijeli* Appeal Judgement**, para. 86.
35 **Trial Chamber's Judgement**, para. 237, and the authorities there cited. See also ***Kajelijeli* Appeal Judgement**, para. 85; ***Kayishema and Ruzindana* Appeal Judgement**, para. 294.
36 **Trial Chamber's Judgement**, para. 238, and the authorities there cited.
37 ***Kajelijeli* Appeal Judgement**, para. 87.
38 **Trial Chamber's Judgement**, para. 239, and the authorities there cited.

"subordinate" of the accused, there is no requirement of *direct* or *formal* subordination; it is only necessary to establish that the relevant accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator.[39] Furthermore, a superior can also be found responsible for a crime committed by a subordinate two levels down in the chain of command.[40]

2.10 Fourthly, a superior-subordinate relationship may be of a military or civilian character, and when examining whether a superior exercises effective control over his subordinates, a Trial Chamber must take into account inherent differences in the nature of military and civilian superior-subordinate relationships, and the fact that effective control may not be exercised in the same manner by a civilian superior and by a military commander.[41] There is no requirement that the "control exercised by a civilian superior must be of the same *nature* as that exercised by a military commander"; rather, "it is sufficient that, for one reason or another, the accused exercises the required 'degree' of control over his subordinates, namely that of *effective* control."[42]

2.11 Fifthly, the indicators of effective control are more a matter of evidence than of substantive law.[43] Whether the evidence regarding a civilian's *de jure* or *de facto* authority establishes effective control over subordinates ***must be determined on a case-by-case basis.***[44]

2.12 Contrary to what the Kondewa Appeal Brief appears to argue,[45] it is not necessary that the superior be a ***commander*** of the subordinate.[46] The existence of a superior-subordinate relationship depends solely on the existence of "a material ability to prevent or punish criminal conduct, ***however that control is exercised***".[47]

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39 ***Čelebići*** **Appeal Judgement**, paras 303, 305 (and also para. 251).
40 **Trial Chamber's Judgement**, para. 239, and the authorities there cited.
41 **Trial Chamber's Judgement**, para. 241, and the authorities there cited. See also ***Kajelijeli*** **Appeal Judgement**, para. 85.
42 ***Kajelijeli*** **Appeal Judgement**, para. 87, quoting ***Bagilishema*** **Appeal Judgement**, para. 55.
43 **Trial Chamber's Judgement**, para. 238, and the authorities there cited.
44 **Trial Chamber's Judgement**, para. 241, and the authorities there cited.
45 **Kondewa Appeal Brief**, para. 21.
46 ***Halilović*** **Appeal Judgement**, paras 57-74.
47 ***Halilović*** **Appeal Judgement**, para. 59, citing ***Čelebići*** **Appeal Judgement**, para. 256. See also ***Blaškić*** **Appeal Judgement**, para. 67: "[A] commander may incur criminal responsibility for

2.13 The Prosecution acknowledges that in order to convict an accused on the basis of superior responsibility under Article 6(3), the Trial Chamber must find that the existence of the superior-subordinate relationship has been established beyond a reasonable doubt.[48] The question to be determined by the Trial Chamber is whether, on the basis of all of the evidence in the case as a whole, the legal requirements of a superior-subordinate relationship as set out above have been established beyond a reasonable doubt. In an appeal against conviction, the question to be determined by the Appeals Chamber, where there is no challenge to the legal findings of the Trial Chamber, is whether it was open to a reasonable trier of fact to so conclude.

C. The Trial Chamber's findings

2.14 The most pertinent findings of facts by the Trial Chamber, on which its conclusion as to the existence of the superior-subordinate relationship were based, are contained in paragraphs 292 to 301 of the Trial Chamber's Judgement.

2.15 The Kondewa Appeal Brief does not challenge any of these findings of fact by the Trial Chamber. Nor does the Kondewa Appeal Brief challenge the credibility or reliability of any of the evidence on which the Trial Chamber relied in making those findings of fact. All that the Kondewa Appeal Brief alleges is that on the basis of the facts as found by the Trial Chamber, it was not open to the Trial Chamber to conclude that the existence of a superior-subordinate relationship had been established beyond a reasonable doubt.

2.16 The relevant facts found by the Trial Chamber, which have not been challenged by the Defence, include the following. Kondewa arrived in Talia before Norman, within two weeks of the first Kamajors arriving after the Kamajors took control of the area in late 1996 or early 1997.[49] Kondewa was at that stage, prior to the arrival of Norman and the establishment of Base Zero, already the chief initiator

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crimes *committed* by persons who are not formally his (direct) subordinates, insofar as he exercises effective control over them."

[48] ***Kajelijeli* Appeal Judgement**, para. 86.

[49] **Trial Chamber's Judgement**, para. 292.

of the Kamajors.[50] At that stage, Kondewa was giving orders to Kamajors in the area to mount attacks, and to set up checkpoints.[51] When the Kamajors in Talia decided to resist the rebels, it was Kondewa who they sought out for a meeting.[52] When the Kamajors were looking for Norman to tell him that they supported him, they sent a letter written by Kondewa and a cassette with Kondewa speaking on it.[53] When a delegation from Bonthe District wanted to complain about the behaviour of Kamajors in Bonthe Town in August 1997 (again prior to the establishment of Base Zero), they sent a delegation to Kondewa, "***who was considered the supreme head of Kamajors***".[54] Kondewa was at the time living in a house guarded by armed Kamajors.[55] At the time, Kondewa had the power to order Kamajors to be tried and executed if convicted.[56]

2.17 The Prosecution submits that on the basis of these findings of facts, it was open to a reasonable trier of fact to conclude that it was established beyond a reasonable doubt that in August 1997, Kondewa had effective control over certain Kamajors for the purposes of Article 6(3) of the Statute, in the sense that he could prevent them from committing crimes or could punish them for crimes that they had committed, and in particular, that these Kamajors over which he had effective control included the Kamajors in Bonthe District in the area in which he himself was located.

2.18 The Trial Chamber made further finding of facts that after the subsequent arrival of Norman in Bonthe District and the establishment of Base Zero in September 1997, Kondewa, together with Norman and Fofana, was one of the three regarded as the "Holy Trinity" at Base Zero, and that the three of them were the ***key and essential*** components of the leadership structure of the organisation and were the executive of the Kamajor society.[57] The Trial Chamber further found that they were the ones actually making the decisions and that ***nobody could make a***

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50 **Trial Chamber's Judgement**, para. 293.
51 *Ibid.*, para. 295.
52 *Ibid.*, paras 293-294.
53 *Ibid.*, para. 296.
54 *Ibid.*, paras 297-301 (also paras 535-537).
55 *Ibid.*, para. 299.
56 *Ibid.*, paras 299-301.
57 *Ibid.*, para. 337.

decision in their absence.[58] The Trial Chamber found that "***Whatever happened, they would come together*** because they were the leaders and the Kamajors looked up to them".[59] The Trial Chamber found that ***the three Accused and the commanders ultimately did all of the planning*** for the prosecution of the war,[60] and that the job of deciding when and where to go to war lay with Norman, Kondewa, Fofana, the Deputy Director of War, the Director of Operations, his deputy, and the battalion commanders.[61] The Kondewa Appeal Brief does not challenge these findings of facts by the Trial Chamber.

2.19 The Trial Chamber made additional findings of fact that in March 1998, Solomon Berewa, the then Attorney-General of Sierra Leone in the Kabbah Government, wrote a letter addressed to the Kamajors in Bonthe. In Bonthe the letter from Soloman Berewa was given to one of Kondewa's alleged subordinates, Commander Morie Jusu Kamara, who passed it on to his second in command, Julius Squire, another of Kamara's alleged subordinates. Julius Squire said that he did not recognise the authority of the Attorney-General; he refused to accept the instructions in the letter, unless they came from Norman ***or Kondewa***.[62] Again, the Defence has not challenged these findings of facts by the Trial Chamber.

2.20 Based on these findings, the Trial Chamber found, at paragraphs 868 to 872 of the Trial Chamber's Judgement, that a superior-subordinate relationship existed between Kondewa and Kondewa's alleged subordinates.

2.21 The Prosecution submits that it was open to a reasonable trier of fact, on the basis of its findings of fact referred to above, to conclude that it was established beyond a reasonable doubt that as at March 1998, following the arrival of Norman in Bonthe District and the establishment of Base Zero, Kondewa had not lost the effective control over the Kamajors in Bonthe District that he was exercising in August 1997, and, particularly on the basis of the findings of fact referred to in paragraph 2.19 above, that those Kamajors over which he exercised such effective control included Morie Jusu Kamara, Julius Squire and their subordinates.

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58 **Trial Chamber's Judgement**, para. 337.
59 *Ibid.*, para. 337.
60 *Ibid.*, para. 306.
61 *Ibid.*, para. 349.
62 *Ibid.*, paras 555-556.

D. The alleged errors

2.22 The Defence alleges that the Trial Chamber erred ***in both law and in fact*** in finding that the Prosecution had proven beyond a reasonable doubt that Kondewa exercised effective control over Kondewa's alleged subordinates.[63]

2.23 The standard of review on appeal in relation to alleged errors of fact are dealt with in paragraphs 1.7 to 1.10 above. It is recalled that the Appeals Chamber will only find that the Trial Chamber erred in fact where the appellant can establish that the finding of fact reached by the Trial Chamber is one which could not have been made on the evidence by ***any*** reasonable tribunal of fact. It is also recalled that two judges, both acting reasonably, can come to different conclusions on the basis of the same evidence.

2.24 The question is thus whether a reasonable trier of fact could have concluded on the basis of the evidence that was before the Trial Chamber, and on the basis of the findings of fact by the Trial Chamber which have not been challenged by the Defence, that it was established beyond reasonable doubt that Kondewa had effective control over Morie Jusu Kamara, Julius Squire and their subordinates, even if another equally reasonable trier of fact might have reached the opposite conclusion.

2.25 For the reasons given above, the Prosecution submits that it was open to a reasonable trier of fact to reach the conclusion that the Trial Chamber did.

2.26 The Kondewa Appeal Brief also contends that the Trial Chamber erred ***in law***, in failing "to correctly apply" the effective control test for determining whether there was a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates.[64] However, the Kondewa Appeal Brief expressly acknowledges that the Trial Chamber correctly identified the effective control test as the appropriate test for determining the existence of a superior-subordinate

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[63] **Kondewa Notice of Appeal**, para. 3; **Kondewa Appeal Brief**, para. 7.
[64] **Kondewa Appeal Brief**, para.12.

relationship.[65] As noted in paragraph 2.11 above, the indicators of effective control are more a matter of evidence than of substantive law, and whether the evidence regarding a civilian's *de jure* or *de facto* authority establishes effective control over subordinates must be determined on a case-by-case basis, on the basis of the evidence in each individual case. An allegation that the Trial Chamber erred in concluding that a superior-subordinate relationship existed is an allegation of an error of fact, not an allegation of an error of law, unless the appellant identifies an error on the part of the Trial Chamber in the articulation of the legal principles that it applied to the evaluation of the evidence.[66]

2.27 Paragraphs 14-17 of the Kondewa Appeal Brief seek to argue that Trial Chambers must apply a "rigorous approach" to the evaluation of evidence of a superior-subordinate relationship, and that such a relationship has only been established in a small number of cases before the ICTY and ICTR. The Prosecution acknowledges that the existence of the superior-subordinate relationship must be established beyond a reasonable doubt. However, on appeal, the question for the Appeals Chamber is whether it was open to a reasonable trier of fact, on the basis of the evidence before it, to conclude that the legal requirements of a superior-subordinate relationship were established beyond a reasonable doubt (even if an equally reasonable trier of fact might have reached the opposite conclusion). Each case must be decided on its own particular facts and evidence. The fact that Trial Chambers in various cases before the ICTY and ICTR have found that the legal requirements were not satisfied on the evidence in those other cases is immaterial to the present case. Decisions of the ICTY or ICTR to the effect that the evidence in a case before the ICTY or ICTR did not satisfy the relevant legal test does not somehow modify the legal test itself, or make the legal test more rigorous. Equally, the mere fact that the Trial Chamber in this case found the legal requirements to be satisfied on the basis of the evidence in this case, while the requirements were found not to be satisfied in various cases before the ICTY and ICTR based on the evidence in those other cases, does not mean that the Trial

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[65] **Kondewa Appeal Brief**, para. 9.

[66] Compare ***Kayishema and Ruzindana* Appeal Judgement**, para. 295.

Chamber somehow erred in law in "lowering the benchmark" (as argued in paragraph 17 of the Kondewa Appeal Brief). The facts and evidence are different in every case. Whether or not the evidence satisfies the legal test in one case, this says nothing about whether it is open to a reasonable trier of fact to decide that the relevant legal test is established on the evidence in another case.

2.28 Contrary to what is suggested in paragraph 16 of the Kondewa Appeal Brief, the case law does not establish that it is "much more difficult" to prove a superior-subordinate relationship in the case of civilian superiors. Reference is made to paragraph 2.10 above. In any event, the law does not draw any clear distinction between "military" and "civilian" commanders. In some cases, a superior may clearly be a military superior (as in the case of a superior in a regular official armed force of a country), and in some cases the superior may clearly be civilian (as for instance in the *Musema* case, where the accused was the director of a tea factory). However, in the case of irregular armed forces and rebel or insurgent groups, it may not always be possible to clearly categorise the group, and the authority exerted by its leaders, as military as opposed to civilian, or *vice versa*. In the present case, the CDF expressly described itself as "**Civil**" Defence Forces,[67] but it was also regarded as "as a cohesive force under one central command",[68] its structure and organisation incorporated "military terminology and concept",[69] and its members underwent military training[70] and engaged in combat operations like a military force. The question in this case, as in any case, is not whether the CDF was a "military" or a "civilian" organisation, but whether Kondewa had a sufficient degree of control over Kondewa's alleged subordinates as to satisfy the legal requirements of the effective control test.

2.29 Paragraphs 18-21 of the Kondewa Appeal Brief argue that in reaching the conclusion that a superior-subordinate relationship existed between Kondewa and Kondewa's alleged subordinates, the Trial Chamber "unjustifiably disregarded" the evidence of Albert Nallo that Kondewa did not at any time during the war

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67 **Trial Chamber's Judgement**, para. 1.
68 *Ibid.*, para. 358.
69 *Ibid.*, para. 357.
70 *Ibid.*, paras 303-304, 318.

"command any troops". The Prosecution submits that there is no basis for this Defence submission. As submitted in paragraphs 2.12 above (and see also paragraphs 2.9 and 2.10 above), it is not necessary for the purposes of Article 6(3) of the Statute that the superior be a ***commander*** of the subordinate: the existence of a superior-subordinate relationship depends solely on the existence of "a material ability to prevent or punish criminal conduct, ***however that control is exercised***". It is thus immaterial that Kondewa may not have commanded any troops in battle.

2.30 Paragraphs 22 and following of the Kondewa Appeal Brief argue that the "evidentiary standard" required to satisfy the effective control test is well established in the case law of the ICTY and ICTR. Paragraph 22 of the Kondewa Appeal Brief then sets out examples of the types of evidence that have been taken into account in other cases before the ICTY and ICTR in determining the existence of a superior-subordinate relationship.

2.31 Contrary to what the Kondewa Appeal Brief appears to be suggesting, the Prosecution submits that there are no fixed categories of types of evidence that may be relied upon by a Trial Chamber to determine the existence of a superior-subordinate relationship. In every case, the Trial Chamber is required to consider the totality of the evidence in the case as a whole, and make a determination of whether on the basis of that totality of evidence, the superior-subordinate relationship has been established beyond a reasonable doubt. On appeal, the question for the Appeals Chamber to decide is whether it was open to a reasonable trier of fact to reach the conclusion that it did. There are no rigid types of evidence that must exist in order for a Trial Chamber to be able to reach this conclusion. In particular, contrary to what is suggested in paragraph 22 of the Kondewa Appeal Brief, it is not necessary for the Trial Chamber to have evidence that the accused gave direct instructions to commit criminal acts, or that the accused gave actual and repeated orders to subordinates, or that the accused actually punished subordinates who failed to obey orders. In any event, in this case the Trial Chamber did make an express finding, which has not been challenged by the Defence, that Kondewa did have the power to issue orders to

Kamajors in Bonthe District,[71] and to order Kamajors in Bonthe District to be tried and to order that they be executed if found guilty.[72] Furthermore, the Trial Chamber also made an express finding, which has not been challenged by the Defence, that Julius Squire, who was a subordinate of Morie Jusu Kamara, did not recognize the authority of the Attorney-General of Sierra Leone and indicated that he would only accept the authority of Norman ***or Kondewa***.[73]

2.32 Paragraphs 23 and following of the Kondewa Appeal Brief argue that "in almost every case" before the ICTY and ICTR in which an accused has been convicted on the basis of superior responsibility, the accused operated under an established hierarchy of command. However, the case law clearly establishes that to be individually responsible on the basis of superior responsibility, it is ***not*** necessary that there be a formal organisational structure as long as the test of effective control is met,[74] this test being the test of whether the alleged superior had the power or authority to prevent the commission of a crime by the alleged subordinate or to punish the alleged subordinate after a crime has been committed (see paragraphs 2.7, 2.8 and 2.12 above). As submitted in paragraph 2.9 above, while it is necessary to prove that the direct perpetrator was a "subordinate" of the accused, there is no requirement of *direct* or *formal* subordination; it is only necessary to establish that the accused is, by virtue of his or her position, senior in some sort of formal or informal hierarchy to the perpetrator. The Prosecution submits that it was open to a reasonable trier of fact in this case to conclude that this requirement was satisfied, in view of the findings of the Trial Chamber referred to above, including in particular the findings referred to in paragraph 2.16 to 2.19 above.

2.33 Paragraph 30 of the Kondewa Appeal Brief suggests that Kondewa did not have superior authority, but only "influence" that was "gained through a reverence on the part of those around [him]". However, the Trial Chamber did not find that Kondewa's power and authority over Kondewa's alleged subordinates flowed

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71 **Trial Chamber's Judgement**, paras 295, 868. See paragraph 2.16 above.
72 **Trial Chamber's Judgement**, paras 300-301, 869. See paragraph 2.16 above.
73 **Trial Chamber's Judgement**, paras 555-556, 872. See paragraph 2.19 above.
74 See paragraph 2.9 above.

from Kondewa's position as High Priest, or from the reverence in which he was held by Kamajors. While Kondewa was held in reverence by Kamajors generally, the Trial Chamber found expressly that it was not established that Kondewa had effective control over certain Kamajors.[75] In the case of Kondewa's alleged subordinates, the finding of the existence of effective control rested rather on evidence specific to those particular alleged subordinates. This evidence established that in their particular case, Kondewa "had the legal and material ability to issue orders",[76] and that Kondewa "had authority and power to issue oral and written directives ..., order investigations for misconduct and hold court hearings".[77]

2.34 Paragraph 32 of the Kondewa Appeal Brief again appears to make the argument that because the Trial Chamber found that the requirements of a superior-subordinate relationship were satisfied in this case, the Trial Chamber must somehow have erred in law in applying the wrong evidentiary standard. (See also, for instance, paragraphs 33-35 of the Kondewa Appeal Brief.) The Prosecution submits that the Defence has identified no relevant error of law. The only alleged error advanced by the Defence, it is submitted, is an alleged error of fact. According to the Defence, a reasonable trier of fact could not have concluded on the evidence in this case that the legal requirements of a superior-subordinate relationship were satisfied. The standard of review on appeal for an alleged error of fact is dealt with above. For the reasons given above, the Prosecution submits that it was open to a reasonable trier of fact to conclude that the requirements of a superior-subordinate relationship were proved in this case.

2.35 Paragraphs 36-42 of the Kondewa Appeal Brief argue that no reasonable trier of fact could have concluded that there was a superior-subordinate relationship between Kondewa on the one hand, and Kamara, Squire and Baigeh on the other, because there was no evidence that Kondewa ever met, or spoke to, or issued orders to, any of these three subordinates. The Prosecution repeats its submissions in paragraphs 2.30 to 2.31 above. There is no requirement that a

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75 See paragraph 2.43 below.
76 **Trial Chamber's Judgement**, para. 868.
77 **Trial Chamber's Judgement**, para. 869.

finding of a superior-subordinate relationship must be based on any specific type of evidence. What is necessary is that on the basis of the totality of the evidence in the case as a whole, the Trial Chamber is satisfied that the legal requirements are met beyond a reasonable doubt. The absence of one particular type of evidence cannot be fatal to a finding of the existence of a superior-subordinate relationship, if the totality of the evidence in the case as a whole is otherwise sufficient to establish its existence.

2.36 Paragraph 38 of the Kondewa Appeal Brief argues that the evidence of Squire's refusal to accept instructions unless they came from Norman or Kondewa "is hardly the basis for concluding the existence of a superior-subordinate relationship". However, the Trial Chamber did not base its finding of the existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates on this evidence alone. The Trial Chamber based its conclusion on the totality of the evidence in the case as a whole. The most pertinent findings of the Trial Chamber on which this conclusion was based have been referred to in paragraphs 2.16 to 2.19 above. The Prosecution submits that there was evidence on the basis of which a reasonable trier of fact could conclude that Kondewa had the ability to issue orders to, and to order the trial and punishment of, Kamajors in Bonthe District as at August 1997.[78] The evidence and findings of the Trial Chamber referred to in paragraphs 2.18 and 2.19 above, ***including but not limited to*** the evidence of Squire's refusal to accept instructions unless they came from Norman or Kondewa, was, it is submitted, evidence on the basis of which a reasonable trier of fact could conclude that this authority and power of Kondewa continued after Norman's arrival and the establishment of Base Zero in September 1997. Furthermore, the evidence of Squire's refusal to accept instructions unless they came from Norman or Kondewa, was, it is submitted, evidence on the basis of which a reasonable trier of fact could conclude that this authority of Kondewa extended over Squire, and Squire's superior Kamara, and other subordinates of Kamara.

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[78] See paragraphs 2.16 and 2.17 above.

2.37 The Trial Chamber expressly found that Kamara exercised command over Julius Squire, Baigeh, Rambo Conteh, Lamina Gbokambama as well as the Kamajors under their immediate command, and that the Kamajors who arrived in Bonthe on 15 February 1998, declared that from then on Bonthe Town was under the control of the Kamajors headed by Morie Jusu Kamara.[79] It is submitted that if it was open to a reasonable trier of fact to conclude that Kondewa had effective control over Kamara, it necessarily follows that it was open to a reasonable trier of fact to conclude that Kondewa also had effective control over all of these subordinates of Kamara. (Compare paragraphs 40-41 of the Kondewa Appeal Brief.)

2.38 Paragraphs 44-45 of the Kondewa Appeal Brief challenge the Trial Chamber's reliance on the evidence of Kondewa's effective control over Kamajors in Bonthe District as at August 1997.

2.39 First, the Kondewa Appeal Brief argues that Kondewa's effective control as at August 1997 is a matter that falls outside the timeframe of the Indictment. In response, the Prosecution submits that even where an accused cannot be convicted of conduct occurring outside the timeframe of an indictment, evidence of matters occurring outside the timeframe of the indictment may nonetheless be taken into account where relevant to and probative of the individual responsibility of the accused for conduct that ***did*** occur within the timeframe of the indictment.

2.40 Secondly, the Kondewa Appeal Brief argues that the fact that Kondewa may have had effective control in August 1997 does not establish that he had effective control in February 1998. In response, the Prosecution submits that while the fact that Kondewa had effective control in August 1997 is not in and of itself conclusive of the question whether Kondewa had effective control in February 1998, this fact is nevertheless relevant and probative of that question. The Prosecution submits that it was open to the Trial Chamber to conclude that Kondewa had effective control in August 1997, and having so concluded, the Prosecution submits that it was open to a reasonable trier of fact to conclude, on the basis of the matters referred to in paragraphs 2.18 and 2.19 above that this effective control continued thereafter to at least March 1998. Furthermore, on the

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[79] **Trial Chamber's Judgement**, para. 871.

basis of the evidence referred to in paragraph 2.19 above, considered together with all of the other evidence, the Prosecution submits that it was open to a reasonable trier of fact to conclude that Kamara and Kamara's subordinates were amongst those over whom Kondewa exercised effective control.

2.41 Paragraph 46 of the Kondewa Appeal Brief argues that, contrary to the findings of the Trial Chamber in paragraphs 868 and 869 of the Trial Chamber's Judgement, there was "no" evidence that Kondewa's *de facto* status with regards the Kamajors was that of a superior, and "no" evidence that his de *jure status* as High Priest enabled him to exercise "effective control" over the Kamajors. The Prosecution submits that it is not correct that there was "no" evidence. The Prosecution repeats its submission that the Trial Chamber was required to, and submits that it did, decide the question of a superior-subordinate relationship on the basis of the totality of the evidence in the case. The Trial Chamber did not base its finding of the existence of a superior-subordinate relationship on Kondewa's position as High Priest alone (see paragraph 2.33 above and paragraphs 2.41 to 2.42 and 2.51 below). However, Kondewa's position as High Priest was one of several matters that was relevant in determining the existence of a superior-subordinate relationship between Kondewa and Kondewa's alleged subordinates (see paragraph 2.18 above). For the reasons given above, it is submitted that it was open to a reasonable trier of fact to conclude, on the basis of the totality of that evidence, that a superior-subordinate relationship was established beyond a reasonable doubt.

2.42 Paragraph 47 of the Kondewa Appeal Brief argues that the Trial Chamber found elsewhere in its Judgement that Kondewa did not exercise effective control over certain other Kamajors in other districts of Sierra Leone at the time. The Prosecution concedes that this is the case.[80] The Kondewa Appeal Brief then

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[80] See **Trial Chamber's Judgement**, paras 806 (in which the Trial Chamber found that it was not established that a superior-subordinate relationship with any of the Kamajors who operated in Koribondo); 853 (in which the Trial Chamber found that it was not established that a superior-subordinate relationship with any of the Kamajors who operated in Bo District); 916 (in which the Trial Chamber found that it was not established that a superior-subordinate relationship with any of the Kamajors who operated in Kenema District).

argues that it is "unclear" how the Trial Chamber determined that Kondewa's statuts as High Priest gave him any higher degree of authority in Bonthe.

2.43 In response to this, it is submitted that it can be seen why the Trial Chamber reached the conclusion that it did in relation to Bonthe District, notwithstanding the contrary conclusion that it reached in relation to Kondewa's Article 6(3) superior responsibility over Kamajors in other districts. Kondewa was himself based in Bonthe District at the time, and the evidence of Kondewa exercising effective control over Kamajors, referred to in paragraphs 2.16 to 2.19 above, all related to control by Kondewa over Kamajors in Bonthe District.

2.44 Paragraph 48 of the Kondewa Appeal Brief refers to one isolated item of evidence and argues that this item of evidence is "not evidence of any weight towards establishing Kondewa's actual 'effective control' over subordinates". However, as submitted above, the Trial Chamber was required to, and did, base its conclusion on the totality of evidence in the case. It is not to the point that an isolated item of evidence does not of itself alone support the Trial Chamber's conclusion. The item of evidence in question does however support the conclusion that Kondewa had control over certain territory.[81]

2.45 Paragraphs 49-53 of the Kondewa Appeal Brief argue that there is no evidence of Kondewa ever giving orders to Kamara or his subordinates, or evidence that he had the power to do so, and that the evidence of Kondewa giving orders to Kamajors in Bonthe District relates to the time period August 1997. The Prosecution repeats its submissions above. On the basis of the evidence referred to in paragraphs 2.16 and 2.17 above, it is submitted that it was open to a reasonable trier of fact to conclude that Kondewa had effective control over Kamajors in Bonthe District in August 1997, and that on the basis of the evidence referred to in paragraphs 2.18 and 2.19 above, it was open to a reasonable trier of fact to conclude that this continued to be the case until at least March 1998, and that those Kamajors in Bonthe District over whom Kondewa exercised effective control included Kamara and his subordinates.

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[81] See **Trial Chamber's Judgement**, paras 299 and 869.

2.46 Paragraphs 52-53 of the Kondewa Appeal Brief refer to the evidence given by TF2-116 that at a public meeting in Bonthe two weeks after the attack on Bonthe, Kondewa had said that "he had not allowed his men to enter Bonthe, but that they had not listened to his advice and had done what they had done".[82] The Kondewa Appeal Brief argues that it is "unclear" how the Trial Chamber "determined that this evidence was further weight towards establishing a superior-subordinate relationship". In fact, the Trial Chamber did not expressly rely on this evidence as proof of the existence of a superior-subordinate relationship, but rather, as proof of Kondewa's knowledge that crimes had been committed by his subordinates in Bonthe District.[83] However, the Prosecution submits that this evidence is evidence of Kondewa purporting to have the power to issue orders to the Kamajors who committed the crimes in Bonthe District. The mere fact that, according to what Kondewa said, these Kamajors did not comply with his order on this occasion, is, it is submitted, immaterial. The mere fact that subordinates commit a crime in disobedience to an order given by a superior does not of itself absolve the superior of all responsibility under Article 6(3). Where this occurs, the superior still has a responsibility under international criminal law to punish the subordinates who committed the crimes in question. It is submitted that this evidence therefore does support the conclusion that was reached by the Trial Chamber.

2.47 Paragraphs 54-58 of the Kondewa Appeal Brief argue that there is no evidence that Kondewa had the legal and material ability to prevent the commission of criminal acts by Kamara and his subordinates or to punish them for those crimes. The Prosecution again repeats its submissions above. On the basis of the evidence referred to in paragraphs 2.16 and 2.17 above, it is submitted that it was open to a reasonable trier of fact to conclude that Kondewa had effective control over Kamajors in Bonthe District in August 1997, and that on the basis of the evidence referred to in paragraphs 2.18 and 2.19 above, it was open to a reasonable trier of fact to conclude that this continued to be the case until at least

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82 **Trial Chamber's Judgement**, paras 553 and 876.
83 See **Trial Chamber's Judgement**, paras 876-877.

March 1998, and that those Kamajors in Bonthe District over whom Kondewa exercised effective control included Kamara and his subordinates.

2.48 Paragraph 57 of the Kondewa Appeal Brief refers to the finding of the Trial Chamber in paragraph 721(ii) of the Trial Chamber's Judgement that "Commanders' authority to discipline their men on the ground was entirely their own". However, this finding must be considered in context. This finding of the Trial Chamber was a reiteration of the findings in paragraph 358 of the Trial Chamber's Judgement, in which the Trial Chamber said that:

> Although the CDF was regarded as a cohesive force under one central command, there were some fighters who acted on their own without the knowledge of the central command because their area of operation was so wide. Commanders' authority to discipline their men on the ground was entirely their own. The CDF also did not keep records of its members like a conventional army would. There were literally hundreds of groups spread throughout the country and they would communicate through their commanders. Commanders went to Base Zero from every group and location in the country and received training, facilities and instruction. Instructions came from the High Command or the National Coordinator.[84]

2.49 This finding provides a further explanation of why the Trial Chamber did not find Kondewa to be in a superior-subordinate relationship with all Kamajors in all districts in Sierra Leone. However, this finding is not inconsistent, it is submitted, with the finding that Kondewa had the power specifically to prevent his subordinates in Bonthe District from committing crimes, or from punishing them for having committed crimes.

2.50 Paragraphs 59-62 of the Kondewa Appeal Brief argue that while Kondewa was in a position of some influence over the Kamajors in Sierra Leone by virtue of his position as High Priest of the CDF, this in itself does not support a finding that a superior-subordinate relationship existed between Kondewa and any of the Kamajors. In response, the Prosecution relies again on its submissions above. The Trial Chamber's conclusion as to the existence of a superior-subordinate relationship was based on all of the evidence in the case as a whole, and not merely on the evidence of Kondewa's influence as High Priest. Even if

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[84] Footnote omitted.

Kondewa's influence as High Priest was not sufficient to establish a superior-subordinate relationship between Kondewa and all of the Kamajors in Sierra Leone, it is submitted that it was open to a reasonable trier of fact, on the basis of the matters referred to in paragraphs 2.16 to 2.19 above, to conclude that a superior-subordinate relationship *had* been established between Kondewa and Kamajors in Bonthe District, including Kamara, Squire and Baigeh.

2.51 Paragraph 63 of the Kondewa Appeal Brief argues that the evidence cited by the Trial Chamber is "in fact more consistent with the case law in which a finding of effective control has been rejected", particularly since Kondewa's role "did not fall into an established chain of command". The Prosecution reiterates its submission that the question of whether a superior-subordinate relationship has been established on the evidence is more a question of fact rather than a question of law, and that each case must be decided on the basis of its own particular facts and evidence. Furthermore, there is no requirement to demonstrate an "established chain of command".

E. Conclusion

2.52 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground One should be rejected.

3. Prosecution Response to Kondewa's Appeal Ground Two: Superior responsibility of Kondewa for crimes committed in Moyamba District

A. Introduction

3.1 This section of this Response Brief responds to paragraphs 70 to 92 of the Kondewa Appeal Brief.

3.2 In response to this appeal ground of Kondewa, the Prosecution relies also on its submissions above in relation to Kondewa's Appeal Ground One.

3.3 In paragraphs 636 to 666 of the Trial Chamber's Judgement, the Trial Chamber made findings as to various crimes committed in Moyamba District by Kamajors / CDF forces.

3.4 The Trial Chamber found, ***in general***, that the evidence before it did not establish beyond reasonable doubt that Kondewa had effective control over the Kamajors who committed these crimes in Moyamba District, in the sense that he had the material ability to prevent or punish them for their criminal acts.[85] However, the Trial Chamber did find that Kondewa was individually responsible, on the basis of superior responsibility, for one specific incident of pillage committed in Moyamba District, which the Trial Chamber found to have been committed by Kamajors over whom Kondewa ***was*** found to have effective control. The incident in question is described in paragraphs 645 to 648 of the Trial Chamber's Judgement, and is referred to below as the "**Moyamba looting incident**". In this incident, a group of Kamajors, three of whom introduced themselves as Steven Sowa, Moses Mbalacolor and Mohamed Sankoh respectively, came to the house of TF2-073, and took his Mercedes car and other items that were in his garage, including a generator, car tires and "many other gadgets".[86]

B. The applicable law

3.5 The Prosecution refers to paragraphs 2.5 to 2.13 above.

C. The Trial Chamber's findings

3.6 The Trial Chamber's findings in respect of the Moyamba looting incident are found in paragraphs 645 to 648 of the Trial Chamber's Judgement. This incident

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[85] **Trial Chamber's Judgement**, para. 951.
[86] *Ibid.*, para. 645.

was found by the Trial Chamber to have occurred on the second day after the Kamajors arrival in Sembehun,[87] in November 1997.[88]

3.7 The Trial Chamber's findings in respect of the individual responsibility of Kondewa for this incident are contained in paragraphs 951-955 of the Trial Chamber's Judgement. The Trial Chamber found that this incident of looting "was done by the Kamajors who operated under the direct orders of Kondewa. Kondewa's knowledge that his subordinates committed crimes of pillage can be established on the basis that the looted car was then given to him to be driven around".[89] The Trial Chamber further found that Kondewa "not only failed in the exercise of his duties to punish his subordinates for looting, but chose to support their actions by using the looted vehicle himself".[90]

3.8 The Prosecution submits that this finding of the Trial Chamber as the individual responsibility of Kondewa was required to be based, and was based, on all of the evidence in the case as a whole, and all of the Trial Chamber's relevant findings of fact in the case. That evidence, and those findings, included the matters referred to in paragraphs 2.16 to 2.19 above, on the basis of which, it is submitted above, it was open to a reasonable trier of fact to conclude that in August 1997, Kondewa had effective control over certain Kamajors for the purposes of Article 6(3) of the Statute, in the sense that he could prevent them from committing crimes or could punish them for crimes that they had committed, and that this effective control continued until at least March 1998.[91]

3.9 The additional evidence and findings on which the Trial Chamber based its conclusion that the particular Kamajors who committed the Moyamba looting incident were amongst those Kamajors over which Kondewa had effective control included the evidence and findings that (1) the Kamajors in question said that they were "Kondewa's Kamajors";[92] (2) the Kamajors in question said that they had

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87 **Trial Chamber's Judgement**, para. 645.
88 **Trial Chamber's Judgement**, para. 641.
89 **Trial Chamber's Judgement**, para. 955.
90 **Trial Chamber's Judgement**, para. 954.
91 See paragraphs 2.17 and 2.20 to 2.21 above.
92 **Trial Chamber's Judgement**, para. 645.

come from Talia, Tihun, Gbangbatoke and other surrounding villages,[93] Tihun being the village in Bonthe District where Kondewa had established himself,[94] and Talia being the site of Base Zero; (3) the vehicle that was stolen in this incident was taken to Talia where it was used by Norman and then given to Kondewa;[95] and (4) Kondewa was subsequently seen using the car.[96] Kondewa does not, in this Ground of Appeal, challenge any of this evidence or any of these predicate findings of fact by the Trial Chamber.

3.10 The Prosecution submits that on the basis of this evidence and these findings of facts by the Trial Chamber, which have not been challenged by the Defence, it was open to a reasonable trier of fact to conclude that, for the purposes of superior responsibility under Article 6(3) of the Statute, a superior-subordinate relationship did exist between Kondewa and the Kamajors who committed the Moyamba looting incident, and that Kondewa was individually responsible under Article 6(3) for the Moyamba looting incident.

D. The alleged errors

3.11 In this Kondewa Appeal Ground Two, Kondewa contends that the Trial Chamber erred in finding the existence of a superior-subordinate relationship between Kondewa and the perpetrators of the Moyamba looting incident.

3.12 In this ground of appeal, Kondewa takes no issue with the Trial Chamber's findings (1) that the Moyamba looting incident occurred; (2) that Kondewa knew that the relevant direct perpetrators had committed the Moyamba looting incident; and (3) that Kondewa failed to take any steps to punish the perpetrators of the Moyamba looting incident. As Kondewa does not challenge the Trial Chamber's findings of law or fact with respect to these issues, the Prosecution makes no submissions on the Trial Chamber's findings in respect of these issues, and the Appeals Chamber is not called upon to consider the Trial Chamber's findings in

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93 **Trial Chamber's Judgement**, para. 645.
94 **Trial Chamber's Judgement**, paras 294, 295, 297, 537, 666.
95 **Trial Chamber's Judgement**, para. 646.
96 **Trial Chamber's Judgement**, paras 647-648.

respect of these issues. This ground of appeal is confined solely to the issue of whether the Trial Chamber erred in finding the existence of a superior-subordinate relationship between Kondewa and the direct perpetrators of the Moyamba looting incident.

3.13 In paragraph 79 of the Kondewa Appeal Brief, the Defence argues that Kondewa's position as High Priest did not make him a commander of Kamajors, and did not give him the capacity to control or issue orders to the Kamajors. In response, the Prosecution relies on its submissions above in relation to Kondewa's Appeal Ground One. It is not necessary for the purposes of Article 6(3) of the Statute that the superior be a *commander* of the subordinate: the existence of a superior-subordinate relationship depends solely on the existence of "a material ability to prevent or punish criminal conduct, ***however that control is exercised***", and there is no requirement of *direct* or *formal* subordination. (See paragraphs 2.9. 2.10. 2.12. 2.29, 2.32 and 2.51 above.) Furthermore, the Trial Chamber did not find that Kondewa's position as High Priest gave him effective control, for the purposes of Article 6(3) of the Statute over all Kamajors: indeed, the Trial Chamber expressly found that Kondewa did not have effective control for the purposes of Article 6(3) over various of the Kamajors who were found to have committed crimes charged in the Indictment. (See paragraphs 2.42 to 2.43 above.) What the Trial Chamber found was that on the basis of the evidence in the case as a whole, and its predicate findings of fact (which have not been challenged by the Defence), Kondewa did have effective control over the specific Kamajors who committed the Moyamba looting incident. For the reasons given in paragraphs 3.8 to 3.10 above, it is submitted that it was open to a reasonable trier of fact to conclude that this was established beyond a reasonable doubt.

3.14 Paragraphs 80-81 of the Kondewa Appeal Brief appear to argue that because the Trial Chamber found that it was not established beyond reasonable doubt that Kondewa exercised effective control over ***all*** of the Kamajors, this should somehow have "eliminated the possibility" that he had effective control over ***any*** of the Kamajors. The Prosecution submits that there is no logical basis for this Defence submission. It is clearly possible, and consistent with logic and

principle, for Kondewa to have had effective control, for the purposes of Article 6(3) of the Statute, over some, but not all, of the Kamajors.

3.15 Paragraphs 83-85 and 89-90 of the Kondewa Appeal Brief argue that the only evidence relied upon by the Trial Chamber to establish that Kondewa had effective control over the perpetrators of the Moyamba looting incident was the fact that Kondewa used the stolen car after it was stolen. The Prosecutor submits that this is not correct. The evidence relied upon also included the fact that the direct perpetrators had said at the time of the incident that they were "Kondewa's Kamajors"[97] and that they came from the area in Bonthe District where Kondewa was located, this evidence being assessed in the light of the Trial Chamber's findings (referred to in paragraphs 2.16 to 2.19 above) that Kondewa had effective control over Kamajors in Bonthe District. For the reasons given above, on the basis of this evidence and these findings, it is submitted that it was open to a reasonable trier of fact to conclude that Kondewa had effective control over the perpetrators of the Moyamba looting incident.

3.16 Paragraphs 86-88 of the Kondewa Appeal Brief argue that the evidence of Kondewa using the stolen car at some point in time ***after*** the Moyamba looting incident does not establish that Kondewa had effective control over the direct perpetrators at the time that the Moyamba looting incident was committed. However, again, the Prosecution submits that this was not the only evidence relied on by the Trial Chamber to reach its conclusion. In particular, at the time of the Moyamba looting incident itself, the perpetrators announced that they were "Kondewa's Kamajors".[98]

3.17 Paragraph 89 of the Kondewa Appeal Brief also argues that the Trial Chamber "erred in law" in concluding that Kondewa had effective control over the perpetrators of the Moyamba looting incident. However, for the reasons given above in relation to Kondewa's Appeal Ground One, it is submitted that the indicators of effective control are more a matter of evidence than of substantive law, and that an allegation that the Trial Chamber erred in concluding that a

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97 **Trial Chamber's Judgement**, paras 645, 951(i).
98 **Trial Chamber's Judgement**, paras 645, 951(i).

superior-subordinate relationship existed is an allegation of an error of fact, not an allegation of an error of law, unless the appellant identifies an error on the part of the Trial Chamber in the articulation of the legal principles that it applies to the evaluation of the evidence. (See especially paragraphs 2.11, 2.26 to 2.28 and 2.34 above.) The Kondewa Appeal Brief does not take issue with any of the Trial Chamber's findings of law in respect of the legal requirements for superior authority. The mere fact that Kondewa disagrees with the conclusion reached by the Trial Chamber does not mean that the Trial Chamber must have somehow misunderstood or misapplied the law, and that there is therefore an error of law. Kondewa's complaint is in effect that the Trial Chamber could not have reached the conclusion that it did on the basis of the evidence before it, and this is an allegation of an error of fact. Kondewa therefore has the burden of establishing that no reasonable trier of fact could have reached the conclusion that the Trial Chamber did on the basis of the evidence before it. For the reasons given above, it is submitted that Kondewa has not established this.

3.18 The Kondewa Appeal Brief only identifies two alleged errors of law (as opposed to errors of fact) in paragraph 89 of the Kondewa Appeal Brief.

3.19 First, the Defence claims that the Trial Chamber reached a conclusion that was somehow inconsistent or illogical, when it found that Kondewa had effective control over the perpetrators of the Moyamba looting incident but simultaneously found that he did not have effective control over other Kamajors who committed crimes in Moyamba District at the same time. The Prosecution submits that there is nothing inconsistent or illogical in this conclusion of the Trial Chamber. It is clearly possible, and consistent with logic and principle, for Kondewa to have had effective control, for the purposes of Article 6(3) of the Statute, over some, but not all, of the Kamajors (see paragraph 3.14 above). There is nothing illogical or inconsistent in the finding that it was established that some of the Kamajors involved in events in Moyamba District were amongst those over whom Kondewa had effective control, but that this had not been established in relation to others of the Kamajors involved in events in Moyamba District.

3.20 Secondly, paragraph 89 of the Kondewa Appeal Brief argues that the Trial Chamber erred in law in relying on a single item of evidence to establish Kondewa's effective control. However, for the reasons given above, the Trial Chamber did not rely on a single item of evidence to establish this (see paragraph 3.15 above). In any event, there is no principle of law that would prevent a Trial Chamber from relying on a single item of evidence to establish a material fact, provided that a reasonable trier of fact would be entitled to conclude that the single item of evidence was sufficient to establish that fact beyond a reasonable doubt. An allegation that the Trial Chamber was not entitled to so conclude is an allegation of an error of fact, not an allegation of an error of law.

E. Conclusion

3.21 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground Two should be rejected.

4. Prosecution Response to Kondewa's Appeal Ground Three: Conviction of Kondewa for murder in Talia / Base Zero

A. Introduction

4.1 This section of this Response Brief responds to paragraphs 93 to 121 of the Kondewa Appeal Brief.

4.2 This ground of appeal relates to the Trial Chamber's finding that Kondewa was individually responsible for murder in respect of an incident in Talia. The relevant findings of the Trial Chamber in respect of this incident are set out in paragraphs 622 and 623, paragraph 921(iii), and paragraphs 934 to 936 of the Trial Chamber's Judgement.

4.3 The Trial Chamber's findings in respect of this incident were as follows:

> Sometime towards the end of 1997, several Kamajors entered Talia while dancing. The two men leading the dance were Town Commanders from another town in the direction of Kongo. They had been appointed Town Commanders by rebels, but they did not bear any signs of the RUF. The rebels had forced these men to organize the civilians from their town to provide assistance to the rebels.
>
> When they entered Talia, the Town Commanders were not carrying guns. Allieu Kondewa and Kamoh Bonnie, Kondewa's priest, were among the Kamajors. They were standing behind the town commanders. TF2-096 witnessed Allieu Kondewa take a gun from Kamoh Bonnie, and shoot one of the Town Commanders. The next morning, TF2-096 saw two graves. She was told that the Town Commanders were buried within them. Joe Tamidey and Ngobeh were also present in Talia on the day Kondewa shot the Town Commander.[99]

4.4 This incident is referred to below as the "**Talia killing incident**".

4.5 Kondewa's Appeal Ground Three contends that the Trial Chamber convicted Kondewa for the killing of ***two*** town commanders in Talia.

4.6 In this connection, the Kondewa Appeal Brief submits that:

> On this basis the Trial Chamber "finds that it has been proved beyond reasonable doubt that Kondewa is individually criminally responsible pursuant to Article 6(1) for committing murder ***[2 murders]*** as a war crime as charged in Count 2 of the Indictment."[100]

4.7 The Prosecution submits that on a correct reading of the Trial Chamber's Judgement, the Trial Chamber did ***not*** find Kondewa to be guilty of ***two*** murders in respect of the Talia killing incident, but rather, that Kondewa was only found to be individually responsible for the killing of one of the two town commanders, namely the one that Kondewa was found personally to have shot..

4.8 It is apparent from paragraphs 934-936 of the Trial Chamber's Judgement, that the Trial Chamber considered that both of the town commanders referred to were in fact killed by the Kamajors, and that the killing of each of the two was a war crime. However, the Trial Chamber did not say that Kondewa himself was in fact individually responsible for the killing of ***both*** of the commanders. Paragraph 934 of the Trial Chamber's Judgement states that the Talia killing incident

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99 **Trial Chamber's Judgement**, paras. 622-623 (footnotes omitted).

100 **Kondewa Appeal Brief**, para. 101 (emphasis added).

constitutes "***an*** intentional killing by Kondewa" (emphasis added), and paragraph 57 of the Sentencing Judgement states that Kondewa "was also held liable for the direct perpetration of some acts, including the shooting of ***a*** town commander in Talia/Base Zero" (emphasis added).

4.9 In the event that the Appeals Chamber were to find that the Trial Chamber did find Kondewa to be individually responsible for the killing of both town commanders in the Talia killing incident, the Prosecution would concede that no reasonable trier of fact could have concluded on the basis of the evidence before it that Kondewa was individually responsible for killing (by personally committing) the second of the two town commanders, but it is submitted that it was open to a reasonable trier of fact to conclude that Kondewa was individually responsible for the murder of the town commander that he individually shot.

4.10 Given what the Trial Chamber said in paragraph 57 of the Sentencing Judgement (quoted in paragraph 4.8 above), it is submitted that even if the Trial Chamber found Kondewa to be individually responsible for the killing of both town commanders (and it is submitted that this is not the case), the finding of individual responsibility in respect of the second town commander had no effect on the sentence imposed on Kondewa. Therefore, even if the Appeals Chamber were to find that the Trial Chamber erroneously convicted Kondewa for the killing of the second of the two town commanders but sustained the conviction for the killing of one of the town commanders, this should not result in any reduction in the sentence imposed on Kondewa.

4.11 For this reason, in the Prosecution response below to Kondewa's Appeal Ground Three, the Prosecution only addresses the Defence arguments that the Trial Chamber erred in convicting Kondewa for the killing of the first of the two town commanders (that is, the town commander that the Trial Chamber found Kondewa to have personally shot).

B. The alleged errors

4.12 The Kondewa Appeal Brief argues that the evidence was insufficient to support a conviction of Kondewa for personally shooting and killing one of the town commanders in the Talia killing incident.

4.13 Paragraph 104 of the Kondewa Appeal Brief gives a summary of the testimony of TF2-096, on whose evidence the Trial Chamber based its finding that Kondewa shot and killed this town commander. Paragraph 105 of the Kondewa Appeal Brief states that this summary is the "sum total" of the evidence presented by the Prosecution in respect of this killing. The Prosecution submits that this summary in paragraph 104 of the Kondewa Appeal Brief is ***not*** the sum total of all of the relevant evidence. The full testimony of TF2-096 in respect of this killing incident is contained in the Transcript of 8 November 2004, at pages 24-27, 39-41 and 70-75, additional details of which are summarised in paragraphs 622-623 of the Trial Chamber's Judgement.

4.14 Additionally, the evidence of this witness had to be evaluated in the light of all of the evidence in the case, and all of the other findings of the Trial Chamber, as a whole.

4.15 At paragraph 265 of the Trial Chamber's Judgement, the Trial Chamber said:

> In some instances, only one witness has given evidence on a material fact. While the testimony of a single witness on a material fact does not, as a matter of law, require corroboration, it has been the practice of the Chamber to examine such evidence very carefully, and in light of the overall evidence adduced, before placing reliance upon it.[101]

4.16 That, it is submitted is a correct statement of the law.[102] The Trial Chamber was therefore clearly conscious of the need to exercise caution when basing findings

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[101] Footnote omitted.

[102] See the authorities cited by the Trial Chamber at paragraph 265 of the **Trial Chamber's Judgement**, and also ***Tadić* Appeal Judgement,** para. 65; ***Čelebići* Appeal Judgement,** para. 506; ***Kordić and Čerkez* Appeal Judgement,** paras 274 and 275; ***Kunarac* Appeal Judgement**, para. 268; ***Kupreškić* Appeal Judgement**, paras 33, 220; ***Rutaganda* Appeal Judgement**, para. 29; ***Musema* Appeal Judgement**, paras. 36-38; ***Kayishema and Ruzindana* Appeal Judgement**, paras.

of fact on the evidence of a single witness. It is submitted that the Defence has not demonstrated that the Trial Chamber failed to exercise the requisite degree of caution in this case when evaluating the evidence of TF2-096.

4.17 Paragraph 107 of the Kondewa Appeal Brief argues that the identification of Kondewa as the perpetrator was not established as TF2-096 did not explain how she knew who Kondewa was and what he looked like. However, in her evidence this witness was in fact capable of giving the names of a significant number of Kamajors who she witnessed to be present at the incidents about which she testified.[103] This witness further testified that her husband was a Kamajor at the time.[104] Furthermore, this witness in her testimony did in fact expressly give details of her previous knowledge of Kondewa. In particular, she testified as follows:

> Q. Madam Witness, apart from these two leaders that you've mentioned, do you know of any Kamajor personality who came to Talia around this time?
>
> A. Yes.
>
> Q. Can you tell us who this was?
>
> A. When they came for those two weeks, it was Kondewa.
>
> Q. Witness, I would like you to speak up.
>
> A. I saw Kondewa, together with his priests.
>
> Q. Who is this Kondewa you mention?
>
> A. We saw Kondewa there, but I knew him at first, so I saw him there as somebody who was leading the Kamajors there. I saw him in that town.
>
> Q. Madam Witness, you said you knew him at first. How did you know him?

154, 187, 320, 322; ***Niyitegeka* Appeal Judgement**, para. 92; ***Kajelijeli* Appeal Judgement**, paras 41-44; ***AFRC* Trial Judgement**, para. 109.

[103] See, in particular, Transcript, 8 November 2004, pp. 25-26, 73 (in which the witness specifically identified Kamoh Boni as having been present at the Talia killing incident, and Joe Tamidey and Ngobeh as having been present in Talia on the day of the Talia killing incident).

[104] Transcript, 8 November 2004, p. 68 and p. 75.

A. I knew him, that he was a herbalist.

Q. Do you know where he was practising as a herbalist?

A. You mean the year?

Q. Where -- location.

A. Yes, Jopowahun.

...

Q. Madam Witness, do you know Kondewa by any other names?

A. Yes.

Q. What other names do you know him as?

A. Mr Allieu Kondewa.

Q. Madam Witness, when Allieu Kondewa came, where did he settle?

A. When he came, he settled in Mokusi. That's where he was settled practising his trade -- doing his initiation.

...

Q. And how far is Mokusi from Talia?

A. Two and a half miles.

Q. Madam Witness, you also mentioned that Allieu Kondewa was doing initiation. What did that entail?

A. I did see him initiating Kamajors.

Q. And do you know why he was initiating Kamajors?

A. Yes, a bit.

Q. Can you tell this Court?

A. They said that when they do this initiation, when they fight -- so that when they fight the rebels they would be able to protect our country. That was why they had come.

Q. Madam Witness, as far as you know, did Kondewa ever leave Mokusi?

A. He stayed in Mokusi for long and then he later came to Nyandehun and he stayed for long at Nyandehun and then he later came to Talia. And Talia and Nyandehun are almost the same town -- they are separated by a few –

...

Q. Madam Witness, can you tell us when Allieu Kondewa settled in Talia?

A. The same, 1996.

Q. At this time was he still initiating Kamajors?

A. Yes, his priests were in Mokusi and they would come from Talia to Mokusi.

Q. Apart from initiating Kamajors, was he doing anything else?

A. That's the only thing I saw -- initiating people. When there is a case or a quarrel, they would report to him.

Q. And who would report to him?

A. The civilians -- anything that happened, they would report to him.[105]

...

Q. Madam Witness, and every time Hinga Norman left Talia, do you know who would be in charge of the Kamajors?

A. Yes.

Q. And who would this be?

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[105] Transcript, 8 November 2004, pp. 14-16.

> A. I did see Pa Konde; he was there. Because whatever happened to civilians, writes a report. They will take the report to him. At that time the chiefs were not doing anything anymore.
>
> Q. Why do you say the chiefs were no longer acting?
>
> A. Because that man, I did see people going to him.[106]

4.18 The Prosecution submits that on the basis of this evidence, and the testimony of TF2-096 as a whole, it was open to a reasonable trier of fact to conclude that this witness was capable of reliably identifying Kondewa at the Talia killing incident.

4.19 Paragraph 107 of the Kondewa Appeal Brief argues that this witness was not asked to identify Kondewa in the court room. However, there is no requirement in international criminal law that a witness identify the accused in the court room in order to confirm the reliability of the witness's identification of the accused at the scene of the crime, if the reliability of the witness's identification is otherwise satisfactorily established. Indeed, a review of the case law of international criminal tribunals indicates a move away from the formalism of in-court identification as the controlling forensic technique of reliably linking an accused to a crime.[107] Rather, what is considered as more reliable is the "evaluation of an individual witness' evidence, as well as the evidence as a whole".[108] Indeed, in *Kvočka* Appeal Judgement, the ICTY Appeals Chamber accepted that it was open to a reasonable trier of fact to rely on the evidence of a witness despite the ***inability*** of the witness to identify the defendant in the courtroom.[109]

4.20 Paragraph 108 of the Kondewa Appeal Brief argues that there is no evidence that the town commander that Kondewa shot actually died. The Kondewa Appeal Brief contends that TF2-096 only testified that "I saw him [Kondewa] shoot one of them [the town commanders]; then he fell". The Kondewa Appeal Brief

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106 Transcript, 8 November 2004, p. 20.

107 ***Kamuhanda*** **Appeal Judgement**, paras 242-244; ***Limaj*** **Trial Judgement**, paras 17 to 20. ***Simić*** **Trial Judgement**, para. 26; ***Kunarac*** **Decision on Motion for Acquittal**, 3 July 2000, para. 19 and ***Kunarac*** **Trial Judgement**, para. 562; ***Kunarac*** **Appeal Judgement**, para. 320. See also ***Furundžija*** **Appeal Judgement**, paras. 103-107.

108 ***Kamuhanda*** **Appeal Judgement**, para. 244; ***Limaj*** **Trial Judgement**, para. 17.

109 ***Kvočka*** **Appeal Judgement**, para. 473.

further argues that the witness was never asked whether she saw that the town commander was dead.

4.21 The Prosecution submits that this is not correct. First, it is submitted that in the context of the testimony of the witness as a whole, who spoke of numerous killings, her statement that "I saw him shoot one of them; then he fell" can naturally be understood as a statement that the victim was shot dead. In the examination of this witness, after the witness had made this statement, Prosecution expressly asked the witness "how did you know this person who was killed was a town commander?"[110] Defence counsel did not object to this question, and the Trial Chamber did not intercede to question whether the witness had in fact testified that the victim had died. The fact that Prosecution counsel asked this question, and the fact that Defence counsel failed to object, and that the Trial Chamber did not interject, suggests that it was the understanding of Prosecution counsel, Defence counsel and the Trial Chamber that the witness had indeed testified that the victim had died. Indeed, in cross-examination of this witness, counsel for Kondewa expressly said to the witness, in relation to this incident, "You have told this Court of a gruesome murder which you witnessed".[111] The witness said nothing to clarify that the victim had not died. The Defence did not pursue any line of cross-examination to suggest that the witness could not be sure that the victim had died. The Prosecution submits that in the circumstances, it was open to a reasonable trier of fact to conclude on the evidence that the victim had in fact died.

4.22 Paragraphs 109-110 of the Kondewa Appeal Brief relate to TF2-096's testimony that the day after the Talia killing incident, she saw two graves, and was told by two Kamajors that "the two people who were dancing yesterday" were in the graves.[112] The Defence argues that this is merely hearsay evidence regarding the death of the two town commanders. However, hearsay evidence is admissible evidence before international criminal courts, and may be taken into account by

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[110] Transcript, 8 November 2004, p. 26 (lines 22-23).
[111] Transcript, 8 November 2004, p. 74 (lines 9-10).
[112] Transcript, 8 November 2004, p. 28.

the Trial Chamber, subject to appropriate caution.[113] In relation to the town commander who was personally shot by Kondewa in the Talia killing incident, this hearsay evidence corroborated TF2-096's own eyewitness evidence of the killing of the town commander by Kondewa the previous day. This evidence was taken into account by the Trial Chamber only as evidence corroborating the eyewitness testimony of TF2-096 that she had personally witnessed Kondewa shoot and kill the town commander. It is to be noted, in this regard, that such circumstantial evidence can corroborate other evidence in a case.[114]

4.23 The Kondewa Appeal Brief also argues at paragraphs 110 and 112 that the hearsay evidence that the graves contained "the two people who were dancing yesterday" does not establish with "any reliability" that the two people in the graves were the two town commanders. The Prosecution concedes that the evidence that TF2-096 was told this the day after the Talia killing incident is not in and of itself sufficient to establish that Kondewa was responsible for the killing of one of the town commanders. However, this evidence, taken together with the eyewitness evidence of TF2-096 that TF2-096 saw Kondewa shoot and kill one of the town commanders is, it is submitted, a sufficient basis upon which a reasonable trier of fact could find this to have been proved beyond a reasonable doubt.

4.24 Indeed, it is submitted that TF2-096's eyewitness account of seeing Kondewa shoot and kill one town commander would of itself be a sufficient basis on which a reasonable trier of fact could reach this conclusion. However, the further evidence of what TF2-096 was told the following day is consistent with TF2-096's eyewitness account of what happened the previous day, and to a degree corroborates what TF2-096 saw the previous day, and renders TF2-096's eyewitness account of the previous day's events even more likely to have occurred. The Trial Chamber was entitled to take the evidence of what TF2-096

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[113] **Trial Chamber's Judgement**, para. 264, and the authorities there cited; ***Naletilić and Martinović* Appeal Judgement**, para, 217; ***Kordić and Čerkez* Appeal Judgement**, paras 281-284; ***Semanza* Appeal Judgement**, para. 159; ***Kamuhanda* Appeal Judgement**, paras. 110-111; ***Gacumbitsi* Appeal Judgement**, para. 115; ***Rutaganda* Appeal Judgement**, paras 34-35; ***AFRC* Trial Judgement**, para. 100.

[114] ***Kordić and Čerkez* Appeal Judgement**, para. 276.

was told the following day into account, together with all of the other relevant evidence in the case as a whole, in reaching the conclusion that Kondewa's individual responsibility for the killing of one of the town commanders had been proved beyond a reasonable doubt.

4.25 Contrary to what is suggested in paragraphs 114 to 118 of the Kondewa Appeal Brief, Kondewa's individual responsibility for the killing of the town commander was not established "solely" on the basis of the evidence of what TF2-096 was told the following day.[115] Furthermore, contrary to what is suggested in paragraph 117 of the Kondewa Appeal Brief, for the reasons given above, what TF2-096 was told the following day was not the only evidence establishing that the town commander that Kondewa shot had in fact died. In response to paragraph 118 of the Kondewa Appeal Brief, the Prosecution submits that for all of the reasons given above, it was open to a reasonable trier of fact to conclude, on the basis of all of the evidence that was before the Trial Chamber, that the inferences to be drawn from all of the relevant evidence in the case as a whole were not only consistent with Kondewa's individual responsibility for shooting and killing one of the town commanders, but was inconsistent with any reasonable hypothesis of Kondewa's innocence.

4.26 Paragraph 111 of the Kondewa Appeal Brief argues that it is not established that the Talia killing incident occurred within the timeframe of the Indictment. The Defence argues that TF2-096 testified that the incident occurred at "the end of 1997", while the Indictment alleges crimes to have occurred in Talia/Base Zero between October 1997 and December 1999. The Prosecution submits that on the basis of the testimony of this witness, who clearly and without any hesitation answered that this incident occurred at the "end of 1997",[116] it was open to a reasonable trier of fact to conclude that this incident occurred within the timeframe of the Indictment. In particular, this witness testified to a number of incidents in apparent chronological sequence. First, this witness testified about

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[115] See in particular **Kondewa Appeal Brief**, para. 114-115.
[116] Transcript, 8 November 2004, p. 27 (line 23).

the arrival of Norman in Talia in 1997.[117] The Trial Chamber found that Norman arrived in Talia on around 15 September 1997. She subsequently testified about the killing of a soldier,[118] which she said occurred after Norman arrived in Talia,[119] and at the end of the rainy season and the beginning of the dry season, which would have meant that this event occurred about October 1997.[120] She then *subsequently* testified about the shooting of the town commander by Kondewa, which she said occurred at the end of 1997, after Norman had arrived.[121] The Prosecution submits that it was therefore open to a reasonable trier of fact to conclude that this incident occurred during October 1997 or later.

4.27 Furthermore, even if the Appeals Chamber were to find that it was not open to the Trial Chamber to conclude that this event necessarily happened in October or later, this would not mean that the event occurred outside the Indictment period. The timeframe pleaded in the Indictment in respect of this incident is "Between ***about*** October 1997 and December 1999".[122] In its Decision on a Kondewa's preliminary motion on defects in the form of the Indictment,[123] the Trial Chamber rejected an objection by Kondewa to the inclusion of the word "about" in the pleading of timeframes in the Indictment.[124] Kondewa never sought to bring an interlocutory appeal against this decision of the Trial Chamber, and the Defence has not in its Notice of Appeal given any notice that it is appealing at this post-final trial judgement phase against this interlocutory decision of the Trial Chamber. On the evidence of this witness, the Talia killing incident occurred after Norman arrived in Talia, which the Trial Chamber held occurred on about 15 September 1997. The Prosecution submits that this was on any view "about" October 1997, and therefore within the Indictment period.

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117 Transcript, 8 November 2004, pp. 17 and following.
118 Transcript, 8 November 2004, pp. 20-23 and following.
119 Transcript, 8 November 2004, p. 20 (lines 27-29).
120 Transcript, 8 November 2004, p. 23 (line 29) to page 24 (line 1).
121 Transcript, 8 November 2004, p. 27 (lines 18-23).
122 Indictment, para. 25(f) (emphasis added).
123 *Prosecutor v. Kondewa*, SCSL-2003-12-PT, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 27 November 2003 ("**Kondewa Preliminary Motion Decision**").
124 *Ibid.*, para. 12.

4.28 Additionally, even if the Appeals Chamber were to find that this event occurred outside the Indictment period, this would not mean that the Trial Chamber erred in convicting Kondewa of this crime. Where it is found that an Accused is responsible for a crime pleaded in the Indictment, but that the date on which the crime is found to have been committed differs from the date pleaded in the Indictment, this does not mean that the Accused must be acquitted of that crime. The common law rule concerning dates specified in an indictment, which was said in *Dossi* to be a rule that has existed "since time immemorial",[125] is expressed in *Archbold* as follows:

> ... a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. ...
>
> The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation....[126]

4.29 The rule in *Dossi* has been applied by the Appeals Chamber of the ICTR[127] and the Appeals Chamber of the ICTY.[128] *Dossi* has been further cited with approval by Trial Chambers of the ICTY and ICTR.[129] The principle is applied in the national courts of a variety of jurisdictions, including for instance England and Wales,[130] Australia,[131] Canada,[132] Trinidad and Tobago[133] and Papua New Guinea.[134,135]

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125 ***R v. Dossi*, 13 CR.App.R. 158 (CCA)**: at pp. 159-160 "From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.... Thus, though the date of the offence should be alleged in the indictment it has never been necessary that it should be laid according to truth unless time is of the essence of the offence."

126 ***Archbold Criminal Pleading, Evidence and Practice***, 2002 Edition, paras 1-127 to 128, emphasis added.

127 ***Rutaganda* Appeal Judgement**, paras 296-306, especially para. 306 (affirmed in ***Rutaganda* Trial Judgement**, para 201).

128 ***Kunarac* Appeal Judgement**, para. 217.

129 ***Tadić* Trial Judgement**, para. 534; ***Kayishema* Trial Judgement**, paras 81-86.

130 ***R. v. Lowe* [1998] EWCA Crim 1204; *R. v. JW* [1999] EWCA Crim 1088.**

131 ***R. v. Kenny*, Matter No. CCA 60111/97**, where the indictment alleged offences in 1986 and the court convicted on evidence indicating that the offence happened in the last week of 1985; ***R. v.***

4.30 The Prosecution submits therefore that the Defence has therefore not established that the Trial Chamber erred in not acquitting Kondewa on this crime on the basis that it was not established to have occurred within the Indictment period.

C. Conclusion

4.31 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground Three should be rejected, in so far as it relates to the Trial Chamber's finding that Kondewa is individually responsible for committing personally the killing of one of the town commanders in the Talia killing incident.

5. Prosecution Response to Kondewa's Appeal Ground Four: Conviction of Kondewa for aiding and abetting crimes in Tongo Field

A. Introduction

5.1 This section of this Response Brief responds to paragraphs 122 to 159 of the Kondewa Appeal Brief.

5.2 This ground of appeal relates to the Trial Chamber's finding that Kondewa was individually responsible for aiding and abetting crimes that were committed by Kamajors in Tongo Field.

5.3 The individual responsibility of Kondewa for these crimes in Tongo Field forms part of the Prosecution's Appeal Ground 4 in the Prosecution's appeal against the Trial Chamber's Judgement, and the relevant findings of the Trial Chamber in

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Liddy **[2002] SASC 19 (31 January 2002) (SA CCA)**, esp. paras 256ff; ***R. v. Frederick*** **[2004] SASC 404 (7 December 2004) (SA CCA)**, esp. paras 38-41.

132 ***R. v. Hughes*** **[1988] BCJ No. 2496**; ***R. v. B(G)*** **(1990), 56 CCC (3d) 200**; ***A.B. and C.S. v. R.*****, [1990] 2 SCR 30 (SCC).**

133 ***Bowen v. State*****, Cr. App. No. 26 of 2004, Trinidad and Tobago Court of Appeal, 12 January 2005.**

134 ***State v. Fineko*** **[1978] PNGLR 262 (25th July, 1978).**

135 The rule is not applicable where the defence has provided an alibi defence or where the age of the complainant is an essential element of the offence: See ***R. v. Radcliffe*** **[1990] Crim LR 524 (CA).**

respect of the Tongo Field crimes are further dealt with in Part 3 of the Prosecution Appeal Brief.

5.4 In respect of the crimes committed in Tongo Field, Kondewa was found to be individually responsible under Article 6(1) on the basis that he aided and abetted the perpetrators of the crimes, by giving a speech to Kamajors at a passing out parade held at Base Zero in December 1997, at which Norman and Fofana also spoke (the "**December 1997 Passing Out Parade**"). In relation to the crimes committed in Tongo Field, Kondewa was accordingly convicted on Counts 2 (murder), 4 (cruel treatment) and 7 (collective punishment).

5.5 The passages of the Trial Chamber's Judgement most relevant to this ground of appeal are paragraphs 320-321, 721, 735-744 and 764. However, these passages and the findings they contain must as always be considered in the context and in the light of the evidence and findings of the Trial Chamber in the case as a whole.

5.6 The Kondewa Appeal Brief seeks to challenge the Trial Chamber's finding that Kondewa aided and abetted the Tongo Field crimes on the basis of two arguments. First, the Defence contends that "the Majority of the Trial Chamber erred in law in failing to establish the correct ***mens rea*** requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1) for Counts 2, 4 and 7 in Tongo Fields." Secondly, the Defence contends that the Trial Chamber "also erred in failing to establish the correct ***actus reus*** requirement for aiding and abetting and the determination of individual criminal responsibility pursuant to Article 6(1)".[136]

5.7 In relation to the Defence argument concerning the ***mens rea*** of aiding and abetting, the Prosecution's submissions in response are set out in Section B below.

5.8 In relation to the Defence argument concerning the ***actus reus*** of aiding and abetting, the Prosecution's primary submission is that it should not be considered by the Appeals Chamber. The Kondewa Notice of Appeal did not contain any contention that the Trial Chamber erred in finding the *actus reus* for aiding and abetting to be established, but only contended that the Trial Chamber erred in

[136] Kondewa Appeals Brief, para. 123.

finding the *mens rea* to be satisfied. The argument concerning the *actus reus* was raised for the first time in the Kondewa Appeal Brief.[137] It is submitted that the Defence cannot now seek to challenge the Trial Chamber's findings in respect of the *actus reus* of aiding and abetting, unless and until the Appeals Chamber grants the Defence leave to amend its notice of appeal.[138]

5.9 However, in the event that the Appeals Chamber does decide that it can consider this Defence contention, the Prosecution submits that it should be rejected on its merits, for the reasons given in Section C below.

B. The Trial Chamber's findings in respect of the *mens rea* of aiding and abetting

5.10 The Kondewa Notice of Appeal and Kondewa Appeal Brief argue that the Trial Chamber erred in law in failing to establish the correct *mens rea* requirement and in the determination of the individual responsibility of Kondewa for the Tongo Field crimes.[139] However, the Defence does not in fact identify any relevant alleged error of law. Paragraphs 124 to 127 of the Kondewa Appeal Brief refer to the Trial Chamber's legal findings in respect of the elements of aiding and abetting, and paragraph 128 of the Kondewa Appeal Brief expressly states that the Defence takes no issue with the Trial Chamber's articulation of the law. The Defence complaint in this ground of appeal is not an allegation that the Trial Chamber made erroneous findings of law, but an allegation that the Trial Chamber erroneously found those elements to be satisfied on the basis of the evidence that was before it. Such an allegation is an allegation of an error ***of fact***, and not an allegation of an error ***of law***, unless the appellant identifies an error on the part of the Trial Chamber in the articulation of the legal principles that it applied to the evaluation of the evidence.[140] The different standards of review on appeal that apply to errors of fact and errors of law are dealt with in Part 1 of this

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137 **Kondewa Notice of Appeal**, para. 6.

138 See, for instance, ***Deronjić* Appeal Judgement**, paras 101-103.

139 **Kondewa Notice of Appeal**, para. 6; **Kondewa Appeal Brief**, para. 122.

140 In the Defence's first ground of appeal, the Kondewa Appeal Brief also similarly confuses the distinction between an alleged error of law and an alleged error of fact: see paragraphs 2.26 and 2.27 above.

Response Brief above. To the extent that the Defence alleges in this ground of appeal that the Trial Chamber erred in finding the elements of aiding and abetting to be satisfied on the basis of the evidence before it, the question for the Appeals Chamber is whether the conclusion reached by the Trial Chamber was open to a reasonable trier of fact on the basis of the evidence before it, or whether the conclusion reached by the Trial Chamber was one which could not have been reached by any reasonable trier of fact.

5.11 The Trial Chamber found that the elements of aiding and abetting are:[141]

Actus reus

(1) the accused carried out an act specifically directed[142] to assist, encourage or lend moral support to the perpetration of a certain specific crime;

(2) this act of the aider and abettor had a substantial effect upon the perpetration of the crime (although proof of a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required);

Mens rea

(3) the accused had knowledge[143] that the acts performed by the accused assist the commission of the crime by the principal offender.

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[141] In this respect, see also Prosecution Appeal Brief, paras 3.78-3.81.

[142] It is emphasised that the words "specifically directed" appear in the *actus reus* of aiding and abetting and ***not*** in the *mens rea*. These words therefore do not refer to the state of mind of the aider and abettor, and in particular, do not import any requirement that the acts of the accused must have had the *specific purpose* of assisting the principal perpetrator, since this would be inconsistent with the firmly established principle that an aider and abettor need not share the principal perpetrator's intent: **Trial Chamber's Judgement**, para. 231 and the authorities there cited; ***Krnojelac* Appeal Judgement**, paras 52 and 75. The words "specifically directed", being part of the *actus reus*, must relate to the *factual* relationship between the conduct of the accused and the crime committed by the perpetrator, and as such they add little or nothing to the words "substantial effect". In the ***Blagojević and Jokić* Appeal Judgement**, which was rendered in 2007, the ICTY Appeals Chamber said that: "The Appeals Chamber observes that while the *Tadic* definition [which contained the words "specifically directed"] has not been explicitly departed from, specific direction has not always been included as an element of the *actus reus* of aiding and abetting. This may be explained by the fact that ***such a finding will often be implicit in the finding that the accused has provided practical assistance to the principal perpetrator which had a substantial effect on the commission of the crime***" (at para. 189, emphasis added). This passage confirms, it is submitted, that the "specifically directed" requirement will normally be satisfied merely by establishing the other elements of the crime, in particular the "substantial effect" requirement.

5.12 Paragraph 138 of the Kondewa Appeal Brief argues that the case law of the *ad hoc* tribunals takes "two approaches" to the *mens rea* requirement of aiding and abetting. It is said in the Kondewa Appeal Brief that under one approach the aider and abettor must know that his acts will assist in the commission of a specific crime, while under the other approach it is sufficient that the aider and abettor is aware that one of a number of crimes will probably be committed. The Prosecution submits that it is the latter test that is consistent with the current case law at the Appeals Chamber level of the ICTY,[144] and the more recent case law at the Trial Chamber level.[145] In any event, paragraphs 138-139 of the Kondewa Appeal Brief appears to take no issue with the Trial Chamber's finding of law that the latter approach was the correct statement of the *mens rea* requirement for aiding and abetting. Again, in any event, it is submitted that the Trial Chamber found that the crimes which Kondewa aided and abetted were the specific crimes that Kondewa knew would be committed in the attack on Tongo.[146] The Defence has not challenged that finding.

5.13 The Kondewa Appeal Brief argues (1) that the Trial Chamber found that Kondewa had the requisite knowledge that his acts would assist in the commission of crimes because he had knowledge that the Kamajors who operated in Tongo Field had previously committed criminal acts; (2) that the Trial Chamber found that Kondewa had this knowledge based on a report sent to Base

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[143] It is submitted that the accused will have such knowledge where the accused "was aware ***of the substantial likelihood*** that his acts would assist the commission of a crime by the perpetrator": see paragraph 5.12 below.

[144] ***Blaškić*** **Appeal Judgement**, para. 50: "[...] it is not necessary that the aider and abettor...know the precise crime that was intended and which in the event was committed. If he is aware that one of a number of crimes will probably be committed, and one of those crimes is in fact committed, he has intended to facilitate the commission of that crime, and is guilty as an aider and abettor." See also ***Simić*** **Appeal Judgement**, para. 86. But compare ***Blagojević and Jokić*** **Appeal Judgement**, paras 221-222; ***Orić*** **Trial Judgement**, para. 288.

[145] ***Limaj*** **Trial Judgement**, para. 518; ***AFRC*** **Trial Judgement**, para. 776; **Trial Chamber's Judgement**, para 231.

[146] Kondewa was convicted having aided and abetted murder, cruel treatment and collective punishment. The Trial Chamber found at paragraph 737 of the Trial Chamber's Judgement that "The Chamber finds that Kondewa knew of Norman's orders that the Kamajors were to kill captured enemy combatants and 'collaborators', to inflict physical suffering or injury upon them and to destroy their houses", and at paragraph 740 that "The Chamber therefore finds that it has been established beyond reasonable doubt that Kondewa was aware of the required specific intent to punish collectively".

Zero; (3) that the evidence did not establish that these reports were ever given to Kondewa, and that there was no evidence that Kondewa otherwise had knowledge of crimes previously committed by Kamajors; and (4) that there was therefore no evidence capable of sustaining a finding that Kondewa had the requisite *mens rea* for aiding and abetting.

5.14 In response, the Prosecution notes, first, that the Trial Chamber did not find that Kondewa's requisite knowledge came solely from a report that had come to Base Zero of crimes previously committed by Kamajors in Tongo. The Trial Chamber found that Kondewa's knowledge came not only from his awareness of crimes previously committed by Kamajors, but also from the very fact that at the December 1997 Passing Out Parade, Norman had expressly instructed the Kamajors to commit crimes during the attack on Tongo. This is clear from the relevant passage of the Trial Chamber's Judgement, which states:

> ***The Chamber finds that Kondewa knew of Norman's orders that the Kamajors were to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses***. The Chamber finds that, based on his awareness that the Kamajors who operated in the towns of Tongo Field had previously engaged in criminal conduct, which had been reported to Base Zero, Kondewa knew that it was probable that the Kamajors would commit at least one of these acts in compliance with the instructions issued. ***With this knowledge and his knowledge of the orders given by the National Coordinator***, Kondewa encouraged and supported the Kamajors in their actions, in consequence of which they committed acts of killing and infliction of physical suffering or injury in the towns of Tongo Field, as was found by the Chamber above.[147]

5.15 The Kondewa Appeal Brief does not challenge the Trial Chamber's finding that at the December 1997 Passing Out Parade, at which Norman gave instructions for the attack on Tongo, Norman addressed the Kamajors and instructed them to commit crimes during the attack on Tongo. It was open to a reasonable trier of fact to conclude that the crimes encompassed within Norman's order included "killing and infliction of physical suffering or injury in the towns of Tongo Field",[148] based on the findings of the Trial Chamber in paragraphs 320 and 321

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[147] **Trial Chamber's Judgement**, para. 737 (footnote omitted, emphasis added).
[148] See **Trial Chamber's Judgement**, para. 737, final sentence.

of the Trial Chamber's Judgement, namely, that Norman had ordered that "there is no place to keep captured or war prisoners like the juntas, let alone their collaborators" (an instruction that was interpreted by one of those present at the meeting as an instruction "not to '[...] spare the vulnerables"), that Norman had made a further comment that was interpreted as an instruction not to spare the houses of the juntas, and that Norman had also made an ironical comment indicating that the Kamajors should not be concerned with being condemned for human rights abuses. The Prosecution submits that what Norman said at the December 1997 Passing Out Parade, which Kondewa attended, would of itself be a sufficient basis on which a reasonable trier of fact could conclude that Kondewa knew that the Kamajors would probably commit crimes during the attack on Tongo.

5.16 As a matter of law, there is no additional requirement that an aider and abettor must have knowledge of previous criminal conduct by the principal perpetrator in order to have the requisite knowledge that the perpetrator is probably going to commit a crime: it is sufficient that such knowledge is inferred from all relevant circumstances.[149] If it were a requirement that an aider and abettor must have knowledge of previous crimes committed by the principal perpetrator, this would mean that it would be legally impossible to aid and abet a crime committed by a first-time offender. That is clearly not correct as a matter of law.

5.17 In any event, it is submitted that it was open to a reasonable trier of fact, based on the evidence that was before the Trial Chamber, to conclude that Kondewa did have knowledge of crimes that had previously been committed by Kamajors.

5.18 The Kondewa Appeal Brief suggests that there is no evidence that Kondewa was ever given the report of 16 November 1997, referred to in paragraphs 377-378 and 721(ix) of the Trial Chamber's Judgement, about criminal conduct of Kamajors in the Tongo Field area. The evidence was that this report was given "first to Fofana and then to Norman". The Defence argues that there is no evidence that it was ever given to Kondewa. However, the evidence of this report must be considered

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[149] ***Limaj* Trial Judgement**, para. 518 referring to ***Čelebići* Trial Judgement**, para. 328; ***Tadic* Trial Judgement**, para. 676.

in the context of all of the evidence in the case as a whole. This evidence establishes that previous criminal conduct committed by Kamajors in the Tongo Field area had, as the Trial Chamber found, "been reported to ***Base Zero***".[150] The Trial Chamber found that "Norman, Fofana and Kondewa were regarded as the "Holy Trinity" and that "[w]hatever happened, they would come together because they were the leaders [...]."[151] Furthermore, TF2-079, who was one of the group who brought the report to Base Zero, and whose testimony was accepted and referred to by the Trial Chamber to make its findings regarding this report,[152] also testified that after he and his delegation had met with Fofana and before they met with Norman, they also met Kondewa who "received [them] in good faith."[153] It is submitted that it was therefore open to a reasonable trier of fact to conclude that Kondewa had knowledge of the previous criminal conduct of Kamajors in the Tongo Field area.

5.19 Furthermore, there are clear findings by the Trial Chamber that Kondewa had at the time knowledge of previous crimes committed by Kamajors generally, and indeed, that he had actively supported the Kamajors who had committed these crimes. The Trial Chamber found for instance that in August 1997, Kondewa had received a delegation from Bonthe District who had come to complain about the continuing harassment of civilians by Kamajors, and that Kondewa had told the delegation that "war means to know that you will die; to know that you have no control over your life; to know that you have no dignity; to know that your property is not yours".[154]

5.20 The Trial Chamber found that as early as mid-October 1997, well before the December 1997 Passing Out Parade and the attack on Tongo, a War Council had been established in Base Zero, because the "elders were displeased with the situation because many atrocities were then being committed by Kamajors".[155] The Trial Chamber found, however, that the War Council had quickly become

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150 **Trial Chamber's Judgement**, para. 737 (emphasis added).
151 *Ibid.*, para. 337.
152 *Ibid.*, paras 377, 378.
153 Transcript, 26 May 2005, TF2-079, p. 26, lines 14-17.
154 **Trial Chamber's Judgement**, paras 297-299, 537.
155 *Ibid.*, para. 304.

ineffective,[156] and that Kondewa was one of those who opposed the War Council, "once condoning Kamajors 'pelting' the members with stones, once shooting amongst the members during a meeting saying, '[w]hen people say war, you say book', and also threatening the members for attempting to investigate complaints of looting and killing made against the Death Squad".[157] The Trial Chamber found that on one occasion, Kondewa threatened the War Council, saying that whoever touched a Kamajor would be punished.[158]

5.21 The Trial Chamber also found that at the end of 1997, Kondewa had himself been present at the Talia killing incident (to which Kondewa's Appeal Ground Three relates), at which Kondewa personally shot and killed one of the town commanders.[159]

5.22 The Trial Chamber also found that crimes against civilians were committed at Base Zero itself, where Kondewa was present, and at least one of these crimes was expressly found by the Trial Chamber to have been committed some time between June and September 1997, again well before the December 1997 Passing Out Parade and the attack on Tongo.[160]

5.23 Furthermore, TF2-096 testified that at Base Zero, Kondewa received reports of what happened to civilians:

> Q. Madam Witness, and every time Hinga Norman left Talia, do you know who would be in charge of the Kamajors?
>
> A. Yes.
>
> Q. And who would this be?
>
> A. I did see Pa Konde; he was there. Because whatever happened to civilians, writes a report. They will take the report to him. At that time the chiefs were not doing anything anymore.
>
> Q. Why do you say the chiefs were no longer acting?

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156 **Trial Chamber's Judgement**, para. 306.
157 *Ibid.*
158 **Trial Chamber's Judgement**, para. 308.
159 *Ibid.*, paras 622-623.
160 **Trial Chamber's Judgement**, paras 626, 921(vi), 923.

A. Because that man, I did see people going to him.[161]

5.24 The Prosecution submits that on the basis of the evidence in the case as a whole, it was open to a reasonable trier of fact to conclude on the evidence before the Trial Chamber that Kondewa was aware, at the time of the December 1997 Passing Out Parade, that crimes had previously been committed by Kamajors. Although, for the reasons given above, it was not necessary to establish such knowledge of prior criminal conduct of the Kamajors in order to establish that Kondewa had the *mens rea* for aiding and abetting, the finding that Kondewa had such knowledge was an additional matter that the Trial Chamber was entitled to consider, together with all of the other evidence in the case, in concluding that Kondewa was aware that Kamajors would probably commit crimes in the attack on Tongo.

5.25 While the Kondewa Appeal Brief specifically challenges the Trial Chamber's finding that Kondewa was aware that the Kamajors would probably commit crimes during the attack on Tongo (an argument that the Appeals Chamber should reject for the reasons given above), the Kondewa Appeal Brief contains no substantive argument challenging the Trial Chamber's finding that Kondewa had knowledge that his speech at Base Zero would assist the commission of the crimes by the Kamajors during that attack.

5.26 The Prosecution submits that it was open to a reasonable trier of fact to conclude, on the basis of the evidence that was before the Trial Chamber, that Kondewa had the knowledge that his words would assist the commission of the crimes. After Norman had given instructions for the commission of crimes during the attack on Tongo, the Trial Chamber found that:

> 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 had long since been exhausted, so we don't need any surrendered rebel." He then said, "I give you my blessings; go my boys, go."[162]

5.27 The Trial Chamber found that:

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[161] Transcript, 8 November 2004, p. 20.
[162] **Trial Chamber's Judgement**, para. 321.

> Kondewa was known as the High Priest of the entire CDF organisation and was performing initiations at Talia. He was also appointed by Norman. He was the head of all the CDF initiators initiating the Kamajors into the Kamajor society in Sierra Leone ...
>
> ... whenever a Kamajor was going to war, he would go to Kondewa for advice and blessing. Kondewa's role was to decide whether a Kamajor could go to the war front that day ...
>
> The Kamajors believed in the mystical powers of the initiators, especially Kondewa, and that the process of the initiation and immunisation would make them 'bullet-proof". The Kamajors looked up to Kondewa and admired the man with such powers. They believed that he was capable of transferring his powers to them to protect them. Because of the mystical powers Kondewa possessed, he had command over the Kamajors from every part of the country. No Kamajor would go to war without Kondewa's blessing. For example, he did this for the Kamajors leaving Base Zero for Tongo.[163]

5.28 The Trial Chamber relied on these findings in making its finding that Kondewa had the *mens rea* for aiding and abetting.[164] These findings must also be considered in the context of the other evidence and findings of the Trial Chamber as a whole, including the Trial Chamber's findings, referred to above, that Kondewa knew that Kamajors had previously committed crimes and that Kondewa had actively opposed those who had sought to take action against those who had tried to stop or deal with the perpetrators of those crimes, a matter that must have been known to the Kamajors. Kondewa was clearly aware of his influence over the Kamajors. It is submitted that it was clearly open to a reasonable trier of fact to conclude that Kondewa, by reinforcing Norman's order to the Kamajors immediately after the order had been given and by giving his blessings to the Kamajors, knew that he "encouraged and supported the Kamajors in their actions".[165]

5.29 The Defence challenge to the Trial Chamber's finding that Kondewa possessed the *mens rea* for aiding and abetting the crimes committed in Tongo should therefore be rejected.

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[163] *Ibid.*, paras 344-346.
[164] *Ibid.*, para. 735.
[165] **Trial Chamber's Judgement**, para. 737.

C. The Trial Chamber's findings in respect of the *actus reus* of aiding and abetting

5.30 For the reasons given in paragraphs 5.8 and 5.9 above, the Prosecution submits that the Appeals Chamber should not entertain the Defence challenge to the Trial Chamber's finding that Kondewa possessed the *actus reus* for aiding and abetting the crimes committed in Tongo. In the event that the Appeals Chamber does however entertain this Defence argument, the Prosecution makes the following submissions in response.

5.31 The sole Defence argument in this respect is that the speech given by Kondewa at the December 1997 Passing Out Parade did not have a "substantial" effect on the commission of the crimes by the Kamajors in Tongo. It is common ground between the Prosecution and the Defence that one of the elements of aiding and abetting is that the relevant act of the aider and abettor must have had a substantial effect upon the perpetration of the crime (see paragraph 5.11(2) above). Therefore, the only issue in relation to this part of the Defence appeal is whether it was open to a reasonable trier of fact to conclude, on the basis of the evidence before the Trial Chamber, that Kondewa's speech at the December 1997 Passing Out Parade had a substantial effect on commission of the crimes in Tongo, for the purposes of the legal elements of aiding and abetting.

5.32 The Kondewa Appeal Brief argues that the effect of Kondewa's speech on the commission of the crimes in Tongo falls "well below" the standard of "substantial effect".[166]

5.33 In support of this argument, paragraphs 144 to 152 of the Kondewa Appeal Brief lists cases before the ICTR and ICTY in which accused have been convicted of aiding and abetting crimes, and describes the particular acts of the accused in those cases which were found to have aided and abetted the crimes in question. The Prosecution submits that these cases are of no assistance in determining whether a reasonable trier of fact could conclude in the present case that the elements of aiding and abetting were established.

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[166] **Kondewa Appeal Brief**, para. 143.

5.34 First, merely citing examples of facts from ICTR and ICTY cases cannot establish what, as a matter of law, amounts to a "substantial" effect. Paragraph 153 of the Kondewa Appeal Brief argues that the effect of Kondewa's words on the commission of the crimes in Tongo was less than the effect of the acts of the accused in the ICTR and ICTY cases on the crimes in those cases, and that the acts of Kondewa do not fall "anywhere within the spectrum" of acts which may constitute aiding and abetting. The Prosecution does not in any way accept that the effect of Kondewa's words on the commission of the crimes in Tongo was "less" than in any of the ICTR or ICTY cases that the Kondewa Appeal Brief refers to. However, even if this were the case, this does not mean that Kondewa's acts must have fallen outside the "spectrum" of acts that can constitute aiding and abetting. Examples of cases where acts have been held to be inside the spectrum do not of themselves indicate where, as a matter of law, the "spectrum" ends. To give a very simple analogy: a finding that said no more than that an examination paper merits a mark of 80 percent and that the candidate therefore has passed the exam would be of no assistance in determining what is the pass mark for that exam. That finding would be of no assistance in determining whether a candidate who achieved 60 percent would pass the exam, or whether a candidate who achieved 40 or 50 percent would pass the exam. Similarly, a finding that said no more than that an apple is a fruit would be of no assistance in determining whether or not an orange should be found to be a fruit.

5.35 Secondly, it is not the case that particular kinds of acts will automatically qualify as satisfying the *actus reus* of aiding and abetting, while other types of acts will automatically not qualify. In one case, a particular act, in the context of all of the facts and circumstances of that case, may be found to have had a substantial effect on the commission of a crime, while in a different case, an identical act may in fact be found, in the context of all of the facts and circumstances of that other case, to have had little or no effect on the commission of the crime. The question whether a particular act had a "substantial effect" on the commission of a crime therefore depends on an evaluation of all of the particular facts and circumstances of a given case as a whole. For instance, as elaborated below, the Trial

Chamber's finding in the present case that the *actus reus* of aiding and abetting was satisfied was not based solely on the actual words spoken by Kondewa at the December 1997 Passing Out Parade, but was based on an evaluation of the effect of those words on the perpetrators in the light of all of the other findings of the Trial Chamber as a whole, including the reverence in which Kondewa was held by the Kamajors, his influence over the Kamajors, his position as one of the "Holy Trinity", and his knowledge of previous crimes committed by Kamajors. If in a different case an accused said words identical to those spoken by Kondewa to the perpetrators of a crime, the question whether this amounted to aiding and abetting could not be answered simply by relying on the precedent of Kondewa. In another case, the answer to that question would depend on all of the facts and circumstances of that other case as a whole.

5.36 Thirdly, nearly all of the cases referred to in paragraphs 144 to 152 of the Kondewa Appeal Brief are decisions at the Trial Chamber level. Furthermore, the paragraphs of the Kondewa Appeal Brief listing these ICTR and ICTY cases do not refer to any analysis in those cases of the legal definition of a "substantial effect". Cases where a Trial Chamber merely states the elements of *actus reus* of aiding and abetting, and finds those elements to be satisfied on the evidence in that case, do not necessarily assist in the ascertainment of the legal principles for determining what, as a matter of law, can be considered a "substantial" effect.

5.37 The role of a Trial Chamber is to determine the law, and to apply that law to the evidence in the case before it, in order to reach a conclusion as to whether the accused is guilty of the crime charged. The role of the Appeals Chamber is to determine whether the Trial Chamber correctly articulated the law, and whether the conclusion that it reached when it applied the law to the facts was one that was open to a reasonable trier of fact. The Trial Chamber and Appeals Chamber cannot make these determinations merely by relying on examples of facts in other cases. There is an infinite variety of human conduct and factual situations, and it is for a Trial Chamber in each individual case to apply the relevant legal principles to the specific facts of the case before it. Precedents in other cases are only useful to the extent that they clarify the legal principles to be applied by the

Trial Chamber and the Appeals Chamber.[167] However, the Kondewa Appeal Brief contains little by way of legal analysis of what, as a matter of law, can be held to constitute a "substantial effect".

5.38 It is submitted that the legal principles that are relevant to determining whether an act had a "substantial" effect on the commission of a crime include the following:

(1) "such a determination is to be made on a case by case basis",[168] and contextual factors may go to proving the significance of the accused's assistance in the commission of the crime;[169]

(2) the accused need not have had sufficient authority to be considered a superior or to have been acting independently, rather than having acted in the course of routine duties;[170]

(3) proof of a cause-effect relationship between the conduct of the aider or abettor and the commission of the crime, or proof that such conduct served as a condition precedent to the commission of the crime, is not required—in other words, the acts of the aider and abettor need not be a *conditio sine qua non* of the actions of the perpetrator(s);[171]

(4) the relevant act of aiding and abetting can take place before, during or after the crime has been committed, and this form of participation may take place geographically and temporally removed from the crime's location and timing;[172] and

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167 See Statute of the Special Court, Article 20(3): "The judges of the Appeals Chamber of the Special Court shall be guided by the decisions of the Appeals Chamber of the International Tribunals for the former Yugoslavia and for Rwanda. In the interpretation and application of the laws of Sierra Leone, they shall be guided by the decisions of the Supreme Court of Sierra Leone".

168 ***Blagojević and Jokić*** **Appeal Judgement**, para. 195.

169 *Ibid.*, para. 195.

170 *Ibid.*

171 ***Blaškić*** **Appeal Judgement**, para. 48; ***Gacumbitsi*** **Appeal Judgement**, para. 140 (both referred to expressly in the **Trial Chamber's Judgement**, para. 229); ***Aleksovski*** **Appeal Judgement**, para. 164. See also ***Kayieshema and Ruzindana*** **Trial Judgement**, para. 201; ***Strugar*** **Trial Judgement**, para. 349; ***Furundžija*** **Trial Judgement**, paras 232-235.

172 ***Blaškić*** **Appeal Judgement**, para. 48; ***Simić*** **Trial Judgement**, para.162; ***Naletilić and Martinović*** **Trial Judgement**, para. 63; ***Vasiljević*** **Trial Judgement**, para. 70; ***Kvočka*** **Trial Judgement**, para. 256; ***Blaškić*** **Trial Judgement**, paras 285; ***Krnojelac*** **Trial Judgement**, para. 88; ***Kunarac*** **Trial Judgement**, para. 391; ***Aleksovski*** **Trial Judgement**, para. 129; ***Blaškić*** **Trial Judgement**, para. 285. The Trial Chamber itself also so found: **Trial Chamber's Judgement**, para. 229.

(5) the substantial effect may consist of the rendering of practical assistance, or ***encouragement or moral support***;[173] as the Trial Chamber found in the present case, "aiding and abetting" can include providing assistance, helping, encouraging, advising, or being sympathetic to the commission of a particular act by the principal offender.[174]

5.39 The case law of the ICTY at appellate level also affirms that the provision of encouragement or moral support may be an act of aiding and abetting, even where the encouragement or moral support is *tacit*, rather than express.[175] In the *Brđanin* Appeal Judgement, the ICTY Appeals Chamber said:

> It is recognized in the jurisprudence of the Tribunal that "encouragement" and "moral support" are two forms of conduct which may lead to criminal responsibility for aiding and abetting a crime. As recalled above, the encouragement or support need not be explicit; under certain circumstances, even the act of being present on the crime scene (or in its vicinity) as a "silent spectator" can be construed as the tacit approval or encouragement of the crime. In any case, the contribution to the crime of this encouragement or moral support must always be substantial. As the *Furundžija* Trial Chamber put it, "[w]hile any spectator can be said to be encouraging a spectacle – an audience being a necessary element of a spectacle – the spectator in these cases was only found to be complicit if his status was such that his presence had a significant legitimising or encouraging effect on the principals". In cases where tacit approval or encouragement has been found to be the basis for criminal responsibility, it has been the authority of the accused combined with his presence on (or very near to) the crime scene, especially if considered together with his prior conduct, which all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it.[176]

5.40 In this case, the Trial Chamber found that Kondewa was one of the three people considered as the "Holy Trinity" at Base Zero, who were the ***key and essential*** components of the leadership structure of the organisation and were the executive

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[173] ***Tadić*** **Appeal Judgement**, para. 229 (referred to expressly in the **Trial Chamber's Judgement**, para. 229); ***Aleksovski*** **Appeal Judgement**, paras. 162, 164; ***Čelebići*** **Appeal Judgement**, para. 352; ***Krnojelac*** **Appeal Judgement**, para. 37; ***Brđanin*** **Appeal Judgement**, para. 277; ***Vasiljević*** **Appeal Judgement**, para. 102; ***Blaškić*** **Appeal Judgement**, para. 46; ***Kvočka*** **Appeal Judgement**, para. 89; ***Simić*** **Appeal Judgement**, para. 85.

[174] **Trial Chamber's Judgement**, para. 228.

[175] ***Brđanin*** **Appeal Judgement**, para. 277; ***Kayishema and Ruzindana*** **Appeal Judgement**, paras 201-202.

[176] ***Brđanin*** **Appeal Judgement**, para. 277, footnotes omitted.

of the Kamajor society.[177] In particular, the Trial Chamber repeatedly emphasized Kondewa's extremely powerful and mythical position and authority in the Kamajor society.[178] All three of the "Holy Trinity" were present at the December 1997 Passing Out Parade. After Norman gave the order for the commission of crimes during the Tongo attack, Kondewa, like Fofana, made a speech reaffirming Norman's order and encouraging its implementation. Thus, the commission of these crimes had been endorsed and called for by all three members of the "Holy Trinity" at a single meeting. Kondewa's support and encouragement was not tacit, but was ***express***. If the silent presence of a person in a position of authority at the scene of a crime may be sufficient to establish a "substantial effect" on the commission of a crime, then it is clearly open to a reasonable trier of fact to find that express support and encouragement given before the event by a person in a position of highest authority is also sufficient, if, in the words of the *Brđanin* Appeal Judgement quoted above, "considered together with his prior conduct, ... all together allow the conclusion that the accused's conduct amounts to official sanction of the crime and thus substantially contributes to it".

5.41 What the Trial Chamber found was as follows:

> Kondewa addressed the fighters ***as the High Priest*** after the National Coordinator and the Director of War had made their comments. All the fighters looked at Kondewa, ***admiring him as a man with mystic powers, and he made the last comment saying that the time for the surrender of rebels had long been exhausted and that they did not need any surrendered rebels.*** The Chamber finds that in uttering these words Kondewa effectively supported Norman's instructions and encouraged the Kamajors to kill captured enemy combatants and "collaborators", to inflict physical suffering or injury upon them and to destroy their houses. ***Kondewa then gave his blessings for these criminal acts as the High Priest***"[179]...As found by the Chamber above, the Kamajors who then proceeded to attack Tongo not only received a direction from Norman to commit specific criminal acts, ***they also had encouragement and support from Kondewa through***

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177 **Trial Chamber's Judgement**, para. 337.
178 See, for instance, **Trial Chamber's Judgement**, paras 344, 346, 721(i) and (vii), 735 *et seq.*
179 **Trial Chamber's Judgement**, para. 735 (emphasis added).

> ***his blessing, as one of their leaders with mystical powers***, to commit such acts."[180]

5.42 The Kondewa Appeal Brief suggests that the utterance of "28 words alone" cannot be sufficient to make a person individually responsible for aiding and abetting a crime.[181] However, for the reasons given above, an act of aiding and abetting need not consist of the uttering of even a single word—silent or tacit encouragement or support can be sufficient. The question is not how many words Kondewa spoke, but rather, whether these words had a substantial effect on the commission of the crimes.

5.43 The Trial Chamber, in reaching the conclusion that they did have a substantial effect on the commission of the crimes, did not base its finding solely on the evidence of those 28 words. The significance and effect of the words spoken by Kondewa were considered in the context of the facts in the case as a whole. The Trial Chamber took into account the entirety of Kondewa's words and deeds, including his blessings and their meaning for the Kamajors, as well as his powerful and important position within the CDF and in the Kamajor Society, the high respect and admiration he enjoyed, *and* the fact that his words were uttered right after the National Coordinator Norman and the Director of War Fofana had made their comments. Paragraph 736 of the Trial Chamber's Judgement is unambiguous in this respect.

5.44 It has been submitted in paragraphs 5.33 to 5.38 above that the comparisons drawn by the Defence with cases from the ICTR and ICTY are of no assistance. The Prosecution adds that the analysis in the Kondewa Appeal Brief of this ICTY and ICTR case law is also imprecise for a number of reasons.

5.45 First, some of the facts of the ICTR cases set out by the Defence were taken into consideration for the specific offence of direct and public incitement to commit genocide (Article 2(3) (c) of the Statute of the ICTR) and complicity in genocide (Article 2(3) (e) of the Statute of the ICTR), which are distinct from the mode of liability of aiding and abetting (Article 6(1) of the Statute of the ICTR). They

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[180] *Ibid.*, para. 736 (emphasis added).
[181] **Kondewa Appeal Brief**, para. 154.

cannot be taken into account to assess any possible crime of aiding and abetting genocide.[182]

5.46 Secondly, the facts of other ICTR and ICTY cases referred to in the Kondewa Appeal Brief are not comparable at all with the facts in the present case, either because they involved acts of aiding and abetting through the provision of practical assistance rather than through the provision of encouragement or moral support, or for other reasons. For instance:

(1) In the *Akayesu* case,[183] the Trial Chamber actually considered and accepted that the accused was responsible for aiding and abetting acts of sexual violence "by facilitating the commission of these acts ***through his words of encouragement in other acts of sexual violence, which, by virtue of his authority, sent a clear signal of official tolerance for sexual violence, without which these acts would not have taken place.***"[184] A proper reading of the relevant paragraph of the judgement reveals that in no way, as the Defence suggests,[185] did the Trial Chamber mean to say that words of encouragement can, in principle, be considered as having a substantial effect on the commission of a crime only if coupled with presence at the crime scene.

(2) In the *Kambanda* case, the accused pleaded guilty and therefore the facts were not examined in great detail by the ICTR Trial Chamber, consequently it cannot be determined exactly what was considered as aiding and abetting and what was not.[186]

(3) In the *Kayieshema* case, the accused was found "individually responsible for instigating, ordering, committing or otherwise aiding and abetting in

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182 ***Kambanda* Trial Judgement**, para. 40; ***Nahimana* Trial Judgement,** paras 1039 and 837, to compare with paras 955 and 1068.

183 Referred to in **Kondewa Appeal Brief**, para. 148 (i).

184 ***Akayesu* Trial Judgement**, para 693 (emphasis added), similar para 694.

185 **Kondewa Appeal Brief**, para. 154.

186 The Trial Chamber simply stated in its Judgement (***Kambanda* Trial Judgement**, para. 40(4)) that "By his acts or omissions [...] Jean Kambanda was complicit in the killing and the causing of serious bodily or mental harm to members of the Tutsi population, and thereby committed **COMPLICITY IN GENOCIDE** stipulated in Article 2(3)(e) of the Statute as a crime, and attributed to him by virtue of Article 6(1) and 6(3), which is punishable in reference to Articles 22 and 23 of the Statute of the Tribunal."

the planning, preparation and execution of genocide by the killing and causing of serious bodily harm to the Tutsis" at various locations.[187] The facts of the *Kayieshema* case were taken into consideration to establish all these modes of liability, and there is no individual analysis of which facts were considered to amount to aiding and abetting only.[188]

(4) In the *Ngeze* case, the acts considered as amounting to aiding and abetting were deeds of practical assistance such as securing and distributing, storing and transporting weapons, not words of encouragement or moral support.[189]

(5) In the *Ndindabahizi* case, also referred to by the Defence,[190] the Trial Chamber did not say that words could only be considered as sufficient for aiding and abetting if coupled with acts.[191] The Trial Chamber in that case also considered that the words constituted instigating only, and also found that the accused's "position as a Minister of Government lent his words considerable authority".[192]

(6) The *Brđanin* case concerned a forcible transfer campaign against non-Serbs.[193] However, in that case, the ICTY Trial Chamber did not examine the inflammatory and discriminatory public statements from the perspective of encouragement ***of the perpetrators***, but only as an element that threatened the non-Serb inhabitants and led them to leave the areas under Bosnian Serb occupation.[194]

(7) In the *Martinović* case,[195] the ICTY Trial Chamber found that the accused had "aided and abetted the murder by various means and at various stages", one of them being the encouragement of his soldiers to mistreat

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187 ***Kayishema and Ruzindana*** **Trial Judgement**, paras 554, 558, 568.

188 See ***Kayishema and Ruzindana*** **Trial Judgement**, paras 473 and 554. Only in paragraph 500 of this judgement was the Trial Chamber more specific in saying that "[...] it is indicative of the effect that Kayishema's presence at a scene could have, thus is appurtenant to the responsibility he must bear in aiding and abetting the crimes pursuant to Article 6(1)."

189 ***Nahimana*** **Trial Judgement**, para. 837.

190 **Kondewa Appeal Brief**, para. 148 (v).

191 ***Ndindabahizi*** **Trial Judgement**, para. 464.

192 *Ibid.*

193 **Kondewa Appeal Brief**, para. 151.

194 ***Brđanin*** **Trial Judgement**, para. 578.

195 ***Naletilić and Martinović*** **Appeal Judgement**, paras 490 ff.

Nenad Harmandžić.[196]

5.47 Far from excluding the possibility that words alone can constitute encouragement, this case law rather confirms that words can indeed constitute aiding and abetting. Some of the examples put forward by the Defence contain acts that are similar to the facts of the present case. For example, in the *Kambanda* case, Prime Minister Kambanda was charged and pleaded guilty of having encouraged the *Radio Télévision Libre des Mille Collines* to continue inciting the massacres of the Tutsi civilian population.[197] This was a case where the words of encouragement were made by an accused before the crime was committed, at a place remote from the place where the crime was committed, in contradiction to paragraph 154 of the Kondewa Appeal Brief, which appears to suggest that words can only be considered as substantial encouragement amounting to aiding and abetting if the aider and abettor is present at the crime scene when expressing his or her words of encouragement. Any such suggestion is not supported by any case law. It is not necessary for the person aiding or abetting to be present during the commission of the crime.[198] Thus, presence, particularly when coupled with a position of authority, is a probative, *but not determinative*, indication that an accused encouraged or supported the perpetrators of the crime.[199]

5.48 In the light of the above, it cannot be argued, as the Defence does,[200] that the Trial Chamber erroneously misapplied the "substantial effect" test and unacceptably extended the concept of aiding and abetting in international criminal law.

5.49 The Prosecution submits that it was therefore clearly open to a reasonable trier of fact to conclude, on the evidence before the Trial Chamber, that the words spoken by Kondewa at the December 1997 Passing Out Parade had a substantial effect on the commission of the crimes in Tongo.

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196 *Ibid.*

197 ***Kambanda* Indictment**, para. 3.12; ***Kambanda* Trial Judgement**, para. 39(vii).

198 See paragraph 5.38 (4) above.

199 ***Kvočka* Trial Judgement**, para. 257; ***Kunarac* Trial Judgement**, para. 393; see also ***Tadić* Trial Judgement**, para. 689; ***Aleksovski* Trial Judgement**, paras 64-65; ***Akayesu* Trial Judgement**, para. 693.

200 **Kondewa Appeal Brief**, para. 154.

D. Conclusion

5.50 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground Four should be rejected.

6. Prosecution Response to Kondewa's Appeal Ground Five: Cumulative convictions

A. Introduction

6.1 This section of this Response Brief responds to paragraphs 160 to 176 of the Kondewa Appeal Brief.

6.2 Kondewa was convicted of collective punishment as a war crime as pleaded in Count 7. This conviction was in addition to his conviction for the war crimes of murder, cruel treatment and pillage, as respectively pleaded in Counts 2, 4 and 5. Kondewa's Appeal Ground 5 contends that the Trial Chamber erred in law in entering cumulative convictions, in respect of the same conduct, under Count 7, as well as under Counts 2-5, on the basis that the additional conviction on Count 7, in addition to the convictions in respect of the same conduct under Count 2, 4 or 5, was impermissibly cumulative.

B. Argument

6.3 The Defence argument in relation to this ground of appeal is, with respect to the Defence, difficult to understand.

6.4 The crux of the Defence argument on this ground of appeal appears to be that "the Trial Chamber erred in law in extending the content of 'punishments' in the collective punishments count to acts broader than those specifically set out in the Indictment".[201]

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[201] **Kondewa Appeal Brief**, para. 168.

6.5 This Defence argument appears to be based on the Trial Chamber's finding, referred to in paragraph 166 of the Kondewa Appeal Brief, that:

> ... the term punishment in the first element is meant to be understood in its broadest sense and refers to all types of punishments.[202]
>
> The *actus reus* of the offence of collective punishment therefore does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment. Nor is it required, in order to find liability for collective punishments, that the *mens rea* of any of these offences needs to be satisfied.[203]

6.6 The Prosecution submits that in making these statements, the Trial Chamber was making findings of law, and that these findings of law are correct. For instance, in the *AFRC* Trial Judgement, the Trial Chamber found (correctly, it is submitted) that "this crime [of collective punishment] covers an extensive range of possible 'punishments'",[204] and noted that the ICRC Commentary of Article 75(2)(d) of Additional Protocol I "advocates an extensive interpretation of the crime of collective punishments", to include "not only penalties imposed in the normal judicial process, but also any other kind of sanction (such as confiscation of property) ... based on the intention to give the rule the widest possible scope, and to avoid any risk of a restrictive interpretation".[205]

6.7 The Kondewa Appeal Brief then refers to the fact that the Indictment pleaded, in relation to Count 7, the same acts that it pleaded in relation to Counts 2, 4 and 5. In relation to Count 7, the Indictment pleaded that:

> At all times relevant to this Indictment, the CDF, largely Kamajors, committed the crimes set forth in paragraphs 22 through 27 and charged in counts 1 through 5, 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. The CDF, largely Kamajors, also committed the crimes to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces.[206]

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202 **Trial Chamber's Judgement**, para. 181.
203 *Ibid.*, para. 978.
204 ***AFRC* Trial Judgement**, para. 681.
205 *Ibid.*, quoting **ICRC Commentary of the Additional Protocols**, para. 1374.
206 Indictment, para. 28.

6.8 Paragraphs 169-170 and 172 of the Kondewa Appeal Brief appear to argue that as the Indictment only pleaded, in relation to Count 7, the same acts that the Indictment pleaded in relation to Counts 2, 4 and 5, the only acts that the Trial Chamber was able to consider under the collective punishments count (Count 7) were the same acts that that the Trial Chamber was called upon to consider in relation to the counts of murder (Count 2), cruel treatment (Count 4) and pillage (Count 5). The Prosecution takes no issue with this argument.

6.9 The Kondewa Appeal Brief then appears to argue, at paragraphs 171-173 that because the Trial Chamber said that 'The *actus reus* of the offence of collective punishment therefore does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment", this must somehow mean that the Trial Chamber took into account, in relation to Count 7, acts or conduct other than acts which were pleaded in relation to Counts 2, 4 and 5, and that the Trial Chamber therefore impermissibly considered, in relation to Count 7, acts which had not been pleaded in the Indictment.

6.10 If this is the Defence argument, the Prosecution submits that it has no basis. The Trial Chamber's statement that "The *actus reus* of the offence of collective punishment therefore does not necessarily include the commission of the *actus reus* of any of the crimes of murder, pillage or cruel treatment" was a general statement of the law, which is correct. However, the Trial Chamber did not say, when it made this statement, that acts other than those which were pleaded in relation to Counts 2, 4 and 5 had been pleaded as collective punishments ***in this specific case***, nor did the Trial Chamber indicate that it would ***in this specific case*** take into account in relation to Count 7 any acts other than those that had been pleaded in relation to Counts 2, 4 and 5. Indeed, in this case the Trial Chamber expressly stated and recognized that "the Prosecution has pleaded 'punishments' that consist only of crimes enumerated in Counts 1-5".[207]

6.11 Furthermore, the Kondewa Appeal Brief does not identify any act of which Kondewa was convicted under the collective punishments count (Count 7) that was not an act for which Kondewa was also charged under Count 2, 4 or 5. It is

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[207] **Trial Chamber's Judgement**, paras 753, 978.

submitted that all of the acts for which Kondewa was convicted under Count 7 were indeed acts for which he had also been charged under Count 2, 4 or 5.[208]

6.12 Paragraph 174 of the Kondewa Appeal Brief then argues that because Kondewa had been charged under the collective punishment count (Count 7) with acts that had also been charged under Counts 2, 3 or 5, the result is that Counts 2, 3 or 5 required proof of no element in addition to the elements that had to be proved for the purposes of Count 7, but rather, that Count 7 required proof of the elements of Count 2, 3 or 5, plus the additional element of an intention to punish collectively. The Kondewa Appeal Brief argues that in respect of those crimes of which Kondewa was convicted under Count 7, he should therefore not also have been convicted under Counts 2, 4 or 5.

6.13 The Prosecution submits that this Defence argument is a distortion of the law on cumulative convictions. Paragraph 162 of the Kondewa Appeal Brief expressly states that it takes no issue with the Trial Chamber's articulation of the law on cumulative convictions. The Trial Chamber's statement of the law, quoted in part in paragraph 161 of the Kondewa Appeal Brief, is that:

> The Chamber is of the view that an Accused may only be convicted of multiple criminal convictions under different statutory provisions, but based on the same conduct, "if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another if it requires proof of a fact not required by the other." In other words, multiple convictions may only be upheld if both of the provisions require proof of an element that is not required by the other provision.[209]

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208 *Ibid.*, paras 760-764; and 899 and 901-903.

209 **Trial Chamber's Judgement**, para. 974. See also ***Čelebići* Appeal Judgement**, para 412: "Having considered the different approaches expressed on this issue both within this Tribunal and other jurisdictions, this Appeals Chamber holds that reasons of fairness to the accused and the consideration that only distinct crimes may justify multiple convictions, lead to the conclusion that multiple criminal convictions entered under different statutory provisions but based on the same conduct are permissible only if each statutory provision involved has a materially distinct element not contained in the other. An element is materially distinct from another ***if it requires*** proof of a fact not required by the other." (Emphasis added.) See further ***Kordić and Čerkez* Appeal Judgement**, para 1033: "The Appeals Chamber will permit multiple convictions for the same act or omission where it clearly violates multiple distinct provisions of the Statute, where each statutory provision contains a materially distinct element not contained in the other(s), and which element ***requires*** proof of a fact which the elements of the other statutory provision(s) do not" (emphasis added).

6.14 Under this test, the relevant question is whether two statutory provisions in respect of which an accused has been charged in respect of the same conduct, ***as a matter of law***, has a materially distinct ***element*** not contained in the other. The question is not whether the two statutory provisions, ***as a matter of fact*** in a particular case, are each based on ***a material fact*** on which the other is not based.

6.15 As the Trial Chamber found (correctly it is submitted), as a matter of ***law*** the crime of collective punishments (Article 3(b) of the Statute) requires proof of a material element that is not required to be proved for the crime of murder (Article 2(a) of the Statute) and vice versa,[210] and this is also the case in relation to the crime of collective punishments (Article 3(b) of the Statute) and the crime of cruel treatment (Article 3(a) of the Statute), and in relation to the crime of collective punishments (Article 3(b) of the Statute) and the crime of pillage (Article 3(f) of the Statute).[211] Therefore, cumulative convictions are permissible under Article 3(b) of the Statute on the one hand, and, on the other, under 2(a), 3(a) or 3(f) of the Statute.

6.16 That this is the case is demonstrated by the following table:

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[210] **Trial Chamber's Judgement**, para. 978.
[211] *Ibid.*

MURDER	COLLECTIVE PUNISHMENT
(i) The death of someone; (ii) The death of the person was caused by an act or omission of the Accused; and (iii) The Accused intended to either kill or to cause serious bodily harm in the reasonable knowledge that it would likely result in death.[212]	(i) A punishment imposed upon persons; (ii) The imposition of punishment was done on a collective basis; (iii) The Accused intended to punish collectively persons for omissions or acts which form the subject of the collective punishment, or acted in the reasonable knowledge that this would likely occur.[213]
CRUEL TREATMENT	
(i) The occurrence of an act or omission; (ii) The act or omission caused serious mental or physical suffering or injury, or constituted a serious attack on human dignity, to a person not taking direct part in the hostilities; and (iii) The Accused intended to cause serious mental or physical suffering or injury or a serious attack on human dignity or acted in the reasonable knowledge that this would likely occur.[214]	
PILLAGE	
(i) The Accused unlawfully appropriated (or destroyed) property; (ii) The appropriation (or destruction) was without the consent of the owner; and (iii) The Accused intended to unlawfully appropriate (or destroy) the property.[215]	

212 See **Trial Chamber's Judgement**, para 146; and ***AFRC* Trial Judgement**, para 688. See also ***Kvočka* Appeal Judgement**, para 261; ***Kordić and Čerkez* Appeal Judgement**, para 37.

213 See generally, **Trial Chamber's Judgement**, para 179 and ***AFRC* Trial Judgement**, para 676. See also Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts* [Oxford, OUP, 1995] p 219.

214 See **Trial Chamber's Judgement**, para. 156. See also ***Limaj* Trial Judgement**, para. 231; ***Struger* Trial Judgement**, para 261; and ***Simić* Trial Judgement**, para. 76.

215 See generally, **Trial Chamber's Judgement**, para. 165 and ***AFRC* Trial Judgement**, para. 755. The Trial Chamber held in this case that the crime of pillage does not include destruction of property. That finding is the subject of the Prosecution's Ground 7 in the Prosecution's appeal against the Trial Chamber's Judgement, and is dealt with in Part 6 of the Prosecution Appeal Brief.

6.17 In contrast to collective punishment, a materially distinct element that is ***required*** for murder is death of the victim(s). That element is not required for collective punishment. And in contrast to murder, the materially distinct elements ***required*** for collective punishment are (a) the collectiveness of punishment and (b) the intention to punish collectively. Those elements are not required for murder.

6.18 For its part, cruel treatment ***requires*** proof that the impugned act or omission caused serious mental or physical suffering or injury to the victim, or constituted a serious attack on human dignity. Such proof is not required for collective punishment. On the other hand, collective punishment, as seen above, ***requires*** proof of (a) the collectiveness of punishment and (b) the intention to punish collectively. Those elements are not required for cruel treatment.

6.19 Finally, pillage ***requires*** proof of appropriation (or, it is submitted destruction[216]) of property. This proof is not required of collective punishment. Once more, collective punishment ***requires*** proof of (a) the collectiveness of punishment and (b) the intention to punish collectively. Those elements are not required for pillage.

6.20 In view of the foregoing, the conviction of Kondewa for collective punishment, in addition to his conviction for murder, cruel treatment and pillage, was entirely permissible.

6.21 The Indictment in this case clearly pleaded that the acts alleged in relation to Counts 2, 3 and 5 were committed "to punish the civilian population for their support to, or failure to actively resist, the combined RUF/AFRC forces"[217] and that:

> By ***their acts or omissions in relation to these events***, SAMUEL HINGA NORMAN, MOININA FOFANA and ALLIEU KONDEWA, pursuant to Article 6.1 and, or alternatively, Article 6.3 of the Statute, are individually criminally responsible for the crimes alleged below:
> **Count 6**: Acts of Terrorism ...
> And:
> **Count 7:** Collective Punishments ....[218]

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216 See previous footnote.
217 Indictment, para. 28.
218 *Ibid.* (emphasis partly added, partly omitted).

6.22 The "events" being referred to in the emphasised part of the quotation set out immediately above are the events comprised in the limited quotation set out by the Appellant Kondewa and his counsel at paragraph 170 of the Kondewa Appeal Brief. This operative part of the pleading in relation to Count 7 clearly shows that the Indictment simply relied, for purposes of Count 7, on the same "acts and omissions" of the Accused as those forming the factual bases of the crimes pleaded in "Counts 1 through 5". The fact that the Indictment relies on the same ***acts or omissions*** in this way does not mean, as the Kondewa Appeal Brief suggests, that collective punishment as charged under Count 7 ***requires*** proof of the same ***elements*** as the crimes charged in Counts 1 through 5.

6.23 Hence, the Kondewa Appeal Brief is wrong in suggesting that the crimes of murder, cruel treatment and pillage do not require, as a ***matter of law***, proof of an element that is not required to be proved for collective punishments, merely because in this particular case the conduct relied upon to establish one of the elements of collective punishments was the same conduct relied upon to establish the elements of murder, cruel treatment or pillage.

6.24 This is demonstrated, for instance, by the decision of the ICTY Appeals Chamber in the *Stakić* Appeal Judgement. In that case, the ICTY Appeals Chamber held that the accused should have been convicted by the Trial Chamber of the crime against humanity of "other inhumane acts" in respect of certain acts of forcible transfer that were established on the evidence.[219] The Appeals Chamber in that case then went on to consider whether the accused in that case could be convicted cumulatively, in respect of the same acts of forcible transfer, not only of the crime against humanity of other inhumane acts, but additionally of the crime against humanity of persecution. The Appeals Chamber said:

> The crime of persecutions requires a materially distinct element to be proven that is not present as an element in the crime of other inhumane acts, namely proof that an act or omission discriminates in fact and that the act or omission was committed with specific intent to discriminate. The crime of other inhumane acts requires proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions – namely proof of an act or

[219] ***Stakić* Appeal Judgement**, para. 321.

> omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity. Therefore, cumulative convictions are permissible for the crimes of other inhumane acts as a crime against humanity under Article 5(i) of the Statute and persecutions as a crime against humanity under Article 5(h) of the Statute.[220]

6.25 In the *Stakić* case, forcible transfers as persecutions had been pleaded in paragraph 54(4) of the indictment in that case, in respect of its count 6 (persecutions).[221] In relation to count 8 (inhumane acts (forcible transfer)), the indictment in that case then stated that "The Prosecutor re-alleges and reincorporates by reference paragraphs ... 54".[222] Paragraph 58 of the *Stakić* indictment, setting out the material facts relied upon in relation to the charge of inhumane acts (forcible transfer), then repeated the same allegations that had been made in paragraph 54 of that indictment in relation to forcible transfers as persecution.

6.26 Thus, in the *Stakić* case, the ICTY Appeals Chamber found that cumulative convictions were possible for both persecutions and inhumane acts (forcible transfer), notwithstanding that the material facts that were relied upon to establish persecutions in respect of the forcible transfers were the same material facts that were relied upon to establish the crime of inhumane acts (forcible transfer).

6.27 The logic of the Defence argument in the present case would lead to the conclusion that in the *Stakić* case, the accused should have been convicted of persecution only, on the basis that the conviction for inhumane acts (forcible transfer) required proof of no material fact in addition to the material facts that were relied on to establish the crime of persecution, while the conviction for persecution required proof of the additional material fact of a discriminatory intent. However, the Appeals Chamber in the *Stakić* case did not find this. Rather, the Appeals Chamber found that as a matter ***of law***, the charge of inhumane acts (forcible transfer) "requires proof of a materially distinct element that is not required to be proven in establishing the crime of persecutions –

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220 ***Stakić* Appeal Judgement**, para. 362.
221 ***Stakić* Fourth Amended Indictment**.
222 *Ibid.*, para. 56.

namely proof of an act or omission causing serious mental or physical suffering or injury or constituting a serious attack on human dignity",[223] and that cumulative convictions on both charges were therefore permissible.

6.28 In the same way, for the reasons given in paragraphs 6.16 to 6.20 above, in the present case, as a matter ***of law***, each of the charges in Counts 2, 4 and 5 of the Indictment required proof of a materially distinct element that is not required to be proven in establishing the crime of collective punishments. The cumulative convictions were therefore permissible.

C. Conclusion

6.29 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground Five should be rejected.

7. Prosecution Response to Kondewa's Appeal Ground Six: Conviction of Kondewa for enlisting a child soldier

A. Introduction

7.1 This section of this Response Brief responds to paragraphs 177 to 215 of the Kondewa Appeal Brief.

7.2 Kondewa's Appeal Ground Six contends that The Trial Chamber's evaluation of the evidence was wholly erroneous and argues that the Trial Chamber made a number of errors, namely that:

(1) the Trial Chamber conflated initiation and enlistment to reach the legal conclusion that initiation can equate to enlistment (as to which see Section B below);

(2) the Trial Chamber made enlistment a crime that can reoccur numerous times to the same child within the same fighting group (as to which see Section C below);

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[223] ***Stakić* Appeal Judgement**, para. 362.

(3) the Trial Chamber based its finding on unclear witness testimony and contradictory conclusions on the meaning of this testimony (as to which see Section D below).[224]

B. Alleged conflating of initiation and enlistment

7.3 The Defence contends that the Trial Chamber erred in conflating "initiation" and "enlistment", and in reaching the conclusion that the acts of initiation which the Trial Chamber found to have occurred were analogous to enlistment.[225] Moreover, the Defence stressed that there was no basis in law or fact for concluding that initiation is an action that is similar to enlistment.[226]

7.4 Contrary to what the Defence alleges, the Prosecution submits that the Trial Chamber did not equate or conflate initiation with enlistment. The Trial Chamber dedicated a whole section in the part of its Judgement dealing with the applicable law to examine the distinction between the different terms used in respect of child soldiers, namely "enlistment", "using children to participate actively in hostilities", "initiation" and "recruitment".[227] Regarding "initiation" in particular, the Trial Chamber emphasized that:

> The Indictment also charges the Accused with "initiation" of child soldiers, which is not listed as an offence in the Statute. However, it is the opinion of the Chamber that evidence of "initiation" may be of relevance in establishing liability under Article 4(c) of the Statute.[228]

7.5 Hence, the Trial Chamber expressly found that "initiation" is not necessarily the same thing as "enlistment", and that "initiation" of children is not in and of itself a crime under the Statute. It is clear from the Trial Chamber's Judgement that Kondewa was not convicted of "initiating" children, but that he was convicted of the "enlistment" of child soldiers.[229] The Trial Chamber however at the same time made clear that the facts underlying the act of initiation could be relevant in

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224 **Kondewa Appeal Brief**, para. 187.
225 *Ibid.*, paras 189 and 199.
226 **Kondewa Appeal Brief**, para. 189.
227 **Trial Chamber's Judgement**, paras 190-198.
228 *Ibid.*, para. 198.
229 **Trial Chamber's Judgement**, para. 971.

determining whether the elements of the crime of enlistment had been established on the evidence in this case. It is submitted that it is clear from the Trial Chamber's Judgement that the Trial Chamber did not consider the "initiation" of children of itself in general to constitute enlistment as soldier, but rather, the Trial Chamber said very clearly that in determining whether enlistment had taken place, it had "looked at the details of the actual initiation ceremony, the circumstances surrounding initiation, as well as the subsequent events, to determine whether in fact a child could be said to have been enlisted in an armed force or group".[230]

7.6 Thus, the approach of the Trial Chamber was not to make initiation itself a crime or to equate initiation to enlistment: The Trial Chamber concluded that initiation was ***in this particular instance*** an act amounting to enlistment, since ***in this particular instance***, in undergoing the initiation, the initiates "had taken the first step in becoming fighters", and the initiation was "an act analogous to enlisting them in active military service".[231] The Trial Chamber found that "the evidence is absolutely clear" that the initiation on this occasion was indeed the first step in becoming fighters on a consideration of all of the relevant evidence as a whole, including the fact that "initiates were given potions to rub on their bodies before going into battle, were told that they would be made strong for fighting, were subsequently given military training, and soon afterwards were sent into battle".[232]

7.7 The Prosecution submits that the term "enlistment" is not as a matter of law, for the purposes of the crime of enlistment of child soldiers, confined to official acts of enlistment of soldiers as undertaken by regular armed forces. As Trial Chamber II observed in the *AFRC* Trial Judgement, in relation to the expression "conscription":

> While the traditional meaning of the term refers to government policies requiring citizens to serve in their armed forces, the Trial Chamber observes that Article 4(c) allows for the possibility that children be conscripted into "[armed] groups". While previously wars were primarily between well-established States, contemporaneous

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230 *Ibid.*, para. 969.
231 *Ibid.*, para. 970.
232 *Ibid.*

> armed conflicts typically involve armed factions which may not be associated with, or acting on behalf, a State. To give the protection against crimes relating to child soldiers its intended effect, it is justified not to restrict 'conscription' to the prerogative of States and their legitimate Governments, as international humanitarian law is not grounded on formalistic postulations. Rather, the Trial Chamber adopts an interpretation of 'conscription' which encompasses acts of coercion, such as abductions and forced recruitment, by an armed group against children, committed for the purpose of using them to participate actively in hostilities.[233]

7.8 The *AFRC* Trial Judgement here recognises that the expression "conscription" is not confined to the situation where regular armed forces pursuant to applicable laws and regulations compel persons to serve in the armed forces. Because irregular armed groups are also required to comply with the prohibition on the conscription of child soldiers, the expression covers any circumstances in which an armed group compels a person to serve in that armed group, whether by simple abduction, coercion or any other means.

7.9 The Prosecution submits that the same must be true of the concept of "enlistment". As was observed in the *AFRC* Trial Judgement:

> "Enlistment" entails accepting and enrolling individuals when they volunteer to join an armed force or group. Enlistment is a voluntary act, and the child's consent is therefore not a valid defence.[234]

7.10 The Prosecution submits that the concept of "enlistment" therefore encompasses any act by which an armed force or armed group by any means accepts a child under the age of 15 to be a member of its armed forces.

7.11 In cases where child soldiers are enlisted by an irregular armed force or other armed group that does not have an official and formal enlistment procedure in the same way as the regular armed forces of a country, it must be a question of fact to determine at which point of time and by which act a person came to be accepted as a member of the armed force or armed group in question.

7.12 There was no need to demonstrate, as the Defence argues[235], that "initiation" is somehow in general the equivalent of enlisting in international law, or that every

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233 ***AFRC* Trial Judgement**, para. 734 (footnotes omitted).
234 *Ibid.*, para. 735 (footnotes omitted).
235 **Kondewa Appeal Brief**, paras 191and 198.

initiation conducted by Kamajors amounted to an act of enlistment. In order for Kondewa to be convicted of the crime of enlistment of child soldiers, what was needed to be demonstrated by the Prosecution was that the particular acts of Kondewa on a given occasion, in relation to one or more specific children under the age of 15, amounted on that particular occasion to the acceptance of the children as combatants or fighters in the CDF. This is a question of fact. The Trial Chamber found, as a matter of fact, that this had been demonstrated in this particular case in relation to TF2-021. The Appeals Chamber will only overturn this finding of fact by the Trial Chamber if the Defence can establish that the finding of fact was one which no reasonable trier of fact could have reached on the evidence before it.[236]

7.13 The Trial Chamber considered that Kondewa's initiation of TF2-021 and other children on the occasion in question was on that occasion an act which amounted to the enlistment of those children, the crime clearly being the enlistment and not the initiation. In this instance, the initiation process as performed by Kondewa was found by the Trial Chamber to be a means by which those specific children were enlisted into the CDF on that particular occasion. The Trial Chamber never indicated that it considered initiation as such to be a crime in international law or to amount to the crime of enlistment. Nor did the Trial Chamber indicate that it considered that initiations, as such, are analogous to acts of enlistment. Rather, the Trial Chamber found that on the specific facts of this particular case, the particular initiations of these particular children by Kondewa (and not all initiations performed by Kondewa, or by other initiators) was the act by which these children were accepted as soldiers, fighters or combatants into the CDF.

7.14 The Trial Chamber said that "it is beyond reasonable doubt that Kondewa, ***in these circumstances***, when initiating the boys, was also performing an act analogous to enlisting them for active military service."[237] The Trial Chamber focused on the circumstances of the case and on the particular circumstances of the initiation of TF2-021 and the other boys initiated with him. The Trial

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[236] See paragraphs 1.7 to 1.11 above.

[237] **Trial Chamber's Judgement**, para. 970 (emphasis added).

Chamber was cautious to confine its finding to this particular instance. Contrary to what the Defence suggests, the Trial Chamber did not reach any broader conclusion that initiations of children amounted to the enlistment of child soldiers.

7.15 The Trial Chamber specifically indicated that initiation should not be automatically seen as enlistment when it stated: "The Trial Chamber understands from the evidence that initiation into Kamajor Society does not necessarily amount to enlistment in an armed force or group. Some parents put their children through initiation for other reasons."[238] The Trial Chamber further explained that it had to look at "the details of the actual ceremony, the circumstances surrounding initiation, as well as the subsequent events, to determine whether in fact a child could be said to have been enlisted in an armed force or group".[239]

7.16 The Trial Chamber therefore showed that it well understood the difference between "initiation" and "enlistment", warned that it was required to take a case-by-case approach, and came to the conclusion, only after having carefully analyzed the circumstances of TF2-021's initiation, that in this instance, this particular initiation was to be considered as an act of enlistment. Hence, the Prosecution submits that the Trial Chamber did not mean to equate initiation to enlistment and that such a generalization of the Trial Chamber's finding by the Defence is an unreasonable and unsustainable interpretation of the Trial Chamber's Judgement.

7.17 In any event, the Prosecution submits that the Trial Chamber did not err in considering that Kondewa was performing an act analogous to enlistment. TF2-021 was initiated by Kondewa at Base Zero, a procedure the aim of which was not only to "prepare his entry into manhood and to be unafraid of the battlefield", as alleged by the Defence.[240] The Prosecution accepts the Defence contention that initiation was not ***necessarily*** military recruitment and was originally meant to serve other ends.[241] The Prosecution further accepts that not every person who was initiated was recruited as a soldier of the CDF, a matter also expressly

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238 *Ibid.*, para. 969 (footnote omitted).
239 *Ibid.*
240 **Kondewa Appeal Brief**, paras 197-199.
241 *Ibid.*, para. 197-198.

accepted by the Trial Chamber.[242] However, it is submitted that in the context of an ongoing armed conflict in which the CDF was actively involved as an armed group, in the particular case of TF2-021 and certain other children, initiation was a practice, led by Kondewa, which was specifically intended to be "the first step in becoming fighters" and therefore the act by which they were enlisted as fighters into the CDF.

7.18 The Defence then raises the question why it is that "initiation was acceptable in one context but not in another"[243] and submits that no reasonable trier could reach the conclusion that Kondewa committed the crime of enlisting an under-aged child, "based on the factual finding of one particular initiation and the broader evidence as the actual role of initiation within the Kamajor society and the CDF".[244] The Prosecution recalls that, in this case, the evidence considered was not confined to "the actual role of initiation within the Kamajor society and the CDF". The Trial Chamber was required to make its findings of fact in the light of all of the evidence in the case as a whole. The Trial Chamber found in particular that as the war progressed, traditional initiations in the Kamajor Society changed to become massive initiations centralized in Base Zero, CDF Headquarters:

> After the Coup, there was a need to substantially increase the number of hunters in the Kamajor society, which required a marked increase in the number of initiations. The initiation procedure changed tremendously and was no longer coordinated at the local or chiefdom level. Instead of being recommended by the chiefdom authorities, fighters started seeking initiation individually and the rules were not highlighted to the fighters. Chiefs were in disarray and everybody came to Base Zero to seek refuge and join the Kamajors there. ***The primary purpose of the initiation was still to prepare the fighters for the war*** and to receive the protection against bullets by immunisation.[245]

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242 **Trial Chamber's Judgement**, para. 969: "The Chamber understands from the evidence that initiation into the Kamajor Society does not necessarily amount to enlistment in an armed force or group".

243 **Kondewa Appeal Brief**, para.198.

244 *Ibid.*, para. 199.

245 **Trial Chamber's Judgement**, paras 314-315 (footnotes omitted, emphasis added).

7.19 Additionally, as developed in the Prosecution Appeal Brief,[246] there was ample evidence, that was accepted by the Trial Chamber, that there were under-aged children in the CDF, and that Base Zero was also a training base where massive initiations took place and were led by Kondewa, who as High Priest was giving his blessings before going to war. Finally, TF2-021, who was initiated in Base Zero by Kondewa, was actually himself involved in combat activities.

7.20 The evidence of the initiation of TF2-021 cannot be considered in isolation from this broader context and the evidence in the case as a whole. It is submitted that, while still being a traditional initiation into the Kamajor Society, the initiation of TF2-021 cannot only be regarded as a customary initiation into manhood. In the light of all of the evidence in the case as a whole, and in the light of all of the other findings of the Trial Chamber, it was open to a reasonable trier of fact to conclude that in the case of TF2-021, the initiation was the means by which he was accepted as a fighter into the CDF.

7.21 The relevant part of Albert Nallo's testimony, to which the Defence refers in support of its argument that initiation is different from military recruitment, is related to the initiation process generally and its meaning for the Kamajor society.[247] Nallo's testimony did not relate specifically to the initiation procedures as they were performed in Base Zero during the war.

7.22 Consequently, the Prosecution submits that the Trial Chamber did not conflate initiation and enlistment, but considered the act of initiation in this particular case, as a matter of fact, to be the act by which TF2-021 and other children were "enlisted" into the CDF, for the purposes of the prohibition under international law on the "enlistment" of child soldiers. This argument of the Defence should therefore be rejected.

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246 **Prosecution Appeal Brief**, para. 4.34.

247 Transcript, 15 March 2005, p. 9 (lines 20-24): The Counsel specifically mentioned in his question to Nallo that he was referring to initiation in the traditional Kamajor society.

C. Alleged treatment of enlistment as a reoccurring crime

7.23 The Defence contends that the Trial Chamber erred in suggesting that the second initiation of TF2-021 into the Avondo society was further evidence of Kondewa's guilt of the crime of enlistment, thereby concluding that Kondewa enlisted TF2-021 again. The Defence argues that the Trial Chamber's reasoning in this respect makes enlisting a perpetual activity that can occur to the same child within the same armed force over and over and establishes enlistment as a re-occurring crime.[248]

7.24 It is noted at the outset that the Trial Chamber expressly stated that it found the evidence relating to the first initiation of TF2-021 "entirely sufficient to establish enlistment beyond a reasonable doubt." The Trial Chamber's mention of TF2-021's second enlistment into the Avondo society was therefore not a finding that was essential to the conviction of Kondewa on Count 8.

7.25 Both the evidence accepted by the Trial Chamber and its factual findings confirm that TF2-021 was initiated a first time at Base Zero and then a second time in Bumpeh when he was initiated into the Avondo Society:

> At Base Zero, the witness was initiated along with around 20 other young boys. Kondewa performed the initiation and told the boys that they would be made powerful for fighting. He gave them a potion to rub on their bodies before going into battle.
>
> After receiving training, TF2-021 was sent on his first mission to Masiaka, where he shot a woman in the stomach and left her there on the ground. On subsequent missions, he fought with the Kamajors at Kenema, SS Camp, Joru and Daru. In 1999 TF2-021 was flown by helicopter into Freetown with three other small boys and their commanders where they were given guns and sent to support ECOMOG who were fighting the rebels at Congo Cross.
>
> In 1999, when TF2-021 was thirteen years old, he was initiated into the Avondo Society, a group of Kamajors led by Kondewa. He received a certificate (Exhibit 18) which proved his membership in this group. The certificate bears details showing the place of initiation

[248] **Kondewa Appeal Brief**, paras 200-201.

> (Bumpeh), the initiate's name, photograph and age. It also bears Kondewa's name, signature and stamp.[249]

7.26 The legal findings based on the above factual findings read as follows:

> Having considered the evidence outlined above, that during the first initiation of TF2-021 initiates were given potions to rub on their bodies before going into battle, were told that they would be made strong for fighting, were subsequently given military training, and soon afterwards were sent into battle, the evidence is absolutely clear that on this occasion, the initiates had taken the first step in becoming fighters. It is beyond reasonable doubt that Kondewa, in these circumstances, when initiating the boys, was also performing an act analogous to enlisting them for active military service. TF2-021 was eleven years old when Kondewa enlisted him. In the Chamber's view, there can be no mistaking a boy of eleven years old for a boy of fifteen years or older, especially for a man such as Kondewa who regularly performed initiation ceremonies. Kondewa knew or had reason to know that the boy was under fifteen years of age, and too young to be enlisted for military service. ***Although the Chamber found this evidence entirely sufficient to establish enlistment beyond a reasonable doubt, TF2-021 was given a second initiation, into the Avondo Society, headed by Kondewa himself, when he was thirteen years old. Exhibit 18, dated 10 June 1999, bears Kondewa's signature and stamp of approval and lists the boy's age (incorrectly) as twelve.***[250]

7.27 The Defence argues that the Trial Chamber found that TF2-021 was enlisted "again" when he was initiated in the Avondo Society in 1999.[251] The Defence argument appears to be that the Trial Chamber erred in considering that a person can be "enlisted" into an armed group more than once. The Defence argument appears to be that a person cannot be "enlisted" into an armed force of which the person is already a member, and that the Trial Chamber's findings therefore contain a legal error.

7.28 However, the Prosecution submits, first, that the Trial Chamber did not make any finding that the second initiation was an actual act of enlistment by itself. The Prosecution submits that the Defence has merely sought to extrapolate such a finding from the Trial Chamber's Judgement.

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[249] **Trial Chamber's Judgement**, paras 968 (ii), (iii) and (iv).
[250] *Ibid.*, para. 970 (emphasis added).
[251] **Kondewa Appeal Brief**, para. 200.

7.29 Secondly, the Prosecution submits that even if it were the case that the Trial Chamber's Judgement must be interpreted as an erroneous legal finding that TF2-021 was initiated for a second time in Bumpeh, the Defence has not established how this would be an error of law "invalidating the decision" for the purposes of Article 20(1)(b) of the Statute. Kondewa was not convicted of two incidents of enlistment of TF2-021, but of only one. The Trial Chamber expressly found that there was sufficient evidence to convict Kondewa on Count 8 without giving any consideration to the second initiation in Bumpeh. Even if the Trial Chamber did erroneously conclude that it was possible for a person to be enlisted a second time, the Defence has not demonstrated how this could invalidate the Trial Chamber's finding that TF2-021 had been enlisted a first time in Base Zero. Any error of law by the Trial Chamber, even if the Defence could establish that there is one, simply had no effect on the Judgement whatsoever.

7.30 Thirdly, because of the above submissions, it is not necessary to consider whether or not it is possible for a person who has already been enlisted in an armed group and is a member of that group to be enlisted again. The Prosecution does not concede that this is a legal impossibility. For instance, in this case, the Trial Chamber found that the CDF was composed of "literally hundreds of groups spread throughout the country".[252] If an accused took a child under 15 who had already been enlisted in one of those groups, and enlisted the child in another of those groups, the Prosecution does not concede that the second act of enlistment would not be a crime under international law, merely on the basis that the child had previously been enlisted in another group that was fighting on the same side, as part of the same CDF.

7.31 Paragraphs 202-203 of the Kondewa Appeal Brief refer to the Trial Chamber's findings that TF2-021 was captured by Kamajors in 1997, and was forced by the Kamajors to carry looted property before he was sent to Base Zero to be initiated.[253]

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[252] **Trial Chamber's Judgement**, para. 358.
[253] *Ibid.*, paras 674-675, 968(i).

7.32 The Kondewa Defence Brief suggests at paragraphs 202-204 that TF2-021 was a child combatant at the time that he was forced to carry looted property, that he must at that time therefore also have already been "enlisted" as a child soldier, and that he could not therefore have been enlisted a second time by Kondewa at Base Zero. However, neither the evidence in the case nor the Trial Chamber's findings establish that TF2-021 was ever enlisted or used as a child soldier prior to his initiation by Kondewa at Base Zero. All that the Trial Chamber found was that TF2-021 was captured by Kamajors in Ngiehun, Kailahun District[254] and that "After the attack on Ngiehun, Kamajors made the boys carry looted property".[255] While this finding may establish that TF2-021 was subjected to forced labour by the Kamajors at Ngiehun, it does not establish that the Kamajors at Ngiehun in any way at that time enlisted or used him as a child soldier. Rather, the evidence and the findings of the Trial Chamber as a whole were to the effect that before being regarded as a fighter or combatant, and before being sent into combat, TF2-021 was "taken to Base Zero for initiation".[256] The Prosecution submits that it was open to a reasonable trier of fact, on the basis of all of the evidence in the case, to find that it was established beyond a reasonable doubt that it was at the time of his initiation at Base Zero that TF2-021 was enlisted as a child soldier, in the sense that it was at that point in time that he was accepted as a fighter in the CDF. The Prosecution submits that this Defence argument should accordingly be rejected.

D. The testimony of TF2-021

7.33 Kondewa submits that the Trial Chamber based its findings on "very unclear witness testimony and contradictory conclusions of its own factual findings".[257] It

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254 **Trial Chamber's Judgement**, para. 674.
255 *Ibid.*
256 *Ibid.*
257 **Kondewa Appeal Brief**, para. 205.

contends that "the Trial Chamber erred in giving so much weight to testimony that was unclear and therefore unreliable."[258]

7.34 The Prosecution recalls at the outset that the Trial Chamber considered the testimony of Witness TF2-021 as credible and reliable. The Trial Chamber expressly said that:

> The Chamber found the evidence of TF2-021 pivotal in making its factual findings. According to TF2-021's own testimony, he was nine years old when he was captured by RUF rebels, and eleven years old when the Kamajors captured him from the RUF and initiated him into their society. For this Witness, the events in question occurred when he was very young, and his testimony comes many years after the events in question. Nonetheless, the Chamber found his testimony ***highly credible and largely reliable***. Clearly, the intensity of his experience has left him with an indelible recollection of the events in question.[259]

7.35 The Defence challenges the testimony of TF2-021 with respect to the identity of the person actually performing the different steps of the initiation.[260] However, in his allegedly unclear testimony, TF2-021 specifically mentioned Kondewa's name three times and clearly identified him as performing the initiation, as is evident from the relevant excerpts of the transcript cited below.

7.36 The Defence contends that the factual finding at paragraph 968(ii) of the Trial Chamber's Judgement is contradictory to other findings in the Judgement.[261] However, the factual finding in paragraph 968 of the Trial Chamber's Judgement is based on paragraph 675, which reads as follows:

> TF2-021 was then taken to Base Zero for initiation. At Base Zero TF2-021 saw many other young boys who had already been initiated. About 20 other young boys were initiated at the same time as TF2-021. ***They were initiated by Kondewa. As part of the initiation process, the boys were told that they would be made powerful for fighting and were given a potion to rub on their bodies before going into battle.***[262]

7.37 The Trial Chamber makes no finding in this paragraph that Kondewa said that he himself was the one who would "make them [the initiates] powerful for fighting",

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258 **Kondewa Appeal Brief**, para. 205.
259 **Trial Chamber's Judgement**, para. 282 (emphasis added).
260 **Kondewa Appeal Brief**, paras 206-211.
261 **Trial Chamber's Judgement**, para. 317.
262 Emphasis added.

as alleged by the Defence.[263] Rather, the finding in this paragraph of the Trial Chamber's Judgement indicates merely that the participants to the initiation were told that they would be made powerful for fighting during the initiation process performed by Kondewa. Notably, the evidence was that Kondewa is also the one who told them not to bathe for one week, before going to the graveyard.[264]

7.38 On the basis of the relevant portions of the transcript, which are not mentioned by the Defence, the Prosecution submits that it was clearly open to a reasonable trier of fact to find it established that Kondewa initiated TF2-021. The relevant parts of the transcript of 2 November 2004 (testimony of TF2-021) read as follows:[265]

a. At p. 39, lines 16-25

Q. What did you do with what you were given?

A. The thing that was in a drum, we would go there and take it and smear it on our bodies.

Q. What did you do after you smeared this on your body?

A. When we had smeared it on our bodies, they told us not to bathe for one week.

Q. Who told you not to take this off for one week?

A. Well, it was Papay Konde.

Q. Who was Papay Konde?

A. Well, he was my sowe -- he joined me into the Kamajor.

b. At p. 40, lines 7-13

Q. Witness, when you say Papay Konde joined you, what do you mean by the word "joined"?

A. It's a particular site -- when you enter the bush, when you've been marked with a razor blade, then that means you've been initiated into the Kamajor society.

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263 **Kondewa Appeal Brief**, paras 207-209 citing Transcript 2 November 2004, TF2-021, p. 40-41 and paragraph 317 of the Trial Chamber's Judgement: "The initiates were told that if anyone had died for them, that person would return to them in the graveyard and give them something to make them powerful fighters."

264 Transcript 2 November 2004, TF2-021, p. 39.

265 See Transcript 2 November 2004, TF2-021.

Q. Who initiated you into the Kamajor society?

A. Well, it's Papay Konde.

c. At p. 43, lines 5-15

Q. How was Dr Gibao registering your names?

A. We would queue. As they called you, on registering you they ask you where you're coming from, but as for me, my questions were answered by German.

Q. And what did Dr Gibao do with this registration?

A. What I saw -- when he finishes with the registration, I saw Papay Konde, who had come to them and collect some money -- the moneys that were paid by the other people.

Q. What was done with this money?

A. But I'm not able to tell that now. The money was given to Papay Konde.

7.39 Furthermore, it was found by the Trial Chamber that Kondewa was the head of initiation in Base Zero. He was present in Base Zero and was the one person deciding how and when initiations were performed.[266]

7.40 The Prosecution submits that the evidence was not unreliable or contradictory, and that it was open to a reasonable trier of fact to reach the conclusion that the Trial Chamber did on the basis of the evidence before it.

C. Conclusion

7.41 For the reasons given above, the Prosecution submits that Kondewa's Appeal Ground Five should be rejected.

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[266] **Trial Chamber's Judgement**, paras 344-347.

Filed in Freetown,
21 January 2008
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APPENDIX A

LIST OF CITED AUTHORITIES AND DOCUMENTS

I. Authorities and documents for which abbreviated citations are used

1. Documents in this Case

(i) Decisions, Orders and Judgements

***Kondewa* Preliminary Motion Decision**	*Prosecutor v. Kondewa*, SCSL-12-PT-050, "Decision and Order on Defence Preliminary Motion for Defects in the Form of the Indictment", Trial Chamber, 27 November 2003
Trial Chamber's Judgement	*Prosecutor v. Fofana and Kondewa,* SCSL-14-785, "Judgement", Trial Chamber, 3 August 2007 (see also Annex C "**Separate Concurring and Partially Dissenting Opinion of Justice Thompson**", Registry Pages 21399-21436) and ("**Separate and Partially Dissenting Opinion Only on Count 8 of Hon. Justice Benjamin Mutanga Itoe**"
Sentencing Judgement	*Prosecutor v. Fofana and Kondewa*, SCSL-14-796, "Judgement on the Sentencing of Moinina Fofana and Allieu Kondewa", Trial Chamber, 9 October 2007
CDF Subpoena Appeal Decision	*Prosecutor v. Fofana and Kondewa,* SCSL-14-688, "Decision on Interlocutory Appeals Against Trial Chamber's Decision Refusing to Subpoena the President of Sierra Leone", 11 September 2006
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APPENDIX B

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BOWEN V STATE

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REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.
L. Jones, J.A.
S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant
Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 12th January, 2005

JUDGMENT

Delivered by S. John, J.A.

1. On February 18, 2004 before a jury the appellant was found guilty of four counts of unlawful sexual intercourse and four counts of serious indecency. On March 24, 2004 he was sentenced to seven years imprisonment on each count of unlawful sexual intercourse and five years imprisonment on each count of serious indecency. All the sentences were to run concurrently.

2. In this case the appellant and the victim are cousins. At the time of the alleged offences the victim who we shall refer to as 'K'was three years old. The appellant was sixteen years of age. The offences to which the eight counts in the indictment related were alleged to have been committed during the period August 31, 1997 and May 01, 1998. The prosecution case against the appellant at trial depended effectively on the uncorroborated evidence of 'K' who was then nine years old.

3. A number of grounds of appeal were filed but the one ground upon which heavy reliance was placed was that the trial judge erred in law when she rejected the submission of no case to answer.

4. Several witnesses testified on behalf of the prosecution, however, only two of them really gave evidence material to the counts on the indictment, namely 'K' and Cheryl Pierre-Brooks a medical practitioner. For the purpose of the judgment it is necessary to allude to the evidence of those two witnesses.

The evidence of 'K'

5. After stating her name, address and the school she attended and acknowledging that the appellant was her cousin, she said:

> *"Jomaine put his penis in my vagina and my mouth. He did that eight times to me. He put his penis in my vagina four times and in my mouth four times. He did that in his bedroom on top the bed and on the ground on the carpet. He did this on several days at different times."*

6. Under cross-examination by attorney for the appellant she said that her aunt Charmaine (her mother's sister) had taken her to Dr. Michael Telemaque on one occasion because she was itching inside and outside of her vagina. She further said that her mother had taken her on two occasions to another doctor in St. James but she could not then recall the name of the doctor. That doctor never testified either at the preliminary inquiry or the trial. In answer to a question from attorney for the appellant 'K' agreed that in her evidence-in-chief she said that the appellant had done something to her eight times. She then said:

> *"I recall telling the Woman Police Constable three times. She read back what I said before I signed it. I did not tell her it was true. I remember the lady police writing what I told her and I wrote my name to it. She read it to me for me to hear what I said. She asked me if that was true and I did say that was true. I can't remember what I told her. I saw where I signed my name. Yesterday, someone read it over for me. My mummy when she read it over I heard her say three times. I talked about that three times with mummy. After talking with mummy I realized it supposed to be eight times. When I spoke to the lady police, mummy and daddy were present."*

In response to a question, no doubt with reference to her evidence given at the preliminary inquiry, she said:

> *"I remember going to the police station I remember telling the lawyer that I did not tell the police anything about Jomaine before I signed the paper. I was not speaking the truth."*

Testimony of Dr. Brooks

7. She said that on January 04, 1999, some eight (8) months after the event she examined 'K' and made notes contemporaneous with the examination. She sought and was granted leave of the court to refresh her memory from her notes. Her testimony then continued:

> *"My findings were: hymen not intact, probably inflicted by sexual interference. I came to findings by examining vaginal area of K.C. By sexual interference, I mean having made a differential diagnosis. I came to conclusion more probable because of what I saw was due to sexual act. In making my conclusion I would have examined the vaginal area thoroughly. On examination of vaginal area I examined the anterior and posterior areas especially looking for tear. There were none – There were no abrasions. I examined the vaginal orifice looking for elasticity – absence or presence of hymen. The elasticity of vaginal orifice at that tender age, I did not insert my hand. I inserted my little finger around the orifice to make sure that hymen was not in tact. I noted that the orifice was not irregular. It was smooth and pliable in texture. It should be noted that a four-year-old child would not have pliable orifice. It would be tightened. Because of all circumstances noted I put down sexual interference as opposed to blunt instrument which I would put sometimes."*

8. During Dr. Pierre-Brooks' cross-examination, Mr. Peterson for the appellant made an application to inspect her notes. Dr. Pierre-Brooks had no notes. In fact, she said that all the details she had given about elasticity, orifice and other details were from memory. The document from which Dr. Pierre-Brooks had refreshed her memory was the medical certificate, which she had issued upon her examination of 'K' on January 04, 1999. All that was written on that medical was – hymen not intact – probably inflicted by sexual interference.

Submission of No-Case

9. At the end of the prosecution case it was submitted for the appellant that there was no case to answer. It was put on two bases. First, that the evidence of the prosecution was so discredited as a result of cross-examination that it was unsafe for the case to go to the jury. The second basis of the submission was that having regard to the wide span in the indictment it was difficult for the appellant to properly answer the charges.

10. The judge in rejecting the submission acknowledged that there were inconsistencies in the evidence but said that it was the function of the jury to decide what they made of the inconsistencies. "*It was not the court's function,*" she said "*to weigh the evidence and to find where the truth lay, to do so she said would amount to a usurpation by the court of the function of the jury.*" As to the indictment she said that it clearly outlined the conduct complained about, the place where it was alleged to have taken place and the period during which it took place. That, she said was sufficient.

11. Following the rejection of the submission the appellant gave evidence and called his uncle, his mother and Dr. Michael Telemaque, a General Practitioner to give evidence on his behalf. The appellant denied the allegations. He admitted that during the period ***August 1997 – May 1998 he had seen the victim 'off and on' at his home and had taken care of her***. He said she was his favourite cousin. He also gave evidence of his previous good character.

12. Dr. Telemaque testified that he had seen 'K' on three occasions at his office on Long Circular Road, St. James. He made notes on each occasion and with the leave of the court he was allowed to refresh his memory. According to his notes, the first visit was July 04, 1997 when 'K' was brought in with a complaint of high fever and vomiting. His diagnosis then was Acute Bacterial Tonsillitis. The second visit was on November 22, 1997, with a complaint of fever and an external vaginal itch that was present for three months. He said that he formed the opinion that the itch was due to fungal infection in the vagina. He examined her by looking at the external genitalia. On the final visit on December 08, 1997 he was told that things had very much improved. Apart from giving her some more medication he said that he did not examine her. He said that during his examination of the victim in November he saw no break of the hymen.

The Grounds of Appeal

13. In submitting that the judge erred in rejecting the no-case submission Mr. Stuart Brook for the appellant referred to several authorities but placed strong reliance on ***Sangit Chaitlal v The State (1985) 39WIR at 295.***

The Law

14. The current view in the United Kingdom today is stated in ***R v Galbraith (1981) 1 WLR 1039 124*** in these terms:

> *" (1) If there is no evidence that the crime alleged has been committed by the defendant, there is no difficulty. The judge will of course stop the case. (2) The difficulty arises where there is some evidence but it is of a tenuous character, for example because of inherent weakness or vagueness or because it is inconsistent with other evidence. (a) Where the judge comes to the conclusion that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it, it is his duty, upon a submission being made, to stop the case. (b) Where however the prosecution evidence is such that its strength or weakness depends on the view to be taken of a witness's reliability, or*

other matters which are generally speaking within the province of the jury and where on one possible view of the facts there is evidence upon which a jury could properly come to the conclusion that the defendant is guilty, then the judge should allow the matter to be tried by the jury."

15. As Lord Lane pointed out the first limb of the ***Galbraith*** test does not cause any conceptual problems. The second limb of the test must be understood, he said, in the context of a practice that developed after the passing of the Criminal Appeal Act 1966 and s. 2 (1) of the Criminal Appeal Act 1968, (which has since been repealed and replaced with some modification by the Criminal Appeal Act 1995), of inviting the judge to hold that there was no case to answer because a conviction on the prosecution evidence would be unsafe. The principles stated in ***Galbraith*** have been consistently applied in Jamaica although the 1968 Act is not part of the law in Jamaica. (See ***Daley v R [1993] 4 All E.R. 87.***

16. In ***R v Barker, (1977) 65 Crim. Rep.*** a case decided before ***Galbraith***, and which involved a conviction for driving a motor vehicle with a blood alcohol concentration above the prescribed limit the appellant was convicted and sentenced to six months imprisonment and suspended for two years. A submission of no-case to answer was made and it was rejected. The matter went to the Court of Appeal where counsel asked the court to find that the conviction was unsafe or unsatisfactory. He based his argument principally on the fact that at one point in his summing-up the judge seemed to be telling the jury that the inconsistencies were such that they could not convict. That was one possible conclusion to apply to one passage of the summing-up. The court went on to say:

"But even if he is right and even if the judge has taken the view that the evidence could not support a conviction because of the inconsistencies, he should nevertheless have left the matter to the jury. It cannot be too clearly stated that the judge's obligation to stop the case is an obligation which is concerned primarily with those cases where the necessary minimum evidence to establish the facts of the crime has not been called. It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying. To do that is to usurp the function of the jury and would have been quite wrong in the present case. The judge, whatever his personal views, must put the issue before the jury fairly."

17. In the Belize case of ***Taibo v R [1996] 48 W.I.R. 74*** the Privy Council stated that the criterion to be applied by a trial judge in dealing with a submission of no-case to answer is whether there is material on which a reasonable jury could be satisfied of the guilt of the defendant. There, the Board applied ***Galbraith*** in maintaining that once there is credible material, even if the prosecution case was 'very thin' the trial should proceed.

18. On the other hand in ***R v Colin Shippey and others, [1988] Crim. L.R. 767*** Turner J considered the scope of ***R v Galbraith***. 'S' was charged alone with rape and with two other defendants with a further rape on a different day of the same girl. The prosecution case depended entirely upon the evidence of the complainant and there was effectively little or no corroboration. After the close of the prosecution case submissions of no case to answer were made on behalf of all three accused on the basis of ***Galbraith*** *(supra)* namely that the evidence was so inherently weak and inconsistent that no jury properly directed could properly convict. The prosecution opposed the application. After reviewing ***Galbraith*** in great detail the judge said that he did not interpret the judgment in either ***Galbraith*** or ***Barker*** as intending to say that if there are parts of the evidence which go to support the charge then no matter what the state of the rest of the evidence that is enough to leave the matter to the jury. He felt it was the duty of the court to make an assessment of the evidence as a whole.

19. He said that it was not simply a matter of the credibility of individual witnesses or simply a matter of evidential inconsistencies between witnesses, although those matters may play a subordinate role. He found that there were within the complainant's own evidence inconsistencies of such a substantial kind that he would have to point out to the jury their effect and to indicate to the jury how difficult and dangerous it would be to act upon the plums and not the duff. (Emphasis mine). He accordingly upheld the submission.

20. In Australia the law has been settled since ***Doney v R [1990] 171 Crim. Law Rep. 214*** a decision of a five-member court. There, the court expressed the principle thus:

> *"If there is evidence (even if tenuous or inherently weak or vague) which can be taken into account by the jury in its deliberations and that evidence is capable of supporting a verdict of guilty, the matter must be left to the jury for its decision. Or, to put the matter in more usual terms, a verdict of not guilty may be directed only if there is a defect in the evidence such that, taken at its highest, it will not sustain a verdict of guilty."*

The High Court went on to point out that the power reserved to a court of criminal appeal to set aside a verdict on the grounds that it is unsafe or unsatisfactory, does not involve an interference with the traditional division of functions between judge and jury in a criminal trial; and that there are no grounds for adding that power to the armoury of a trial judge.

21. In ***Sangit Chaitlal v State*** Bernard J.A. (as he then was) in delivering the judgment of the court expressed the view that the test as laid down in ***Galbraith*** was too restricted a view for while it may cover the case where the verdict is unsafe or unsatisfactory, it did not seem to meet the situation where the verdict was unreasonable or could not be supported having regard to the evidence (which is the language used by our statute giving a judge a somewhat wider discretion.) He opined, that in the ultimate the matter should be left to the good sense of the trial judge who must be depended upon to see that there has been no miscarriage of justice.

22. More recently in the case of ***Bethel v The State (No. 2) [2000] 59 W.I.R. 456*** de la Bastide, C.J. referred to the approach taken by the English Court of Appeal in ***R v Clinton [1993] 1 All E.R. 998*** which was based on section 2(1)(a) of the Criminal Appeal Act 1968 (which has since been repealed and replaced with some modification by the Criminal Appeal Act, 1999). The English sub-section, he said, provided that an appeal against conviction should be allowed if the conviction was considered unsafe and unsatisfactory. The corresponding provision in the Trinidad and Tobago Judicature Act is section 44(1) which prescribes that an appeal should succeed if the Court of Appeal thinks that on any ground there was a miscarriage of justice. The matter he said was considered previously in ***Solomon v The State [1999] 57 WIR 324***, where the court considered the difference in the language of the English provision as compared with ours and came to the conclusion that there was no substantial difference in the effect of both provisions.

23. In the instant case whilst there were several inconsistencies and weaknesses in the evidence of 'K' they were not necessarily fatal. It must be remembered that the unfortunate incident occurred when 'K' was three years old. We agree that at the time of the trial she was nine years of age but it was important for the jury not to lose track of those important aspects of the case. Furthermore, within recent times there seems to be a practice where some judges have come to think it right that when their own assessment of the credibility and consistency of the evidence led by the prosecution is such that a conviction on the evidence would be unsafe, they should withdraw the case from the jury so as to make sure that the accused is not the victim of a miscarriage of justice. The court deprecates that practice. As Lord Widgery C.J. said in ***R v Barker*** (supra) "*.....It is not the judge's job to weigh the evidence, decide who is telling the truth, and to stop the case merely because he thinks the witness is lying.*" See too the dicta of Ibrahim J.A. in the ***State v Rick Gomes*** and ***Luis Blanco Gomez Cr. A 98/99 (unreported) at page 17*** where he said:

> *"A judge sitting with a jury, however, must be careful not to be too anxious to save a jury from themselves by relieving them of the responsibility and the right to make their own assessment of the perceived weaknesses in the prosecution's case."*

24. We are therefore of the opinion that the judge was correct in rejecting the submission of no case to answer.

25. Another very important feature of the prosecution case was the failure of 'K' to give any evidence that would link the appellant with the dates in the indictment, that is to say, August 31st 1997 – May 01,1998.

26. In the case of ***R v Dossi (1919) 13 Cr. App. R. 158*** the indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "*on March 19th 1918,*" and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy Chairman's summing up the jury retired, and on their return said that they found the appellant "*with regard to the date March 19th, Not Guilty. If the indictment covers other dates, Guilty.*" They also found him Not Guilty of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy Chairman amended the indictment by substituting "*on some day in March*" for the words "*On March 19th, 1918,*" and the jury then found the appellant Guilty on the amended indictment.

27. It was submitted on behalf of the appellant that if a man is put on trial on an indictment which charged him with committing an offence on a specific date and no amendment was made before or during the trial and the jury found that he did not commit the offence on that date they should return a verdict of Not guilty. That, it was further submitted, was especially so where the defence was one of alibi. The judgment of the Court of Criminal Appeal was delivered by Atkin J who, in relation to the submission that there was no power in the court to amend the indictment and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days, they ought to have found him Not Guilty. He then stated:

> "*It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence.*"

28. Later on in the same judgment he said at page 160:

> "*Though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment.*"

29. In the instant case two situations arose:

i *Time was not an essential part of the alleged offence; and*

ii. *Whilst there was no evidence on the prosecution case to link the appellant with the dates in the indictment when the appellant gave*

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evidence he provided the necessary evidence thereby filling the lacuna in the state's case. He said:

> *"When mother operated these bars in functions and fetes – when she come she would bring 'K' and I used to take care of 'K' during the period.....That period included August 31 1997 – May 01 1998.*

30. Other grounds of appeal were filed but as we indicated at the beginning of this judgment counsel relied on the no-case submission. Out of deference to Counsel we have considered the other grounds but have found no merit in any of them.

31. Having regard to all these reasons we would dismiss the appeal. The question of sentence has been adjourned to January 25, 2005 for consideration.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

SUPPLEMENTAL

REPUBLIC OF TRINIDAD AND TOBAGO

IN THE COURT OF APPEAL

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Cr. App. No. 26 of 2004

BETWEEN

JOMAINE BOWEN **APPELLANT**

AND

THE STATE **RESPONDENT**

PANEL:

R. Hamel-Smith, J.A.

L. Jones, J.A.

S. John, J.A.

APPEARANCES:

Mr. Ian Stuart Brook for the Appellant

Mr. Trevor M. Ward for the Respondent

DATE OF DELIVERY: 28th January 2005

SENTENCE

Delivered by S. John, J.A.

This judgment is a supplemental to the judgment delivered on January 12, 2005.

2. On January 12, 2005 we dismissed this appeal and deferred the question of sentence. On January 25, 2005 we heard submissions from both Counsel on the issue and reserved our decision.

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3. Mr. Stuart Brook for the appellant submitted to the court that he was relying on the mitigation plea made by senior counsel for the appellant at the trial. In addition, he submitted, he was relying on the following documents also submitted at the trial namely:

(i) The probation officer's report;

(ii) A petition signed by more than 250 persons who all spoke about the appellant's glowing performance at his workplace; and

(iii) A letter written by a minor cousin living abroad who spoke of the love she had for the appellant and the high esteem in which she held him.

4. The appellant was fifteen years of age at the time of the commission of the offences. They were committed during the period August 31 1997 to March 1998. At the conclusion of the preliminary inquiry on November 23 1999 he was committed to stand trial, which did not begin until February 04 2004. The trial judge no doubt took into account the fact that he was fifteen years of age at the time of the commission of the offences but in a general way. We say general because she then proceeded to relate that a certain degree of trust had been reposed in him and that he had breached that trust. In the course of passing sentence she commented: *"You were about 3 times older than Crystal. She was entrusted in your care, and you betrayed that trust by committing these acts upon her."*

5. We have some difficulty in such a proposition. One can readily understand the reposing of trust in a male adult to baby-sit a young girl child but we do not think that the same can be said of a fifteen year old male. It may be leaving things to chance when one entrusts a fifteen year-old male with a young girl. This is not to countenance the commission of the offence in any way but in today's world to repose such a high degree of trust in such a young person may be placing the bar somewhat on the high side.

6. In Cr App 62/2000 ***Latchman v The State***, Lucky JA stated that a court is always concerned about sending young first offenders to an extended term of imprisonment. Of

course, it all depends on the circumstances of the case but nonetheless we share that reluctance if only because of the adverse consequences on the accused in such an environment.

7. It cannot be doubted that in the instant appeal the question of sentence must have been a difficult one for the trial judge, given that she had standing before her a 21-22 year old young man and was attempting to go back in time to the date of commission of the crime. Nevertheless, we express concern whether the judge took all that was required into consideration.

8. In ***R v Secretary of State ex parte Uttley*** [2004] UKHL 38 the House of Lords recognized that in circumstances such as these where the accused at the time of the offence would have been liable to a certain term of imprisonment as a young offender had he been tried within a reasonable time, that term must be taken into account when determining the sentence after a delay of a number of years. Regrettably, this was a recent decision so it could not have been brought to the attention of the trial judge.

9. In this case, the delay between committal and trial was in no way attributable to the appellant. The maximum term which could have been imposed upon him was not less than three years nor more than four years had he been sentenced pursuant to the provisions of the Young Offenders Detention Act Chap13:05. The trial judge did not take into account the maximum sentence available under the Young Offenders Detention Act at the time of sentencing. Section 7 of that Act provides as follows:

> *(1) Where a person is convicted before the High Court on indictment of any offence other than murder, or before a Court of Summary Jurisdiction of any offence for which he is liable to be sentenced to imprisonment, and it appears to such Court-*
>
> *(a) that the person is not less than sixteen nor more than eighteen years of age, and*

(b) *that by reason of his antecedents or mode of life it is expedient that he should be subject to detention for such term and under such instruction and discipline as appears most conducive to his reformation and the repression of crime,*

the Court may, in lieu of sentencing him to the punishment provided by law for the offence for which he was convicted, pass a sentence of detention under penal discipline in the Institution for a term not less than three years nor more than four years.

(2) *Before passing such a sentence the Court shall be satisfied that the character, state of health, and mental condition of the offender, and the other circumstances of the case, are such that the offender is likely to profit by such instruction and discipline as aforesaid.*

10. It is therefore quite clear that had he been convicted at a time when he was not less than sixteen nor more than eighteen, he could not have received a sentence of more than four years. Through no fault of his own he was deprived of that sentencing option and also deprived of the opportunity to receive such instruction and discipline afforded young offenders at the institution.

11. We have carefully read the probationer officer's report and the many recommendations that counsel has provided. They all demonstrate that the appellant is a young man of good character with many good qualities and who has never had a brush with the law. In fact, the final sentence of the probation officer's report states: "*Jomaine's personality stands in sharp contrast to the deviant acts committed.*" The judge in passing sentence acknowledged that the appellant was not a person in need of rehabilitation.

12. We, in no way wish to diminish the seriousness of the offences and do not for a moment lose sight of the fact that the victim was just three years old. However, there

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must be a balancing exercise that takes into account on the one side the harm done to the victim and the need for retribution and the need to protect society from persons who commit such crimes on the other.

13. In the circumstances of this case, primarily because of the age of the appellant at the time of the offence and the fact that the trial judge, through no fault of her own, did not have the benefit of the authority referred to earlier, we think that the sentences were unduly severe.

14. Accordingly, we reduce it to a term of three years imprisonment. The sentence on each count will run concurrently from the date of his conviction.

R. Hamel-Smith
Justice of Appeal

L. Jones
Justice of Appeal

S. John
Justice of Appeal

R V DOSSI

*158 Severo **Dossi**

Court of Criminal Appeal

CCA

Darling J. Atkin J. Shearman J.

June 17, 1918

On an indictment alleging an offence on a specific date the jury is entitled to find Not Guilty on that date, and "if the indictment covers other dates Guilty," and the Court is thereupon entitled to amend the date in the indictment to "some day in" the month in question. The Court does not take the view that it is "safer to accept the uncorroborated evidence of a young child than that of an adult."

Appeal against conviction on law.
The appellant was convicted, on May 9th, 1918, before the Deputy-Chairman, at the London Sessions, of indecent assault, and was sentenced on May 10th to nine months' imprisonment with hard labour, and was recommended for deportation.
Sir Ernest Wild, K.C. (*J. A. C. Keeves* with him), for the appellant, who was present. The indictment on which the appellant was convicted charged him with indecently assaulting a child, Nora Elizabeth White, aged 11, "on March 19th, 1918," and with indecently assaulting another child, Rebecca Barnett, aged 14, between September 12th and 30th, 1917. White gave evidence of no specific date, but referred to constant acts of indecency over a considerable period ending at some date in March, 1918. A witness called for the defence swore that he was with the appellant on March 19th during the material time and that no indecency with a child took place. At the conclusion of the Deputy-Chairman's summing up the jury retired, and on their return said that they found the appellant "with regard to the date March 19th, *Not Guilty* . If the indictment covers other dates, *Guilty* ." They also found him *Not Guilty* of indecently assaulting Rebecca Barnett. On the application of the prosecution the Deputy-Chairman amended the indictment by substituting "on some day in March" for the words "on March 19th, 1918," and the jury then found the appellant *Guilty* on the amended indictment.
It is submitted that if a man is put on his trial on an indictment which charges him with committing an offence on a specific date and no amendment is made before or during the trial and the jury find that he has not committed the offence on that day they have returned a verdict of Not Guilty, which must be allowed *159 to stand. This is especially so where the defence is an *alibi* or, as in this case, a kindred plea. The time at which the amendment was allowed in this case was not "before trial, or at any stage of the trial," as is permitted by s of the Indictments Act, 1915 . A trial is at an end when a verdict of Not Guilty is given (Archbold, 5th ed., p. 220). It is further submitted that the Deputy-Chairman misdirected the jury with regard to the corroboration of the evidence of the child White. That evidence was entirely uncorroborated, and the Deputy-Chairman perfectly properly warned the jury that they must act on it only with the greatest caution. He went on, however, to tell them that it was safer to accept the uncorroborated evidence of a young child than that of an adult. It is submitted that that negatived the whole value of the warning that he had previously given and was a very improper direction.
Percival Clarke for the respondents (upon want of corroboration only). The evidence of Nora White required, in law, no corroboration. The jury were entitled to act upon it if

they thought fit, after the warning of the learned Deputy-Chairman--but it was in fact corroborated by the evidence of the defendant himself, and the evidence of Rebecca Barnett tended to shew that the assault was not accidentally but intentionally indecent. The statement on the value of the evidence of a young child was one which the learned Deputy-Chairman in his experience was entitled to make, and in no sense detracted from the warning he had given to the jury.

Atkin J.:

The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him *Not Guilty* and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And althouth the day be allegec, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the ***160** same law is in the case of an indictment," 1 *Inst.* 318. " *Syer* was indicted of burglary 1 *Augusti* , 31 Eliz ... it fell out in evidence that the burglary was done 1 *die Septembris* ... so as *primo Augusti* there was no burglary done, and thereupon he was found *Not Guilty* , and afterwards he was indicted againe 1 *Septembris* , &c., and it was resolved by Wray and Periam, justices of assise, and by the greatest part of the judges that he ought not to be tried again, for he mought have been found *Guilty* upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day." *Ib.* , and 3 *Inst.* 230: Syer was discharged. Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictments Act, 1915 , which give the Court power to amend an indictment "at any stage of a trial" might, in a proper case, permit of an amendment in circumstances similar to those which exist here.

The substantial point made by Sir Ernest Wild was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care. (See R. v. Graham, 4 Cr. App. R. 218, 1910 ; R. v. Pitts, 174 E.R. 509 ; and R. v. Cratchley, 9 Cr. App. R. 232, 1913 .) Those cases sufficiently shew what kind of direction should be given to the jury in cases of this kind, and the question arises whether or not the summing up of the Deputy-Chairman offended against the rules which are there laid down. He told the jury that "The law does not require corroboration. ... What the law does require is that it must be most carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there ***161** is no corroboration of the story in such a case as this ... It is for you to say whether or not you are satisfied that that little girl was trying to tell you the truth. I say that you must be very careful before you act without corroboration, but that you are entitled, if you are convinced beyond all reasonable doubt that the little girl is telling the truth, to act on her story even without corroboration." If the summing up had stopped there it could not have been contended that it was open to any objection. The law is stated as the authorities which I have cited laid it down, and the caution to the jury is framed in careful words. But the Deputy-Chairman went on to say in reference to the question of

corroboration: "It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people." We think that those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons--sometimes their parents--than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories. There seems to us no reason to distinguish between the amount of corroboration required in the one case and that required in the other. But doubtless the jury looked on this summing up as advice on a matter on which they were quite able to form an opinion. They had heard the beginning of the summing up where they were directed quite accurately, and immediately after the passage I last read the Deputy-Chairman ***162** said: "You must act with great care in the case of the little girl White. You must act with great care also in the case of Rebecca Barnett." In our view, the repetition of that caution prevented the other parts of the summing up from having the serious effect on the jury they might have had. White's story had very slight corroboration and, indeed, it might be said that, at the end of the case for the prosecution, there was none. But the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined. The appellant in this case stated in evidence that he was in the habit of fondling the little girls and described how he took them up, and the jury might well have refused to accept his story that these things were done innocently. There was evidence to support the verdict, there was no substantial misdirection on the facts or on the law, and the appeal must, therefore, be dismissed. The Court does not see its way to interfere with the sentence which was passed on the appellant.
Appeal dismissed .

Representation

Solicitors: S. Fraulo for the Appellant; Wontner & Sons for the Respondents.

G. B. ***163**

(1919) 13 Cr. App. R. 158

END OF DOCUMENT

***158** Severo **Dossi**

Court of Criminal Appeal

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CCA

Darling J. Atkin J. Shearman J.

June 17, 1918

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Atkin J.:

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The first point taken on behalf of the appellant is that there was no power to amend the indictment, and that when the jury found that the appellant had not committed the acts charged against him on the day specified in the indictment but on some other day or days they found him *Not Guilty* and that that verdict must stand. It appears to us that that is not a correct contention in law. From time immemorial a date specified in an indictment has never been a material matter unless it is actually an essential part of the alleged offence. "And althouth the day be alleged, yet if the jury finds him guilty on another day the verdict is good, but then in the verdict it is good to set down on what day it was done in respect of the relation of the felony; and the ***160** same law is in the case of an indictment," 1 *Inst.* 318. " *Syer* was indicted of burglary 1 *Augusti* , 31 Eliz ... it fell out in evidence that the burglary was done 1 *die Septembris* ... so as *primo Augusti* there was no burglary done, and thereupon he was found *Not Guilty* , and afterwards he was indicted againe 1 *Septembris* , &c., and it was resolved by Wray and Periam, justices of assise, and by the greatest part of the judges that he ought not to be tried again, for he mought have been found *Guilty* upon the first indictment, for the day is not materiall; but it is necessary for the jury in that case to set down the day." *Ib.* , and 3 *Inst.* 230: Syer was discharged. Thus, though the date of the offence should be alleged in the indictment, it has never been necessary that it should be laid according to truth unless time is of the essence of the offence. It follows, therefore, that the jury were entitled, if there was evidence on which they could come to that conclusion, to find the appellant guilty of the offence charged against him, even though they found that it had not been committed on the actual date specified in the indictment. It is, therefore, unnecessary to consider whether there was power to amend the indictment, but we must not be taken to express any doubt that the wide words in s. 5 (1) of the Indictments Act, 1915 , which give the Court power to amend an indictment "at any stage of a trial" might, in a proper case, permit of an amendment in circumstances similar to those which exist here.

The substantial point made by Sir Ernest Wild was with regard to the direction by the Chairman to the jury on the question of corroboration. There can be no doubt that in cases of this kind the jury are entitled to act on the uncorroborated evidence of a child who is able to give evidence on oath, but judges must warn juries not to convict a prisoner on the uncorroborated evidence of a child except after weighing it with extreme care. (See R. v. Graham, 4 Cr. App. R. 218, 1910 ; R. v. Pitts, 174 E.R. 509 ; and R. v. Cratchley, 9 Cr. App. R. 232, 1913 .) Those cases sufficiently shew what kind of direction should be given to the jury in cases of this kind, and the question arises whether or not the summing up of the Deputy-Chairman offended against the rules which are there laid down. He told the jury that "The law does not require corroboration. ... What the law does require is that it must be most carefully pointed out to a jury that they ought to act with great caution and with the greatest deliberation, if there ***161** is no corroboration of the story in such a case as this ... It is for you to say whether or not you are satisfied that that little girl was trying to tell you the truth. I say that you must be very careful before you act without corroboration, but that you are entitled, if you are convinced beyond all reasonable doubt that the little girl is telling the truth, to act on her story even without corroboration." If the summing up had stopped there it could not have been contended that it was open to any objection. The law is stated as the authorities which I have cited laid it down, and the caution to the jury is framed in careful words. But the Deputy-Chairman went on to say in reference to the question of corroboration: "It does seem to me that it is infinitely less dangerous to act on the uncorroborated testimony of little children who allege that they have been indecently assaulted than to act on the uncorroborated testimony of older people who allege that they have been assaulted, and I will tell you why. I should always practically tell a jury that they must not convict on the uncorroborated testimony of a woman of full years, because it is so easy to make a charge, for purposes that you can well imagine, either against the wrong man when there is a right man, or against a person who has had no dealings with her at all, or for the purposes of blackmail. But with regard to small

children there is less incentive for them to make up a false story about a particular man in a matter of this sort than there often is in the case of an older woman. Children are less likely to suggest a wrong man when there is a right man, and they are less likely to be open to the purposes of blackmail than older people." We think that those were dangerous remarks to make to the jury. No doubt, the considerations which the Deputy-Chairman had in his mind were perfectly sensible. But, on the other hand, small children are possibly more under the influence of third persons--sometimes their parents--than are adults, and they are apt to allow their imaginations to run away with them and to invent untrue stories. There seems to us no reason to distinguish between the amount of corroboration required in the one case and that required in the other. But doubtless the jury looked on this summing up as advice on a matter on which they were quite able to form an opinion. They had heard the beginning of the summing up where they were directed quite accurately, and immediately after the passage I last read the Deputy-Chairman ***162** said: "You must act with great care in the case of the little girl White. You must act with great care also in the case of Rebecca Barnett." In our view, the repetition of that caution prevented the other parts of the summing up from having the serious effect on the jury they might have had. White's story had very slight corroboration and, indeed, it might be said that, at the end of the case for the prosecution, there was none. But the question of corroboration often assumes an entirely different aspect after the accused person has gone into the witness-box and has been cross-examined. The appellant in this case stated in evidence that he was in the habit of fondling the little girls and described how he took them up, and the jury might well have refused to accept his story that these things were done innocently. There was evidence to support the verdict, there was no substantial misdirection on the facts or on the law, and the appeal must, therefore, be dismissed. The Court does not see its way to interfere with the sentence which was passed on the appellant.
Appeal dismissed .

Representation

Solicitors: S. Fraulo for the Appellant; Wontner & Sons for the Respondents.

G. B. ***163**

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R V RADCLIFFE

1990 WL 753253 (CA (Crim Div)), [1990] Crim. L.R. 524

(c) Sweet & Maxwell Limited

R. v **Radcliffe**

(CA (Crim Div)) Court of Appeal (Criminal Division)

2 February 1990

Summary
Case Comments

Summary

Subject: Criminal procedure

Keywords: Child abuse; Indecent assault; Jury directions

Catchphrases: Direction to jury; indecency; gross indecency with a child under 14; whether dates on indictment material

Summary: Held, that it must be made perfectly plain to the jury on charges of gross indecency with a child under the age of 14 that that child must have been under that age when the indecency took place in order for them to convict the accused. A direction that "the dates which are set out in the indictment...are immaterial. The prosecution does not have to prove that any particular act happened between those dates. What you have to prove is that it happened... " was therefore a misdirection.

Case Comments

Children; Indictments; Jury directions; Sexual offences. Gross indecency with child under 14. Crim. L.R. 1990, Jul, 524

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§ 1–127), the prosecution should not be entitled to rely on any earlier date that may appear from the evidence if that date is not within the relevant time limit.

Where the exact date of the offence is not known the date should be stated as being on or about a particular date, or on a day unknown between two stated dates, so as to isolate the date of the offence alleged as accurately as possible. Unless the offence is a "continuous" one (*post*, § 1–133), the date of the offence should not be given merely as between two stated dates because this may give rise to problems of duplicity, *post*, §§ 1–135 *et seq.*

See also the *Children and Young Persons Act* 1933, s.14(4), *post*, § 19–323 (continuous offences against children).

Materiality of averment as to date and place

1–127 In *R. v. Wallwork*, *ante*, it was held that the lack of precision as to place in the particulars did not invalidate the indictment because the place of commission of the offence was not material to the charge.

Despite the old authorities to the effect that the date of the offence must be shown in the indictment it never seems to have been necessary for the date shown to be proved by the evidence unless time is of the essence of the offence.

In other cases, if the time stated were prior to the finding of the indictment, a variance between the indictment and evidence of the time when the offence was committed was not material: 2 Co. Inst. 318; 3 Co. Inst. 230; *Sir H. Vane's Case* (1662) Kel.(J.) 16; *R. v. Aylett*, *ante*; *R. v. Dossi*, *ante*. In *Dossi* it was held that a date specified in an indictment is not a material matter unless it is an essential part of the alleged offence; the defendant may be convicted although the jury finds that the offence was committed on a date other than that specified in the indictment. Amendment of the indictment is unnecessary, although it will be good practice to do so (provided there is no prejudice, *post*) where it is clear on the evidence that if the offence was committed at all it was committed on a day other than that specified.

1–128 The prosecution should not be allowed to depart from an allegation that an offence was committed on a particular day in reliance on the principle in *Dossi* if there is a risk that the defendant has been misled as to the allegation he has to answer or that he would be prejudiced in having to answer a less specific allegation: see *Wright v. Nicholson*, 54 Cr.App.R. 38, DC; *R. v. Robson* [1992] Crim.L.R. 655, CA.

1–129 In *R. v. Hartley* [1972] 2 Q.B. 1, 56 Cr.App.R. 189, CA, the court observed that where the words "on or about [the date]" are used, the offence must be shown to have been committed "within some period which has reasonable approximation to the date mentioned in the indictment". However this dictum was *obiter* and should not be taken as more than an indication of the desirability of identifying the relevant date as accurately as possible so that the defendant is not misled as to the case which he has to meet.

1–130 For further examples of circumstances in which it has been held that a variance between the evidence and the particulars was immaterial, see *R. v. Bonner* [1974] Crim.L.R. 479, CA; *R. v. Browning* [1974] Crim.L.R. 714, CA; *R. v. Fernandes* [1996] 1 Cr.App.R. 175, CA; and *Kay v. Biggs and another, The Independent (C.S.)*, November 23, 1998, DC. For examples of allegations as to time, or time and place, being held to be material, see *R. v. Radcliffe* [1990] Crim.L.R. 524, CA (allegation of indecency with child contrary to s.1 of the *Indecency with Children Act* 1960, *post*, § 20–272, an essential ingredient of which is that the child is under 14 at the time of the act of indecency); *R. v. Allamby and Medford*, 59 Cr.App.R. 189, CA (having an offensive weapon in a public place, *post*, § 24–107); *R. v. Pickford* [1995] 1 Cr.App.R. 420, CA (inciting incest where boy incited was under age of capacity for part of period particularised); and *R. v. Macer, The Times*, February 17, 1995, CA (convictions quashed where based on general allegations rather than on specific evidence relating to the particular occasions charged).

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Dieter Fleck (ed), *The Handbook of Humanitarian Law in Armed Conflicts*, Oxford, OUP, 1995

tion and its property (Art. 33, para. 3 GC IV; Arts. 20 and 51, para. 6 AP I), and pillage (Art. 33, para. 2 GC IV; Art. 47 HagueReg) are all prohibited.

1. Collective penalties, terrorism, reprisals, and pillage are characterized by the use of force against the civilian population or individual civilians. They are prohibited without exception, as established in Article 27 GC IV. According to that provision, civilians shall 'at all times be humanely treated, and shall be protected especially against all acts of violence or threats thereof and against insults and public curiosity'.

2. With regard particularly to collective penalties, these clearly contradict the principle of individual penal responsibility, according to which no one may be convicted of or punished for an act which he or she did not personally commit. This rule is one aspect of the principle of fair trial which has been universally accepted. It is guaranteed in all international human rights conventions and in the four GCs (Art. 38 GC IV—with reference to the rules of general international law—and Art. 67 GC IV; Art. 75, para. 4(b) AP I).

3. For non-international armed conflicts, Article 6, para. 2(b) AP II also expressly lays down the principle of individual penal responsibility. It gives concrete form to common Article 3 of the GCs, which requires a fair trial by a regularly constituted court.

4. Collective penalties are also specifically and expressly prohibited, in both international (Art. 33, para. 1 GC IV; and Art. 75, para. 2(d) AP I) and non-international armed conflicts (Art. 4, para. 2(b) AP II).

5. According to Article 33, para. 1, 2nd sentence GC IV, every measure aimed at 'intimidating or terrorizing' civilians is prohibited. Such measures are already covered by the general prohibition in Article 27. Intimidation or terrorism is also prohibited if its declared purpose is to prevent the civilian population (e.g. of an occupied territory) from engaging in hostile or even illegal acts. The authorities or armed forces must adopt other measures, in conformity with human dignity and the rule of law, to ensure public security. Like collective penalties, intimidating and terrorist acts always affect the civilian population as a whole, without differentiating between potential trouble-makers and peaceful citizens.

6. Over and above the general prohibition of Article 33 GC IV, Article 51, para. 2, 2nd sentence AP I contains a rule drawn up specifically for military operations: 'Acts or threats of violence the primary purpose of which is to spread terror among the civilian population are prohibited.' This prohibits the use of terrorism as a weapon aimed deliberately against the civilian population. It should be pointed out that not every type of terrorization of the civilian population is prohibited by international law. Military operations against (lawful) military objectives in close proximity to a concentration of civilians will always arouse fear and terror, without the attack